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

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

APRIL—MAY, 1914

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(211 FED.)

JUDGES

OF THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE DISTRICT COURTS

FIRST CIRCUIT

Hon. OLIVER WENDELL HOLMES, Circuit Justice.....Washington, D. C.
Hon. WILLIAM L. PUTNAM, Circuit Judge.....Portland, Me.
Hon. FREDERIC DODGE, Circuit Judge.....Boston, Mass.
Hon. GEO. H. BINGHAM, Circuit Judge.....Concord, N. H.
Hon. MARTIN A. KNAPP, Circuit Judge.....New York, N. Y.
Hon. CLARENCE HALE, District Judge, Maine.....Portland, Me.
Hon. JAS. M. MORTON, Jr., District Judge, Massachusetts.....Boston, Mass.
Hon. EDGAR ALDRICH, District Judge, New Hampshire.....Littleton, N. H.
Hon. ARTHUR L. BROWN, District Judge, Rhode Island.....Providence, R. I.

SECOND CIRCUIT

Hon. CHARLES E. HUGHES, Circuit Justice.....Washington, D. C.
Hon. E. HENRY LACOMBE, Circuit Judge.....New York, N. Y.
Hon. ALFRED C. COXE, Circuit Judge.....New York, N. Y.
Hon. HENRY G. WARD, Circuit Judge.....New York, N. Y.
Hon. HENRY WADE ROGERS, Circuit Judge.....New Haven, Conn.
Hon. EDWIN S. THOMAS, District Judge, Connecticut.....New Haven, 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. 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. GEORGE GRAY, Circuit Judge.....Wilmington, Del.
Hon. JOSEPH BUFFINGTON, Circuit Judge.....Pittsburg, Pa.
Hon. JOHN B. McPHERSON, Circuit Judge.....Philadelphia, Pa.
Hon. EDWARD G. BRADFORD, District Judge, Delaware.....Wilmington, Del.
Hon. THOS. G. HAIGHT, District Judge, New Jersey.....Jersey City, N. J.
Hon. JOHN RELLSTAB, District Judge, New Jersey.....Trenton, N. J.
Hon. JAMES B. HOLLAND, District Judge, E. D. Pennsylvania[1].....Philadelphia, Pa.
Hon. OLIVER B. DICKINSON, District Judge, E. D. Pennsylvania[2].....Philadelphia, Pa.
Hon. J. WHITAKER THOMPSON, 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[3].....Pittsburg, Pa.
Hon. CHARLES P. ORR, District Judge, W. D. Pennsylvania.....Pittsburg, Pa.

[1] Died April 24, 1914. [2] Appointed April 28, 1914. [3] Died February 25, 1914.

FOURTH CIRCUIT

Hon. EDWARD D. WHITE, Circuit Justice.....Washington, D. C.
Hon. JETER C. PRITCHARD, Circuit Judge.....Asheville, N. C.
Hon. CHAS. A. WOODS, Circuit Judge.....Marion, S. C.
Hon. JOHN C. ROSE, District Judge, Maryland.....Baltimore, Md.
Hon. HENRY G. CONNOR, District Judge, E. D. North Carolina.....Wilson, N. C.
Hon. JAMES E. BOYD, District Judge, W. D. North Carolina.....Greensboro, N. C.
Hon. 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.....Waco, Tex.
Hon. DAVID D. SHELBY, Circuit Judge.....Huntsville, Ala.
Hon. THOMAS G. JONES, District Judge, N. and M. D. Alabama[4].....Montgomery, Ala.
Hon. HENRY D. CLAYTON, District Judge, N. and M. D. Alabama[5]...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. RHYDON M. CALL, 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. JOHN W. WARRINGTON, Circuit Judge.....Cincinnati, Ohio.
Hon. LOYAL E. KNAPPEN, Circuit Judge.....Grand Rapids, Mich.
Hon. ARTHUR C. DENISON, 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. ARTHUR J. TUTTLE, District Judge, E. D. Michigan.....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.

SEVENTH CIRCUIT

Hon. HORACE H. LURTON, Circuit Justice.....Washington, D. C.
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. JULIAN W. MACK, Circuit Judge.....Chicago, Ill.

[4] Died April 28, 1914.

[5] Appointed May 2, 1914.

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 A. GEIGER, District Judge, E. D. Wisconsin .....Milwaukee, Wis.
Hon. ARTHUR L. SANBORN, District Judge, W. D. Wisconsin .....Madison, Wis.

EIGHTH CIRCUIT

Hon. WILLIS VAN DEVANTER, Circuit Justice.....Washington, D. C.
Hon. WALTER H. SANBORN, Circuit Judge.....St. Paul, Minn.
Hon. WILLIAM C. HOOK, Circuit Judge.....Leavenworth, Kan.
Hon. ELMER B. ADAMS, Circuit Judge.....St. Louis, Mo.
Hon. WALTER I. SMITH, Circuit Judge.....Council Bluffs, Iowa.
Hon. JOHN E. CARLAND, Circuit Judge.....Sioux Falls, S. D.
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. 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[6].....Minneapolis, Minn.
Hon. WILBUR F. BOOTH, District Judge, Minnesota[7].....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. WM. H. POPE, District Judge, New Mexico.....Santa Fé, N. M.
Hon. CHARLES F. AMIDON, District Judge, North Dakota.....Fargo, N. D.
Hon. RALPH E. CAMPBELL, District Judge, E. D. Oklahoma.....Muskogee, Okl.
Hon. JOHN H. COTTERAL, District Judge, W. D. 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. WM. H. HUNT, Circuit Judge.....Helena, Mont.
Hon. WM. H. SAWTELLE, District Judge, Arizona.....Tuscon, Ariz.
Hon. OLIN WELLBORN, District Judge, S. D. California.....Los Angeles, Cal.
Hon. WM. C. VAN FLEET, District Judge, N. D. California.....San Francisco, Cal.
Hon. MAURICE T. DOOLING, District Judge, N. D. California.....San Francisco, Cal.
Hon. FRANK S. DIETRICH, District Judge, Idaho.....Boise, Idaho.
Hon. GEO. M. BOURQUIN, District Judge, Montana.....Butte, Mont.
Hon. EDWARD S. FARRINGTON, District Judge, Nevada.....Carson City, Nev.
Hon. CHARLES E. WOLVERTON, District Judge, Oregon.....Portland, Or.
Hon. ROBERT S. BEAN, District Judge, Oregon.....Portland, Or.
Hon. FRANK H. RUDKIN, District Judge, E. D. Washington.....Spokane, Wash.
Hon. EDWARD E. CUSHMAN, District Judge, W. D. Washington.....Seattle, Wash.
Hon. JEREMIAH NETERER, District Judge, W. D. Washington.....Seattle, Wash.

[6] Died March 13, 1914.

[7] Appointed May 4, 1914.

CASES REPORTED

CASES ON REHEARING

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

FIFTH CIRCUIT.

EIGHTH CIRCUIT.

NINTH CIRCUIT.

CASES

ARGUED AND DETERMINED

IN THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE DISTRICT COURTS

RAILWAY MAIL ASS'N v. MOSELEY et al.

(Circuit Court of Appeals, Sixth Circuit. February 11, 1914.)

No. 2382.

1. INSURANCE (§ 668*)—ACTIONS ON POLICIES—QUESTIONS FOR JURY.

In an action on a policy, insuring against sudden or violent death from external causes not the result of the member's own vicious conduct, evidence *held* to make a question for the jury as to whether insured was assaulted by an officer and shot while fleeing to save his life, and hence the direction of a verdict for the insurer was properly denied, even if the insurer would not be liable if insured assaulted the officer and was shot by the officer for the purpose of avenging himself.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1556, 1732–1770; Dec. Dig. § 668.*]

2. INSURANCE (§ 146*)—CONSTRUCTION—CONSTRUING AGAINST INSURER.

A policy, insuring against sudden violent death from external causes "not the result of the members' own vicious conduct," was ambiguous and susceptible of more than one construction, and should therefore be construed more strongly against the insurer.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 292, 294–298; Dec. Dig. § 146.*]

3. HOMICIDE (§ 105*)—JUSTIFIABLE HOMICIDE—KILLING WHILE MAKING ARREST OR PREVENTING ESCAPE.

Under some circumstances a police officer in whose presence a criminal act is committed may pursue the offender if the offense is a felony, and kill him if he cannot otherwise take him, but he may not kill the offender if the offense is a misdemeanor.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 135; Dec. Dig. § 105.*]

4. INSURANCE (§ 455*)—LIFE INSURANCE—DEATH CAUSED BY VICIOUS CONDUCT.

If the holder of a policy insuring against sudden violent death from external causes not the result of the member's own vicious conduct shot a police officer and fled from arrest and could not be otherwise taken, a killing by the officer while he was so fleeing was justifiable and the direct and proximate result of insured's vicious conduct.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1166–1169; Dec. Dig. § 455.*]

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

5. INSURANCE (§ 455*)—LIFE INSURANCE—DEATH CAUSED BY VICIOUS CONDUCT.

If the holder of a policy, insuring against sudden violent death from external causes not the result of the member's own vicious conduct, shot a police officer and fled and was pursued by the officer and shot, not for the purpose of arresting him or preventing his escape, but to avenge his own injury, the death was not the direct and proximate result of insured's vicious conduct, and the insurer was liable; and hence the court properly so charged, and properly refused to charge that if insured came to his death by being shot by the officer, whom he had previously shot without provocation, to find for defendant.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1166–1169; Dec. Dig. § 455.*]

6. TRIAL (§ 255*)—INSTRUCTIONS—NECESSITY OF REQUESTS.

In an action on a policy, insuring against sudden violent death from external causes not the result of the member's own vicious conduct, where it was not an unnatural implication from the testimony of the officer who shot insured that insured, after firing one shot at the officer, did not attempt to keep up the fight until he had been pursued by the officer for at least 600 feet, the failure of the court to hypothesize the theory of a continued cross-fire and running fight following the first shot, and the theory of self-defense, was not error, where no instructions on these theories were requested.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 627–641; Dec. Dig. § 255.*]

In Error to the District Court of the United States for the Western District of Tennessee; Jno. E. McCall, Judge.

Action by Mollie Moseley and others against the Railway Mail Association. Judgment for plaintiffs, and defendant brings error. Affirmed.

C. L. Marsilliot and Walter C. Chandler, both of Memphis, Tenn., for plaintiff in error.

Bell, Terry & Bell, of Memphis, Tenn., for defendants in error.

Before KNAPPEN and DENISON, Circuit Judges, and HOLLISTER, District Judge.

HOLLISTER, District Judge. This case involves the construction of a clause in a contract of insurance, issued by Railway Mail Association, plaintiff in error, to Emmett F. Moseley, a railway mail clerk at Memphis, Tenn., by which it was agreed, among other things, that if the insured should receive bodily injuries, resulting in death from such injuries alone, within 180 days therefrom, during the continuance of the insurance, through external, violent, and accidental means, the defendant would pay his sisters, the defendants in error, $4,000, less such sum as might have been paid as weekly indemnity during the disability that caused his death.

The clause in question defines accidental death:

"Accidental death shall be construed to be either sudden, violent death from external causes not the result of the members' own vicious conduct, or death within one hundred and eighty days from injuries received by accident alone."

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

Moseley was a colored man of nearly white complexion. While the insurance was in force, he was shot and instantly killed at Memphis by Burns, a police officer of that city.

To the declaration in the suit below, brought by Moseley's sisters, the defendant interposed the plea:

"That said Emmett Moseley lost his life on or about the 22d day of August, 1911, as the direct and proximate result of his own vicious, violent, and intemperate conduct, in that late in the evening on said date said Emmett Moseley, while committing an unlawful trespass upon private property in the city of Memphis, Tenn., was ordered off of said property in a quiet and peaceable manner by a regularly constituted police officer of the city of Memphis, who was in charge of said property; that said Moseley, being then and there engaged in another violation of the law, to wit, in carrying a concealed, dangerous weapon, a pistol, without any reason or provocation, there and then committed a murderous assault upon said police officer by shooting said police officer with said pistol, whereupon said police officer in defense of his life shot and killed said Moseley, all in express violation of the terms and conditions of the policy sued on in this cause."

The jury brought in a verdict for the plaintiffs in the full amount of the policy and interest, for which judgment was rendered with costs.

The errors assigned, including the refusal of the court to grant defendant's motion made at the close of all of the testimony to instruct the jury to find for the defendant, all relate to the construction put by the court, under the testimony in the case, upon the clause in the contract defining accidental death.

[1] That Moseley's death was sudden and violent from a pistol shot at the hands of Burns was not disputed; and the questions were whether or not Moseley had been guilty of vicious conduct, and, if so, whether or not his death was the direct and proximate result thereof.

Burns testified:

"Well, at five minutes after 9, on August 22, 1911, I went through the Dan Shea Boiler Works, one of my customers or clients, to see that their property was all right, and we have an electric patrol system—an electric box—four boxes located at various points in the building; the first box is on the corner of Washington, and I went to that box first and pulled that box first and went from there to the second, and intended to pull it, and when I got almost to it, I saw a man standing up, and a woman laying down, and I flashed my lamp, and I told them to get out of there, and this woman got up and preceded me; I didn't intend to make any arrest, or anything, but intended to flash on the lamp to show them the way out; I told this man that I was an officer, and if I caught him around there any more, I would arrest him, and when we got out to the road—that is, to the road going to the railroad that is between the office and the boiler shops, why, I heard a shot and felt something strike me in the back, although I felt no pain, although I could feel the blood running down, and this man I had seen a minute before, he ran around to Poplar street depot, and I grabbed my pistol—as soon as I could get it—I grabbed my pistol out and fired a shot at him, and missed him; in the meantime, he ran towards the depot, and I ran after him as quick as I could; I couldn't shoot for the number of railroad men there, and when I got down about on a line with the fourth electric light inside the shed, about midway between Exchange street and Poplar street, I saw this man step behind a coach, and he dropped there, and I ran around the corner of the coach, and he fired another shot at me, and I shot back, and then he ran possibly 50 feet, and I fired a second shot and killed him; in the meantime, I had fallen down between the second and third shots, and I got up

again, and I saw he still held his pistol, and I staggered up to him, and took his pistol away from him, thinking that he might shoot back, and when I got there and took hold of the pistol, I saw he was dead; so I laid down there until the patrol wagon came and got me and carried me to the hospital."

He also said that it was about 100 yards from the boiler works to the south end of the shed, and where he was shot was about 100 feet further south than the north end of the boiler works. If this is true, it would make the distance from where he says he was shot to the place where some of the witnesses first located the two shots at the south end of the shed as much as 400 feet. This is an appreciable distance, even when men are running, and reflects upon the question as to where the first two shots were fired, as well as upon the quality of Burns' conduct. The jury may have found, and could find, from all the evidence in the case, that those shots were actually fired at the south end of the shed, and not at the boiler works at all.

The unfortunate woman referred to denies being present in the boiler works, though she was later arrested in the vicinity, but just how far away is not made clear; and she denies ever having had to do with negroes. Burns alone testifies to Moseley's presence in the boiler works, if, indeed, he was present. It is difficult, from the testimony, to lay with accuracy the scene of the killing, because of the lack of exact location of fixed objects referred to, and their distances from each other. But it may be gathered from the testimony and a map of the city of Memphis (itself lacking in notations of distances) that on the south of the railroad shed spoken of in the testimony, is Poplar street, and to the south of Poplar street the boiler works are located. How wide Poplar street is does not appear. Whether the shed covers the whole distance between Poplar street and the street at the north of the railroad station and the length of the shed do not appear. It may be gathered from the testimony and the briefs of counsel that the distance between the boiler works and the place where Moseley fell dead is about 600 feet; it may be more than that. There was a train of cars standing in the station, the most southerly of which, an express car, was probably midway of the shed.

Moseley lived with his brother and sisters, not far away from the station. How far does not appear. He left home to mail a letter at the station. One of the witnesses talked with him on the subject at the station within a very short time before he was killed. There is substantial agreement among the witnesses that the killing took place between 9 and 10 o'clock, probably not earlier than quarter past 9. There were electric lights in the station. The news was telephoned to Moseley's brother, who testified that Moseley had been away about 45 minutes. Moseley was 21 years of age, and had a good reputation for peacefulness.

The weight of the evidence fixes the firing of the initial two shots at the south end of the station. There was some evidence that the sound of footsteps preceded any shooting. It was substantially proved that Moseley and Burns, the former leading, were running rapidly northwardly in the station. It was established that Burns had a pistol in his hand. Some witnesses say Moseley had a pistol in his hand while running, and others that he did not. Moseley ran past the south

end of the car and at the west of it, there being evidence tending to show that Burns was gaining upon him, and, at a distance of perhaps 15 or 20 steps, shot him; Moseley fell; but regained his feet quickly, at which time Burns was but a few feet from him, and ran back southwardly and around the south end of the car toward the east, "circling around" the end of the car; Burns taking a wider circle, and, with an oath, saying, "I am going to kill you," shot again at Moseley, who fell dead, shot twice in the back.

There is evidence tending to show that Burns himself fell down, or lay down, shouting: "You all seen him shoot me first," and others say he said, "He shot me first."

There is evidence tending to show that at the corner of the car Moseley stopped and shot twice at Burns.

If Moseley lingered at the end of the car to shoot Burns, the length of time he lingered must have been very brief—indeed scarcely appreciable. But it is quite possible, and from all the evidence the jury could have found, that the shooting of Burns occurred at that time and immediately before he killed Moseley. Two pistols were found in front of Burns. Burns was undoubtedly shot, and in the back, but whether the shot came directly from behind, or made a glancing wound in the back, does not appear.

There was evidence tending to show that Burns while pursuing Moseley called out: "Stop that man!"

It would not be practicable to set out all the evidence at length. It is not necessary to do so, because sufficient is shown upon which a number of hypotheses might be based for submission to the jury:

[2] Before considering these in detail it may be said that the meaning of the language in the clause in question is not clear and under the circumstances becomes ambiguous and susceptible of more than one construction. It should therefore be construed more strongly against the insurer. Am. Surety Co. v. Pauly, 170 U. S. 133, 144, 18 Sup. Ct. 552, 42 L. Ed. 977. But, passing this rule of construction as one not involving a vital question in the case, we proceed.

From one aspect of the case the jury might find that Moseley was killed while fleeing from arrest for some offense, whether a misdemeanor or a felony. Strangely enough, Burns does not claim that Moseley was resisting arrest or fleeing to escape arrest, but claims only that he killed Moseley in self-defense.

[3, 4] Under some circumstances, a police officer, in whose presence a criminal act is committed, may pursue the offender fleeing from arrest, and, if the offense is a felony, may kill the offender if he cannot take him otherwise; but he may not kill him if the offense is a misdemeanor. 2 Cooley's Blackstone (3d Ed.) 292; 1 East's Pleas of the Crown, 302; Williams v. State, 44 Ala. 41; Reneau v. State, 2 Lea (70 Tenn.) 720, 31 Am. Rep. 626; Head v. Martin, 85 Ky. 480, 3 S. W. 622; State v. Sigman, 106 N. C. 728, 11 S. E. 520; Thomas v. Kinkead, 55 Ark. 502, 18 S. W. 854, 15 L. R. A. 558, 29 Am. St. Rep. 68. If Moseley was a trespasser on the property of the boiler works, and if he carried a pistol, those offenses may be assumed, under the laws of Tennessee, to be misdemeanors. If Moseley did shoot Burns

in the back at the boiler works, he was guilty of a felony, and if he fled from arrest and could not be overtaken, and was killed by Burns while so fleeing, Burns had the right to kill him if he could not take him otherwise. And such killing would have been the direct and proximate cause of Moseley's vicious conduct. Or if immediately upon being shot, Burns, to save his own life or to save himself from great bodily harm, had then and there killed Moseley, there might be good ground for claiming the necessity of self-defense in taking human life, and so make Moseley's misconduct the direct and proximate cause of his death. Or if Moseley's death occurred in a continuing running fight and cross-fire, his death might be said to have been the proximate result of his own conduct. But the facts necessary to support these defenses were not, to say the least, undisputed; and it cannot be said that there was not room for a conclusion that Burns, pistol in hand, assaulted Moseley, and that the latter thereupon fled to save his life. Therefore, apart from the legal effect of a finding that Burns, after being shot in the back at the boiler works, pursued Moseley, not to arrest him, nor in self-defense, but only for the purpose of avenging himself upon him, it is clear that there was no error in refusing to direct a verdict for defendant.

[5] The hypotheses above mentioned (except those of self-defense and the running fight and cross-fire, which are not involved in the assignments presented) were clearly submitted to the jury in the following language:

"If you believe from this evidence that the assured was assaulted by this police officer, Burns, and then ran, and he pursued him, as the proof shows was done in this case, and shot him, then the plaintiff is entitled to a recovery.

"If you believe from the evidence that this police officer came upon the assured in Shea's warehouse in company with a woman, and he told him to get out, and in going out, the assured shot him in the back, and ran to get out of his way, and Burns followed him with the intention of revenging himself for the shot which had been inflicted upon him, and not for the purpose of arresting Moseley, and shot him, then the plaintiff would be entitled to recovery.

"If, however, you believe from the preponderance of the evidence in this case that this man Burns was a police officer and was attempting to arrest Moseley and the man shot him, and that Burns pursued him for the purpose of arresting him, and in the shed the deceased turned on him and shot at him, and then Burns fired and wounded him, then the company would not be liable, and you should find for the defendant.

"The distinction I am seeking to make is this, so that you may understand it. In the one case, if the colored man shot him in the back, and ran to get out of his way, and this man, Burns, to avenge himself upon him, pursued him, and shot him, then the company is liable, but if the man was attempting to arrest the deceased in the warehouse for the violation of the law, and the negro shot him and ran, and this officer pursued him to arrest him for the law he had violated, and not for shooting him, and the colored man turned upon him and shot him, or shot at him, and the officer then shot him and killed him, plaintiffs cannot recover, because in the latter case he was pursuing his duty as an officer in arresting the man for violation of the law, and if the deceased resisted that, and continued to resist it, while he was trying to arrest him for that violation of the law, then his death would have come about from his own vicious conduct, and he could not recover, whereas, if he shot Burns in the back and ran, and abandoned the difficulty, and was trying to get away, he would not have been killed, except the officer pursued

him and shot him. The officer was not authorized to inflict punishment upon the deceased for having shot him. That is the business of the courts and juries. Under the law, as I interpret it, if Moseley came to his death at the hands of this officer, who was seeking revenge for shooting him, it could not be said that was the result of the vicious conduct of Moseley in the warehouse."

Counsel for the defendant excepted to so much of the charge as instructed the jury that if Moseley shot Burns and ran, and Burns pursued him to avenge his own injury, this would not be vicious conduct within the meaning of the policy, and the plaintiffs might recover. We think this instruction was proper.

Another objection was:

"The defendant objects to that part of the charge of the court which instructs the jury that unless they find from the evidence that the deceased, Emmett Moseley, was killed while resisting arrest, there can be a recovery by the plaintiff."

The court did not so instruct the jury. It is true that the theory of self-defense and the theory of the running fatal fight, both combatants shooting, were not submitted to the jury, but counsel for defendant made no objection to the charge for that reason, nor did he at any time request a charge on those phases of the case. The defendant, therefore, takes nothing by this exception as heretofore shown.

In the motion for a new trial and in the assignments of error is found a claim that the court erred in refusing defendant's special request to charge the jury:

"If you find from the evidence that Emmett Moseley came to his death by being shot by W. F. Burns, whom he had previously shot on the premises of Dan Shea Boiler Works, without provocation on the part of said Burns, then your verdict should be for the defendant."

The record of the trial does not apparently disclose any such request, but if, indeed, it was made, the charge would not have been proper, for it entirely ignores the important consideration that Moseley's misconduct, in order to avoid the policy, must have been the direct and proximate cause of his death.

It is true that Burns is not on trial for murder in this case, yet it was necessary for the jury to consider the quality of his conduct in determining whether or not Moseley met his death as the direct and proximate result of his own vicious conduct, for, if he was murdered by Burns, then, as will appear, his death resulted directly and proximately, not from his own initial wrong, whatever it was, but from the crime of Burns.

If the exemption in this policy had been for accidental death resulting from the negligence of the insured, and it appeared on the trial that while he was negligent, yet the proximate cause of his injury, as recognized in the law, was the negligence of another, it could not be successfully claimed that the injury to the insured resulted from his own negligence. There must be proximation, such as the law recognizes, between cause and effect (or result) before a given effect, or result, may be ascribed to that cause. The defendant recognizes that the "result" the parties to the contract had in mind has the same meaning the law would give it, for in the plea it is averred that Moseley

lost his life "as the direct and proximate result of his own vicious conduct."

If Moseley shot Burns at the boiler works, and Burns in hot blood at the moment instinctively had shot and killed Moseley (which is quite different from pursuing Moseley, and twice shooting him in the back while he was running away), the resulting death might, with some force, be charged to Moseley's conduct as its cause (Murray v. Insurance Co., 96 N. Y. 614, 618, 48 Am. Rep. 658); and, of course, if Burns killed Moseley in self-defense, Moseley's death would, no doubt, have been the proximate result of his own conduct against which Burns must protect himself. Or if death ensued during an exchange of shots in a running fight, it might be said to proximately result from Moseley's conduct. And if Moseley had committed the felony of shooting Burns in the back, and his own death resulted while resisting arrest, no one would doubt that he lost his life as the direct and proximate result of the vicious conduct involved in resisting an officer of the law in the lawful discharge of his duty.

On the other hand, if Moseley had shot Burns in the back and escaped, and Burns, after being in the hospital for two weeks, as he says he was, met Moseley on the street and arrested, or sought to arrest, him, and killed him while he was trying to escape, it could not be said that Moseley's conduct at the boiler works was the cause of his death. In that case, also, the cause would be his resistance to lawful authority. And if in so meeting Burns did not intend to arrest him, or try to arrest him, but drew his pistol and shot him while running away, for the purpose of avenging the injury to himself, all would probably agree that his death was not the direct and proximate result of whatever viciousness he had displayed at the boiler works, but was the result of unjustifiable homicide at Burns' hands.

But when the circumstances make a case which does not fall within either of these extremes, where shall the line be drawn with respect to which it may be said that all cases falling on one side of it are of such character that the cause of death shall be ascribed to the conduct of the insured, and in all cases falling on the other side of it the death shall be charged to the conduct of the one by whose unlawful act the death was in fact brought about? Manifestly, if the killing is the lawful act of the one who does it, the result cannot be ascribed to him as the guilty cause of it; and it is equally true that if the death results from the unlawful conduct of the slayer which was not the natural and reasonably to be expected consequence of the conduct of the one slain, then the slayer's vicious conduct is the guilty cause, and not the conduct of him who is slain, whatever it may have been.

The line, then, must be drawn where the law draws it, and the resulting death must be ascribed to its cause in law, and not to a cause which in itself and of itself does not proximately lead to the fatal result, and is only a condition under which that result happened.

While no case has been cited involving a clause just like the one in question, yet there are a number of cases in which the agreement was that the policy was void if (in substance) the insured should die in the known violation of any law, or in consequence of any unlawful act.

The clauses vary in language, but these two are illustrative of the others.

In these cases the courts were dealing with cause and effect, as we are here; in all of them they were construing contracts in order to ascertain the meaning of the parties; in all of them they were of opinion that "result" means "proximate result," as the law would define it, and in all of them, when the insured has lost his life, no matter how heinous his initial conduct may have been, through the crime of the slayer, the resulting death was ascribed to the unlawful conduct of the slayer as its proximate cause, and the beneficiaries in the policies were permitted to recover.

In Utter v. Insurance Co., 65 Mich. 545, 32 N. W. 812, 8 Am. St. Rep. 913, in which the policy under consideration provided, among other things, that no claim could be made under it when the death happened while the insured was engaged in or in consequence of any unlawful act, it appears that the insured, a minor and deserter from the army, was shot and killed in a house of ill fame by a police officer who, without a warrant and acting under instructions of the undersheriff, went to the place where the deserter was for the purpose of arresting him. There was evidence tending to show (if one of the witnesses who was in the house was to be believed) that the insured was killed in a wanton and murderous manner. The trial judge had directed a verdict for the insurance company. This was held to be error, not only upon the ground upon which the direction was made, but also because the Supreme Court were of opinion that the question whether or not the insured was doing anything unlawful at the time he was killed should have been left to the jury; and the court said (65 Mich. 553, 32 N. W. 815, 8 Am. St. Rep. 913):

"Nor can it be held, as a matter of law, that Utter was engaged in an unlawful act, within the meaning of this policy. If he had been shot in the act of deserting, this claim might be made with some reason and propriety, but such was not the case here. Neither was he shot because he was a deserter, nor because he was in a house of ill fame."

In other words, from one aspect of the case, the cause of his death was not that he was at the time engaged in, or his death resulted as a consequence of, any unlawful act of his, but the cause of it was the unlawful act of the officer in killing him.

The general term of the Supreme Court of New York had before them the case of Goetzman v. Insurance Co., 3 Hun (N. Y.) 515, in which the company was exempted "if the assured shall die by suicide or in consequence of his violation of any law." It appeared that the assured, being caught by one Hesler immediately after having committed adultery with his wife, was shot and killed by him. The court were of opinion that, however great a violation of law and morals the assured's act was, yet that offense had been completed and the assured was about to go away; that the act of Hesler in killing the assured was a crime, and (3 Hun, 518):

"If the assured had been killed a week or a year after the injury, for the same cause, it would have been quite as direct a result thereof as when it was done. In short, the proposition that a man, who has been thus wantonly killed by another, without necessity or lawful excuse, died in consequence of

his own act, is logically contradictory, unless it be admitted that the killing of an adulterer follows his offense in the ordinary sequence of events. That admission we are not prepared to make."

The question put by Chief Justice Hill of the Supreme Court of Arkansas, in Supreme Lodge v. Bradley, 73 Ark. 274, 276, 83 S. W. 1055, 1056 (67 L. R. A. 770, 108 Am. St. Rep. 38, 3 Ann. Cas. 872), which, by their decision, the court answered in the negative, was this:

"Is a death received while retreating from a personal difficulty (and not retreating for the purpose of gaining a vantage ground to renew it), where the rencounter is begun by an assault by the deceased upon his slayer with a weapon capable of inflicting great bodily harm or death, according to its use, a death within the meaning of an insurance clause exempting against liability for a death 'in violation or attempted violation of any criminal law'?"

It appeared that one Bradley entertained ill feeling toward one Morscheimer. They met at the entrance of the courthouse; Morscheimer entering, and Bradley leaving, the building. Words passed; Bradley struck Morscheimer on the ear with a piece of iron. Morscheimer staggered, stepped back a few paces, drew his pistol, and began firing at Bradley. One of the shots, not fatal, struck Bradley in the breast. When Morscheimer began firing, Bradley turned and ran back into the courthouse, and, in attempting to enter the sheriff's office 24 feet away from the place where the affray began, fell into the arms of the sheriff, having received a fatal wound in the back from which he died almost immediately. He received the fatal wound immediately after he had turned and fled. There is much in the opinion of the learned Chief Justice pertinent to the issue here, but what he says about the proximate cause of Bradley's death is especially apt (73 Ark. 278, 83 S. W. 1057, 67 L. R. A. 770, 108 Am. St. Rep. 38, 3 Ann. Cas. 872):

"There must be a line drawn somewhere between consequences proximately, and those remotely, flowing from an unlawful assault; and the safe place to draw that line is where the law draws the line of lawful resistance to the unlawful assault."

And then he proceeds to say that Bradley was fleeing from the conflict, and received his wound in the back while escaping, and that Morscheimer was not legally justified in taking Bradley's life under those circumstances.

"Therefore, the first violation of the law by Bradley was not the proximate cause of his death, but the subsequent unlawful act of Morscheimer in shooting his retreating assallant was the proximate cause."

To the same effect are Harper's Adm'r v. Insurance Co., 19 Mo. 506; Overton v. Insurance Co., 39 Mo. 122, 90 Am. Dec. 455; Cluff v. Insurance Co., 13 Allen (Mass.) 308; Bradley v. Insurance Co., 45 N. Y. 422, 6 Am. Rep. 115; Griffin v. Benevolent Ass'n, 20 Neb. 620, 31 N. W. 122, 57 Am. Rep. 848; and Supreme Lodge v. Crenshaw, 129 Ga. 195, 58 S. E. 628, 13 L. R. A. (N. S.) 258, 121 Am. St. Rep. 216, 12 Ann. Cas. 307.

There is a class of cases of which Taliaferro v. Protective Ass'n, 80 Fed. 368, 25 C. C. A. 494, and Casualty Co. v. Stacey's Ex'rs, 143 Fed. 271, 74 C. C. A. 409, 5 L. R. A. (N. S.) 657, 6 Ann. Cas. 955, are

examples in which the insurance was against death by accident. Under the circumstances in these the courts were of opinion that the fatal result to the insured was to be expected from what he did, and was the natural and logical result of an intentional act on his part, and hence could not be regarded as an accident in any sense in which that word has been defined in the books.

In Gresham v. Insurance Co., 87 Ga. 497, 13 S. E. 752, 13 L. R. A. 838, 27 Am. St. Rep. 263, the policy excepted, among other things, accidental injuries caused by fighting, and recovery was denied because the insured was killed while the fight with his slayer was continuing, though from the facts it cannot be said that the slayer was legally justified in what he did.

But that case is distinguished in Supreme Lodge v. Crenshaw, 129 Ga. 195, 58 S. E. 628, 13 L. R. A. (N. S.) 258, 121 Am. St. Rep. 216, 12 Ann. Cas. 307, in which the policy provided that if death is caused or superinduced at the hands of justice, or in violation of or attempt to violate any criminal law, the insurer would not be liable for the full amount of the policy. In that case the insured was killed by a husband, either while he was attempting to commit adultery with the wife, or immediately after the act was completed. It was held (129 Ga. 200, 201, 58 S. E. 630, 13 L. R. A. [N. S.] 258, 121 Am. St. Rep. 216, 12 Ann. Cas. 307) that the policy must be given a reasonable construction, and that the liability of the company is not to be discharged—

"unless the violation of the law consisted in an act of which the death of the insured was the reasonable and legitimate consequence. * * * But there must be something in the act itself, independent of other circumstances, which makes the death the reasonable consequence."

And then, referring to Gresham v. Insurance Co., 87 Ga. 497, 13 S. E. 752, 13 L. R. A. 838, 27 Am. St. Rep. 263, the court makes a distinction between a case of death resulting immediately from hot blood engendered by fighting and while the fight is in progress and cases in which the death cannot be immediately ascribed to the unlawful conduct of the insured, however great a provocation that act may have given the slayer, because the death in such cases is not the reasonable, natural, logical, direct, or proximate result of the insured's conduct, but of the wrongdoing of the slayer. The same distinction is made in Murray v. Insurance Co., 96 N. Y. 614, 48 Am. Rep. 658.

It follows that notwithstanding Moseley had previously shot Burns, if, upon so shooting, Moseley ran, abandoned the difficulty, was trying to get away, and the shot by Burns was in the course of a pursuit made only for the purpose of avenging himself upon Moseley, defendant would be liable. The killing of Moseley under such circumstances would not be the direct and proximate result of his misconduct. In such contingency something intervened between the situation in which Moseley's conduct might have been said to have resulted in his death, if he had then been killed, and the situation in which, fleeing for his life, his death resulted from Burns' unlawful purpose to kill. It cannot, we think, properly be said to be matter of reasonable and natural expectation that a police officer, if shot from behind his back by one whom he, as such officer, had just driven or ordered away from certain

premises, would pursue his previous assailant, no longer such, but bent only on saving his life and avoiding further collision, and would follow the fugitive at least 600 feet, not with the design of arresting him, but solely and purely with the design of killing him then and there, by way of revenge.

[6] It is true that the theory of a continued cross-fire and running fight between Burns and Moseley, following the latter's shot at the boiler shop, was not submitted. But in view of the not unnatural implication from Burns' testimony that Moseley did not attempt to keep up the fight after the first shot fired at the boiler shop, until at least after he had been pursued by Burns for at least 600 feet (when Burns says Moseley dropped behind the car and fired again), it was incumbent upon defendant, if it relied upon the defense that Burns' shot was delivered in the course of a running fight or actually in self-defense, to have presented a request embodying that theory. This was not done, and so the situation presented by such theory is not necessarily before us. The rule given by the trial court, confined as it was to the theory stated, is, in our opinion, amply supported by the authorities cited.

We find no error in the charge or in the action of the court in overruling defendant's motion for an instructed verdict.

The judgment of the district court is therefore affirmed, with costs.

CHICAGO, B. & Q. R. CO. v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. November 28, 1913.)

No. 3892.

1. RAILROADS (§ 229*)—SAFETY APPLIANCE ACT—CONSTRUCTION—EQUIPMENT OF CARS—"ON ITS LINE."

The Safety Appliance Act of March 2, 1893, c. 196, § 2, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174), which makes it unlawful for a railroad engaged in interstate commerce to use "on its line" any car not equipped with automatic couplers, etc., applies to cars being moved in switching operations, in which, in fact, the greater part of the coupling and uncoupling of cars is done.

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

2. RAILROADS (§ 229*)—SAFETY APPLIANCE ACT—EQUIPMENT OF CARS.

It is not a defense to an action for violation of such provision by using a car with a defective and inoperative coupler that the car to which it was coupled was in perfect condition, and that the two could have been uncoupled without the necessity of going between them.

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

3. RAILROADS (§ 229*)—SAFETY APPLIANCE ACT—ACTION FOR VIOLATION—DEFENSES.

To bring a railroad company within the protection of Act April 14, 1910, c. 160, § 4, 36 Stat. 299 (U. S. Comp. St. Supp. 1911, p. 1328), which provides that, where a car shall have been properly equipped, but the equipment shall become defective while being used, it may be hauled from the place where it is first discovered "to the nearest available point where

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

such car can be repaired without liability for the penalties * * * if such movement is necessary to make such repairs and such repairs cannot be made except at such repair point," it must be shown, not only that the repairs could not have been made where the defect was discovered, but that the movement of the car was for the purpose of making the repairs.

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

4. RAILROADS (§ 229*)—SAFETY APPLIANCE ACT—ACTION FOR VIOLATION—DEFENSES.

It is not the duty of a government inspector, on discovering that a railroad company is using a defective car in violation of the statute, to notify the company of such fact.

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

5. RAILROADS (§ 229*)—SAFETY APPLIANCE ACT—TRAIN BRAKE PROVISIONS—CONSTRUCTION.

The provisions of the Safety Appliance Act of March 2, 1893, c. 196, § 1, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174), as amended by Act March 2, 1903, c. 976, § 2, 32 Stat. 943 (U. S. Comp. St. Supp. 1911, p. 1315), and supplemented by an order of the Interstate Commerce Commission, requiring that in any train operated by power or train brakes at least 75 per cent. of the cars shall be so equipped that their brakes can be operated by the engineer, do not apply to switching operations, and the movement by a switching crew of defendant railroad company of a string of cars from one terminal yard to another in the same city, for distribution of the cars into outgoing trains, in accordance with the practice in the modern system of freight terminals, was a switching operation, although the distance between the yards was two miles and the cars were moved over a main line track also used by other roads.

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

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

6. WORDS AND PHRASES—"TRAIN."

The word "train" covers any string of cars hauled by an engine.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 8, pp. 7056, 7057, 7818.]

Hook, Circuit Judge, dissenting in part.

In Error to the District Court of the United States for the Western District of Missouri; Arba S. Van Valkenburgh, Judge.

Action by the United States against the Chicago, Burlington & Quincy Railroad Company. Judgment for the United States, and defendant brings error. Reversed in part.

H. C. Timmons, of Kansas City, Mo. (William Warner, O. H. Dean, and W. D. McLeod, all of Kansas City, Mo., on the brief), for plaintiff in error.

Hugh C. Smith, of Kansas City, Mo., and Philip J. Doherty, of Washington, D. C. (Leslie J. Lyons, of Kansas City, Mo., on the brief), for defendant in error.

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

AMIDON, District Judge. The government brought this action to recover penalties for violations of Safety Appliance Act, Act March

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

2, 1893, c. 196, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174) as amended by Act April 1, 1896, c. 87, 29 Stat. 85 (U. S. Comp. St. 1901, p. 3175), and Act March 2, 1903, c. 976, 32 Stat. 943 (U. S. Comp. St. Supp. 1911, p. 1314).

The first count is based upon section 2. It charges defendant with using on its line a car when the coupling apparatus of the "A" end thereof was out of repair and inoperative. The issues upon this count were submitted to a jury, and resulted in a verdict in favor of the government, upon which judgment was entered in the sum of $100.

[1] The car was moved from the Twelfth Street yard in Kansas City, Mo., across the Missouri river, over the bridge and main line of the company, to the Murray Street yard. The evidence was quite clear that at the time the movement started the coupling apparatus was out of repair, and continued so throughout the movement. It is first urged by the company that this movement was a switching operation, and not "on the line" of the company within the meaning of the statute; in other words, that section 2 of the act does not relate to the movement of cars in switching. The coupling and uncoupling of cars, however, is confined almost wholly to such operations, and to hold that it is not a violation of the law to have the coupling and uncoupling apparatus in a defective condition at such times would be a clear nullification, not only of the language of the statute, but of its manifest purpose. This assignment of error is therefore wholly devoid of merit.

[2] It was also shown that the coupling apparatus on the car to which the car in question was coupled was in perfect condition, and that the two cars could have been uncoupled by the use of the lever on the first-mentioned car, and for this reason it is urged that the cars could be uncoupled "without the necessity of men going between the ends of the cars," and hence there was no violation of section 2. That section, however, makes it a crime to use "any car" upon which the coupling apparatus is not operative, and we think that under this statute every car is a unit, and must have its coupling apparatus in condition. Norfolk & W. Ry. Co. v. U. S., 177 Fed. 623, 101 C. C. A. 249. The argument of plaintiff in error in support of this contention is based mainly upon the decisions of this court in Morris v. Duluth, S. S. & A. Ry. Co., 108 Fed. 747, 47 C. C. A. 661; Gilbert v. Burlington, C. R. & N. Ry. Co., 128 Fed. 529, 63 C. C. A. 27; Suttle v. Choctaw, O. & G. R. R. Co., 144 Fed. 668, 75 C. C. A. 470; and Union Pacific Ry. Co. v. Brady, 161 Fed. 719, 88 C. C. A. 579. In those cases it was held that a switchman was guilty of contributory negligence in going between cars to uncouple them if the lever upon either car was operative. The opinions contain no suggestion, however, that the company in suffering the coupling appliance upon one car to be inoperative was not guilty of a violation of the Safety Appliance Act. On the contrary, all those decisions proceed upon the ground that the company was guilty of such a violation of the law, but held that the plaintiff was guilty of contributory negligence which defeated his right of recovery because, notwithstanding the company's breach of duty, there was a safe way in which the employé could have uncoupled the cars, and he was bound to choose that way rather than the dangerous method of going between the cars.

[3] The company also urges that the car in question comes within the proviso of section 4, Act April 14, 1910, c. 160, 36 Stat. 298 (U. S. Comp. St. Supp. 1911, p. 1327). That proviso enacts that where any car shall have been properly equipped, as provided in the act—

"and such equipment shall have become defective or insecure while such car is being used by such carrier upon its line of railroad, such car may be hauled from the place where such equipment is first discovered to be defective or insecure to the nearest available point where such car can be repaired, without liability for the penalties * * * if such movement is necessary to make such repairs and such repairs cannot be made except at such repair points."

The evidence tended to show that the car was received by defendant from the Atchison, Topeka & Santa Fé Railroad Company at Kansas City; that before it was received it was inspected and found to be in proper condition, and that the company first learned that the coupling appliance was out of repair after the car had been moved into the Murray yard. There was evidence, however, on the part of the government inspectors that they examined the car while it was in the Twelfth Street yard, and found it in a defective condition; that they accompanied it to the Murray Street yard, and there informed the company's employés of its defective condition, who thereupon promptly supplied the defective part. The trial court submitted to the jury the question whether the car was defective when it started from the Twelfth Street yard, or became defective in the course of its journey from that yard to the Murray yard, charging them that if the defect arose while the car was in transit, the company would not be liable. The jury accepted the testimony of the government inspectors, and found that the car was defective before it started upon the movement complained of. It is quite clear, therefore, that the company is not protected by the proviso upon which it relies. That is so for two reasons: First, the defect was of a character that could have been supplied in the Twelfth Street yard. It consisted of a small clevis which had fallen out of the coupling appliance. This could have been supplied as well in one yard as the other, and a car can be moved for purposes of repair under the proviso only when such a movement is necessary; that is, when the repair is of a character which requires the taking of the car to some particular point. Second, the movement which is permitted must be for the purpose of making repairs, and the evidence showed that the movement complained of was not of that character.

[4] The company also urges that it was the duty of the government inspectors when they discovered the defective condition of the car in the Twelfth Street yard to inform the company's employés so that the defect could be supplied before the car was moved. Such a ruling would make it almost impossible for the government to enforce the statute. It would be difficult, indeed, to show at the conclusion of a trip that the car was defective when the movement started. Such evidence could only be obtained from railway employés, and as a rule, would show that the witnesses themselves were guilty of negligence in not remedying a known defect. Government inspectors are no part of the company's repair force. It is their duty to ascertain whether or not the company is violating the statute. They can do that effective-

ly in no other way than that adopted by the inspectors in the present case.

The trial court committed no error as to the first count, and its judgment upon that count is therefore affirmed.

Counts 2, 3, and 4 are based on section 1 of the Safety Appliance Act, 27 Stat. 531, as amended by section 2, Act March 2, 1903, 32 Stat. 943. The first statute provides as follows:

"That from and after the first day of January, 1898, it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving wheel brake and appliances for operating the train-brake system, or to run any train in such traffic after said date that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose."

Section 2 of the act of March 2, 1903, fixes the minimum percentage of cars having air brakes coupled up at 50 per cent., and empowers the commission, after full hearing, to increase that minimum percentage, and makes a failure to comply with any such requirement of the Interstate Commerce Commission subject to the like penalty as failure to comply with any requirement of the statute. After the passage of this act the Interstate Commerce Commission promulgated a regulation fixing the minimum of cars having air brakes coupled at 75 per cent. of the train.

The second cause of action charges the defendant with moving a transfer train consisting of 42 cars, engaged in interstate traffic, having only nine cars upon which the air was coupled up. The third cause of action charges the movement of a similar train consisting of 36 cars, having only 10 cars upon which the air was coupled up. The fourth cause of action charges the movement of such a train containing 39 cars, and having the air coupled up on only 9 cars.

The evidence showed that each of these trains was in charge of a switching crew, was hauled by a switch engine, had no caboose, and had not been moved as a train over defendant's line, nor was it intended to be moved as a train. Defendant has two yards at Kansas City, Mo., one known as the Twelfth Street yard, south of the Missouri river, and the other the Murray yard north of that river. These two yards together constitute a terminal yard. Trains coming in from the west are broken up in the Twelfth Street yard, and such cars as are to go forward to eastern points are distributed upon tracks according to the practice in modern railroading. Strings of these cars are then drawn out at the eastern end of the system of tracks by a switch engine, and transferred to the Murray yard, where they are again redistributed according to the connecting carriers, who are to move them forward to eastern points. The distance between the yards is about two miles. The line on the bridge across the Missouri river is a single line, and is about 3,000 feet long. The tracks between the two yards are intersected by the terminal road at Kansas City. The line across the bridge is used not only by defendant, but by the Wabash and Rock Island Railroad Companies for both freight and passenger trains. The movement of trains in this territory is controlled by block signals. Trains such as those here complained of have no schedule, and are not under

the control of the train dispatcher, but are moved by the yardmaster. The principal issue upon these counts was whether trains of the character described are subject to the provisions of the law requiring 75 per cent. of the air brakes to be coupled up. The trial court held that they were, and directed the jury to return a verdict in favor of the government. This action of the court is the principal ground of error assigned upon these counts.

[5] It is not controverted by the government that the provisions of the Safety Appliance Act in regard to air brakes have not heretofore been regarded as applicable to switching operations. This has been the interpretation of executive officers charged with the enforcement of the act, and is justified by the language of the statute. The words, "on its line," "in moving interstate traffic," "to run any such train in such traffic," are properly applicable to trains moving from point to point rather than to switching operations. We do not think the act of 1903 was intended to make any change in the original statute in this respect. That statute was passed to correct the decision of this court in the case of Johnson v. Southern Pacific Railway Co., 117 Fed. 462, 54 C. C. A. 508, and was mainly declaratory. Johnson v. Southern Pacific, 196 U. S. 1, 21, 25 Sup. Ct. 158, 49 L. Ed. 363.

The controversy here presented has arisen because of a change in the method of doing switching at important terminal points since the passage of the statute. When the act was passed terminal yards consisted of main tracks and a system of sidings upon which cars were moved by the old "push and pull" system. Even in such yards the main tracks of the road were used to a considerable extent in switching operations. The immense increase in the volume and density of traffic upon American railroads since 1898 has compelled a complete reconstruction of terminals at all important points. These terminals now consist of at least two systems of ladder tracks operated by gravity, or by the hump and gravity systems combined. In one of these yards incoming trains are broken up and the cars distributed upon different sidings according to their destination. From these sidings strings of cars are pulled out and moved forward to another system of tracks constructed upon the same plan as the first, and there distributed upon sidings so as to constitute trains to be carried forward by connecting carriers. For trains moving in the opposite direction the process is simply reversed. Another ladder of sidings in the yard in which the cars were assembled into trains becomes a yard for classification, and the classification yard becomes the yard in which cars are assembled into trains to be carried forward in the opposite direction. In this reconstruction of terminals old yards have, as a rule, been used as one end of the system, and carriers have been compelled to go considerable distances to find land that could be acquired at any reasonable price for the other end. While the record is silent on the subject, we have no doubt that this was the reason for the location of the Murray yard across the river. Standard works such as Droege's Freight Terminals and Trains, published in 1912, give the history of this development and the construction of present-day terminals and the methods of handling cars therein. The double system of yards above described

is the simplest form now in use, and in important terminals, instead of there being two yards, the traffic has compelled the construction of several yards. In the publication referred to such yards are described with drawings, which make both their structure and method of operation much more plain than any verbal description. This combination of yards constitutes a single terminal yard, and is just as indispensable in the switching of freight cars at the present time as the old system of sidings was a few years ago.

[6] This case was tried mainly by the dictionary. We have much reasoning of counsel upon general principles. What we would have preferred would be an accurate description of the development of the terminal yards at Kansas City; the present structure of those yards, the method of handling trains therein; the speed at which transfer trains are moved between the yards; the control over such trains afforded by the coupling up of the air upon a part of the cars only; whether in actual practice, with the air coupled up on six to ten cars, the engineer can control the speed of these transfer trains from the locomotive, "without requiring brakemen to use the common hand brakes for that purpose;" what, if any, accidents have resulted from the failure to couple up 75 per cent. of the air; the time that would be consumed in coupling up 75 per cent. of the air on such trains; the number of trains that are moved in the yard; the effect upon the movement of cars in such terminal yards if 75 per cent. of the air had to be coupled up on all these strings of cars. In other words, the evidence should do all that could be done to place the court in the same position as an experienced railroad man in judging of these transportation questions. Instead of reasoning from such a disclosure of the actual facts, the attempt is made to deduce the decision of the case from the definition of the word "train" by a process of abstract reasoning. One fundamental trouble with such reasoning is that it proves too much. The word "train" of course covers any string of cars hauled by an engine. But if the statute is to be applied to all trains falling within this definition, then it would cover all movements of cars by means of a locomotive in switching operations, and it would make no difference whether that movement was on a main track or a siding. Such a result reduces the reasoning to an absurdity, because its application to railroads would operate as an embargo upon commerce. Because of these results, as well as from the language of the statutes, we are of the opinion that the air-brake sections of the Safety Appliance Acts were not intended to apply to switching operations. But if the statute at the time of its enactment was not intended to apply to such operations, may the court, because those operations have been enlarged since the passage of the act, apply the statute to the new conditions? We think not. That is a matter for Congress and not for the courts. If conditions have so changed in our modern terminal yards as to require that strings of cars, moved by a switch engine from one yard to another in the breaking up and making up of trains, shall be subject to the air-brake provisions of the Safety Appliance Acts, Congress ought so to provide. The whole question turns upon two points: First, do the air-brake provisions of the Safety Appliance Acts apply to switching op-

erations? Second, was the movement of the strings of cars here involved a good-faith switching operation? We are satisfied that the movement of these trains was as genuinely a switching operation as the old movement when terminal yards were less extended than they are now. Being of that opinion, and that the air-brake sections of the Safety Appliance Acts were not intended to apply to switching movements, we think the trial court committed error when it directed the jury to return a verdict in favor of plaintiff.

At no time since the passage of the Safety Appliance Act in 1893 has it been the practice to couple up the air upon cars which were being moved in switching operations. This has been equally true whether the movement was upon sidings or upon main lines. At any time during the period referred to it has been possible to see hourly, not only at terminal points, but at any divisional point, such trains moving from one yard to another over the main lines of the road without coupling up the air. The same is true of trains moving from the yards of one carrier to yards of a connecting carrier at the same divisional point. It is true that such yards, as a rule, are less distant from each other than yards in the great terminal systems of important centers of traffic. It seems to us, however, impossible for courts to develop different rules according to the length or character of the main line that is used in such operations. The statute attempts to make no such classification, and, in our judgment, courts would be guilty of palpable legislation if they should attempt to do so.

The most difficult problem that confronts railroads at the present time is to prevent strangulation of the arteries of commerce at these great terminal points. The traffic of half the continent at certain seasons of the year rushes down upon these centers. Thousands of cars have to be distributed and recombined daily in these terminal yards. There is no evidence in this record as to the time that would be consumed in coupling up 75 per cent. of the air on these transfer trains, but it was shown in a similar case (Erie Railroad Company v. United States, 197 Fed. 287, 116 C. C. A. 649) that it would take at least half an hour. In cold weather it would take considerably more than that time. The movement of the trains from one yard to the other at the rate of six to eight miles an hour would take less than 20 minutes. The result is that nearly twice the time would be consumed in coupling up the air that is needed for the brief movement of the train, and this with the clear certainty that at the end of the journey the air would have to be again uncoupled in order to distribute the cars. If such delay is necessary for public safety, all will agree that safety should be placed above speed. But, considering the shortness of the journey and the slowness of the speed, there is no evidence in this record that the safety of the public or of employés requires the coupling up of 75 per cent. of the air on these transfer trains. Furthermore, the question is for Congress, and not for the courts.

The identical question which is here presented was before the Circuit Court for the Third Circuit in Erie Railroad Co. v. United States, 197 Fed. 287, 116 C. C. A. 649, and, we think, was there properly decided, notwithstanding its criticism in United States v. Pere Marquette R. R.

Co., 211 Fed. 220, in the District Court of the United States for the Western District of Michigan, decided September 5, 1913.

The judgment of the trial court as to causes of action 2, 3, and 4 is reversed, with directions to grant a new trial.

HOOK, Circuit Judge (dissenting in part). I am unable to concur in the conclusions of the court upon the second, third, and fourth counts, which charge defendant with moving on its line of railroad three trains in which the train brakes on the prescribed percentage of cars were not connected. Each string of cars, one of 32, another of 36, and the third of 39 was hauled as a unit, without switching in transit, from one of defendant's yards to another. The yards at their nearest points were about two miles apart. The movement over this intervening distance was by a main line track used constantly in the freight and passenger traffic of three great railroad systems into and out of Kansas City, Mo.—the Burlington, the Rock Island, and the Wabash. Three thousand feet of this distance was by the defendant's single-track Hannibal bridge across the Missouri river, one of the important and most congested arteries of commerce in that part of the country. About 4,000 feet including the bridge was used by the passenger trains of the three railroad systems in gaining access to the Union Station. This stretch of main line track intersected a track of another railroad company and from 12 to 15 tracks of a terminal company.

Defendant's contentions which the court sustains are: First, that the train-brake provisions of the Appliance Acts (27 Stat. 531; 29 Stat. 85; 32 Stat. 943) do not apply to switching operations; second, that the movements of the cars in question were of that character. I will not stop to consider the first of these, except to say that in some switching operations compliance with the requirement in question may be impracticable, and for that reason may not have been enforced as to them. But it is another thing to declare generally that switching operations are without the statute, and then to attribute to that phrase such a broad meaning as to impair the very intent of Congress. The test of the application of the statute is in the essential nature of the conditions presented, not in the words by which they may be conveniently described. Otherwise the fate of the legislation would depend upon extraneous phraseology. It is noteworthy that the phrase "switching operations" does not appear in the statute, though that would have been the easy, obvious way had Congress broadly intended to exempt them. Here that result is reached by construction. The last act (32 Stat. 943) declares that the provisions and requirements "relating to train brakes * * * shall be held to apply to all trains * * * used on any railroad engaged in interstate commerce." No broader declaration can be conceived. No exception like that urged upon us appears, and a court should be most careful in inserting one by construction. If to observe the intent of an act of Congress "any car" includes a locomotive engine (Johnson v. Southern Pacific, 196 U. S. 1, 25 Sup. Ct. 158, 49 L. Ed. 363), it would seem that the expression "all trains used on any railroad engaged in interstate commerce" should be held to include the three trains of defendant. In view of the decisions of the courts

it is too late to say the three strings of cars with their engines were not "trains" within the meaning of the law.

An argument in aid of the exemption of switching operations is deduced from the expression "on its line" in section 1 of the act of March 2, 1893. Whatever force there may have been in this disappeared when Congress provided by the act of March 2, 1903, that the requirements should be held to apply to all trains used on any railroad engaged in interstate commerce. If we keep in view the letter and the spirit of the law and the evils intended to be lessened or prevented, it seems to me the defense of switching operations is manifestly untenable. Among the dangers which Congress had in mind were those which arose from the movement of trains not quickly controllable by coupled power brake appliances. It also appears from the proceedings in Congress that the dangers to brakemen from the slippery tops of cars and overhead obstructions were especially regarded. The train-brake provisions would take the brakemen from the places of peril while the trains were moving.

The purpose of defendant in making up these trains at the point of origin and its intended disposition at destination are purely adventitious, and so of the absence of markers and the movement by switch engines and crews. In the passage of the trains all the dangers were present as patently as if they had been solid through trains from distant cities, as to which no one would doubt the applicability of the statute. Two of the three trains in question, each composed of an engine and more than 30 cars, moved from the Murray yards north of the Missouri river to the Twelfth Street yards in Kansas City. If they had been preceded by a freight train from Chicago, separated by a passenger train from Omaha and followed by a freight train from St. Louis, all five moving on the same stretch of main line track used in interstate commerce, only the last three, according to defendant, would have been within the train-brake provisions of the statute. Yet in each case every condition suggested by the letter and spirit of the legislation would be present: Each a train; each on a railroad engaged in interstate commerce; each moving with the same character of motive power; each at every stage of its progress menaced by similar dangers, and each equally a source of danger to others; the same intersections; the same overhead obstructions. Though three would be subject to the statute, it is said two would not, and the anomaly is sought to be justified by the contention that the movements of the two from yard to yard were "switching operations," employing a phrase not found in the statute. There may be reasons in practice for the exemption of some such operations, but if admitted it should be with a much narrower scope than that claimed in this case. It should not be held to cover the transfer of long strings of cars over extended distances of main line track in the midst of through traffic. The exemption has been allowed here for reasons of inconvenience, not impracticability.

BROPHY v. KELLY et al.

(Circuit Court of Appeals, Fifth Circuit. February 10, 1914.)

No. 2463.

1. JUDGMENT (§ 17*)—PROCESS TO SUSTAIN—SUBSTITUTED SERVICE.
Personal service of process on a nonresident of Texas without that state as authorized by a statute of that state will support a judgment foreclosing a vendor's lien on land owned by such nonresident within the state and ordering its seizure and sale, but not awarding any relief against such nonresident personally.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 25–33, 157, 422; Dec. Dig. § 17.*]

2. VENDOR AND PURCHASER (§ 277*)—VENDOR'S LIEN—ENFORCEMENT—VENUE—OBJECTIONS—WAIVER.
In view of Const. Tex. art. 5, § 8, and Rev. St. Tex. 1895, art. 1098, giving the District Court original jurisdiction in suits to enforce liens on land, article 1194, subd. 12, providing that a suit for the foreclosure of a mortgage or other lien may be brought in the county in which the property subject to the lien or a part thereof may be situated, does not deprive the District Courts of jurisdiction of the subject-matter of suits to enforce liens on land situated in other counties, but only gives the defendant a privilege to be sued in the county in which the land is situated, which may be waived and is waived by defaulting or by appearing and consenting to judgment, notwithstanding the omission of any statutory provision authorizing a plea of privilege in such case; this not justifying the inference that no such plea is recognized.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 774, 775; Dec. Dig. § 277.*]

3. VENDOR AND PURCHASER (§ 285*)—LIEN FORECLOSURE—JUDGMENT.
A judgment foreclosing a vendor's lien was not void as to the nonresident owner who defaulted, because the vendor who indorsed the lien notes to plaintiff and was liable thereon voluntarily appeared and consented to the bringing of the suit in a county other than that in which the land was situated and to the entry of judgment, as plaintiff could have taken final judgment against the land without such appearance and consent by dismissing against such vendor, and such appearance and consent therefore did not affect the owner.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 800–807; Dec. Dig. § 285.*]

4. CONSTITUTIONAL LAW (§ 42*)—PERSONS ENTITLED TO RAISE CONSTITUTIONAL QUESTIONS.
Whether Rev. St. Tex. 1895, art. 1230 et seq., providing for service of process on nonresidents and that a defendant so served shall be required to appear and answer in the same manner as if he had been personally served within the state in connection with article 1263, providing that, where a citation has been personally served at least ten days before the first day of the term at which it is returnable, defendant's answer shall be filed on or before the second day of the return term, denies due process of law to nonresidents personally served outside the state because of the possibility that they might have only 12 days in which to appear and answer, will not be determined at the instance of a nonresident defendant who had ample time in which to appear and answer.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 39, 40; Dec. Dig. § 42.*]

5. VENDOR AND PURCHASER (§ 287*)—FORECLOSURE OF LIEN—SALE—VALIDITY.
At a sale under a judgment foreclosing a vendor's lien on property worth $35,000 and subject to a prior lien of $9,000 or $10,000, plaintiff,

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

who was a transferee of the lien notes, was prepared to bid $3,000, the approximate amount of the judgment, but was informed by the vendor that he would pay plaintiff the difference between his bid and the judgment; plaintiff's interest in bidding being thereby taken away. Payment of the prior lien had been assumed by such vendor in the sale to the vendee, and another purchase-money note for $15,000 given by the vendee had been postponed by the vendor's agreement to the lien of plaintiff's note, and, though one present at the sale who made inquiry was told of such liens by plaintiff, the vendor, or the sheriff in their presence and with their acquiescence, these facts were not explained to him, and, unexplained, the liens were such as to destroy his interest in the property. The land was sold to the original vendor for $676. *Held*, that the sale was collusive and fraudulent as to the vendee and should be set aside and the sheriff's deed declared null and void because of such fraud and collusion.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 810–814; Dec. Dig. § 287.*]

Appeal from the District Court of the United States for the Southern District of Texas; Waller T. Burns, Judge.

Suit by Reuben C. Brophy against John C. Kelly and others. From a decree dismissing the bill of complaint, plaintiff appeals. Reversed and remanded, with directions.

This is an appeal from a decree of the District Court for the Southern District of Texas in equity, dismissing appellant's (plaintiff's) bill of complaint after a hearing upon the merits. The decree also dismissed the cross-bill of the appellee John C. Kelly, who was one of the defendants and a cross-complainant in the court below; but no cross-appeal has been taken from that part of the decree.

The original bill was filed, so far as its purposes are here material, for the purpose of setting aside and vacating, as fraudulent and void, a judgment order of sale and a sale thereunder of a state court, which was asserted by the appellant to be a cloud on his title to certain lands in Hidalgo county, Tex. The judgment was obtained by one of the defendants, L. W. Campbell, in a suit instituted by him as plaintiff in the district court of Dallas county, Tex., against the appellant and the appellee John C. Kelly, as defendants. The purpose of this suit was to recover on a note executed by the appellant to the appellee Kelly for $2,525.85, and indorsed by Kelly to the plaintiff, in that suit, Campbell, and to enforce a vendor's lien upon the land for a part of the purchase money of which the note was given. There was a default taken against the appellant, and on the 14th day of February, 1911, the default was made final by a judgment in the district court of Dallas county. The final judgment was for the foreclosure of the vendor's lien on the land, for part of the purchase money of which the note sued on was given, and, as well, a personal judgment against the defendant John C. Kelly, as indorser on the note. There was no personal judgment taken against the appellant Brophy. The appellant Brophy, at the time of the beginning of that suit and of the rendition of the judgment therein, was a resident of Illinois and a nonresident of Texas. He was served with the notice of the suit personally in the state of Illinois in pursuance of articles 1230 to 1234, inclusive, of the Revised Statutes of Texas, on the 9th day of January, 1911, and by the terms of the citation was required to appear and answer upon the first Monday in February, 1911. Appellant made no appearance or answer. At the time of the bringing of the suit appellant's codefendant Kelly was a resident of Texas. Citation was issued to him but not served upon him. On February 14, 1911, Kelly entered a voluntary appearance in the district court of Dallas county in the cause and consented to a judgment against him, as prayed for in plaintiff's petition, and personal judgment was entered against him on that day. On March 10, 1911, an order of sale, founded on the judgment, was issued from the clerk's office, directing the sheriff of Hidalgo county to

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

seize and sell the land to satisfy the vendor's lien. The sheriff thereupon duly advertised the land for sale, and sold it at public outcry at the county seat of Hidalgo county on the first Tuesday of May, 1911, pursuant to the advertisement, and returned the order for the seizure and sale to the district court of Dallas county, having executed a deed to the purchaser. The purchaser was the defendant, John C. Kelly, and the amount realized therefor was $676.

The purpose of the bill was to have (1) the judgment declared void and removed as a cloud on plaintiff's title to the land, or (2) to have the sale made by the sheriff under it set aside and declared void, because of alleged collusion and fraud between the execution creditor Campbell and the purchaser Kelly, who was one of the defendants.

Noah Allen, of San Antonio, Tex., and E. F. Thompson, of Chicago, Ill., for appellant.

Coke K. Burns, of Houston, Tex. (Andrews, Ball & Streetman, of Houston, Tex., on the brief), for appellee John C. Kelly.

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

GRUBB, District Judge (after stating the facts as above). 1. The bill assails the judgment because, as it alleges, the district court of Dallas county did not acquire jurisdiction of the defendant Brophy or of his land; he being a nonresident of Texas and personally served in the state of his residence, Illinois, and the land involved not being situated wholly or partly in Dallas county, in which county the suit was brought. As to defendant Brophy, it is contended that the judgment was void, whether the action be one in personam or one in rem. It is also alleged that the defendant Brophy was deprived of due process of law by being deprived of his land under the judgment, because the Texas statute, under which service was obtained, failed to afford reasonable time for appearance and answer by a nonresident defendant when personally served beyond the limits of the state. The statute provided that the citation should be served ten days before the return term, and answer was required to be made by the defendant on or before the second day of the return term, and before the call of the appearance docket on said second day. Revised Statutes Texas, art. 1263.

[1] It is not contended by the appellee that service by personal citation upon a nonresident defendant under article 1230 of the Revised Statutes of Texas, outside the limits of the state, would be a sufficient predicate for a personal judgment against him. Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565. No personal judgment was rendered against defendant Brophy in that case, and the only question is whether such service is effective to sustain a judgment foreclosing a vendor's lien; the land being situated within the jurisdiction of the court.

Constructive service may be a sufficient foundation for a judgment or decree in rem. So personal service upon a nonresident defendant, when he is out of the state, in which the suit against him is pending, may avail to support a judgment in that state, if its effect is limited to property of his within the jurisdiction of the court. This is as true of actual service upon a nonresident when out of the state of the forum, as it is of constructive service upon a nonresident. A suit may be one in rem either by virtue of its purpose being to enforce an existing lien

or foreclose an existing mortgage on property of the nonresident defendant, situated within the state of the forum, or because of the creation in the suit itself by attachment or other process of a legal lien on the property of the nonresident defendant found within the jurisdiction of the court.

In the case of Roller v. Holly, 176 U. S. 398–405, 20 Sup. Ct. 410, 412 (44 L. Ed. 520) the Supreme Court said:

"The substance of these cases is that if the plaintiff be in possession, or have a lien upon land within a certain state, he may institute proceedings against nonresidents to foreclose such lien or to remove a cloud from his title to the land, and may call them in by personal service outside of the jurisdiction of the court, or by publication, if this method be sanctioned by the local law. In suits for the foreclosure of a mortgage or other lien upon such property, no preliminary seizure is necessary to give the court jurisdiction. The cases in which it has been held that a seizure or its equivalent, an attachment or execution upon the property, is necessary to give jurisdiction are those where a general creditor seeks to establish and foreclose a lien thereby acquired."

That the suit in the district court of Dallas county and the judgment rendered therein are to be construed, so far as they affected the defendant Brophy, as being in rem only, is apparent from the fact that no relief against Brophy was obtained, except an order for the seizure and sale of his land. That service by personal citation upon a nonresident defendant, in the state of his residence, is sufficient to support a judgment in rem, foreclosing a lien on his land situated within the state of the forum and within the jurisdiction of the court, is the holding of the case of Roller v. Holly, supra. That case also holds that article 1230, Texas Revised Statutes, the one relied on by appellee in this case, applies to suits for the foreclosure of liens or mortgages on lands, as construed by the courts of Texas, a construction adopted by the Supreme Court in that case.

The appellant, however, contends: (1) That the land being in a county different from that in which the suit was brought and the judgment obtained, and the Texas statute requiring suits for foreclosure of liens on land to be brought in the county where the land was located, partly or wholly (Revised Statutes Texas, art. 1194, subd. 12), the district court of Dallas county had no jurisdiction of the rem, and, having no jurisdiction of the person of the defendant Brophy, was without jurisdiction altogether; and (2) that article 1230, Texas Revised Statutes, providing for service on nonresidents, allowing the citation to be returnable at a term to be held within ten days after service, the Texas law requiring the defendant to answer on or before the second day of the term makes it possible that a nonresident defendant have but 12 days in which to appear and answer the citation, which might be an unreasonably short time, depending upon the distance the residence of the defendant is from the place of trial, and that the statute, for this reason, deprives nonresident defendants of due process, and is violative of the fourteenth article of amendment to the federal Constitution for that reason.

[2] 2. The district court of Dallas county is by the Constitution and laws of Texas vested with general original jurisdiction in all suits for the enforcement of liens on lands (Constitution of State of Texas, art.

5, § 8; Revised Statutes of Texas 1895, art. 1098), where the amount in controversy exceeds the sum of $500. Article 1194, subd. 12, Texas Revised Statutes, provides that a suit for the foreclosure of a mortgage or other lien may be brought in the county in which the property subject to such lien or a portion thereof may be situated. Is the effect of the latter statute to deprive the district courts of jurisdiction of the subject-matter of suits to enforce liens on lands situated in counties other than that of the forum, or merely to provide for the venue, giving the defendant a privilege to be sued only in the county of his residence, or that in which is situated property against which a lien is sought to be enforced, a privilege which he may insist on or waive, as he sees fit, and which he waives by permitting a default to go against him? That the latter is the correct rule is apparent from the Texas cases we quote from.

In De La Vega v. League, 64 Tex. 205–215, the Supreme Court of Texas said, with reference to subdivision 14 of the same section, which limits the venue in actions for the recovery of lands, to remove incumbrances, to quiet title, and to prevent waste, to the county in which the land or a part thereof lies:

"Our statutes in force at the time the reconvention was filed provided that suits for the recovery of land should be brought in the county where the land or a part thereof is situated. This is one of the exceptions to the general rule requiring suits to be brought in the county of the defendant's residence. This requirement is not a matter that affects the jurisdiction of the district courts over the subject-matter of controversies about the title or possession of lands. Every district court in the state has cognizance of such suits; the requirement as to the county in which the suit may be brought is a mere personal privilege granted to the parties, which may be waived like any other privilege of this character."

In the case of Dittman v. Iselt, 52 S. W. 96, the Texas Court of Civil Appeals said:

"It is well settled that the requirement that suits for the recovery of lands should be brought in the county where the land, or a part thereof, may be situated, is not a matter that affects the jurisdiction of district courts over the subject-matter of controversies about the title or possession of lands. The requirement is one of personal privilege merely, and, when the parties were once in court, any matter arising out of the subject-matter of the suit could be litigated."

In the case of Wolf v. Sahm, 55 Tex. Civ. App. 569, 120 S. W. 1114–1116, the same court said:

"It is true that while article 1194 of the Revised Statutes of 1895 prescribes that suits concerning lands shall be brought in the counties where the lands are situated, still district courts have the power to try such suits regardless of the county in which the land is located, and the statute referred to merely secured to a defendant a personal privilege to be sued in a particular county. It is also true that the general rule is that the privilege referred to is waived when a defendant files a plea to the merits before asserting his privilege to be sued in another county."

In the case of Houston Oil Co. v. Bayne (Tex. Civ. App.) 141 S. W. 544, the same court reapplied the principle decided in the case of De La Vega v. League, supra, to a case in which a judgment was entered against nonappearing unknown heirs, upon constructive service by posting and publication. The court said:

"We are of the opinion, however, that the general rule announced by the authorities, and above stated, applies to this case. The presumption is that the court obeyed the plain command of the statute, and appointed an attorney ad litem to represent the defendants, and they are bound by his waiver of objections to the venue."

There is no reason for the drawing of a distinction between subdivision 14 and subdivision 12 of article 1194, in this respect. Each relates to the venue in suits concerning lands, and fixes the venue in the county where the lands are situated. However, in the case of Cavanaugh v. Peterson, 47 Tex. 206, the Supreme Court of Texas said:

"The statute provides for a mortgage on land to be foreclosed in the county where the land is situated. It does not follow, from that, that a judgment of foreclosure would be void, if it was foreclosed in another county; the district court having general jurisdiction of the subject-matter—the debt, and the mortgage to secure it. That judgment, being rendered in Harris county, was binding, and, not being appealed from or set aside, was conclusive, as between the parties to it, to the full extent of what was decreed."

The same principle has been announced by the Texas courts in the cases of Ryan v. Jackson, 11 Tex. 400; Morris v. Runnells, 12 Tex. 175; Bonner v. Hearne, 75 Tex. 247, 12 S. W. 38; Walker v. Stroud (Tex. Sup.) 6 S. W. 206; and Fairbanks v. Blum, 2 Tex. Civ. App. 479, 21 S. W. 1009.

Appellant contends that article 1903, Texas Revised Civil Statutes, does not apply to nonresident defendants. It, however, applies only to a plea of privilege based upon the residence of a defendant in a county of the state other than that in which he is sued, and does not attempt to prescribe the form of such a plea, where it is based upon the ownership of lands, which are affected by a suit, which is pending in a county, other than that in which the lands are located. It cannot be inferred, from the absence of legislation prescribing the form of such a plea of privilege, that no such plea in such cases is recognized in Texas, especially in view of the express authorities cited, which sustain the right to file it in cases of like character. Where the basis of the privilege is the locality of the land, about which the suit relates, the place of residence of the defendant, whether within or without the state, becomes immaterial.

We think the fact that the land involved in the suit in Dallas county was in Hidalgo county was a matter of affirmative defense by the defendants in that suit, which might be waived, and which was waived by the defendant Brophy by permitting a default to be taken against him, and by the defendant Kelly by entering a voluntary appearance and consenting to the entry of the judgment in that cause.

[3] It is contended that Kelly collusively consented that the suit might be brought in Dallas County. It is apparent that an agreement on Kelly's part with Campbell, the plaintiff in the suit, could not have prevented Kelly's codefendant Brophy from pleading his privilege to be sued only in the county where the land was located. Brophy was deprived of the opportunity of setting up this defense, because he defaulted, and not because of Kelly's agreement with plaintiff. Kelly was responsible as indorser on the note to the holder of it, and had a legitimate interest in seeing that it was paid by the maker, and if his

interest, in this respect, was subserved by consenting to the jurisdiction of the Dallas county court over him, his codefendant had no ground of complaint. Nor was he entitled to complain of Kelly's act in appearing voluntarily at the return term, and consenting to the judgment, for the same reason. However, the plaintiff Campbell could have taken final judgment against Brophy's land at the return term, in the absence of Kelly's appearance and consent by dismissing against Kelly. So that Kelly's appearance and consent only had the effect of enabling the plaintiff Campbell to obtain a judgment at that term against Kelly as well as against Brophy's land. This was not a matter in which Brophy had an interest or of which he was entitled to complain.

[4] 3. It is also contended that article 1230, Texas Revised Statutes, when considered in connection with article 1263, fails to furnish nonresident defendants, personally served beyond the limits of the state of Texas, due process of law, in that the period between the service of personal citation and the time required of the defendant to appear and answer may be unreasonably short, if the citation is served within the nearest day possible to the return term. The period would then be 12 days. The appellant relies upon the case of Roller v. Holly, 176 U. S. 398, 20 Sup. Ct. 410, 44 L. Ed. 520. In that case the Supreme Court held that a nonresident defendant, who was called upon to answer a suit pending in Texas, while he himself was in Virginia, within 5 days of date of service of citation, was not furnished due process of law, and was entitled to have a default judgment rendered on such service set aside for that reason. It is quite clear from the opinion of the court that an interval of 20 days between service and return day would not have been held to be unreasonable. In this case, the appellant was served with the citation January 9, 1911, in Elgin, Ill., and was not required to appear or answer until the day succeeding the first Monday in February. This was in excess of 20 days. The period between service and return day for answer, under the Texas statutes, might have been as short as 12 days. The contention is that as to some nonresident defendants such an interval might be too short to afford due process, and that, if the statute permits of such a contingency, it must be declared invalid, even though appellant had ample time after service to plead in the case in which he was defendant.

We think the case of Tyler v. Judges of Court of Registration, 179 U. S. 405, at page 409, 21 Sup. Ct. 206, at page 208 (45 L. Ed. 252), answers this contention adversely to the appellant, deciding that a federal court will not strike down a state statute as unconstitutional because not affording due process of law in the matter of notice at the instance of a defendant who concededly had ample notice of the pendency of the suit against him. In that case the Supreme Court said:

"In the case under consideration the plaintiff in error is the owner of a lot adjoining the one which is sought to be registered, and the only question in dispute between them relates to the location of the boundary line. In his petition he does not set forth that he made himself a party to the proceedings before the court of registration, and his name does not even appear in the list of those who are required to be notified, or elsewhere in the proceedings before the court. In the assignment of error he complains only of the unconstitutionality of the statute, in that it deprives persons of property without due process of law. In his brief his first objection to the validity of the act is

that the registration, which deprives all persons, except the registered owner, of interest in the land, is obtained as against residents and known persons only by posting notices in a conspicuous place on the land and by registered letters, and as against nonresidents and unknown persons by publication in a newspaper; and that the rights of the parties may be foreclosed without actual notice to them in either case, and without actual knowledge of the proceedings. His second objection to the validity of the act is that the registration of dealings with the land after the original registration would, in certain cases, have the effect of depriving the registered owners of their property without due process of law. His objections throughout assume that he has actual knowledge of the proceedings, and may make himself a party to them and litigate the only question, namely, of boundaries, before the court of registration. In other words, he is not affected by the provisions of the act of which he complains, since he has the requisite notice. Other persons, whether residents or nonresidents, whose rights might be injuriously affected by the decision, might lawfully complain of the unconstitutionality of an act which would deprive them of their property without notice; but it is difficult to see how the petitioner would be affected by it. * * * It may well have been thought that, to avoid the necessity and expense of appearing before an unconstitutional court and defending his rights there, he had sufficient interest to attack the law, which lay at the foundation of its proposed action; but to give him a status in this court he is bound under his petition to show, either that he has been, or is likely to be, deprived of his property without due process of law, in violation of the fourteenth amendment; and, as no such showing has been made, we cannot assume to decide the general question whether the commonwealth has established a court whose jurisdiction may, as to some other person, amount to a deprivation of property."

Upon the authority of this case, we decline, at the instance of appellant, who had ample and timely notice of the pendency of the Dallas county suit, to decide the general question as to whether article 1230 is a violation of the fourteenth amendment, because of its possible failure to furnish another person, in another case, reasonable notice and opportunity to appear and defend.

This results in a denial to appellant of the relief prayed for by him, so far as it relates to the judgment of the district court of Dallas county. We reach this conclusion with less reluctance, since the only defense to the action on the note that we understand from the record the appellant would or could interpose, if afforded an opportunity, is that it was transferred to plaintiff by the payee and endorser Kelly, in violation of his agreement with appellant, an agreement which was found by the district judge not to have been made, in which finding we concur.

[5] We come then to the other branch of relief prayed for by appellant, namely, the setting aside of the sale made under the judgment.

It is conceded by the appellant that the sale was made in pursuance of an order of sale, issuing upon the judgment, and was regularly advertised, and was conducted by the sheriff of Hidalgo county, as a judicial sale at public outcry. The appellant claims that the sale was fraudulent as to him, because there was a collusive agreement between the plaintiff in the judgment, Campbell, and the purchaser, Kelly, as to the bidding; because of the announcement at the sale that there were certain liens on the property, made either by the sheriff or by Campbell or Kelly, no explanation having been given that these liens were subsequent to that under which the sale was had; and because the property was sold for a grossly inadequate price.

The evidence showed that Campbell, the plaintiff in execution, went to Edinburgh, where the sale was to occur, to look after his interest at the sale; that, at Kelly's request, the sale was continued to a later hour, to enable Kelly to reach Edinburgh and bid on the land; that Kelly came to Edinburgh prepared to bid $3,000, which was the approximate amount due on the judgment for the land; that before the bidding commenced Kelly told Campbell that he would pay Campbell the difference between the amount due on the note and judgment and what he (Kelly) might bid in the land for; that Campbell said what he wanted was his money and not the land. This is Kelly's own testimony. The land was knocked down to Kelly after Campbell had stopped bidding, there being no bidders other than Kelly and Campbell, for $676. That amount was insufficient to pay the judgment in favor of Campbell to satisfy which the land was sold. Campbell, however, was protected as to the unpaid balance by Kelly's agreement to pay it to him, though the property sold for less. Kelly did pay Campbell the difference between what was due on the judgment, and the amount of his bid and took a transfer of the note, on which the judgment was based, from Campbell, crediting it with the amount of his bid. A sheriff's deed was made on the date of the sale to Kelly. It seems clear that Campbell's interest in bidding was taken away by his foreknowledge that he would get his money from Kelly, without requiring Kelly to bid the amount due on the judgment, as he was prepared to do, if necessary. Instead of the judgment being satisfied in full by the land sold, as it would have been in the absence of such an understanding, it was satisfied only to the extent of $676, leaving to Campbell or to his transferee, Kelly, the power to collect the balance from the appellant Brophy by execution against his other property.

Again, it is quite clear that an announcement was made at the sale by either Kelly or Campbell or the sheriff in their presence and with their acquiescence that there were liens on the land to a person, who was present at the sale, and displayed enough interest in the sale to make the inquiry. There was a prior lien in favor of the Bedell Mooré estate of about $9,000, but the payment of this had been assumed by Kelly, in his trade with Brophy. There was another purchase-money note for $15,000 of Brophy's, held by Kelly or his transferee; but the lien of this note was postponed by Kelly's agreement with Campbell to the lien of the note, which was the basis of the judgment under which the sale was made. No explanation of the status of the liens was vouchsafed the inquirer. The amount of the liens was such as to destroy his interest in the property, if his statement is to be credited. He made no bid at the sale, thus leaving the competition altogether between Campbell and Kelly. The partial information furnished the possible bidder was misleading, and calculated to induce a withdrawal of interest. It was made by or in the presence and with the apparent acquiesence of Campbell and Kelly. We do not think they are in a position to say that appellant has not shown the solvency or capacity of the inquirer to purchase, after having discouraged his bid.

The property sold for $676, subject to a lien of $9,000 or $10,000. The record shows it to have been worth $35,000 or more.

In view of the facts attending the sale, as stated, and the inadequate

price realized for the property sold, we have reached the conclusion that the sale was collusive and fraudulent as to appellant Brophy and should be set aside, and the sheriff's deed declared to be null and void, leaving the property to be resold under another order of sale to be issued upon the judgment. The following authorities support this conclusion: Byers v. Surget, 60 U. S. 303, 15 L. Ed. 670, and Graffam v. Burgess, 117 U. S. 180, 6 Sup. Ct. 686, 29 L. Ed. 839.

The equities as between the parties will also be conserved by this course. If the sale is permitted to stand, the appellant Brophy will have lost the land he purchased from Kelly, without opportunity to redeem it from the sale. For this land, he paid Kelly $5,200 in cash and executed two notes, one for $2,525 and one for $15,000. The smaller note is still outstanding against him, except for the credit of $676, the amount realized from the land at the sale. The second note for $15,000 is also still outstanding against him and in the hands of a possible innocent holder for value, with no notice of any equities between Kelly and appellant. Against these obligations, Brophy has nothing. The inequity of this situation needs no enlargement.

The decree of the District Court is reversed, and the cause remanded to that court, with directions to there enter a decree, setting aside the sale of the land by the sheriff of Hildago county to the appellee Kelly, and declaring the sheriff's deed to Kelly null and void, but without prejudice to the right of the appellee Campbell to sue out another order of sale on the judgment in the district court of Dallas county, and in pursuance of it to readvertise and resell the land, if he is so advised. The costs in this court and in the court below to be taxed against the appellees and defendants.

MUTUAL LIFE INS. CO. OF NEW YORK v. HILTON-GREEN et al.

(Circuit Court of Appeals, Fifth Circuit. January 17, 1914.)

1. INSURANCE (§ 265*)—AVOIDANCE OF POLICY FOR FALSE REPRESENTATIONS.
Where a life insurance policy provided that all statements by insured should, in the absence of fraud, be deemed representations and not warranties, it was not avoided by false representations made by insured unless they were made fraudulently, with knowledge, actual or imputed, of their falsity, when he made them, and were material to the risk, tending to influence the insurer to write the policy when, if their falsity had been known to it, it might not have done so.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 560; Dec. Dig. § 265.*]

2. INSURANCE (§ 292*)—AVOIDANCE OF POLICY FOR FALSE REPRESENTATIONS.
Representations by an applicant for insurance that he had been examined by the insurer's medical examiner, and that no previous application by him had been rejected and passed upon unfavorably, which were untrue to his knowledge, avoided the policy, unless the insurer was estopped to rely thereon by reason of its knowledge of their falsity.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 691, 692; Dec. Dig. § 292.*]

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

3. INSURANCE (§ 378*)—FALSE REPRESENTATIONS—KNOWLEDGE OF AGENT IMPUTED TO COMPANY.

Under Gen. St. Fla. 1906, § 2765, providing that every person receiving money for an insurance company for any contract of insurance made by him, or who directly or indirectly makes or causes to be made any contract of insurance, shall be deemed to all intents and purposes an agent or representative of such company, the knowledge of a company's managing and soliciting agents and medical examiners of the falsity of representations by insured was chargeable to the company, in the absence of collusion between them and insured to defraud the company, though acquired in connection with the soliciting and examining of insured for another company; such previous transaction having been of recent happening, and the knowledge not having passed out of the recollection of such agents, but having been rehearsed during the examination for the subsequent policy and when the application therefor was taken, where the only limitation in the policy on the authority of agents was a provision that they were not authorized to modify the policy or extend the time for paying a premium, especially where the policy also provided that representations in the absence of fraud should not be deemed warranties.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 968-997; Dec. Dig. § 378.*]

In Error to the District Court of the United States for the Northern District of Florida; Wm. B. Sheppard, Judge.

Action by L. Hilton-Green and another, as executors of C. L. Wiggins, deceased, against the Mutual Life Insurance Company of New York. Judgment for plaintiffs, and defendant brings error. Affirmed.

See, also, 202 Fed. 113, 120 C. C. A. 267.

This was an action to recover upon four policies of life insurance, issued by the plaintiff in error (defendant in the trial court) at one and the same time to the intestate. The suit was instituted in the Circuit Court of the First Judicial Circuit of Florida, and removed to the District Court of the United States for the Northern District of Florida. It was twice tried in that court, each trial resulting in a verdict for the plaintiff for the amount of the four policies with interest and attorneys' fees.

The first judgment was reversed by this court because the policies sued on were erroneously held by the District Judge on the first trial to be Alabama contracts, which, under the statute of that state, made them noncontestable for any cause after two annual premiums had been paid. No other question was decided on the former appeal. The opinion of the court appears in 202 Fed. 113, 120 C. C. A. 267.

Upon the second trial, to review the judgment in which the present writ of error is taken, the court below held that the Florida law governed the policies, and other questions only are now presented for decision. They arise entirely out of false statements alleged to have been made or ratified by the insured in the application for the policies and in the reports of the two medical examiners of the defendant, and which the defendant contended avoided the policies. The alleged false answers related to the insured's present and past health history; as to previous illnesses, surgical operations, consultations with physicians, hospital treatment, etc.; also, that he had been examined by the defendant's medical examiners, and that the examiners had correctly recorded his answers; and that he had never applied for other insurance and been rejected or his application not passed upon favorably. The alleged false statements were made the subjects of numerous special pleas by the defendant, to which the plaintiff replied by taking issue thereon and also by alleging knowledge of the falsity of the statements relied upon, on the part of the defendant, through its agents and examiners who were instrumental in writing the policies for it. No questions with relation to the pleadings are assigned as error. The errors relied upon relate altogether to exceptions to the court's

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

oral charge, and to the refusal of certain charges requested by the defendant. There are 23 errors assigned and relied upon for a reversal, all of which have been examined by us. We feel that clearness of presentation will be accomplished rather by a general statement of our views respecting them than by a detailed consideration of each assignment.

George W. P. Whip, Emmett Wilson, and Philip D. Beall, all of Pensacola, Fla., for plaintiff in error.

W. A. Blount, A. C. Blount, Jr., and F. B. Carter, all of Pensacola, Fla., for defendants in error.

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

GRUBB, District Judge (after stating the facts as above). The main questions considered on the trial in the court below, and about which the errors insisted upon here relate, were: (1) Whether the alleged false statements must have been fraudulently made by the insured, in order to be availed of by the insurer; (2) whether they must have been material to the risk to have that effect; (3) whether they or any of them were, in fact, material to the risk; (4) whether knowledge of the falsity of the statements made by the insured on which defendant relies, if proven, would be the knowledge of the defendant and estop it from asserting the invalidity of the policies for that reason; and (5) whether the defendant's agents or medical examiners are shown to have had such knowledge.

[1] 1. Each of the policies was alike in form and in its conditions and provisions. Each contained this stipulation:

"All statements made by the insured shall, in the absence of fraud, be deemed representations and not warranties."

When the language of a policy by its terms excludes warranties, it would seem that it leaves false representations made by the insured with substantially the status that they would have with relation to the offense of obtaining money by false pretenses. In order to avoid a contract of insurance, because a party to it was induced to enter into it by the false representations of the other party to it, it must be made to appear that the representations were untrue; that they were known to be untrue by the party making them; that they were material inducements to the party, to whom they were made, to enter into the contract; and that the party to whom they were made relied upon their truth, which implies that he was unaware of their falsity.

In the case of Ætna Life Ins. Co. v. Outlaw, 194 Fed. 862, 114 C. C. A. 608, the Circuit Court of Appeals for the Fourth Circuit said of a policy containing a like stipulation:

"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 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."

In the case of Pelican v. Mutual Life Insurance Co., 44 Mont. 277, 119 Pac. 778, the court said:

"An application for a policy provided that all statements made by the insured should, in the absence of fraud, be deemed representations and not warranties, and that no such statement of the insured should avoid or be used in defense to a claim under the policy, unless contained in the written application, etc. It also recited that all of the answers to the medical examiner were true and were offered as inducements to the issue of the policy. Held, that answers to questions in the application as to insured's prior health history were representations and not warranties, and the falsity thereof would not avoid the policy unless fraudulent, under Rev. Codes, 5043, providing that the language of the policy must be construed most strongly against insurer."

Section 5043, Revised Code, referred to in the citation, and declaring that the language of the policy must be construed most strongly against the pleader, being merely declaratory of the rule of construction as to insurance policies in the absence of statute, does not diminish the weight of this authority.

In the case of Penn Mutual Co. v. Trust Co., 73 Fed. 653, 19 C. C. A. 316, 38 L. R. A. 33, 70, Circuit Judge Taft held that where a representation was by a statute required to be made "in bad faith," to be available to the insurance company, nothing short of an actual intent to mislead or deceive would suffice; that a misstatement, honestly made, through inadvertence or even gross forgetfulness and carelessness, was not enough.

We are of the opinion that, under the language of these policies, they could be avoided because of false representations made by the insured, only if such representations were fraudulently made, i. e., with knowledge, actual or imputed, upon the assured's part, of their falsity when he made them.

2. We also think that the false representations relied upon to avoid the policies must have been material to the risk, tending to influence the insurer to write the policies, when, if their falsity had been known to it, it might not have done so. The peculiar stipulation of the policies themselves excludes the idea that the representations made by the insured were to be considered warranties, unless they were fraudulently made. If not to be construed as warranties, then, in order to avoid the policies, they must have been material to the risk.

In the case of Ætna Life Ins. Co. v. Outlaw, 194 Fed. 862, 863, 114 C. C. A. 608, 609, the Circuit Court of Appeals for the Fourth Circuit said:

"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."

We hold that, under the language of the policies involved in this suit, the defendant, to avoid the policies for false representations, must

establish their falsity, materiality, and the knowledge of the insured, actual or imputed, of their falsity.

3. So far as the alleged false representations related to the insured's previous and present condition of health, as to whether he had suffered from indigestion or from a weak and diseased heart, and whether he was then in good health, we think that the issues were properly left as questions of fact to the jury, both as to the falsity and as to the materiality of these representations. So we think the materiality of the omission of the insured to mention the history of the impacted tooth and the operation for its removal, and the visits of the insured to Hot Springs, Montgomery, and Atlanta, in pursuit of treatment for what turned out to be an inverted tooth, was a question for the jury to determine, under the evidence disclosed in the record.

[2] This leaves for consideration the representation of the insured that he had been examined by Dr. Turberville, defendant's medical examiner, and that the answers recorded by the medical examiner in his report were correct. In truth, there was no such examination had, and the insured must have known that there was none, and the representation that there had been one was a material one. So with regard to the representation of the insured that there had been no previous application for insurance made by him and rejected or not passed upon favorably by the insurance company. This was untrue, must have been known to have been untrue by the insured when he made it, and it was material. Either of these two last representations would be sufficient to avoid the policies, unless the defendant is estopped to rely upon them, by reason of its knowledge of their falsity. It had such knowledge, if at all, because of the knowledge of its agents and examiners, who handled the matter for it.

[3] 4. This brings us to the inquiry as to whether defendant is chargeable with the knowledge of its agents, Hogue and Torrey, and its medical examiners, Kirkpatrick and Turberville, who reported to it that they had examined the insured, and facts indicating that he was an acceptable risk.

In considering this legal question, two facts, peculiar to this case, are to be noticed: (a) The effect of the Florida statute, and (b) the language of the policies sued upon.

(a) Section 2765 of the General Statutes of Florida is as follows:

"Sec. 2765. Agents.—Any person or firm in this state, who receives or receipts for any money on account of or for any contract of insurance made by him or them, or for such insurance company, association, firm or individual, aforesaid, or who receives or receipts for money from other persons to be transmitted to any such company, association, firm or individual, aforesaid, for a policy of insurance, or any renewal thereof, although such policy of insurance is not signed by him or them, as agent or representative of such company, association, firm or individual, or who in anywise, directly or indirectly, makes or causes to be made, any contract of insurance for or on account of such insurance company, association, firm or individual, shall be deemed to all intents and purposes an agent or representative of such company, association, firm or individual."

In the absence of such a statute and under different language in the policies, the case of New York Life Ins. Co. v. Fletcher, 117 U. S. 519, 6 Sup. Ct. 837, 29 L. Ed. 934, relied upon by the plaintiff in error,

would seem controlling of this case. However, effect must be given to the statute and to the language of the policies.

In the later case of Continental Ins. Co. v. Chamberlin, 132 U. S. 304–310, 10 Sup. Ct. 87, 89 (33 L. Ed. 341), the Supreme Court considered a similar statute of Iowa, and distinguished the case of Insurance Co. v. Fletcher, supra, from one where such a statute controlled, and declined to apply the rule laid down in the Fletcher Case to the case then under their consideration. The court said, referring to such a statute:

"This statute was in force at the time the application for the policy in suit was taken, and therefore governs the present case. It dispenses with any inquiry as to whether the application or the policy, either expressly or by necessary implication, made Boak the agent of the assured in taking such application. By force of the statute, he was the agent of the company in soliciting and procuring the application. He could not, by any act of his, shake off the character of agent for the company. Nor could the company by any provision in the application or policy convert him into an agent of the assured. If it could, then the object of the statute would be defeated. In his capacity as agent of the insurance company he filled up the application—something that he was not bound to do, but which service, if he chose to render it, was within the scope of his authority as agent. If it be said that, by reason of his signing the application, after it had been prepared, Stevens is to be held as having stipulated that the company should not be bound by his verbal statements and representations to its agent, he did not agree that the writing of the answers to questions contained in the application should be deemed wholly his act, and not, in any sense, the act of the company, by its authorized agent. His act in writing the answer, which is alleged to be untrue, was, under the circumstances, the act of the company. If he had applied in person, to the home office, for insurance, stating in response to the question as to other insurance the same facts communicated by him to Boak, and the company, by its principal officer, having authority in the premises, had then written the answer, 'No other,' telling the applicant that such was the proper answer to be made, it could not be doubted that the company would be estopped to say that insurance in co-operative societies was insurance of the kind to which the question referred, and about which it desired information before consummating the contract. The same result must follow where negotiations for insurance are had, under like circumstances, between the assured and one who in fact, and by force of the law of the state where such negotiations take place, is the agent of the company, and not, in any sense, an agent of the applicant."

In the case of New York Life Ins. Co. v. Russell, 77 Fed. 94–104, 23 C. C. A. 43, 53, the Circuit Court of Appeals for the Eighth Circuit said of the effect to be given the language of a policy as against a similar statute of Nebraska:

"The obvious purpose of this clause, like that which declared the agent of the insurance companies should be deemed the agent of the insured, is to enable the insurance company to escape from the necessary obligations and liabilities imposed by the law of agency on a principal who commits the conduct of his business to an agent. It is designed to evade a fundamental rule of the law of agency, and to shear its acknowledged agents of their appropriate and accustomed powers and duties, and impose them on the insured. If this application is to receive the construction contended for, no one can safely transact business with an agent of the company; for, while he would be bound by his acts and representations and any information communicated to him by the agent, the company will not be bound by the acts or representations of its agent and any information communicated to him in the conduct of the business of his agency. Under such a rule, the rights and obligations of the contracting parties would not be reciprocal; contracts made with the company's agents would be one-sided; and the company could, at its own

election, avail itself of the acts and representations of its agents when it was profitable to do so, and repudiate them when they were likely to prove burdensome. The company cannot play fast and loose in this manner. The persons who are authorized by the company to solicit insurance, take applications, or receive premiums in Nebraska, are made by statute the agents of the company 'to all intents and purposes'; and it is not within the power of the company to shear these statutory agents of the powers and authority with which the law, for the protection of the public dealing with the company, invests them. These powers are precisely those which an agent of an insurance company possesses, upon whose powers and authority no special limitations have been imposed. * * *

"Insurance companies perfectly understand the fact that these applications, which are framed by themselves, and furnished to their agents, are filled up, and the answers to the questions written down, by their agents, and that every applicant accepts without question the advice, direction, and assurance of the agents in all matters relating to the preparation of the application. This is a part of the duty of such agents, and the applicant has a right to assume that they will discharge it intelligently and honestly. He has a right to assume, also, that the agent will honestly and faithfully discharge his duty to his principal. In this case it was the duty of the company's medical examiner to make the report called for by the clause of the application last quoted, if the answer to the question and the information communicated to the medical examiner made such report necessary. This was a duty required of the medical examiner by the company. It would be unprecedented and unreasonable for an applicant to take into his own hands the preparation of the medical examiner's report, and, in doing so, disregard the express advice and direction of the company's medical examiner. * * *

"Under the Nebraska statute, the agents and medical examiner of the defendant company were 'to all intents and purposes' the agents of the company; and, in their respective spheres, they possessed all the powers and authority conferred on agents and medical examiners of insurance companies by an unqualified appointment as such. It results that the information communicated by the applicant to the company's agents and medical examiner was, in contemplation of law, communicated to the company itself; and the company, therefore, having issued the policy with knowledge of all the facts, will not be heard to defend upon the ground that these facts were not fully set out in the report of its agents or medical examiner. We concur fully in the conclusion reached by the learned judge who tried the case at the circuit, whose opinion is inserted in the statement of the case. The judgment of the Circuit Court is affirmed."

In view of the Florida statute, we think these two cases are controlling of this case, rather than is the case of New York Life Ins. Co. v. Fletcher, which plaintiff in error relies upon. The statute prescribes that every person who receives money for an insurance company in payment of a contract of insurance, or who directly or indirectly causes to be made any contract of insurance, shall be deemed to all intents and purposes an agent or representative of such company. Under this description, we think Torrey, the defendant's Mobile manager, Hogue, the soliciting agent, and the two medical examiners were agents of the defendant to all intents and purposes, and so, for the purpose of charging it with notice of what they knew, when the policies were written.

(b) Again, the language of the policies in this case differs from that of the policy in the case of Life Ins. Co. v. Fletcher, supra. In that case the policy contained a stipulation:

"That the rights of the company could in no respect be affected by his verbal statements, or by those of its agents, unless the same were reduced to writing and forwarded with his application to the home office."

Of this stipulation the court, in that case, said:

"The company, like any other principal, could limit the authority of its agents, and thus bind all parties dealing with them with knowledge of the limitation. It must be presumed that he read the application, and was cognizant of the limitations expressed therein."

And again:

"The present case is very different from Insurance Co. v. Wilkinson, 13 Wall. 222 [20 L. Ed. 617], and from Insurance Co. v. Mahone, 21 Wall. 152 [22 L. Ed. 593]. In neither of these cases was any limitation upon the power of the agent brought to the notice of the assured. * * * Where such agents, not limited in their authority, undertake to prepare applications and take down answers, they will be deemed as acting for the companies. In such cases it may well be held that the description of the risk, though nominally proceeding from the assured, should be regarded as the act of the company. Nothing in these views has any bearing upon the present case. Here the power of the agent was limited, and notice of such limitation given by being embodied in the application, which the assured was required to make and sign, and which, as we have stated, he must be presumed to have read. He is therefore bound by its statements."

In the case of Ætna Life Ins. Co. v. Moore (decided December 22, 1913) 231 U. S. 543, 34 Sup. Ct. 186, 58 L. Ed. ——, the Supreme Court of the United States said:

"The medical examiner, as we have seen, put down the answer, 'No,' to the question asked Salgue as to whether he had heart disease, after being informed by Salgue that he (Salgue) had been told by physicians that his heart was affected. It appears from the evidence that the other answers of Salgue in his application were written down by the agent of the company; and there is testimony for and against the fact that Salgue informed the agent of the opinion entertained of him by his physicians, and that he also informed the agent of other applications for insurance. It is hence contended that the agent, not Salgue, is responsible for the positive character of the answers, and that the insurance company is estopped by this action of the agent and by his knowledge of the actual conditions and circumstances. It is therefore further contended that the case comes within the principle of the cases which establish that, where the agent of the company prepares the application or makes representations to the assured as to the character and effect of the statements of the application, he will be regarded in so doing as the agent of the company, and not the agent of the insured. Among the cases cited to sustain the principle are the following in this court: Union Mutual Life Ins. Co. v. Wilkinson, 13 Wall. 222 [20 L. Ed. 617]; American Life Ins. Co. v. Mahone, 21 Wall. 152 [22 L. Ed. 593]; New Jersey Mutual Life Ins. Co. v. Baker, 94 U. S. 610 [24 L. Ed. 268]; Continental Life Ins. Co. v. Chamberlain, 132 U. S. 304 [10 Sup. Ct. 87, 33 L. Ed. 341]. German-American Life Ass'n v. Farley [102 Ga. 720, 29 S. E. 615], supra, is also cited, and, being a Georgia case, its authority is especially urged.

"There are, however, later cases which enforce the provisions of a policy, and we have seen that it was agreed in the policy under review 'that no statement or declaration made to any agent, examiner or other person, and not contained in' the application, should 'be taken or construed as having been made to or brought to the notice or knowledge of' the company, 'or as charging it with any liability by reason thereof.' And he (Salgue) expressed his understanding to be that the company or one or more of its executive officers, and no other person, could grant insurance or make any agreement binding upon the company.

"The competency of applicants for insurance to make such agreements, and that they are binding when made, is decided by Northern Assur. Co. v. Grand View Building Ass'n, 183 U. S. 308 [22 Sup. Ct. 133, 46 L. Ed. 213]; Northern Assur. Co. v. Grand View Building Ass'n, 203 U. S. 106 [27 Sup. Ct. 27, 51 L. Ed. 109]; Penman v. St. Paul Fire & Marine Ins. Co., 216 U. S. 311 [30 Sup. Ct. 312, 54 L. Ed. 493]."

So, in the case of the Prudential Ins. Co. v. Moore, 231 U. S. 560, 34 Sup. Ct. 191, 58 L. Ed. —— (decided by the same court the same day), the Supreme Court said:

"It is contended here, as in the Ætna Case, that the company is estopped by the knowledge of the agent, and the same cases are cited as were cited here. We answer here, as we answered there, that the terms of the policy constituted the contract of the parties and precluded variation of them by the agent."

In the case cited, the language of the policy, limiting the authority of the agent, was significantly different from that of the policies in this case. It was:

"No agent has power in behalf of the company to make or modify this or any contract of insurance, extending the time for paying a premium, to waive any forfeiture or to bind the company by making any promise, or making or receiving any presentation or information."

In this case the corresponding stipulation is "agents are not authorized to modify this policy or to extend the time for paying a premium." In the Moore Case the agent was debarred from making any contract of insurance in advance of the issue of the policy and from receiving any information so as to bind the company. In this case the only restriction upon the agent is against modifying the policy after it is issued and extending the time for paying a premium.

In each of these cases, as in the Fletcher Case, the Supreme Court held that the terms of the contract prevented the knowledge of the agent from estopping the insurance company, as it would have done in the absence of such a stipulation in the policy. In this, they are to be distinguished from this case. Neither in the application nor in the policies involved in this case is there any similar stipulation limiting the authority of the agent. The only limitation upon the power of the agent contained either in the application or in the policy is this:

"Agents are not authorized to modify this policy, or to extend the time for paying a premium."

The stipulation has no effect until after the contract of insurance has been consummated and the policy issued. It does not purport to limit the power of the agent or examiner in taking the application or the insured's answers or in reporting them to the company. The very provision upon which alone the Supreme Court based its conclusion in the Fletcher and in the Moore Cases is absent from the policies in this case, and the court, in those cases, has said that, in the absence of some such stipulation, the knowledge of the agent or examiner would be that of the company.

The Moore Cases also differ from this case in that there was no Georgia statute similar to the Florida statute with reference to agency. The Supreme Court, after analyzing the then existing legislation in Georgia upon the subject of insurance, stated that its only effect to vary the law of insurance was in providing that in no case should an immaterial false statement operate to avoid the policy.

Again, the policies in the Moore Cases contained no stipulation that representations, in the absence of fraud, should not be deemed warranties, the effect of which, as construed by the courts, is to avoid the

policy only for willfully and knowingly false representations, though in the absence of such a stipulation, an innocently false but material representation would forfeit the contract.

Our conclusion is that under the language of the policies sued upon, and under the Florida statute heretofore set out, the knowledge of the defendant's agents, Torrey and Hogue, and of its examiners, Kirkpatrick and Turberville, would be binding upon it, unless there was collusion between such agents and the insured to defraud the principal. There was evidence in the record from which the jury might have inferred such collusion and also evidence from which it might have reached the contrary conclusion. The court below instructed the jury fully and properly as to the effect of such collusion, and, in view of this fact, its refusal to give the instruction requested by the defendant on this point becomes immaterial.

5. Finally, does the record show that the agents and examiners of defendant had knowledge at the time the policies were written of the falsity of the representations relied upon by defendant to avoid the policies? Both Torrey and Hogue knew of the insured's previous application to the Prudential Insurance Company, and of its result. Kirkpatrick also knew of the history of insured's impacted or inverted tooth and of the operation that removed it. Hogue knew that Turberville had made no examination of insured and that Kirkpatrick had made but a partial one. There is evidence from which the jury might have inferred that Hogue deceived the insured and the examiners as to what was required, and that there was no collusion between the insured and himself to falsely report the examination of the doctors. The evidence as to whether the insured had ever had heart disease or indigestion previous to his applying for the policies sued upon is too unsatisfactory to be a sufficient ground for avoiding the policies, even if it were not known to defendant.

It is contended that the knowledge of defendant's agents and examiners was acquired in a different transaction, namely, the previous soliciting and examining of the insured for the Prudential Life Insurance Company, and, having been so acquired, should not bind the defendant. However, the previous transaction was of recent happening, and the knowledge then acquired is shown not to have passed out of the recollection of defendant's agents, but was rehearsed during his examination for the policies sued on and when his application therefor was taken; and, having been then within the actual knowledge of the agents, it should be imputed to the defendant, without reference to how or when acquired. If it was then actually known, it was the duty of defendant's agents to have communicated it to defendant, and, if the jury found that there was no collusion on their part with the insured, the insurer would be chargeable with knowledge of what its agents then actually knew.

We think the charge of the court fairly presented the law, as we have stated it to be, to the jury, and that the refused instructions, when not consistent with it, were erroneous and properly refused. Taken in connection with the entire charge, we find no error in the court's reference to Hogue, as defendant's agent, or in the statement that the agents' and examiners' knowledge was imputable to the defendant.

The court also told the jury that collusion between the insured and the defendant's agents would prevent this imputation.

We find no error in the record.

Affirmed.

STEWART v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. February 2, 1914.)

No. 2320.

1. CRIMINAL LAW (§ 759*)—INSTRUCTIONS—FLIGHT.

In a prosecution for homicide, the court charged that defendant's defense was that he did not kill deceased and did not participate in the commission of the crime by any act of his own, or agreement, plan, or understanding with codefendant, but admitted that he participated in a robbery of the bodies of the persons killed; that the statute provided that killing of a human being committed in the perpetration of or attempt to perpetrate a robbery was murder; and that defendant's flight with his codefendant was evidence of guilt and a fact for the jury's consideration. *Held*, that such instruction, in so far as it referred to flight, was not fatally defective as instructing the jury, as a matter of law, that defendant was guilty of the offense charged if he fled from the scene of the crime.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1737, 1738, 1790–1793; Dec. Dig. § 759.*]

2. CRIMINAL LAW (§ 444*)—EVIDENCE—MAPS.

Where a map, offered in evidence, showed on its face that it was issued from the General Land Office under the authority of the Secretary of the Interior, it was admissible, without independent proof of its accuracy or authenticity, to show the location of an Indian Reservation on which it was claimed the homicide in question occurred.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1028; Dec. Dig. § 444.*]

3. CRIMINAL LAW (§ 1169*)—APPEAL—RULINGS ON EVIDENCE—PREJUDICE.

Where, in a prosecution for homicide alleged to have been committed on the White Mountain Indian reservation, several witnesses were called by the government, all of whom resided in Arizona and for many years had been familiar with the boundaries of the reservation and the location of the scene of the homicide, and all testified that the latter was within the boundaries of the reservation, defendant was not prejudiced by any error in the admission of a map of the territory showing the reservation boundaries without sufficient proof of its accuracy or authenticity.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 754, 3088, 3130, 3137–3143; Dec. Dig. § 1169.*]

4. CRIMINAL LAW (§ 346*)—PLACE OF OFFENSE—INDIAN RESERVATION—BOUNDARIES—EVIDENCE.

Where the government claimed that a homicide was committed on an Indian reservation, evidence of persons who had resided in Arizona for many years and were familiar with the boundaries of the reservations in that state and the location of the scene of the homicide was admissible to show that such scene was within the reservation.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 786; Dec. Dig. § 346.*]

5. CRIMINAL LAW (§ 631*)—TRIAL—COPY OF LIST—STATUTES—APPLICATION.

Rev. St. § 1033, provides that, when a defendant is indicted for a capital offense, a copy of the indictment and list of jurors and witnesses shall be

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

delivered to him at least two days before trial. *Held*, that such provision applies only to the list of the regular panel of jurors in attendance at the opening of the trial and does not require notice of jurors brought in on a special venire to complete the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1379, 1437–1446; Dec. Dig. § 631.*]

6. CRIMINAL LAW (§ 472*)—EVIDENCE—OPINION—PERSONS—RACE.
In a prosecution for homicide committed on an Indian reservation, evidence of a witness who had had intimate knowledge of Indian characteristics, gained from many years' official connection with Indian reservations, that in his opinion defendant was a white man and not an Indian was competent.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1059; Dec. Dig. § 472.*]

7. CRIMINAL LAW (§ 718*)—TRIAL—UNITED STATES ATTORNEY—MISCONDUCT.
In a prosecution for homicide, the district attorney, in closing his argument, said, "We will ask you to reach a verdict of guilty, and to affix the death penalty on this young man, as has been done on his partner in crime." *Held*, that such statement with reference to accused's codefendant was improper.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1668; Dec. Dig. § 718.*]

8. CRIMINAL LAW (§ 1171*) — APPEAL — MISCONDUCT OF DISTRICT ATTORNEY — PREJUDICE.
Where wide publicity had been given to a homicide, and jurors, who admitted having read accounts thereof, were accepted to try accused, and it also appeared that during defendant's cross-examination he testified that his partner had been convicted of the killing, defendant was not prejudiced by an improper statement by the district attorney that accused's codefendant had been convicted of the same offense and had been sentenced to suffer the death penalty.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3126, 3127; Dec. Dig. § 1171.*]

9. WITNESSES (§ 277*)—CROSS-EXAMINATION—SCOPE.
Where accused becomes a witness in his own behalf, the cross-examination is not restricted to the precise questions put to him on his direct examination but covers the subject-matter involved in such questions.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 925, 979–983; Dec. Dig. § 277.*]

10. CRIMINAL LAW (§§ 419, 420*) — TRIAL — RECEPTION OF EVIDENCE — LIMITATION.
Where accused, in a prosecution for homicide, claimed that what he did was under coercion of his codefendant, the court properly refused to permit him to testify what his codefendant told him, and limited the inquiry to what defendant did under such coercion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 973–983; Dec. Dig. §§ 419, 420.*]

In Error to the District Court of the United States for the District of Arizona; William W. Morrow, Judge.

William Stewart was convicted of murder, and he brings error. Affirmed.

The plaintiff in error, hereinafter designated the defendant, was jointly indicted with one John B. Goodwin for the crime of murder in the killing of one Fred Kibbe. The indictment was returned in May, 1911, by the grand jury for the Fifth judicial district of the then territory of Arizona, and charged the offense to have been committed on September 15, 1910, in that

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

district, "within and upon the White Mountain Indian reservation," and alleged that the defendant was "a white person and not an Indian." A severance, being demanded by defendant, was granted, and, the territory having been admitted to the Union before the trial, the indictment was transferred from the territorial court to the court below, where a trial was had, resulting in a verdict of murder in the first degree, without qualification, and defendant was adjudged to suffer death. From the judgment and an order denying him a new trial, he prosecutes this writ of error.

While but three errors are specified in the formal assignment of errors found in the record, the defendant has in his brief specified several additional rulings of which he complains as involving prejudicial error, and in that regard it is stated that by reason of delay, over which defendant had no control, in the completion of the transcript of the evidence by the reporter, he was unable, at the time of suing out his writ of error, to present a more full and complete assignment than that found in the record; and he asks that the additional errors as assigned in his brief be reviewed by the court under the rule which authorizes the court to notice prejudicial error found in the record, although not formally assigned. As the record discloses some considerable delay in the completion of the transcript, without apparent responsibility by the defendant, the court is disposed, in view of the gravity of the case, to accord to it the consideration requested, and we proceed to a review of the various rulings complained of. While no question is made as to the sufficiency of the evidence to sustain the verdict, a brief statement of the salient facts will conduce to a readier appreciation of the pertinency and materiality of the errors urged.

The evidence of the government shows without controversy that one Fred Kibbe and one Alfred Hillpot were shot and killed about dusk on the evening of the 15th of September, 1910, at a remote wayside stopping place, commonly known as "Tuttle's Station," upon the White Mountain Indian reservation, in Gila county, Ariz. The defendant at the time of the homicide was, and had been for some months prior thereto, in charge of the station for the owner, and Goodwin, his codefendant in the indictment, whom he had previously served with in the army, had been staying with him at the house for several weeks. Kibbe and Hillpot, two young men from Globe, with whom they had no previous acquaintance, came to the station on September the 14th, the day before the homicide, on a hunting trip, having with them two riding horses and a hunting outfit. The defendant and his companion Goodwin were alone at the station and invited them to put up with them and make the place their headquarters for their hunt. This invitation was accepted. The next evening about 8 o'clock, while the four men were lounging in the main room of the building, Kibbe sitting by a table and Hillpot lying down in one corner, the two latter were, without warning or any previous altercation, shot to death by the defendant and his companion Goodwin, or by one of them. Kibbe was shot through the head with a revolver, and never spoke; Hillpot was shot three times with a rifle and, not being instantly killed, his skull was crushed by blows from the weapon, wielded as a club, and a deep wound inflicted in his throat with a knife, severing the aorta. The defendant and Goodwin immediately rifled the bodies of the slain men of money and other personal effects, took their arms and saddle horses, and within the hour fled from the place and disappeared. The crime being discovered the next morning, they were trailed by the officers and apprehended about a week later at a small railway station in a distant part of the territory, and, upon being searched, several articles of personal property belonging to the dead men were found in their possession, a watch and purse on Goodwin, and two purses and two revolvers on the defendant. No arms were found at the time on Goodwin. They were wearing the hats of the dead men. Their horses, saddles, and rifles had been abandoned.

When asked by the officers why they had killed the two men, defendant answered that they "had a fight over a dog; that they had to do it, and it was in self-defense." This statement was corroborated at the time by Goodwin. Substantially the same statement was made by the defendant after being taken to the county jail; but some little time later he repudiated this version of the killing and stated that the story was concocted by Goodwin,

who induced him to tell it; that the truth was that Goodwin alone had killed the men and coerced the defendant, through fear of bodily injury, to go with him when he fled. At the trial defendant adhered to this latter version, denying that he killed either of the two men or that he had anything to do with it further than to take a purse from the body of Hillpot after the killing, and that this was done under Goodwin's direction and induced by fear of bodily harm from the latter, who was armed. He testified that Goodwin, before the killing of Kibbe and Hillpot, had suggested the killing of several other people, including Mr. Tuttle, the proprietor of the station. He denied making some of the statements testified to by the officers, while admitting the truth of others, but said that Goodwin made up the story and induced him to tell it, and that "it was intended as a joke." He was the sole witness for the defense.

Benton Dick, of Phœnix, Ariz., for plaintiff in error.

J. E. Morrison, U. S. Atty., of Bisbee, Ariz., and J. C. Forest and O. T. Richey, both of Phœnix, Ariz., for the United States.

Before GILBERT and ROSS, Circuit Judges, and VAN FLEET, District Judge.

VAN FLEET, District Judge (after stating the facts as above). [1] 1. Considering the assignments in the order in which they are discussed in the brief, the first is that the court committed prejudicial error in its charge to the jury on the subject of the defendant's flight from the scene of the homicide. The extract from the charge which is complained of is this:

"The flight of the defendant with Goodwin from the place of the murder is also evidence of guilt and a fact for your consideration."

It is said that this is virtually an instruction that as a matter of law the defendant was guilty of the offense charged if he fled from the scene of the crime, and was a palpable invasion of the province of the jury to find the effect of that fact in the light of all the evidence. We are not inclined to regard this language, standing alone, as open to the interpretation thus put upon it, or that it would be so understood by the average mind, but we are quite certain that it cannot be so construed when read, as it must be, with its context. The entire feature of the charge bearing upon the question was this:

"The defense of Stewart is that he did not kill Kibbe, and did not participate in the commission of the crime by any act of his own, or by any agreement, plan, or understanding with Goodwin. The defendant admits that he participated in the robbery of the bodies of Hillpot and Kibbe. The statute provides that the killing of a human being committed in the perpetration of or attempt to perpetrate a robbery is murder. The fact of robbery is therefore a direct admission for your consideration. The flight of the defendant with Goodwin from the place of the murder is also evidence of guilt and a fact for your consideration. The only answer the defendant makes to these admitted facts is that he was compelled by Goodwin to do as he did. Is this answer sufficient in the light of all the events and surrounding circumstances? This is the question you are called upon to answer by your verdict."

It is quite apparent, we think, that by this language the court did no more in effect than tell the jury that defendant's flight, which he admitted, like the admission of robbery, was a fact tending to show guilt, which they could take into consideration in determining the ulti-

mate fact; and, while the language was perhaps not as discriminatingly chosen to convey the meaning as it might have been with more mature opportunity for deliberation, we are satisfied that under the circumstances presented to them by the evidence and the charge in its entirety the jury would necessarily so understand it. It is not materially different from the language of the charge construed in Allen v. United States, 164 U. S. 492, 498, 17 Sup. Ct. 154, 156, 41 L. Ed. 528, where the court, distinguishing it from that held erroneous in Hickory v. United States, 160 U. S. 408, 422, 16 Sup. Ct. 327, 40 L. Ed. 474, and in Alberty v. United States, 162 U. S. 499, 509, 16 Sup. Ct. 864, 40 L. Ed. 1051, say:

"But in neither of these cases was it intimated that the flight of the accused was not a circumstance proper to be laid before the jury as having a tendency to prove his guilt. Several authorities were quoted in the Hickory Case (160 U. S. 417, 16 Sup. Ct. 327, 40 L. Ed. 474) as tending to establish this proposition. Indeed, the law is entirely well settled that the flight of the accused is competent evidence against him as having a tendency to establish his guilt. Whart. on Homicide, § 710; People v. Pitcher, 15 Mich. 397. This was the substance of the above instruction, and, although not accurate in all its parts, we do not think it could have misled the jury."

In the case of Starr v. United States, 164 U. S. 627, 17 Sup. Ct. 223, 41 L. Ed. 577, relied on by defendant, the jury were, in substantial effect, told that flight was in a sense a confession of guilt. This the court held was, within the principles of the Hickory and Alberty Cases, prejudicially erroneous. The present language is, we think, open to no such construction.

[2] 2. The second assignment is based upon error claimed to be involved in the admission in evidence against defendant's objection of a map of the territory disclosing upon its face the boundaries of the White Mountain Indian reservation, without independent proof first being made of its accuracy or authenticity.

In the first place, we are inclined to the opinion, as seems to have been held by the trial judge, that the recitals upon the face of the map sufficiently evidenced its character as a public document; it appearing therefrom that it was issued from the General Land Office under the authority of the Secretary of the Interior. Holt v. United States, 218 U. S. 245, 252, 31 Sup. Ct. 2, 54 L. Ed. 1021, 20 Ann. Cas. 1138; 3 Wigmore on Evidence, § 1684, p. 2157.

[3] But in the next place, if there was error in the ruling, it was entirely without prejudice to the defendant's case. Some five or six witnesses were called by the government, all of whom had resided in Arizona for many years and were familiar with the boundaries of the White Mountain Indian reservation and the location of the scene of the homicide, and all testified positively that the latter was within the boundaries of that reservation. One of these was the sheriff of Gila county, in which Tuttle's Station was situated, who had lived in the territory since 1881 and had been sheriff for eight terms, with frequent occasion in the discharge of his official duties to familiarize himself with that part of the reservation lying within his county; and another was Mr. Tuttle, the owner of Tuttle's Station, who testified that he had lived in the territory 36 years, that the station was on

the Indian reservation, and that when he built the house he was required to secure permission from the government authorities at Washington for the purpose.

[4] All this evidence was admissible for the purpose, was wholly uncontroverted, and quite sufficient, independently of the map, to establish the location of the premises involved in the inquiry. Holt v. United States, supra.

[5] 3. The third assignment relates back to the impanelment of the jury, and arises upon the construction of section 1033, R. S. (U. S. Comp. St. 1901, p. 722). That section provides that, when a defendant is indicted for a capital offense, a "copy of the indictment and list of jurors and witnesses shall be delivered to him at least two entire days before the trial." In due time a copy of the indictment, with a list of the witnesses and of the panel of jurors then in attendance upon the court, was furnished defendant, and the trial commenced without objection to their sufficiency. Before the jury was completed, however, the first panel was exhausted and a special venire was brought in. When the first name on this panel was called, defendant interposed an objection to his selection or that of any other juror upon the new panel, upon the ground that their names and residences had not been furnished him at least two days before the trial in accordance with the above provision. This objection was overruled, and the ruling is now assigned as error. We regard the objection as wholly without merit. In enacting the provision in question, Congress must be presumed to have had in mind the method provided by law for the impanelment of juries in criminal cases, and the very frequent necessity of calling in special venires after a trial has commenced. The statute is to receive a reasonable and practical construction in view of this requirement. The court can never know beforehand how much difficulty may be encountered in getting 12 fair and unbiased men, but, if defendant's construction of the statute is correct, then the court would be bound at its peril to have in attendance a panel sufficiently large to meet any possible contingency in that regard, for to conform to the statute literally, whenever a regular panel is exhausted, without securing a completed jury, the trial must end and be commenced de novo upon a new venire being secured, since the language of the statute is not that the names of the jurors shall be furnished two days before they are called but "at least two entire days before the trial." It is obvious that to so construe the statute would result in its being absurdly impracticable, and we are of opinion that the requirement is satisfied by furnishing a list of the regular panel of jurors in attendance at the opening of the trial. Its evident purpose is to put the defendant on an even plane with the government in preparing for his defense by giving him the names of the attending jurors and of the witnesses to be called against him. This purpose is accomplished when a list of the panel in attendance upon the court at the time is furnished him, since the government can have no advantage in knowledge of the personnel of a new venire called during the trial.

The same question was not involved in Logan v. United States, 144 U. S. 263, 12 Sup. Ct. 617, 36 L. Ed. 429, relied on by defendant. There the government had failed to deliver to the defendants the list of witnesses as required, and it was held that the provision being for their benefit, to enable them to prepare for trial, was mandatory and, if not waived, must be complied with. The present case is more nearly like, if not strictly analogous to, Goldsby v. United States, 160 U. S. 70, 16 Sup. Ct. 216, 40 L. Ed. 343. There the government had furnished the defendant with a list of the witnesses to be called for "proving the indictment" (that is, to make out its primary case), but during the defendant's case evidence came out which could not be anticipated and which required rebuttal. The name of the witness called for such purpose was not on the list furnished, and the defendant objected on that ground to his being allowed to testify. This objection was overruled, and the Supreme Court, in sustaining the ruling, said with reference to the meaning of the statute:

"The words 'for proving the indictment,' and the connection in which they are used, clearly refer to the witnesses relied upon by the prosecution to establish the charge made by the indictment. They do not extend to such witnesses as may be rendered necessary for rebuttal purposes resulting from the testimony introduced by the accused in his defense. Indeed, that they do not apply to rebuttal is obvious from the very nature of things, for if they did, as was well said by the trial judge, it would be impossible to conduct any trial."

This reasoning applies aptly to the present case, since it would be equally "impossible to conduct any trial" under the construction of the statute contended for by defendant.

[6] 4. There was no error involved under the fourth assignment in permitting the witness Shafer to testify that from an intimate knowledge of Indian characteristics gained from many years official connection with Indian reservations, and his observation of the defendant in the light of such knowledge, the latter was, in his opinion, a white man and not an Indian. Such evidence may not be very strong or conclusive, but "it is good for what it is worth" (Reed v. State, 16 Ark. 499; Locklayer v. Locklayer, 139 Ala. 354, 35 South. 1008); and where, as here, there was no countervailing evidence on the question, it was sufficient, if the jury believed it, to establish the fact.

[7] 5. The fifth assignment is based upon misconduct of the United States Attorney claimed to be prejudicial to the defendant's case. In closing his opening statement to the jury the Attorney said:

"Having shown these things, and the court having instructed you fully on the law, we will ask you to reach a verdict of guilty and to affix the death penalty on this young man, as has been done on his partner in crime."

Defendant's attorney immediately said, "We object to that last statement;" and the court promptly ordered it stricken out. Nothing further was said at the time by either counsel, and no instruction to the jury was asked with reference to the matter.

[8] While the statement of the United States Attorney was unquestionably unwarranted and highly improper, and one ordinarily well calculated, if permitted to go unnoticed, to work prejudice, the

general rule governing such breaches is that where, as here, prompt action is taken by the trial court to correct the wrong, a reversal will not be had except in instances where the breach is so flagrant that the court will necessarily presume prejudice to the defendant. Was the conduct of the United States Attorney of the latter character? We think a brief reference to the history of the trial will show that it was not. Early in the examination of talesmen in the impanelment of the jury it became apparent that the wanton and flagrant character of the homicide, with its sordid motive, had arrested very general attention throughout the territory wherever access was had to the newspapers, and that its circumstances were well known to many members of the panel; the prejudice flowing therefrom resulting in the exclusion of a considerable number, while others with equal knowledge of the facts, but not disqualified by a fixed opinion, were retained on the jury as finally sworn. This pervading knowledge of the crime itself being disclosed, it is hardly conceivable, although not directly elicited, that the fact, equally notorious, that Goodwin had previously been convicted of the offense and was then under sentence of death was not as well known to a number upon the jury; and we must recognize that human nature is so constituted that most naturally knowledge of such a fact in one or more of an aggregation as intimately associated as a trial jury is soon the knowledge of all.

Moreover, the fact that Goodwin had previously been convicted was brought out on the examination of the defendant himself. In his direct examination, with reference to when he first met Kibbe and Hillpot, the defendant was asked by his counsel:

"Q. And who was present at the time? A. Goodwin was present at the time. Q. That was John B. Goodwin? A. Yes, sir. Q. Is that the same Goodwin who was convicted for the killing of Alfred Hillpot? A. Yes, sir."

Under such circumstances, we do not think the court would be justified in holding that the fact disclosed by the District Attorney, presumptively already known to the jury, although involving a grave impropriety, was such as to necessarily work prejudicial harm to the defendant's cause.

[9] 6. The next four assignments are grouped in their presentation in the brief, and we may so consider them. They all relate to objections made to questions asked defendant on cross-examination on the ground, in some instances, that they were immaterial matters, and in others not gone into on the direct examination. After a careful review of the entire examination of the defendant, direct and cross, and having in mind the limitations on the right of the prosecution in that regard, we are unable to say that any one of the instances presented in the objections involved a transgression of the defendant's rights. The rule does not restrict the cross-examination of the defendant to the precise questions put to him in direct. It is the subject-matter involved which governs the limitation of the inquiry; and, while the cross-examination of the defendant was a searching one, it in no instance violated this limitation. His correspondence with Goodwin before the latter came to the station, his knowledge of his character and as to his being a deserter, the suggestions of Good-

win to defendant about the killing of other people, and particularly as to Mr. Tuttle, the employer of the defendant, and why the defendant did not warn the latter of his danger, each and all these matters were clearly involved in the statements made by the defendant on his direct examination as to his relations with Goodwin and the previous history of both of them. Nor were any of them immaterial to the inquiry, particularly as bearing strongly on the degree of credibility the jury should accord to the defendant. If it may be truthfully said that the cross-examination was in some respects unrelenting and pitiless, it must be answered that it was invited by the very remarkable character of the defendant's evidence and the necessity of the prosecution to rely largely upon the cross-examination to show its untruth. We find no error in it.

[10] 7. The tenth and last assignment arises on a ruling made during defendant's direct examination. He was being interrogated about the property of the dead men taken with them in their flight, and was asked by his counsel how he came to see the guns and ammunition. He answered, "Well, Goodwin told me I might need it." This answer was stricken out on motion of the United States Attorney as improper. His counsel then offered to prove that the defendant took the guns and all the other articles of the dead men under coercion from Goodwin. The court ruled that he might show that what he did was under coercion, but not to relate conversations between himself and Goodwin. We think this was a proper limitation of the inquiry, and under it the defendant was given all the latitude that was proper. The record shows that he was permitted in various ways and on different occasions during his examination to lay before the jury his theory of his defense that all he did in the transaction was at the coercive instance of Goodwin.

The examination of the somewhat voluminous record has been beset by much difficulty and labor on the part of the court in an endeavor to locate the matter involved in the various exceptions, owing to the fact that the briefs have no proper reference to the pages of the record where the exceptions are to be found; the brief of the government being silent in that regard, and that of the defendant referring to the pages of the reporter's transcript instead of the record as filed here. This latter omission, we assume, arises from the delay in completing the record, and we overlook it. We believe, however, that we have covered all the matters embraced in the case of which defendant has complained or could justly complain, and as a result we are unable to discover anything of a nature to justify us in disturbing the judgment of the court below or its order denying a new trial.

The judgment and order must therefore be affirmed; and it is so ordered.

ARCTIC LUMBER CO. v. BORDEN et al.

(Circuit Court of Appeals, Ninth Circuit. February 2, 1914.)

No. 2282.

1. APPEAL AND ERROR (§ 1011*)—REVIEW—QUESTIONS OF FACT.
Where the court on conflicting testimony found material facts against plaintiff, the only question for consideration on appeal was whether the findings or the conclusions of law were based upon a mistaken view of the law, or an obvious error in applying the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983–3989; Dec. Dig. § 1011.*]

2. MECHANICS' LIENS (§ 281*)—ACTIONS TO FORECLOSE—SUFFICIENCY OF EVIDENCE.
In a suit to foreclose a mechanics' lien in which it was claimed that the notice of lien was not filed within 30 days after completion of the building, evidence *held* insufficient to support a finding that the plan of installing a heating plant which had not been installed when the notice was filed had been abandoned.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 565–572; Dec. Dig. § 281.*]

3. MECHANICS' LIENS (§ 132*) — TIME FOR FILING NOTICE — COMPLETION OF BUILDING.
A building erected by a lessee pursuant to the lease had not been completed within a statute requiring the notice of lien to be filed within 30 days after completion of the building, where a heating plant contemplated by the lease had not been installed, one side had not been covered with cedar siding, and the building had been only partially painted.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 190, 192–207; Dec. Dig. § 132.*]

4. MECHANICS' LIENS (§ 132*)—TIME FOR FILING—FILING BEFORE COMPLETION OF BUILDING.
Within a statute requiring notices of mechanics' liens to be filed within 30 days after the completion of the building on which the lien is claimed, the notice may be filed by one furnishing material at any time after it is furnished, though before the completion of the building.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 190, 192–207; Dec. Dig. § 132.*]

5. MECHANICS' LIENS (§ 78*)—AGREEMENT OR CONSENT OF OWNER—NOTICE TO PREVENT LIEN.
Under Civ. Code Alaska, § 262, giving a lien to every contractor, lumber merchant, etc., furnishing material for the construction of a building for the work or labor done or material furnished at the instance of the owner, and section 265, providing that every building constructed upon lands with the knowledge of the owner shall be held to have been constructed at his instance and the land shall be subject to a lien unless within three days after obtaining knowledge of the construction he shall give notice that he will not be responsible therefor by posting a notice in writing to that effect in some conspicuous place upon the land or in the building, a lien may be prevented by posting such notice only where the work is not done and the material is not furnished at the owner's instance or at the instance of his agent, and where the work is done or material furnished at his instance he may not so prevent a lien.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 111; Dec. Dig. § 78.*]

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

6. MECHANICS' LIENS (§ 75*)—AGREEMENT OR CONSENT OF OWNER—NOTICE TO PREVENT LIEN.

A lease for five years was made in consideration of the lessees' agreement to pay a specified rental and to erect a building on the premises at their expense which upon termination of the lease was to belong to the lessor. The lessor agreed to grade the lot and build the foundation, and the lessees agreed to insure the building, any money collected thereon to be used in rebuilding or repairing, or, if they failed to rebuild, to be paid to the lessor. Before making the lease, the lessor had discussed with plaintiff, who subsequently sold lumber to a contractor with the lessees, the terms on which he could purchase lumber for the building, and plaintiff furnished one-third of the lumber before receiving notice that the lessor disclaimed liability for the cost. Within a year from the time the lease was made, the lessor was again in possession of the property. *Held*, that the lumber was furnished at the instance of the lessor, and hence he could not prevent a lien by posting a notice under Civ. Code Alaska, § 265, giving a lien where a building is constructed with the knowledge of the owner of the land unless he gives notice that he will not be responsible by posting a notice in writing to that effect on the land or in the building.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 103–107; Dec. Dig. § 75.*]

7. MECHANICS' LIENS (§ 75*)—AGREEMENT OR CONSENT OF OWNER—IMPROVEMENTS BY LESSEE.

Where a lease authorizes the lessee to make improvements by deducting the cost from the rent, or where part of the consideration for the lease is the making of improvements which become a part of the realty or revert to the lessor, a mechanics' lien may attach for work done or materials furnished pursuant to a contract with the lessee.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 103–107; Dec. Dig. § 75.*]

8. MECHANICS' LIENS (§ 157*)—NOTICE OF LIEN—INCLUSION OF NONLIENABLE ITEMS.

A claim of a mechanics' lien for lumber furnished for use in the construction of a building was not rendered void by the inclusion of two items of lumber not used in the building, where there was nothing to show that the lienor did not deliver the lumber in good faith on the understanding that it was to be so used.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 268–274; Dec. Dig. § 157.*]

Appeal from the District Court of the United States for the Third Division of the Territory of Alaska; Edward E. Cushman, Judge.

Suit by the Arctic Lumber Company against W. H. Borden and others. From a decree dismissing the complaint, plaintiff appeals. Reversed and remanded, with instructions.

The appellant, a corporation, in a suit to foreclose a mechanic's lien, alleged in substance that on February 17, 1910, the appellee Borden was the owner of a certain lot in the town of Cordova, Alaska, and that on said date he leased the same to McCauley and Palmer upon the condition that the lessees should construct a building on the lot, which building should revert to Borden, according to the terms of the lease; that on February 23, 1910, the lessees entered into an agreement with the appellant, under which the latter was to furnish material for the construction of said building; that in pursuance thereof lumber was furnished to the amount of $3,480.36, of which $2,236.57 remained unpaid; that the appellant began to deliver the lumber on February 23, 1910, and continued so to do until August 6, 1910; that on September 6, 1910, within 30 days from the completion of the building, the appellant filed

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

its claim of lien in accordance with the Code of Alaska. The answer of the appellee Borden denied that any material had been furnished by the appellant for said building since the month of April, 1910, and it alleged that the building was completed and occupied in that month. Upon the issues and the testimony, the court found as facts that the lessees, on or about February 23, 1910, entered into a contract with one Goodall for the erection of a building on the lot, at the agreed price of $1,900; that the building was completed by the contractor on the 14th day of April, 1910; and that at that time the ground floor of the building was occupied by the lessees, and the second floor was occupied as a rooming house; and that the material furnished by the appellant after April 14, 1910, was certain small lots of lumber purchased by the lessees for the purpose of making alterations, changes, and repairs in said building which was no part of the original plan of the same; and that the small lots of lumber delivered on July 8th and August 6th were not shown to have been used in the construction of the building or in the alteration or repair of the same; that a period of more than 30 days had elapsed from the date of the completion of the building to the time of the filing of the lien in the recorder's office. On the ground that the notice of lien was not filed within 30 days from the completion of the building, as required by the law of Alaska, and the further ground that the appellee Borden on February 24, 1910, posted a notice in a conspicuous place on said lot notifying all persons that he would not be responsible for any material used in said building, a decree was entered dismissing the complaint.

R. J. Boryer, of Cordova, Alaska, and Kerr & McCord, of Seattle, Wash., for appellant.

J. C. Campbell and David L. Levy, both of San Francisco, Cal., and Brown & Lyons and E E. Ritchie, all of Valdez, Alaska, for appellee W. H. Borden.

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

GILBERT, Circuit Judge (after stating the facts as above). [1-3] The court below, upon the consideration of the conflicting testimony of witnesses heard in open court, having found two important facts against the appellant, the only question for consideration here is whether the findings or the conclusions of law are based upon a mistaken view of the law, or an obvious error in applying the evidence. The appellant contends that, in finding that the lien notice was not filed within 30 days from the completion of the building, the court took the erroneous view that, because work upon the building had ceased and the building was occupied, it was completed, although a heating plant had not been installed therein and in other respects the building had not been finished. The lease provided that the building should be equipped with steam heat and radiators, "said steam heat to be either furnished by a boiler in the building or from and through steam pipes from outside the building." The court below found that, after the execution of the lease, McCauley and Palmer, the lessees, abandoned the plan of installing a heating plant and other features in said building, as provided in said lease, "and adopted different plans, in accordance with terms and plans set out in the written contract with Goodall." If this were a finding reached upon a consideration of conflicting evidence, it would be conclusive here. But it is not. The court assumed from the fact that the heating plant was not included in the contract which the lessees made with Goodall, a carpenter and builder,

for the construction of the building, and from the fact that the lessees postponed the installation of the heating plant, that the agreement between the lessees and Borden had been changed. But Borden testified that no change had ever been made in his agreement with the lessees, and it is clear from the evidence that Goodall's contract was limited to the construction of the building only. It did not include the plumbing nor the heating plant, and it did not include several important features of the agreement between Borden and his lessees. It included only a part of what was agreed upon in the lease. Goodall testified that he could not recall that he had ever discussed with Borden the subject of the heating plant, "only he (Borden) said that McCauley had agreed he would put in a steam heating plant at some future time," and Goodall testified that the lessees did not intend to put in a heating plant right then; that it was a consideration to come later on. All this indicates that the installation of the heating plant was deferred for a short time. The manager of the appellant testified that, when McCauley first discussed with him the prices of lumber for the building, McCauley said he was going to build a two-story house, to be a rooming house upstairs, plastered and lighted, and wired for electric lights and telephone, "and to contain a steam heating plant with radiators and pipes." Borden left for Juneau April 3, 1910, and did not return to Cordova until February 28, 1911. Feldman, a hardware merchant, who had an understanding with the lessees by which he was to furnish the heating plant, testified that Borden corresponded with him concerning the heating plant, and that in July he wrote Feldman a letter, "in which he complained that I did not answer his questions, and to induce me to answer his questions he said I might have something to say when the heating plant is going to be put in." The evidence indicates that at the time when the lien notice was filed, not only had the steam heating plant not been installed, but the building was incomplete, in that upon one side it had not been covered with cedar siding, and that it had been but partially painted.

The Mechanic's Lien Law of Alaska is adopted from the lien law of Oregon, and before its adoption the Supreme Court of Oregon had held, in Avery v. Butler, 30 Or. 287, 47 Pac. 706, that:

"When work demanded by the terms of the original contract has been omitted, the final completion of the structure dates from the time such omissions are supplied by the builder at the request of the owner, although in the meantime the latter may have taken possession of the property, and that, while there is anything to do which it is the duty of the builder to perform under the terms of the contract, the work upon which he is engaged is not completed until this obligation is accomplished."

And in Crane Co. v. Ellis, 58 Or. 299, 114 Pac. 475, in a case where the building contract provided that the building should be completed by December 1, 1906, and the work of construction was completed in February, 1907, except for the laying of a cement floor in the basement which, on account of the dampness of the ground was not put in until August, 1907, the date of the laying of the cement floor was taken by the court as the date of the completion of the building.

[4] But the appellee contends that, if the building was not completed when the lien notice was filed, the notice was ineffective and

void for the reason that it was filed prematurely and not within 30 days after the completion of the building, and cites decisions of courts which so hold. We are not disposed to follow those decisions, based as they are upon a narrow and technical construction of the lien law. There is no prejudice to any substantial right of the owner of the building in the filing of a lien at any time after the material is furnished, and before the completion of the building. In Wills v. Zanello, 59 Or. 291, 117 Pac. 291, it was held that this may be done, and that a lien filed before the completion of the building is not filed prematurely. The same was held by the Supreme Court of Nevada in Self & Sellman Mill & Bldg. Co. v. Savage, 123 Pac. 333. The Supreme Court of Oregon has repeatedly ruled that the Mechanic's Lien Law should be liberally construed, and this court, in Russell v. Hayner, 130 Fed. 90, 64 C. C. A. 424, expressly affirmed that doctrine in construing the Mechanic's Lien Law of Alaska. In Hooven, Owens & Rentschler Co. v. John Featherstone Sons, 111 Fed. 81, 49 C. C. A. 229, Judge Sanborn said:

"Labor and material once bestowed lose all their value to the laborer or materialman. He cannot take them back. They enhance the value of the property upon which they are placed, and its owner and those who take under him receive all the benefits of the labor and of the material. In such circumstances the lien of the laborer or materialman should be maintained to the full extent to which the statutes give it."

We hold that the lien notice in the case at bar was filed in due time.

[5, 6] Assuming, as found by the court below, that within three days from the commencement of the building Borden posted a notice in a conspicuous place thereon that he would not be responsible for any material or work furnished in the construction thereof, the question remains whether he thereby defeated the appellant's claim of lien. The Code of Alaska, section 262 of chapter 28, Civ. Code, gives a lien to every contractor, lumber merchant, etc., who furnishes material in the construction of a building, for work or labor done or material furnished "at the instance of the owner." Section 265 provides that every building constructed on any lands with the knowledge of the owner "shall be held to have been constructed at the instance of such owner," and that his interest shall be subject to any lien filed in accordance with the provisions of the Code, unless he shall, within three days after he shall have obtained knowledge of the construction, give notice that he will not be responsible for the same by posting a notice in writing to that effect, in some conspicuous place upon the land or in the building. The provisions of section 265 are for the benefit and protection of the owner in cases where the work is not done and the material is not furnished at his instance, or at the instance of his agent. It is not the intention of the law, nor is it the purport thereof, that when in fact the work is done, and the material is furnished at the owner's instance, he may prevent a lien upon his property by posting the notice referred to in that section. We think that in the case at bar it should be held that the materials supplied by the appellant were furnished at the instance of the owner. On February 17, 1910, he executed a lease of the property for a term of five years to McCauley

and Palmer, in consideration of their agreement to pay $75 per month as rental and to commence and fully finish a building on the premises at their expense, and as a preliminary to the erection of the building he agreed to grade the lot and put in at his own expense "a good, suitable foundation for a building two stories and a basement in height, to cover the entire lot, to wit, 25 feet by 100 feet." The lessees further agreed to insure the building against loss by fire, in not less than $2,500, any money collected thereon to be used in rebuilding or repairing the building if the lessees so desired, and, if they failed to rebuild, the insurance money to be paid to the lessor. It was further provided that, upon the failure of the lessees to pay any installment of rent when due, the lessor might declare the lease null and void, and that thereupon, or at the termination of the lease, he might repossess himself of the building and all improvements, "including steam heating plants, plumbing, wiring," etc. Before making the lease, Borden had discussed with the appellant the terms on which he could purchase lumber for the proposed building. Immediately upon the execution of the lease he began the construction of the foundation, and he completed the same by February 24th, and on that day McCauley and Palmer, by Goodall their contractor, began the erection of the building. The appellant furnished approximately one-third of the lumber therefor before it received actual notice that Borden disclaimed liability for the cost of the building. From the record it is evident that the building was constructed and insured principally for the benefit of Borden, and that the premises were leased to the lessees at a reduced rent in consideration of their promise to erect the building. Within a year from the time when the lease was made, Borden was again in possession of the property, and he leased the same at a monthly rental of $150, and he paid the plumbing bill and the sum of $480 due Goodall on his contract with the lessees for the erection of the building.

[7] It is the general rule that where a lease contains a provision authorizing the lessee to make improvements "by deducting the cost thereof from the rent, or where part of the consideration of the lease is the making by the lessee of improvements which become a part of the realty, or that the improvements made by the lessee shall revert to the lessor, a mechanic's lien may attach to the property for work done or materials furnished, pursuant to a contract with the lessee." 27 Cyc. 58; Kremer v. Walton, 16 Wash. 139, 47 Pac. 238; Shaw v. Spencer, 57 Wash. 587, 107 Pac. 383; Whitcomb v. Gans, 90 Ark. 469, 119 S. W. 676; Potter v. Conley, 83 Kan. 676, 112 Pac. 608; Western Lumber Co. v. Merchants' Amusement Co., 13 Cal. App. 4, 108 Pac. 891; Wallinder v. Weiss, 119 Minn. 412, 138 N. W. 417; Dougherty-Moss Lumber Co. v. Churchill, 114 Mo. App. 578, 90 S. W. 405; Lumber Co. v. Nelson, 71 Mo. App. 110; Crandall v. Sorg, 198 Ill. 48, 64 N. E. 769; Carey-Lombard Lumber Co. v. Jones, 187 Ill. 203, 58 N. E. 347; Jones v. Menke, 168 N. Y. 61, 60 N. E. 1053. In Wallinder v. Weiss, the court held that, in order that the lessor's interest be subject to a lien, it is essential that he either contracted for the improvement or else that it was done at his instance, and held that he might protect his interest by notice "unless he has required the im-

provement to be made." In Western Lumber & Mill Co. v. Merchants' Amusement Co., 13 Cal. App. 4, 108 Pac. 891, it was held that the finding of the court below that the owner failed to give the notice that he would not be responsible was rendered immaterial by the other finding that the lessee was the mere agent of the owner of the land, in the erection and construction of the building. In Lumber Co. v. Nelson, one of the stipulations in the lease was that the lessee should spend $20,000 in making improvements upon the leased premises, according to plans and specifications which had been agreed to. These improvements were to become the property of the lessor at the termination of the lease. The court said:

"In this state of the evidence, it may be truthfully said the improvements on the Nelson lot and the material necessary to make them were made and furnished by his consent and for his benefit. He not only consented to them, but contracted with his lessee for them."

In Crandall v. Sorg, where the owner of vacant premises leased the same for 99 years at an annual rental, and by contract the tenant was to construct upon the premises a building at a cost of $300,000, of which $100,000 was to be contributed by the lessor, and by the contract it was provided that the property should be insured, and in case of loss the amount recovered should either be used in reconstruction or be paid to the lessor, it was held that the lessor's interest was subject to a mechanic's lien, notwithstanding that the contract provided that there should be no lien thereon.

[8] We find no merit in the contention that the appellant's claim of lien was rendered void by the fact that the two items of lumber furnished on July 8th and August 6th were not used in the building. It might be a sufficient answer to the contention to point to the fact that the total value of those items amounted to the unimportant sum of $3.24. But it may be added that the case at bar is not like Williams v. Toledo Coal Co., 25 Or. 426, 36 Pac. 159, 42 Am. St. Rep. 799, cited by the appellee, in which a lumber company in its notice of lien made a lump charge for material and labor, when the lien law allowed it no lien for labor; but it is similar to Fitch v. Howitt, 32 Or. 396, 52 Pac. 192, and West Side Lumber & Shingle Co. v. Herald, 64 Or. 210, 128 Pac. 1006, in which it was held that the creation of a mechanic's lien will not be defeated because of the inclusion in the claim of lien of some lumber not delivered or used, the claimant having reasonably believed it to have been left at the proper place for use in the building, but that reduction will be made therefor. This court held likewise in Pioneer Mining Co. v. Delamotte, 185 Fed. 752, 108 C. C. A. 90. There is nothing to show that the appellant did not, as his testimony indicated, deliver the lumber on July 8th and August 6th in good faith, and on the understanding that the material was to be used in the construction of the building.

The decree is reversed, and the cause remanded to the court below for further proceedings and with instructions to enter a decree for the appellant in accordance with the finding as to the amount due it.

CITY OF HARPER, KAN., v. DANIELS.

(Circuit Court of Appeals, Eighth Circuit. January 7, 1914.)

No. 3784.

1. MANDAMUS (§ 116*)—COMPELLING LEVY OF TAX—PAYMENT OF JUDGMENT—"EXECUTION."

A mandamus to compel a municipality to levy and collect taxes for the payment of a judgment is equivalent to an "execution against a private person," within Gen. St. Kan. 1901, § 4895, providing that if execution shall not be sued out within five years from the date of any judgment, or if five years shall intervene between the date of the last execution and the time of suing out another execution, the judgment shall become dormant and cease to operate as a lien.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 243–248; Dec. Dig. § 116.*

For other definitions, see Words and Phrases, vol. 3, p. 2564; vol. 8, p. 7656.

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

2. EXCEPTIONS, BILL OF (§ 43*)—TIME FOR FILING—EFFECT OF DELAY.

A bill of exceptions, not filed within the time granted, could not be considered where no extension of time for filing was agreed upon, asked, or granted, and the court's control over the record was not preserved by the pendency of a motion for a new trial or otherwise.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. § 72½; Dec. Dig. § 43.*]

3. PLEADING (§ 418*)—DEMURRER—EFFECT OF PLEADING OVER.

Where, after a demurrer to the petition was overruled, defendant answered over, the judgment would be reversed for the error in overruling the demurrer if the petition was fatally defective in substance and clearly showed that, upon the case as stated, plaintiff could not recover.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1399, 1403–1406; Dec. Dig. § 418.*]

4. JUDGMENT (§ 866*)—REVIVAL—LIMITATIONS.

Where, for ten years after the recovery of judgment on city warrants payable out of the general revenue fund, the city officers never levied a tax to the full amount authorized by statute, and the judgment creditor took no steps to compel them to do so by mandamus, a suit to revive the judgment was barred by Gen. St. Kan. 1901, § 4895, providing that if execution shall not be sued out within five years from the date of the judgment, or if five years shall intervene between the date of an execution and the time of suing out another execution, the judgment shall become dormant; section 4890 providing that a dormant judgment may be revived in the same manner as is prescribed for reviving actions before judgment, and section 4883 providing that an order to revive an action shall not be made except by consent, unless made within one year from the time it could have been first made.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1603–1607; Dec. Dig. § 866.*]

5. LIMITATION OF ACTIONS (§ 139*)—ACKNOWLEDGMENT OF DEBT—"JUDGMENT."

A judgment is not a contract within Gen. St. Kan. 1909, § 5616, providing that an action on a contract may be brought within the time prescribed by statute after any payment of principal or interest or acknowledgment of the debt, or promise to pay it, in writing, and hence the time for re-

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

viving a judgment against a city was not extended by payments thereon and written acknowledgments of the debt by the city.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 574, 593, 621; Dec. Dig. § 139.*

For other definitions, see Words and Phrases, vol. 4, pp. 3827–3842; vol. 8, pp. 7695, 7696.]

6. JUDGMENT (§ 583*)—MERGER OF CAUSES OF ACTION.

A judgment on a note or contract merges the note or contract, and no other suit can be maintained thereon.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1082; Dec. Dig. § 583.*]

7. MANDAMUS (§ 116*)—LEVY OF TAX—PAYMENT OF JUDGMENT.

One recovering judgment against a city on city warrants payable from the general revenue fund had a right to demand that a tax should be levied each year until his judgment was paid to the full amount authorized by statute for ordinary city expenses, and this right could be enforced by mandamus.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 243–248; Dec. Dig. § 116.*]

In Error to the District Court of the United States for the District of Kansas; John C. Pollock, Judge.

Action by James Daniels against the City of Harper, Kan. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

E. C. Wilcox, of Anthony, Kan. (H. C. Sluss, of Wichita, Kan., on the brief), for plaintiff in error.

Charles Blood Smith, of Topeka, Kan. (Samuel Barnum, of Topeka, Kan., on the brief), for defendant in error.

Before HOOK and SMITH, Circuit Judges, and VAN VALKENBURGH, District Judge.

VAN VALKENBURGH, District Judge. Defendant in error, plaintiff below, was the owner of a number of city warrants issued by plaintiff in error, defendant below, a city of the third class, in 1891 and 1892; these warrants were all duly presented to the city treasurer within less than five years after their issue and duly indorsed, as required by law, "Not paid for want of funds." They were payable only out of the general revenue fund of the city. Suit was brought to enforce collection, and on the 8th day of March, 1897, judgment was rendered in favor of plaintiff, and against defendant, in the sum of $14,573.23.

[1] This judgment was not paid, and June 18, 1907, this action was brought to revive it. The statutes of Kansas then provided:

"If execution shall not be sued out within five years from the date of any judgment that now is or may hereafter be rendered in any court of record in this state, or if five years shall have intervened between the date of the last execution issued on such judgment and the time of suing out another writ of execution thereon, such judgment shall become dormant, and shall cease to operate as a lien on the estate of the judgment debtor." Section 4895, General Statutes of Kansas 1901.

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

"If a judgment become dormant, it may be revived in the same manner as is prescribed for reviving actions before judgment." Section 4890, General Statutes of Kansas 1901.

"An order to revive an action against the representatives or successor of a defendant shall not be made without the consent of such representatives or successor, unless in one year from the time it could have been first made." Section 4883, General Statutes of Kansas 1901.

In Kansas, judgments against municipalities are paid by taxation, and the levy and collection of taxes may be enforced by mandamus. Such a mandamus is equivalent to an execution against a private person, within the meaning of the statutes relating to the life of judgments. Between March 8, 1897, the date of the judgment, and June 18, 1907, the date of filing this suit, a period of more than ten years, no writ of mandamus had issued, nor had application been made to revive the judgment sued on.

The situation, so far as it affects this phase of the controversy, is thus stated in the second amended petition:

"That in the year of the rendition of said judgment the said city of Harper made a levy of seven mills for general purposes, but failed to make any provision in said levy towards the creation of a fund to pay said warrants and failed and neglected so to do until the year 1900, although frequently demanded to do the same by said plaintiff, but in the year 1900, as aforesaid, the said city of Harper, recognizing the validity of said indebtedness as evidenced by and liquidated in said judgment in accordance with law in that behalf, passed its certain ordinance for a two-mill levy of taxes for the purpose of making a payment on said judgment. That the said defendant since the year 1900 has failed, neglected, and refused to make any levy for the purpose of collecting or paying any moneys into its general fund.

"That in the years 1901, 1902, and 1903, the said city of Harper passed ordinances making levy for said judgment, but since the year 1904 has failed, neglected, and refused to make any levy for the purpose of raising a fund to pay said warrants or judgment. That the levies so as aforesaid made for the years 1900, 1901, 1902, and 1903 were duly indorsed upon the tax books in conformity to said ordinances and the same were duly collected, and the fund realized therefrom were paid over and deposited in the treasury of the city of Harper.

"Thereafter, and from time to time as the said taxes were so collected and deposited in the city treasury, the said city of Harper, through its proper officers, paid upon said indebtedness, liquidated and evidenced by said judgment, various amounts as follows:

On February 26, 1901	$133 80
On January 28, 1902	279 46
On July 25, 1902	74 29
On February 27, 1903	221 72
On April 8, 1904	395 98

"That said various sums were duly accepted and receipted for by said plaintiff as part payment of said indebtedness and duly credited thereon, as per the order and direction of the said defendant, the city of Harper.

"That within the past five years at various times the said city of Harper, through its duly authorized officers and agents, duly acknowledged in writing the existence of said debt upon said warrants as evidenced by said judgment and its present and continuing obligation to pay and discharge the same to this plaintiff.

"That the foregoing payments so as aforesaid made comprise all the fruits and return from said levies and collection of taxes between the years 1900 and 1905, inclusive, and said levies and collection of taxes were advisedly and purposely made to create a fund in the treasury as required by law to be applied towards the payment of said judgment and the indebtedness evidenced by it, so far as it would go.

"But said defendant (plaintiff) says that at no time since the presentation of said warrants and their indorsement as aforesaid, 'Not paid for want of funds,' has there been levied and collected and in the treasury of said city of Harper any sums of money whatsoever for the payment of said warrants or the judgment evidencing the same, save and except the said sums of money above set forth, which, as aforesaid, were paid over to this plaintiff to be applied upon this indebtedness and which have been applied as of the above dates mentioned.

"Said plaintiff further says that if, beginning with the year 1897, the year said judgment was rendered, the full ten-mill levy, which it was in the power of the said defendant, the city of Harper, to tax for general purposes, had been levied for the specific and exclusive purpose of being placed in the treasury as a fund to be applied upon the payment of these warrants and upon the judgment liquidating the same, and the same was duly extended and made a charge upon the full assessed valuation of the city of Harper, and the same was fully collected without delinquency upon the part of the taxpayers, it would produce a fund, which, after the payment of interest, would be insufficient to pay and satisfy more than 20 per cent. of said judgment or of said warrants."

[2, 3] To this petition defendant interposed a demurrer setting up the bar of the statute of limitations. The demurrer was overruled, and an exception saved; thereafter defendant answered over, a jury was waived, and the case was submitted to the court upon pleadings and evidence. Judgment was rendered in favor of plaintiff in the sum of $27,922.30. Defendant was given 120 days within which to file its bill of exceptions. The trial court filed neither findings of fact nor conclusions of law, but made only a general finding in the nature of a general verdict. The bill of exceptions was not filed within the time granted, and not until the succeeding term of court; no extension of time for the filing was ever agreed upon, asked, or granted; nor was the court's control over the record preserved by the pendency of a motion for new trial or otherwise. Under these circumstances, the bill of exceptions cannot be considered by us. United States v. Carr et al., 10 C. C. A. 80, 61 Fed. 802; Missouri, Kansas & T. Ry. Co. v. Russell, 9 C. C. A. 108, 60 Fed. 501; Jennings v. Phil., Balt. & Wash. Ry. Co., 218 U. S. 255, 31 Sup. Ct. 1, 54 L. Ed. 1031; Morse v. Anderson, 150 U. S. 156, 14 Sup. Ct. 43, 37 L. Ed. 1037; Michigan Insurance Bank v. Eldred, 143 U. S. 293, 12 Sup. Ct. 450, 36 L. Ed. 162; Muller v. Ehlers, 91 U. S. 249, 23 L. Ed. 319. This leaves but one of the assignments of error subject to review, viz.:

"The court erred in overruling the demurrer of the city of Harper to the plaintiff's second amended petition."

If the petition, as challenged by the demurrer, is fatally defective in substance, and clearly shows that upon the case as stated the plaintiff cannot recover, the judgment must be reversed, otherwise it should be affirmed. Teal v. Walker, 111 U. S. 242, 4 Sup. Ct. 420, 28 L. Ed. 415; Hudson Canal Co. v. Penna. Coal Co., 8 Wall. 276–287, 19 L. Ed. 349; Rush v. Newman, 7 C. C. A. 136, 58 Fed. 158–161.

[4, 5] The issue presented is whether the suit was barred by the statute of limitations, which this court has expressly ruled applies to judgments against municipalities. Dempsey v. Township of Oswego, 2 C. C. A. 110, 51 Fed. 97. Under section 5616, General Statutes of

Kansas 1909, the running of that statute may be arrested in the following manner:

"In any case founded on contract, when any part of the principal or interest shall have been paid, or an acknowledgment of the existing liability, debt, or claim, or any promise to pay the same, shall have been made, an action may be brought in such case within the period prescribed for the same, after such payment, acknowledgment, or promise; but such acknowledgment or promise must be in writing, signed by the party to be charged thereby."

However, the Supreme Court of Kansas, in construing this section, has held that a judgment is not a contract within the meaning of its terms (Burnes et al. v. Simpson, 9 Kan. 658); and so it has been held under similar statutes in Willard v. Wood, 164 U. S. 502–522, 17 Sup. Ct. 176, 41 L. Ed. 531; McAleer v. Clay County (C. C.) 38 Fed. 707; McCaskill v. Graham, 121 N. C. 192, 28 S. E. 265. Therefore the allegations of payments made, and of written acknowledgment of the debt by defendant, are ineffective. This is practically conceded, and to escape the bar of the statute counsel for plaintiff rely mainly upon the contention that the statute of limitations does not run in favor of a municipal or quasi municipal corporation upon its outstanding obligations until the corporation has provided a fund with which payment thereof may be made (School District v. Bank, 63 Kan. 668, 66 Pac. 630; Hubbell v. South Hutchinson, 64 Kan. 645, 68 Pac. 52; Schoenhoeft v. Kearny County, 76 Kan. 883, 92 Pac. 1097, 16 L. R. A. [N. S.] 803, 14 Ann. Cas. 100); that in this case no such fund was provided which would have been sufficient to pay this debt and all of it; that the judgment can be paid in no other manner than the warrants upon which it was founded (King v. Board of Commissioners, 23 C. C. A. 348, 77 Fed. 583; United States v. County of Macon, 99 U. S. 582, 25 L. Ed. 331; Schoenhoeft v. Kearny County, 76 Kan. 883, 92 Pac. 1097, 16 L. R. A. [N. S.] 803, 14 Ann. Cas. 100); that therefore the court may look behind the judgment to the nature of the debt formerly evidenced by the warrants, and, if the warrants are not barred, then the judgment is equally exempt. Such was the view taken by the trial court. Upon most thoughtful and attentive consideration of this contention we are unable to give it our assent. That in default of execution a judgment becomes dormant at the expiration of five years from the date of its rendition, and cannot be revived or enforced by any action unless within one year after dormancy ensues, has been repeatedly and consistently ruled by the Kansas Supreme Court. Scroggs v. Tutt, 23 Kan. 181; Angell v. Martin, 24 Kan. 334; Halsey v. Van Vliet, 27 Kan. 474; Tefft v. Citizens' Bank, 36 Kan. 457, 13 Pac. 783; Mawhinney v. Doane et al., 40 Kan. 676, 17 Pac. 44. The statute contains no exception which would exclude judgments upon municipal warrants such as these, and this court, as we have seen, has expressly recognized its application to such judgments. Dempsey v. Township of Oswego, supra.

[6] A judgment on a note or contract merges the note or contract and no other suit can be maintained on the same instrument. Eldred v. Bank, 17 Wall. 545, 21 L. Ed. 685; Ralls County Court v. United States, 105 U. S. 733, 26 L. Ed. 1220; Gaines v. Miller, 111 U. S. 395–399, 4 Sup. Ct. 426, 28 L. Ed. 466; Schuler v. Israel, 120 U. S. 506–

509, 7 Sup. Ct. 648, 30 L. Ed. 707. In the latter case it is said that, when "it is made to appear that a judgment on the same cause of action has been recovered and is in full force and effect, that judgment must be held to merge the evidence of the debt, whether that evidence be parol or written, in the judgment first recovered." In the case at bar, then, there could be no recovery upon the warrants themselves, and, indeed, it may be sufficient to say that none is attempted. The action is confessedly based upon the former judgment, and must stand or fall accordingly as that judgment is able to support it. It is true that the judgment does not change the manner and form of payment because of the limited power of taxation conferred upon municipalities. It does, however, establish the validity and amount of the claim. It cannot be said that the character of the obligation has been in no sense changed.

The petition alleges that prior to the original judgment the city of Harper failed to take any step toward the payment of the debt evidenced by the warrants. As matters stood, plaintiff was helpless to enforce payment. His remedy was mandamus, but in the federal court a judgment at law is necessary to support the writ, which is in the nature of an execution to carry the judgment into effect. County of Greene v. Daniel, 102 U. S. 187, 26 L. Ed. 99; Davenport v. County of Dodge, 105 U. S. 237–243, 26 L. Ed. 1018; King v. Board of Commissioners, 23 C. C. A. 348, 77 Fed. 583–586. It was imperative that plaintiff should reduce his demand to judgment before he could set in motion any process that could result in the payment of his claim; by so doing the nature of his demand was changed and he acquired a valuable right which he could not otherwise enjoy. A statutory responsibility concurrent with the privilege was imposed upon him. The duty of vigilance in the pursuit of his remedy was enjoined. The life of his claim was not thereby endangered.

"A party may, by the issue of executions every five years, keep a judgment alive indefinitely. It remains in force without execution for five years, and the plaintiff may revive it at any time within one year thereafter, so that practically a plaintiff may neglect his judgment for six years, lacking a day, and then revive and put it in force for five years more. And if a party neglects his judgment for six years, he has little cause of complaint if the law says to him, 'You have slept upon your rights too long, and public policy requires that claims so old should be considered barred.'" Angell v. Martin, 24 Kan. 334–336.

There is no hardship in this. It is but an incident of the ultimate repose and end to litigation which it is the office of statutes of limitation to insure.

[7] Having acquired the right to avail himself of the writ of mandamus in aid of his judgment, he could demand that a tax should be levied each year to the full amount of the limit fixed by statute for taxation for ordinary city expenses until his judgment was paid. Stryker v. Board of Commissioners, 23 C. C. A. 286, 77 Fed. 567. The power of the court to issue a mandamus to compel municipal officers to perform their duty of levying is a distinct power, which extends to ministerial acts which officers are legally bound and refuse to perform. Barkley v. Levee Commissioners et al., 93 U. S. 258–265, 23 L. Ed.

893; Ex parte Rowland, 104 U. S. 604–615, 26 L. Ed. 861. It is true that a court has no taxing powers and can impart none to the city authorities; nor has the holder of city warrants, or a judgment rendered thereon, a right to demand that a special tax shall be carved out of a general given rate and levied for the exclusive purpose of paying his warrants or judgment unless the statute requires it and leaves the city levying board no discretion (Board of Commissioners v. King, 14 C. C. A. 421, 67 Fed. 202); but he has the right to demand that a levy be made and the tax collected to the full amount authorized for the fund out of which his warrants and judgment are payable. In the present case that authorized rate for general purposes was ten mills. According to the petition the officers of the city never discharged their full duty in this respect, nor did plaintiff take the appropriate legal steps to compel them to do so. In the year of the rendition of the judgment a levy of seven mills only was made for general purposes, and after the year 1900 the defendant failed, neglected, and refused to make any levy for the purpose of collecting or paying any moneys into its general fund. Moneys provided by the two-mill levy were paid and credited on the judgment; but this action of the city officials fell far short of performance authorized by law, which plaintiff might have demanded, but did not demand. It would thus appear that plaintiff invoked neither the letter nor the spirit of the law for the preservation of his judgment. From the situation disclosed by the petition it must be presumed that timely writs of mandamus would have produced at least an increased partial payment of the judgment debt. The suggestion that the issuance of such writs is not demanded unless they could effect the discharge of the entire indebtedness cannot, of course, be entertained.

The case of Beadles v. Smyser, 209 U. S. 393, 28 Sup. Ct. 522, 52 L. Ed. 849, is cited in support of the contention that the city is estopped to raise the bar of the statute in the instant case. In the opinion the following quotation from Dillon on Municipal Corporations is quoted with approval:

"Any positive acts (infra vires) by municipal officers which may have induced the action of the adverse party, and where it would be inequitable to permit the corporation to stultify itself, by retracting what its officers had done, will work an estoppel."

The facts in the two cases are essentially different. In Beadles v. Smyser the city council provided by legislation that all judgments against the city should be paid, in the order of their rendition, out of moneys then on hand and as they should accrue in the judgment fund. The judgment creditors agreed to this and signed written waivers of their right to payment of their judgments pro rata; this had the effect of postponing the payment of some judgments beyond the statutory period. The city made payments according to this agreement, and so long as it did so the creditors who were parties thereto were precluded from issuing execution or suing out writs of mandamus, and a court of equity would have promptly restrained such proceedings on their part if attempted. Under such circumstances, the Supreme Court held that the city was estopped to invoke the statute of limitations. In the

case at bar no such arrangement existed. The city merely neglected to pay in any substantial way, and the plaintiff neglected to take steps to enforce payment. Nothing is disclosed in the petition but inadequate partial payments and alleged written acknowledgment of the debt; but, as we have already seen, such are insufficient to toll the statute. Judge Sanborn's language in Dempsey v. Township of Oswego has substantial, though not literal, application here:

"If the plaintiff in this case has failed to collect the money that was due him it has not been because he was remediless under the law. It has been because for more than five years he issued no writ upon his judgments when he could have had a writ for the asking, and because he brought no suit, and made no application to revive his judgments, for more than three years after they became dormant, at a time when there was ample opportunity to serve notice and process upon the defendant."

While courts in the interest of justice lean to such conclusions as will insure the discharge of honest obligations by cities as well as by individuals, they are not justified in granting relief to creditors who have neglected to avail themselves of their proper remedies, in the face of the plain bar of a statute, whose construction is not involved in doubt. The demurrer to the petition should have been sustained.

The judgment is reversed, and the cause remanded for further proceedings in accordance with the views herein expressed, including if the facts warrant it, leave to plaintiff to amend, in the discretion of the trial court.

SMITH, Circuit Judge (concurring). I concur in the foregoing opinion of VAN VALKENBURGH, District Judge, but deem it desirable to add the following thereto:

In my opinion ordinarily a demurrer is waived whenever the party filing it pleads over in the trial court. Eau Claire National Bank v. Jackman, 204 U. S. 522, 535, 27 Sup. Ct. 391, 51 L. Ed. 596; Campbell v. Haverhill, 155 U. S. 610, 612, 15 Sup. Ct. 217, 39 L. Ed. 280; Stanton et al. v. Embry, Administrator, 93 U. S. 548, 553, 23 L. Ed. 983; Marshall v. Vicksburg, 15 Wall. 146, 148, 21 L. Ed. 121; Railroad Co. v. Harris, 12 Wall. 65, 84, 20 L. Ed. 354; Campbell v. Wilcox, 10 Wall. 421, 423, 19 L. Ed. 973; Watkins v. United States, 9 Wall. 759, 761, 19 L. Ed. 820; Young v. Martin, 8 Wall. 354, 357, 19 L. Ed. 418; Aurora City v. West, 7 Wall. 82, 92, 19 L. Ed. 42; Bell v. Railroad Co., 4 Wall. 598, 602, 18 L. Ed. 338; Clearwater v. Meredith et al., 1 Wall. 25, 42, 17 L. Ed. 604; United States v. Boyd, 5 How. 29, 50, 12 L. Ed. 36; Evans v. Gee, 11 Pet. 80, 85, 9 L. Ed. 639.

The question, therefore, considered in the foregoing opinion would not be open for disposition by us were it not for the so-called conformity act (section 914, Revised Statutes [U. S. Comp. St. 1901, p. 684]) that:

"The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held, any rule of court to the contrary notwithstanding."

This of course does not change the practice in this court, but the waiver, if any, existed on the ruling on the demurrer must have taken place in the District Court for the District of Kansas. That the ruling on the demurrer was erroneous I have no doubt, and an exception was duly taken to the ruling on the demurrer at the time, and under the laws of Kansas, where such an exception is taken, the ruling on demurrer is not waived by answering.

I am therefore of the opinion that the ruling on the demurrer is in this case still available to the plaintiff in error, and, being of the opinion that it was erroneously overruled, concur in the reversal of the judgment.

NATIONAL POLE CO. v. CHICAGO & N. W. RY. CO.

(Circuit Court of Appeals, Seventh Circuit. January 6, 1914.)

No. 1973.

1. COURTS (§ 405*)—FEDERAL COURTS—CIRCUIT COURT OF APPEALS—JURISDICTION.

Where a demurrer was sustained to a complaint in an action against an interstate carrier to recover alleged unjust and unreasonable charges on the ground that the complaint did not show that plaintiff's cause of action had been first submitted to and established by the Interstate Commerce Commission, but the trial court did not put its ruling in the form that the omission precluded the court from considering the merits of the complaint, but rather included such proposition, and also that such omission constituted a failure to state a cause of action on the merits, an appeal was properly taken to the Circuit Court of Appeals and not directly to the Supreme Court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1097–1099, 1101, 1103; Dec. Dig. § 405.*

Jurisdiction of Circuit Court of Appeals in general, see notes to Law Ow Bew v. United States, 1 C. C. A. 6; United States Freehold Land & Emigration Co. v. Gallegos, 32 C. C. A. 475.]

2. CARRIERS (§ 36*)—INTERSTATE COMMERCE ACT—JURISDICTION—SUFFICIENCY OF COMPLAINT—DETERMINATION.

Interstate Commerce Act (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]) § 1, requires that all of charges for transportation shall be reasonable and denounces every unreasonable charge as unlawful and prohibited. Section 8 gives every injured party a right of action for damages on account of carriers doing anything that is prohibited or declared unlawful by the act. Section 9 authorizes the injured party either to make complaint to the commission as provided for in section 13, or to sue in a federal District Court, but denies him the right to pursue both remedies and requires him to elect which he will adopt. Section 15 authorizes the commission after a full hearing on the complaint to determine what charges and practices are unjust and unreasonable and to prescribe what just and reasonable charges and practices shall be observed. *Held* that, where plaintiff brought suit in a federal court to recover for alleged unjust and unreasonable charges without submitting his complaint to the commission, he thereby elected under section 9 to sue in the federal court, and, such court being given authority by such section to receive complaints, it had jurisdiction to determine whether the complaint stated sufficient facts to constitute a cause of action.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 95; Dec. Dig. § 36.*]

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

8. CARRIERS (§ 36*)—INTERSTATE REGULATIONS—PERSONS ENTITLED TO SUE—REAL PARTY IN INTEREST.

Where, in an action against an interstate railroad company to recover damages for the imposition of unreasonable and excessive charges in the shipment of poles, it appeared that some of the shipments were made by plaintiff, an objection that plaintiff was not the real party in interest could not be sustained because it was claimed that the assignment of rights of other shippers to the same relief were invalid.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 95; Dec. Dig. § 36.*]

4. COMMERCE (§ 89*)—INTERSTATE COMMERCE—DISCRIMINATING PROVISIONS—INVALIDITY—RIGHT TO SUE—PRESENTATION OF CLAIM TO COMMISSION.

Defendant, interstate railroad company, published a tariff on poles providing that the poles might be dressed, sawed, concentrated in transit, and shipped from origin to concentration point and then to destination at through rates which were less than the sum of the locals, but only on condition that the shipping bill issued at the point of origin specified the ultimate destination. This condition, having been submitted to the Interstate Commerce Commission on the complaint of other shippers, was declared void and an order passed that it should be disregarded. *Held*, that complainant was entitled to sue in the federal court to recover the difference in rates paid on shipments of poles on which it was not accorded through rates because of the enforcement of such condition prior to its being declared void by the commission without itself presenting its cause of action to the commission and obtaining a reparation order on which to sue; such requirement imposed by Interstate Commerce Act (Act Feb. 4, 1887, c. 104, 24 Stat. 384 [U. S. Comp. St. 1901, p. 3165]) § 16, being intended only for the exercise of the commission's legislative powers to determine the reasonableness of the condition, and, the commission having once acted, it was not necessary that an injured shipper should again present the same question to the commission before electing to sue directly in the federal court as authorized by section 9.

[Ed. Note.—For other cases, see Commerce, Dec. Dig. § 89.*]

In Error to the District Court of the United States for the Eastern District of Wisconsin; Ferdinand A. Geiger, Judge.

Action by the National Pole Company against the Chicago & Northwestern Railway Company. Judgment (200 Fed. 185) for defendant, and plaintiff brings error. Reversed, with directions.

Plaintiff in error, plaintiff below, alleged in its complaint that plaintiff and its assignors made shipments of poles over defendant's railroad from various initial points in Michigan to a concentration point, Escanaba, Mich.; that plaintiff and its assignors shipped the same poles in interstate commerce over defendant's railroad from Escanaba to various ultimate destinations throughout the United States; that defendant's published tariff, in force at all times, provided that poles might be dressed, sawed, or concentrated in transit, and might be shipped from origin to concentration point and thence to destination at through rates (less than the sum of locals), but only on condition that the shipping bill issued at origin should specify ultimate destination; that the shipping bills issued for plaintiff's poles at points of origin failed to specify the ultimate destinations; that plaintiff was required by defendant to pay and did pay the local rates from points of origin to the concentration point and the local rates thence to the ultimate destinations (and the excess of such payments above the through rates is figured by plaintiff in each case from defendant's aforesaid tariff sheet); that the aforesaid condition in said tariff was unjust and unreasonable and resulted in excessive charges; and that, after plaintiff's aforesaid shipments and before the bringing of this action, the Interstate Commerce Commission on June 14, 1909 (16 Interst. Com. Com'n R. 382), on the complaint of other shippers, and after a full hearing, determined

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

and ruled that the aforesaid condition in the aforesaid tariff was wholly unreasonable and unjust and should be disregarded.

To this complaint defendant demurred on two grounds: (1) That the complaint failed to state facts sufficient to constitute a cause of action against defendant; and (2) that it appeared from the face of the complaint that the court was without jurisdiction to pass upon the matter complained of, because there had been no determination of it by the Interstate Commerce Commission.

The judgment reads: "The plaintiff having in open court waived all right to amend in case the demurrer should be sustained, it is ordered that said demurrer be and the same is hereby sustained; further adjudged and determined that plaintiff take nothing by this action, that said action be and hereby is dismissed on the merits, and that defendant have and recover of said plaintiff its costs herein."

In the trial court ([D. C.] 200 Fed. 185) attention seems to have been given exclusively to the merits. And in this court plaintiff's whole contention is that its complaint states a good cause of action, while defendant only insists that the absence of an allegation that the Interstate Commerce Commission, at plaintiff's petition therefor, had decided that plaintiff was entitled to reparation, left the complaint bad, and that the complaint shows affirmatively that plaintiff is not the real party in interest, and that the supposed cause of action is barred by limitations. No suggestion has come from either side that this court is without jurisdiction to entertain the writ of error.

Edward H. S. Martin, of Chicago, Ill., for plaintiff in error.

C. C. Wright, of Chicago, Ill., for defendant in error.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

BAKER, Circuit Judge (after stating the facts as above). [1] I. Appellate jurisdiction. In passing on the merits the trial court decided sub silentio that it had jurisdiction as a federal court under section 9 of the Interstate Commerce Act to hear the complaint. As a question of merits the court held that the failure to aver that plaintiff's grounds of complaint had first been submitted to and established by the Interstate Commerce Commission, made the complaint bad. If what was treated as a question of merits was in reality a question of jurisdiction of the court as a federal court, and if that was the only question decided, should the writ of error be sued out from the Supreme Court or from this court? If the trial court had put its ruling in the form that the failure to aver that plaintiff's grounds of complaint had first been submitted to and established by the Interstate Commerce Commission, precluded the court as a federal court from considering the merits of the complaint, the decisions in The Ira M. Hedges, 218 U. S. 270, 31 Sup. Ct. 17, 54 L. Ed. 1039, The Steamship Jefferson, 215 U. S. 130, 30 Sup. Ct. 54, 54 L. Ed. 125, 17 Ann. Cas. 907, and Mitchell Coal Co. v. Pennsylvania R. Co., 230 U. S. 247, 33 Sup. Ct. 916, 57 L. Ed. 1472, would indicate that this case properly should have been taken directly to the Supreme Court. And the query arose during consultation whether, the one question being the effect of the omission of a certain averment, the form of the answer given by the trial court should determine the appellate jurisdiction. In the Hedges Case, supra, the court recognized that "there sometimes is difficulty in distinguishing between matters going to the jurisdiction and those determining the merits," and concluded that, although "it may be said that the two considerations coalesce, * * * at all events, the form of the de-

cree must be taken to express the meaning of the judge." If the two considerations coalesce, if all the substance is run into one mold, still the aspects of the obverse and reverse faces are from as separate points of view as if the faces were on separate castings. And if the judgment and the assignments of error actually present both aspects, this court has appellate jurisdiction. Darnell v. Illinois Central R. Co., 225 U. S. 243, 32 Sup. Ct. 760, 56 L. Ed. 1072; Morrisdale Coal Co. v. Pennsylvania R. Co., 183 Fed. 929, 938, 106 C. C. A. 269.

[2] II. Jurisdiction of the trial court. Section 1 of the act requires all charges for transportation to be reasonable and just, and denounces every unjust and unreasonable charge as unlawful and prohibited. Section 6 provides that carriers shall make, file, and publish schedules of their charges. Section 15 authorizes the commission, after a full hearing upon a complaint, to determine what charges and practices are unjust and unreasonable and to prescribe what just and reasonable charges and practices shall be observed by the carriers. Section 8 gives every injured party a right of action for damages on account of a carrier's doing anything that is prohibited or declared unlawful by the act. Section 9 authorizes the injured party either to make complaint to the commission as provided for in section 13 or to bring suit in a District Court of the United States, denies him the right to pursue both remedies, and requires him to elect which he will adopt. If he makes complaint to the commission and if the commission finds that he is entitled to damages and gives him a reparation order, he may sue upon the order either in a District Court of the United States or in a state court of general jurisdiction.

Plaintiff's complaint manifestly purported to be based upon the right of action given by section 8 for defendant's unlawful acts under sections 1 and 6 as determined by the commission under section 15. Manifestly, also, plaintiff elected under section 9 to sue in the federal court. And as the federal court was given by section 9 organic authority to receive complaints under section 8, the court below had jurisdiction to determine the sufficiency of the present complaint to constitute a cause of action, just as a court having organic authority to entertain replevin suits has jurisdiction of the particular case wherein the complaint is bad for lack of an averment of demand before suit.

[3] III. Merits. Before taking up the substantial question it is proper to observe: (1) There is nothing in defendant's point that plaintiff is not the real party in interest. Some of the shipments were made by plaintiff. So it is immaterial whether claims of other shippers could lawfully be assigned to plaintiff or not, even if such a question could be raised on the present record. (2) Under the Wisconsin practice (adopted on the law side of the court below) the question of limitation can be presented only by special demurrer or by answer.

[4] We have taken the complaint, as did the trial court, to be sufficiently definite and specific to present the question in this form: After the commission at the complaint of another shipper had determined with respect to the very tariff under which plaintiff shipped that the condition relating to the recital in the bill of lading was unreasonable and unjust, and that, throughout the times during which plaintiff ship-

ped the through rate as published was the maximum reasonable and just rate, was plaintiff compelled to go to the commission and get a reparation order on which to sue under section 16, or could plaintiff exercise the choice professed to be given by section 9 and go directly to the federal court?

On its face section 9 clearly gives the option; but if other and paramount provisions of the act would be impaired by an unrestricted reading of section 9, then of course the option must be limited to conform to the legislative will as determined by a consideration of the act as a whole.

In Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co., 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas. 1075, the carrier had filed and published its rates for interstate transportation; the shipper paid those rates, but claimed they were excessive; and in the shipper's suit the court found that the published rates were unreasonable, determined what were reasonable rates and what was the excess of the published above the reasonable, and rendered judgment for such excess. This judgment was reversed by the Supreme Court on the ground that, if different courts in different suits should find differently as to the reasonableness of the same rates or the justness of the same practices, the uniformity and equality of rates and practices, which were the prime objects of the act and for the maintenance of which the commission was created and given regulatory powers, would be utterly destroyed. In the language of the court:

"Indeed, no reason can be perceived for the enactment of the provision endowing the administrative tribunal, which the act created, with power, on due proof, not only to award reparation to a particular shipper, but to command the carrier to desist from violation of the act in the future, thus compelling the alteration of the old or the filing of a new schedule, conformably to the action of the commission, if the power was left in courts to grant relief on complaint of any shipper, upon the theory that the established rate could be disregarded and be treated as unreasonable, without reference to previous action by the commission in the premises. This must be, because, if the power existed in both courts and the commission to originally hear complaints on this subject, there might be a divergence between the action of the commission and the decision of a court. In other words, the established schedule might be found reasonable by the commission in the first instance and unreasonable by a court acting originally, and thus a conflict would arise which would render the enforcement of the act impossible."

In Robinson v. Baltimore & O. R. Co., 222 U. S. 506, 32 Sup. Ct. 114, 56 L. Ed. 288, the carrier, by its published tariff, made a discriminatory charge of fifty cents more per ton for transporting coal when loaded into cars from wagons than when loaded from tipples. The shipper claimed that this was an unjust discrimination, but failed to allege or prove that the unjustness (and the extent thereof) had been determined by the commission. Also it was admitted by the parties that the shipper had not presented to the commission any claim for reparation. The Supreme Court stated and answered two questions: First, that matters of unreasonable rates, unjust discriminations and undue preferences in published tariffs must be determined exclusively by the commission. Second, that a published report of the commission

is not in court by judicial notice, but must be offered in evidence. After the answer to the second question the following appears:

"The result, however, would have been the same had the decision been properly before the court. An examination of it discloses that it did not contain any finding or direction as to what, if any, reparation should be made because of prior exactions of the rate which it condemned. It did find that the complaining party in that proceeding had been injured by the refusal of the railroad company to furnish cars on certain occasions for the shipment of coal, and did direct that reparation therefor be made, but that is without bearing here."

This expression, in our opinion, is not decisive of the case before us, because we believe that the Supreme Court as a court did not intend to preclude inquiry into a matter that was not in the record then under consideration, and also because the expression seems to proceed on the theory that the commission had not fixed a basis for figuring the damages of one who had shipped under the condemned rate, while in the case before us the commission had fixed the basis, but on the complaint of a shipper other than the present plaintiff.

These decisions end the claim of shippers that they should recover judgments for excessive exactions in published tariffs while those tariffs stand uncondemned by the commission. To that extent the Abilene and Robinson Cases modify the apparent value of section 9. No controlling precedent, however, rules that section 9 is utterly deleted. Yet such would be the effect if it were found that every claim for damages had to be presented by the claimant to the commission for a reparation order. Under what circumstances, if at all, the option apparently offered by section 9 may be available, we will endeavor to determine from a consideration of the nature of the Interstate Commerce Act.

Varying secret rates, unjust discriminations, undue preferences, were the evils to be cured. Publicity, uniformity, and equality, with respect to all matters of rates and practices, were the remedies. And a new means was created for administering the remedies, namely, the commission with its supervisory and regulatory powers. The commission was added as an instrumentality of the administrative (executive) department of government, and two distinct classes of powers were conferred upon it, quasi legislative and quasi judicial.

When shippers before the commission challenge a published rate as unjust and demand the fixing of a just rate, and fail to make a claim or admit they have no claim for damages accrued, they present nothing but matter that is legislative in its nature. Congress directly and in the first instance might have inquired into the character and value of the particular transportation service now under investigation by the commission and have named the rate therefor in a statute. But, with the increasing complexities of human activities, it was impossible to cover the details of rate-making (and the same is true of many other subjects) by specific statutes; and so the board or commission form of legislation was used. That is, Congress declared the public policy and fixed the legal principles that were to control, and charged an administrative body with the duty of ascertaining within particular fields from time to time the facts on which the legal principles established by Congress would be brought into play. Such action by the commission,

to be constitutional, cannot of course be legislation, for the whole of the lawmaking power of the United States, except the advisory and veto power of the President, is in Congress. But since the Congressional prohibition of unjust rates cannot, by the terms of the act, be effective against a particular published rate, although unjust, until the commission has investigated the service in question and has established the standard of justness for all shippers who use that service, the action of the commission in regulation of rates is quasi legislative—it converts the actual legislation from a static into a dynamic condition.

When shippers before the commission challenge a published rate as unjust and demand the fixing of a just rate, and additionally ask a reparation order for damages measured by the excess of the published rate over the declared just rate as applied to their shipments, their additional or secondary demand, considered by itself, presents nothing but matter that is judicial in its nature. There is a controversy, between parties, in which none but the parties are interested, to be settled by hearing the evidence, finding the facts and applying the law, and the settlement to be binding only upon parties and privies. In such a controversy the facts to be found from the evidence are the facts that pertain to the particular shipments and payments of the complaining shipper, and the law to be applied is the Interstate Commerce Act by virtue of either its direct terms or an administrative, quasi legislative declaration of the commission. The commission's action in such a controversy, to be constitutional, cannot of course be judicial, for the whole of the judicial power of the United States is vested in its courts. But, while such action is of a judicial nature, in respect to power it is only quasi judicial, since a judicial determination of a controversy is a final determination embodied in a judgment or decree of a court and enforceable by execution or other writ of the court.

Turning now to section 8, that the "carrier shall be liable to the person injured for the full amount of damages sustained in consequence of any violation of the provisions of this act," let us see what is required to constitute a cause of action thereunder.

If a shipper states in his complaint that he paid 12 cents per hundredweight on certain described shipments, that during the times of the shipments the carrier had a published tariff of 10 cents per hundredweight on such shipments, and that the payments exacted of the shipper were unjust to the extent of 2 cents per hundredweight, the stated facts make a good complaint, for the statutory prohibition of unjust rates is directly effective by reason of the published rate's being equivalent to a statutory declaration of the maximum of reasonable rates. There need be no administrative, quasi legislative determination of conditions on which the statutory prohibition would be brought into effect. Such a complaint for damages is presentable to the commission for its quasi judicial action. Or, under section 9, the plaintiff may at once demand judgment in a federal District Court. Pennsylvania R. Co. v. International Coal Co., 230 U. S. 184, 33 Sup. Ct. 893, 57 L. Ed. 1446.

If a shipper states in his complaint that he paid 12 cents per hundredweight on certain shipments, that the carrier's published rate on

such shipments was 12 cents per hundredweight, and that the payments exacted of the shipper were unjust to the extent of 2 cents per hundredweight, the stated facts fail to constitute a cause of action, for the statutory prohibition of unjust rates cannot, in the face of the presumption attaching to the carrier's published rate, be effective until the commission has exercised its quasi legislative function of determining the just rate, with which the trier of the damage case may compare the facts respecting the plaintiff's shipments and the payments therefor exacted by the carrier. But when the rate-determining function has been fully exercised by the commission (and the function is exactly the same whether exercised over a present or future rate, or over a past or abandoned rate (Mitchell Coal Co. v. Pennsylvania R. Co., 230 U. S. 247, 33 Sup. Ct. 916, 57 L. Ed. 1472), then the statutory standard is as definite and specific as if Congress itself had fixed the rate. And consequently it seems clear to us that, since legislation is for all citizens and subjects and therefore requires uniformity and equality, while judgments concern only the parties litigant and therefore may be variant or contradictory without affecting their nature, whenever damages are occasioned by unjust exactions and the standard of justness is definitely fixed in the act itself or in the quasi legislative determination of the commission, an injured party who has had no hand in procuring either the legislation or the quasi legislation is given a cause of action by section 8, and for his damages he may have by virtue of section 9 either a reparation order of the commission or a judgment of a federal District Court. This must be the result because, on the basis that all legislative functions have been completely and explicitly exercised, there would be nothing for the commission to do for an injured shipper except to apply to his particular facts the universal law, and that can be done as well in court without disturbing or obstructing the act's cardinal purposes of uniformity and equality in the legislative subject-matter of rates and practices.

While a different question was involved in Mitchell Coal Co. v. Pennsylvania R. Co., 230 U. S. 247, 33 Sup. Ct. 916, 57 L. Ed. 1472, we believe that the line of reasoning therein employed is supportive of our conclusions.

"For doing an act prohibited by the statute (like departing from a published tariff), the injured party might sue the carrier without previous action by the commission, because the courts could apply the law prohibiting a departure from the tariff to the facts of the case. But where the suit is based upon unreasonable charges or unreasonable practices there is no law fixing what is unreasonable and therefore prohibited. In such cases the whole scope of the statute shows that it was intended that the commission and not the courts should pass upon that administrative question. When such order is made it is as though the law for that particular practice had been fixed, and the courts could then apply that order, not to one case, but to every case—thereby giving every shipper equal rights and preserving uniformity of practice. Section 9 gives the plaintiff the option of going before the commission or the courts for damages occasioned by a violation of the statute. But since the commission is charged with the duty of determining whether the practice was so unreasonable as to be a violation of the law, the plaintiff must, as a condition of his right to succeed, produce an order from the commission that the practice or the rate was thus unreasonable and therefore illegal and prohibited. * * * The courts can then apply that law, and, measuring what

has been charged by what the commission declares should have been charged, can award damages to the extent of the injuries occasioned by the payment of the allowance found to have been unreasonable and unlawful."

According to the complaint now before us, the carrier had published in its tariff sheet certain through rates (less than the sum of the local rates) as the just and full compensation for its services in transporting poles from points of origin to the concentration point and thence to ultimate destinations; the carrier in the same tariff sheet and in respect to the same transportation service had promulgated a discrimination that had nothing to do with the cost or value of the carriage but was based upon the wording of the bill of lading; and the commission, after a full hearing of the matter, had determined that this discrimination was wholly unjust. This action of the commission made the statutory standard of just rates as definite and positive as if Congress itself in the act had forbidden this particular discrimination and had commanded that the through rates should be applied to all such shipments. That is, all legislative and quasi legislative functions necessary to compete operativeness of the act having been exercised, it was open to any shipper who was given a cause of action by section 8 to present his particular facts either to the commission or to a federal District Court under section 9.

The judgment is reversed, with the direction to overrule the demurrer and to proceed further not inconsistently with this opinion.

Ex parte JIM HONG.

(Circuit Court of Appeals, Ninth Circuit. February 2, 1914.)

No. 2278.

1. HABEAS CORPUS (§ 1*)—SCOPE OF WRIT—REVIEW.

The office of a writ of habeas corpus is confined to an inquiry as to the cause of the commitment, and, if it is ascertained that the party invoking it is held under a process of a court or tribunal having jurisdiction of his person and of the subject-matter of the charge involved, the inquiry under the writ is at an end and it must be dismissed.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 1, 3; Dec. Dig. § 1.*]

2. HABEAS CORPUS (§ 4*)—REMEDY BY APPEAL—EXCLUSION OF CHINESE.

Since by Chinese Exclusion Act (Act Sept. 13, 1888, c. 1015, § 13, 25 Stat. 476 [U. S. Comp. St. 1901, p. 1317]) jurisdiction of exclusion proceedings is expressly conferred on United States commissioners with the right to appeal to the District Court as provided by Judicial Code (U. S. Comp. St. Supp. 1911, p. 140) § 25, a Chinese person arrested in exclusion proceedings before a United States commissioner is not entitled to discharge on habeas corpus on the ground that he possessed a certificate of residence as a merchant entitling him to remain in the United States; such question being one for determination before the commissioner and on appeal from his decision and not on habeas corpus.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 4; Dec. Dig. § 4.*]

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

3. ALIENS (§ 32*)—CHINESE DEPORTATION PROCEEDINGS—COMPLAINT.
Where a Chinese alien had a certificate of residence entitling him to remain in the United States, it was not essential, to confer jurisdiction on the United States commissioner in proceedings to deport such alien, that the complaint aver facts invalidating the certificate, since the existence thereof was a matter of evidence and its effect a matter of law, neither of which were required to be pleaded.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 84, 92, 93–95; Dec. Dig. § 32.*]

4. ALIENS (§ 32*)—CHINESE DEPORTATION PROCEEDINGS—PLEADING.
A charge against a Chinese alien in deportation proceedings alleging his unlawful residence in the United States does not involve a criminal offense, and hence the strictness and formality required of criminal pleading is not essential.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 84, 92, 93–95; Dec. Dig. § 32.*

What Chinese persons are excluded from the United States, see note to Wong You v. United States, 104 C. C. A. 538.]

5. ALIENS (§ 32*)—DEPORTATION PROCEEDINGS—PLEADINGS—AMENDMENTS.
Where a United States commissioner has jurisdiction of the subject-matter in Chinese deportation proceedings, he may require amendment of the complaint in order to cure a defect therein.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 84, 92, 93–95; Dec. Dig. § 32.*]

6. COURTS (§ 405*)—CIRCUIT COURT OF APPEALS—HABEAS CORPUS.
Where, on habeas corpus to secure the release of a Chinese person in deportation proceedings, the government claimed that the trial court exceeded its jurisdiction in the extent of the inquiry and in the judgment rendered in discharging petitioner and in that the court did not have jurisdiction to inquire into the cause of petitioner's detention, the appeal was regularly taken to the Circuit Court of Appeals and not to the Supreme Court under Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1157 [U. S. Comp. St. Supp. 1911, p. 228]) § 238.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1097–1099, 1101, 1103; Dec. Dig. § 405.*]

Appeal from the District Court of the United States for the District of Arizona; Richard E. Sloan, Judge.

Application by Jim Hong for a writ of habeas corpus. From a judgment granting the writ and discharging petitioner, the government appeals. Motion to dismiss appeal denied, and judgment reversed, with directions to remand petitioner to the custody of the marshal and to dismiss the writ.

This is an appeal from an order of the court below, on habeas corpus, discharging the appellee from the custody of the United States marshal. The facts, so far as we deem them material, are these:

Appellee was arrested by the United States marshal in Phœnix, Ariz., on a warrant issued by a United States commissioner at that place, based upon a complaint sworn to by the Assistant United States Attorney, charging him with being a Chinese person not lawfully entitled to be or remain within the United States, and asking that he be arrested and dealt with in accordance with law. Being taken before the commissioner, he was admitted to bail, and the hearing on the complaint was set for a future date. Before the day set for the hearing, and while the matter was still pending unheard before the commissioner, appellee sued out the writ of habeas corpus before the District Court, setting forth in his petition the cause of his arrest, and attaching thereto the complaint and warrant under which he was held, but alleging "that

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

the said complaint and the said warrant are fatally defective in that it appears from the face thereof that neither said complaint nor said warrant state any facts sufficient to constitute the offense of being unlawfully within the United States, nor are any facts stated from which it can appear that your petitioner is a person who by reason of any act or omission is a person unlawfully within the United States"; alleging that at the time of his arrest he had been a resident of the United States for many years and then held a certificate of residence entitling him to remain therein, and "that he still has and maintains his status in this country under and by virtue of his said certificate as a merchant, and that in consequence thereof neither this court nor the commissioner before whom there is now pending the application of the United States to deport and remove your petitioner from the United States have jurisdiction in the premises"; that he is "now restrained and deprived of his liberty without due process of law, in violation of the 'due process' clause of the Constitution of the United States"; and praying his discharge.

The return of the marshal, aside from setting up certain matters as to the custody of the appellee at the time of the service of the writ, which we do not regard as material to our inquiry, and admitting the cause of his detention to be based upon the complaint and warrant as set out in the petition, is in the nature of a demurrer to the sufficiency of the grounds alleged for a discharge, in substance, that the proceeding in which appellee was arrested and detained was still within the exclusive jurisdiction of the United States commissioner and yet unheard, and that it was not competent for the District Court or the judge on habeas corpus to inquire into such matter further than to determine the jurisdiction of the commissioner; and asking that the petitioner be remanded and the writ dismissed.

To this return the appellee interposed a demurrer, as stating no sufficient cause for his detention, and the court below, adopting that view, granted a motion of appellant's counsel for what is termed in the record a "judgment on the pleadings," and entered a final order wherein it is found and recited that appellee was at all times since the issuance of his certificate of residence, and is now, "a person lawfully within the United States," that he is unlawfully restrained of his liberty, and ordering and adjuding that he be discharged. This order constitutes the judgment appealed from.

J. E. Morrison, U. S. Atty., of Bisbee, Ariz., and O. T. Richey, Asst. U. S. Atty., of Phœnix, Ariz., for appellant.

Edward Kent and William M. Seabury, both of Phœnix, Ariz., for appellee.

Before GILBERT and ROSS, Circuit Judges, and VAN FLEET, District Judge.

VAN FLEET, District Judge (after stating the facts as above). [1] It is apparent from the record that the court below proceeded upon the theory that the inquiry under the writ of habeas corpus involved the merits of the proceeding pending before the United States commissioner, to the extent at least of ascertaining and determining as to the right of the appellee under the certificate held by him to remain in the United States, and that this theory actuated the judgment entered. But if the commissioner had acquired jurisdiction in the proceeding, this view of the learned judge involved manifest error. No question is better settled in the federal courts than that of the proper functions of the writ of habeas corpus and the limitations of the inquiry that may be had under its authority. As far back as Ex parte Tobias Watkins, 3 Pet. 193, 7 L. Ed. 650, the office of this writ was held to be confined to an inquiry into the cause of the commitment; and, if it be ascertained that the party invoking it is held under process of a court

or tribunal having jurisdiction of his person and of the subject-matter of the charge involved, the inquiry under the writ is at an end and it must be dismissed. In other words, it extends only to an inquiry as to the jurisdiction of the inferior tribunal, and can in no case subserve the purpose of an appeal or writ of error to review the merits of the proceedings in which the commitment is had. These principles have since been applied, reiterated, and amplified in cases from both the Supeme Court and the inferior federal courts too numerous to mention, and in variety covering nearly every conceivable character of instance. It will be sufficient to cite some of the leading cases from the Supreme Court. Ex parte Carll, 106 U. S. 521, 1 Sup. Ct. 535, 27 L. Ed. 288; Ex parte Mason, 105 U. S. 696, 26 L. Ed. 1213; Ex parte Wilson, 114 U. S. 417, 5 Sup. Ct. 935, 29 L. Ed. 89; Ex parte Harding, 120 U. S. 782, 7 Sup. Ct. 780, 30 L. Ed. 824; Horner v. United States, 143 U. S. 570, 12 Sup. Ct. 522, 36 L. Ed. 266; United States v. Pridgeon, 153 U. S. 48, 14 Sup. Ct. 746, 38 L. Ed. 631; Terlinden v. Ames, 184 U. S. 270, 22 Sup. Ct. 484, 46 L. Ed. 534.

The doctrine is aptly summed up in Horner v. United States, supra, where the petitioner at the time of presenting his petition had been committed by a United States commissioner to await the action of the grand jury on a charge of illegally conducting a lottery; his contention being that the charge involved no offense under the statute. The Supreme Court, in affirming the judgment of the court below dismissing the writ, say, in response to the contention:

"But we are of opinion that that question ought not to be reviewed by us on this appeal. The point raised is that the Austrian bond scheme was not a lottery. That is a question properly triable by the court in which an indictment may be found against Horner. He is now held to await the action of a grand jury. *His case is in the regular course of criminal adjudication.* It is not proper for this court, on this appeal, nor was it proper for the Circuit Court, on the writ of habeas corpus, to determine the question as to whether the scheme was a lottery. In re Cortes, 136 U. S. 330 [10 Sup. Ct. 1031, 34 L. Ed. 464]; Stevens v. Fuller, 136 U. S. 468 [10 Sup. Ct. 911, 34 L. Ed. 461]. The commissioner had jurisdiction of the subject-matter involved and of the person of Horner, and the grand jury would have like jurisdiction. * * * Whether the scheme was a lottery is a question to be determined in the administration of the jurisdiction. It is not for this court to determine that question in advance. The principle is the same as that involved in Re Fassett, 142 U. S. 479, 483, 484 [12 Sup. Ct. 295, 35 L. Ed. 1087]. The case presents for the determination of the court in which the indictment may be found the question as to whether the scheme was a lottery, and it is not for any court to determine it in advance, on habeas corpus. *If an inferior court or magistrate of the United States has jurisdiction, a superior court of the United States will not interfere by habeas corpus.*" (Italics volunteered.)

[2] That the commissioner in this instance had jurisdiction to try the appellee on the charge made against him, no serious question may be entertained. Section 13 of the Chinese Exclusion Act, so called (25 Stat. 476), expressly confers that jurisdiction. It provides:

"That any Chinese person, or person of Chinese descent, found unlawfully in the United States, or its territories, may be arrested upon a warrant issued upon a complaint, under oath, filed by any party on behalf of the United States, by any justice, judge, or commissioner of any United States court, returnable before any justice, judge, or commissioner of a United States court, or before any United States court, and when convicted, upon a hearing, and

found and adjudged to be one not lawfully entitled to be or remain in the United States, such person shall be removed from the United States to the country from whence he came. But any such Chinese person convicted before a commissioner of a United States Court may, within ten days from such conviction, appeal to the judge of the District Court for the District."

(Such appeal now lies to the District Court. Section 25, c. 2, Judicial Code [U. S. Comp. St. Supp. 1911, p. 140]).

This provision has been modified by the Act of March 3, 1901, c. 845, 31 Stat. 1093 (U. S. Comp. St. 1901, p. 1327), as to the persons competent to make complaint; but an Assistant United States Attorney is one of these.

Under these provisions the jurisdiction of the United States commissioner in the trial of such cases in the first instance is as ample and complete in all respects as that of a justice, judge, or court before whom the warrant might have been returned, no distinction being made in that respect (Chin Bak Kan v. United States, 186 U. S. 193, 199, 22 Sup. Ct. 891, 46 L. Ed. 1121), the statute providing, however, that, where the trial is before a commissioner, an appeal shall lie as indicated. Indeed, the general jurisdiction of the commissioner under the statute is conceded by appellee. Counsel say in their brief:

"Undoubtedly the return showed that the commissioner had a general jurisdiction over the charge that the prisoner was illegally here, but it failed utterly to disclose the existence of a particular jurisdiction to adjudge the presence of the accused in this country to be illegal in contradiction of an unrevoked certificate of residence. It could not have disclosed such a particular jurisdiction because there was no claim nor assertion that the prisoner had done anything to forfeit his right to his certificate."

In other words, the attitude of appellee, which was sustained by the court, was that the return was insufficient to show jurisdiction in this instance because it failed to plead facts avoiding the effect of the certificate. But, obviously, the question whether the facts would show the present legal existence of such certificate, and the subsistence of appellee's rights thereunder, was a question involved in the very inquiry before the commissioner. In re See Ho How (D. C.) 101 Fed. 115, 117; Jew Sing v. United States (D. C.) 97 Fed. 582. However conclusive such a certificate may be when its existence and effect are competently ascertained (In re See Ho How, supra; Lew Quen Wo v. United States, 184 Fed. 685, 106 C. C. A. 639), it is none the less a proper subject of inquiry before a commissioner on such a charge to ascertain, first, whether the certificate claimed is genuine, and, if so, whether the right to its protection has been forfeited by failing to observe the requirements of the statute. Its mere physical existence in his possession does not conclude inquiry into and a determination of the question whether, under the circumstances appearing, it is still a valid protection to the holder. Liu Hop Fong v. United States, 209 U. S. 453, 463, 28 Sup. Ct. 576, 52 L. Ed. 888. The statement of such facts in the return was therefore wholly unnecessary to show legal cause to hold the appellee, and their averment would have subserved no purpose to enlarge the limits of the court's inquiry on habeas corpus, however proper for review on appeal from the commissioner. The case of United States v. Jung Ah Lung, 124 U. S. 621, 8 Sup. Ct. 663,

31 L. Ed. 591, is not in point. It arose before the passage of the Chinese Exclusion Act, and no judicial inquiry was in progress or contemplated, but petitioner was being detained on board ship under an order of the collector denying him the right to land.

[3] Nor was it necessary to aver facts invalidating the certificate in the complaint before the commissioner to confer jurisdiction. The existence of the certificate was a matter of evidence, and its effect a matter of law. Neither was required to be pleaded. The complaint was in the usual form in such cases, and, we think, sufficiently pleaded the ultimate fact involved in the charge. Chin Bak Kan v. United States, supra.

[4] The charge does not involve a criminal offense, and strictness or formality of pleading is not required. Ah How v. United States, 193 U. S. 65, 77, 24 Sup. Ct. 357, 48 L. Ed. 619; Fong Yue Ting v. United States, 149 U. S. 698, 729, 13 Sup. Ct. 1016, 37 L. Ed. 905; Chin Bak Kan v. United States, supra.

[5] Moreover, the commissioner having jurisdiction of the subject-matter, if there was any defect in the complaint it was clearly within his power to require an amended complaint to be filed. Such defects are not jurisdictional.

If the commissioner fail, upon the hearing before him, to give due effect to the certificate, his action may be competently reviewed on appeal (In re See Ho How, supra); but while the proceeding remains within his jurisdiction that question cannot be inquired into under this writ.

We are of opinion therefore that upon the facts disclosed the contention of the United States Attorney should have been sustained and the writ dismissed.

[6] It is sufficiently apparent from what has been said on the merits that the motion to dismiss the appeal, submitted by appellee, must be denied. It proceeds upon the theory that the only question involved is one of jurisdiction of the court below, and under section 238 of the Judicial Code the case should have gone direct to the Supreme Court. This is a misconception. No question is made but that the court below had jurisdiction to inquire into the cause of appellee's detention. The objection is that it exceeded its power in the extent of its inquiry and the judgment rendered. It is not therefore an instance of want of jurisdiction, but one of an excess of it. Ex parte Lange, 85 U. S. (18 Wall.) 163, 21 L. Ed. 872; Ex parte Rowland, 104 U. S. 604, 26 L. Ed. 861.

The motion to dismiss the appeal is denied; and the judgment of the court below is reversed, with directions to remand the appellee to the custody of the marshal and dismiss the writ.

TRUCKEE RIVER GENERAL ELECTRIC CO. v. BENNER.

(Circuit Court of Appeals, Ninth Circuit. February 9, 1914.)

No. 2284.

1. COURTS (§ 347*)—AMENDMENT—FEDERAL COURTS—STATUTES.
Amendment of pleadings in federal courts is governed by Rev. St. § 954 (U. S. Comp. St. 1901, p. 696), and not by the laws of the state under the Conformity Act (Rev. St. § 914 [U. S. Comp. St. 1901, p. 684]).
[Ed. Note.—For other cases, see Courts, Cent. Dig. § 921; Dec. Dig. § 347.*]

2. APPEAL AND ERROR (§ 959*)—PLEADING (§ 236*)—REVIEW—AMENDMENT OF PLEADINGS.
The allowance or refusal of leave to amend pleadings in actions at law is discretionary with the trial court, the exercise of which is not reviewable except in case of gross abuse of discretion.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3825–3831; Dec. Dig. § 959;* Pleading, Cent. Dig. §§ 601, 605; Dec. Dig. § 236.*]

3. PLEADING (§ 248*)—COMPLAINT—AMENDMENT—NEW CAUSE OF ACTION.
In an action for wrongful death from decedent coming in contact with the lining of a mine entry that had become charged with electricity through the negligent maintenance of defendant's wire outside the entry, the court permitted plaintiff to amend so as to allege that for more than four years prior to decedent's death plaintiff, his father, had emancipated him and surrendered to him all rights to his earnings, and that for more than a year decedent had contributed large sums of money to the support of his brothers and sister, and had he lived he would have continued such contributions. *Held*, that such amendments were not objectionable as setting forth a new and different cause of action.
[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 686, 687, 689–706, 708½, 709; Dec. Dig. § 248.*]

4. APPEAL AND ERROR (§ 1004*)—REVIEW—DAMAGES—EXCESSIVENESS.
An objection that the damages allowed were excessive is not reviewable by the Circuit Court of Appeals.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3944–3947; Dec. Dig. § 1004.*]

5. COURTS (§ 366*)—INSTRUCTIONS—CONSTRUCTION OF STATE STATUTE.
Where, in an action for wrongful death under a state statute, the court limited plaintiff's recovery, if any, to the actual pecuniary loss or damage which the beneficiaries had sustained from decedent's death, and the instructions conformed to the construction which had been placed on the statute by the highest court of the state, it was not material that the individual view of the trial court as to the construction of the statute did not coincide with that submitted.
[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 954–957, 960–968; Dec. Dig. § 366.*
State laws as rules of decisions in federal courts, see notes to Wilson v. Perrin, 11 C. C. A. 71; Hill v. Hite, 29 C. C. A. 553.]

In Error to the District Court of the United States for the District of Nevada; Edward S. Farrington, Judge.

Action by A. S. Benner, as administrator of the estate of Clarence J. Benner, deceased, against the Truckee River General Electric Company. Judgment for plaintiff, and defendant brings error. Affirmed.

See, also, 193 Fed. 740.

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

The plaintiff in error was the defendant in an action which was brought by the administrator of the estate of Clarence J. Benner to recover damages on account of the death of his decedent. The parties will be designated herein "plaintiff" and "defendant," as they were in the court below. The defendant was engaged in furnishing electrical power to the Charles Butters Company, for use in that company's mine. Clarence J. Benner was working as a miner in the employment of that company. The defendant maintained a pole line with high tension wires, which crossed three or four feet above an iron-covered passageway leading from the mine to a rock breaker. The poles were held by a guy wire, which, during the month of July, 1909, became loosened, in consequence of which the electric wires were slackened and allowed to fall and rest upon the iron-covered passageway, charging the same with a deadly current of electricity. On August 18, 1909, Clarence Benner came out of the mining claim with others, to eat his lunch, sat down within the passageway, and leaned his head and shoulders against the iron covering thereof, and received a severe charge of electricity, causing his death. The plaintiff alleged negligence of the defendant in carelessly, wantonly, and maliciously permitting the wire to touch the covering of the passageway, and thereby to charge the same with a current of electricity. There was evidence that the defendant was warned of the loosening of the guy wire, and of the gradual inclination of the poles in the direction of the passageway, and that they were in danger of touching the same, and that the defendant promised to repair the said line. The deceased was a son of the plaintiff. He was 18 years and 10 months of age, and had never been married. His mother had been dead for several years. The beneficiaries of the cause of action were his three brothers and one sister, to wit, C. E. Benner, 32 years of age, George Benner, 22 years of age, William H. Benner, 20 years of age, and Mrs. Charles Bogle, 25 years of age. The younger two of the brothers and Clarence were residing with their father. The expenses of the home were borne by the three brothers who lived there. Clarence had been working for the Charles Butters Company about 14 or 16 months prior to the time of his death, and had contributed towards the expenses of his father's household between $40 and $50 per month, and there was evidence that he had contributed to his brother William, a minor, when he was out of work or needed money, about $10 or $15 per month, and about $40 or $50 per year for clothing, and that he contributed to his sister Mrs. Bogle about $15 a month in money each month and between $18 and $28 each month for clothing. Clarence was healthy and robust, and worked as a miner, receiving $4 a day. The jury returned a verdict for the plaintiff of $7,000, and judgment was rendered thereon.

Cheney, Downer, Price & Hawkins, of Reno, Nev., for plaintiff in error.

Mack & Green and A. A. Heer, all of Reno, Nev., for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). [1] It is assigned as error that, after the close of the testimony, the court permitted the plaintiff to amend his complaint so as to allege: First, that for more than four years prior to the death of Clarence the plaintiff, as his father, by his acts and conduct had emancipated said Clarence and surrendered to him all rights to his earnings; second, that for more than one year prior to his death Clarence had contributed large sums of money to the support of his said sister and brothers in the sum of at least $50 per month, and that if he had lived he would have continued said contributions. It is said that to allow these amendments was error for the reasons: First, that no affidavit was filed showing good cause therefor as required by section 68 of the Civil

Practice Act of Nevada (Comp. Laws, § 3163); and, second, that the amendment stated a new cause of action. But the trial court was not bound to follow the provision of the Civil Practice Act of Nevada. Although section 914 of the Revised Statutes (U. S. Comp. St. 1901, p. 684) requires the District Courts of the United States in matters of practice, pleadings, and forms, in actions at law, to conform as nearly as may be to the state practice, section 954 of the Revised Statutes (U. S. Comp. St. 1901, p. 696) contains the legislation of Congress on the subject of amendments to pleadings in the federal courts, and is paramount to the local state statute.

[2] It has uniformly been held in those courts that the allowance or refusal of leave to amend pleadings in actions at law is discretionary with the trial court, and that its action is not reviewable except in case of gross abuse of discretion. Chapman v. Barney, 129 U. S. 677, 9 Sup. Ct. 426, 32 L. Ed. 800; Gormley v. Bunyan, 138 U. S. 623, 11 Sup. Ct. 453, 34 L. Ed. 1086; Montana Mining Co. v. St. Louis Min. & Mill Co., 78 C. C. A. 33, 147 Fed. 897; Lange v. Union Pac. R. Co., 62 C. C. A. 48, 126 Fed. 338; Dunn v. Mayo Mills, 67 C. C. A. 450, 134 Fed. 804.

[3] Nor did the amendments which were allowed set forth a new or different cause of action. Neither of the allegations contained in the amendments was an essential element to the statement of the cause of action, although their tendency may have been to enlarge the grounds for the recovery of damages. It is to be observed in this connection that the amendments were not made at the close of the testimony on the trial which is reviewed here, but at the close of the testimony on a former trial of the cause, and that the defendant had answered the same and thereafter had ample time in which to gather testimony concerning the new allegations.

[4] The facts in the case, as well as the argument of counsel, suggest the injustice of permitting the recovery of $7,000 in favor of three able-bodied young men, capable of supporting themselves, and one married sister who is not shown to be in need, for the death of a brother nearly 19 years of age, who was under no obligation to contribute to their support, and probably would soon have married and ceased his contributions. But this court has nothing to do with the question whether the damages were excessive. The jury having fixed the measure of damages, and the court below having refused to set aside their verdict, the only questions for our consideration are whether or not there was error in the admission or exclusion of evidence or in the giving or denying of instructions to the jury.

[5] The statute of Nevada, providing for the recovery of damages for the death of a person caused by the wrongful act or neglect of another, enacts that, in case there be no lineal descendants or surviving husband or wife, the amount recovered shall be distributed to a surviving brother or sister or brothers or sisters if there be any, and declares that:

"The jury in every such action may give such damages, pecuniary and exemplary, as they shall deem fair and just, and may take into consideration the pecuniary injury resulting from such death to the kindred as herein named."

The Supreme Court of Nevada, in Christensen v. Floriston P. Co., 29 Nev. 552, 92 Pac. 210, in an action brought to recover damages for the death of a laborer for the benefit of his parents, construed the statute, and held that the amount of the damages must be largely determined upon the questions of relationship and dependency existing between the beneficiary and the decedent, at the time of his death. In that case the jury had awarded a verdict of $10,000. The court said:

"Whether or not $10,000 is a large or a small damage to pay for a human life depends entirely upon the facts of a given case. In one sense no amount of money might compensate for a human life, but the law only looks at the question from the point of actual monetary damage sustained by the person for whose benefit the action is brought, and not that inflicted upon the decedent. * * * We think it may be further said that this pecuniary loss may be either a loss arising from the deprivation of something to which such heirs would have been legally entitled if the person had lived, or a loss arising from a deprivation of benefits which, from all the circumstances of the particular case, it could be reasonably expected such heirs would have received from the deceased had his life not been taken, although the obligation resting on him to bestow such benefits on them may have been a moral obligation only."

And the court in that case in view of the evidence reduced the damages to $3,000.

In the case at bar, the court below, in instructing the jury, told them that they might take into account the amount which it was reasonable to assume the deceased would have contributed to his brothers and sister in money, property, and services had he lived during his and their expectancy of life, and said:

"I further instruct you that, if you find for the plaintiff in this case, then the amount to be fixed by you shall consist only of such pecuniary damages which would be the exact equivalent of the injury, if any, sustained by the brothers and sister of the deceased, as shown by all the evidence in this case, by reason of the death of Clarence Benner. You cannot award the plaintiff in this case exemplary damages by way of punishment or as smart money for defendant's negligence, if any, in causing the death of Clarence Benner," and the court added that the jury were "not to take into consideration any grief or sorrow of the brothers or sister of the deceased, nor any pain or suffering of the deceased caused by any act of negligence of the defendant."

The instructions so given are clearly in harmony with the construction given to the statute of Nevada by the Supreme Court of the state, and guided by those instructions the jury returned its verdict. But counsel for the defendant contend that in ruling upon the motion for a new trial the court expressed a different view of the statute, in saying, after quoting the statute:

"This statute plainly contemplates pecuniary and exemplary damages. Exemplary damages are to be given when the injuries are inflicted willfully and intentionally, or under such circumstances as to be wanton and reckless, and, in awarding damages pecuniary and exemplary, this statute says 'the jury may take into consideration the pecuniary injury resulting from such death to the kindred as herein named.' This would seem to imply pecuniary injury other than that which results to the kindred named, to wit, the value of the life itself, based on the earning power of the deceased and his expectancy or life."

And the court observed that these provisions were not in harmony with the doctrine that the recovery is limited to the actual pecuniary

injury suffered by the kindred named in the statute, nor with the further restricted view that the recovery can be only for the pecuniary injury suffered by that group of kindred in whose behalf the suit is brought. But the court added that the instructions which he had given to the jury were given on the request of the plaintiff, and that whatever his own opinion as to the true interpretation of the statute and the measure of damages recoverable in such cases, he was bound by the instructions given at the request of the plaintiff, and that thereby the amount which could be allowed by the jury was limited to a sum equal to the present value of the money, clothing, and other financial assistance which, had Clarence Benner lived, it is probable he would have given his brothers and sister. In conclusion the court said:

"$7,000 is more than I should have awarded under the instructions, but it is less in my judgment than the pecuniary value of the life of Clarence Benner. However, it is the judgment of the jury, not of the court, as to what is just and fair, which the statute requires."

It is clear from the record of what occurred in the court below that the court in instructing the jury limited the amount that might be recovered to the actual pecuniary loss and damage which the beneficiaries of the suit had sustained from the death of the deceased, and that the instructions conformed to the construction which was placed upon the statute by the highest court of the state, and whatever may have been the individual view of the court as to the true construction of that statute, as indicated in the opinion on the motion for a new trial, it is clear that that view did not affect or even color the instructions which were given to the jury.

Error is assigned to the denial of the defendant's motion for a new trial; the contention being that the well-settled rule, universally recognized in the federal courts, that the denying or granting of a motion for a new trial rests in the discretion of the trial judge, and is not reviewable on writ of error, is not applicable here, for the reason that the action of the court below in denying the motion was influenced by an erroneous construction of the statute, or, in other words, that the court believed the verdict to be excessive but allowed it to stand for the reason that in his opinion the statute allowed a broader ground of recovery than was indicated in the decision of the Supreme Court of Nevada. But the record does not sustain this contention. The remark of the judge that $7,000 was more than he would have awarded under the instructions does not mean that he deemed that sum excessive. It meant no more than to say that, while the minds of reasonable men might differ as to the amount of damages recoverable under the instructions as they were given to the jury, the court's own judgment was that the amount of the verdict should have been less. But the language of the opinion clearly indicates that the court regarded the verdict as having been rendered in accordance with the instructions given, and that the jury were controlled thereby, and it is not fairly deducible from anything said therein that a new trial would have been granted but for the court's own opinion that damages were recoverable on broader grounds than as stated in Christensen v. Floris-

ton P. Co. This is shown by the reference to the Christensen Case, of which the court said:

"If $3,000 was a reasonable amount to be awarded in the Christensen Case, it could not well be said that $7,000 in the Benner Case was so excessive that it must have been rendered under the influence of passion or prejudice."

There are other minor assignments of error which are not of sufficient merit to require any extended discussion. It is sufficient to say that we find no error in any of them.

The judgment is affirmed.

BEATON v. SEABOARD PORTLAND CEMENT CO. et al. FIDELITY TRUST CO. v. SAME. Appeal of NORTON.

(Circuit Court of Appeals, Second Circuit. January 13, 1914.)

No. 43.

1. CORPORATIONS (§ 560*) — RECEIVERSHIPS — INTERVENTION — MOTIONS — EVIDENCE.

Where, in a receivership suit against a corporation, a bondholder obtained an order to show cause why he should not be permitted to intervene and move to reopen an order confirming a sale of the corporation's property and to set such sale aside, the motion was to be decided upon the affidavits of both parties as well as upon anything relevant in the record of the cause, and the moving party's affidavits were not to be taken as true.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2253–2260, 2262; Dec. Dig. § 560.*]

2. CORPORATIONS (§ 560*)—RECEIVERSHIPS—POWERS OF RECEIVER.

The District Court had power to authorize the receiver of a corporation to borrow money with which to buy a mortgage on the corporation's property prior to a corporate mortgage securing the bonds of the corporation, in order that the sale of the property might be had in that court instead of the state court, and the receiver was bound to hold such mortgage as security for the lenders of such borrowed money until they were repaid.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2253–2260, 2262; Dec. Dig. § 560.*]

3. CORPORATIONS (§ 573*) — REORGANIZATION — SALE OF PROPERTY — SETTING ASIDE.

N., the holder of a bond for $1,000 of a corporation having outstanding bonds amounting to more than $1,200,000 and which was in the hands of a receiver, joined a small syndicate of bondholders whose object was to get control, for their own benefit, of a mortgage on the corporation's property prior to a corporate mortgage securing such bonds, and who did purchase such mortgage. Thereafter a reorganization committee acting for all the bondholders and a committee representing such syndicate met and outlined a plan of reorganization for the equal benefit of both parties, involving the turning over of such mortgage to a new reorganization committee. A new reorganization agreement was executed by six of the seven managers of the syndicate. The reorganization committee arranged to borrow and loan to the receiver enough money to purchase such mortgage, and this was approved by the court and the mortgage assigned to the receiver, the syndicate returning to its subscribers the amounts paid by them except 10 per cent. to cover the expenses of the managers. The new reorganization committee issued a series of notices to all bondholders, which

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

N. received, asking contributions if they expected the property to be bought in for their benefit, but N. did not come into any plan for purchasing the property. The bondholders having failed to so contribute, a new plan was adopted for buying the property for the equal benefit of all bondholders who should come into the plan, and a copy of this plan was sent to every bondholder, including N., and the property was thereafter purchased by the parties to such plan. The sale was confirmed without objection after notice to the bondholders. The corporation had spent $700,000 on the property, and it was sold for $150,000; but unless a large sum was expended it had only the value of agricultural land. *Held*, that there was no such fraud, inadequacy of price, or change in the plan of reorganization outlined at the meeting of the reorganization committee and the committee representing the syndicate as entitled N. to have the confirmation of the sale reopened and the sale set aside, though he claimed that he did not understand the various notices sent him asking him to cooperate in the reorganization.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2293–2296; Dec. Dig. § 573.*]

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

Bill by George A. Beaton against the Seaboard Portland Cement Company and others for the appointment of a receiver of such company. From an order denying his motion for leave to intervene and move to reopen the order confirming the sale of the company's property and to set such sale aside, Joseph A. Norton appeals. Affirmed.

The Seaboard Portland Cement Company having become financially embarrassed, a suit was brought against it by complainant by the usual creditors' bill. Defendant admitted insolvency and the other allegations of the complaint. A receiver was appointed. The litigation and receivership proceeded through the usual stages. Reorganization committees were formed. On May 25, 1912, a final decree was entered directing that the property be sold under foreclosure of two mortgages. It was so sold, and after a hearing upon notice to bondholders such sale was confirmed July 24, 1912, and the receiver distributed the proceeds of sale on July 26th and 30th. On August 29, 1912, Norton, the holder of a $1,000 bond, applied for leave to intervene and reopen the order of confirmation and to set aside the sale. He had notice of the motion to confirm. From an order denying Norton's motion, this appeal is taken.

The opinion of Ward, Circuit Judge, in the District Court, refusing leave to intervene, was as follows:

Joseph A. Norton, the owner of one $1,000 bond of the Seaboard Portland Cement Company, obtained this order to show cause why he should not be permitted to intervene as a party to the end that he might move to reopen the order confirming the sale of the company's property and that the sale be set aside. The motion has been pressed with such ardor that I will give it full consideration.

An outline of the proceedings is as follows:

March 8, 1910, a bill was filed asking for the appointment of a receiver of the Seaboard Portland Cement Company, the allegations of which were admitted by the company's answer, and William F. Allen was appointed temporary receiver. The company was then unable to meet its current obligations and had an unfinished plant subject to a corporate mortgage securing bonds to the amount of $2,000,000 and subject also to a prior purchase money mortgage of $87,500.

April 15th, a bondholders' protective committee was formed, which committee appointed five persons to act as a reorganization committee.

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

May 26th, a reorganization agreement was prepared between all holders of bonds and stock of the Seaboard Portland Cement Company who should come in as parties of the first part, the Reorganization Committee as party of the second part and the Fidelity Trust Company, as depositary, party of the third part. All bondholders were invited to join this plan on equal terms.

June 15th, Norton deposited his bond under this agreement with the Fidelity Trust Company.

July 11th, the court permitted the owners of the Bonneville mortgage of $87,500 which was a prior lien upon nearly all of the real estate covered by the corporate mortgage, to foreclose in the state court.

July 20th, Norton joined a small syndicate of bondholders called the New England Syndicate, whose object was to get control of the Bonneville mortgage for their own benefit solely. The difference between the purposes of the Bondholders' Committee and this New England Syndicate was that the former was for the benefit of all bondholders who would come in, whereas the latter was for the benefit of the subscribers to the syndicate only.

September 24th, the New England Syndicate purchased the Bonneville mortgage.

From this time there began a contest between the New England Syndicate, representing bonds something like $200,000 in amount, and the Bondholders' Committee, representing more than $1,000,000 of bonds.

November 14th, the Bondholders' Committee, finding the Reorganization Committee to be without the necessary funds, circularized all bondholders, inviting them to contribute to the expenses of reorganization.

January 31, 1911, the Reorganization Committee and the Executive Committee of the New England Syndicate met at the Hotel Astor and outlined a plan of reorganization for the equal benefit of both parties. This involved, among other things, the turning over of the Bonneville mortgage by the New England Syndicate to a new reorganization committee.

The preparation of the new agreement was intrusted to Messrs. Noble & Hardy representing the old Reorganization Committee, and Mr. Dewey, representing the New England Syndicate. Norton was present at this meeting.

March 29th, after long negotiations the original reorganization agreement was modified and executed by six of the seven living managers of the New England Syndicate.

The Reorganization Committee arranged to borrow of the Fidelity Trust Company and loan to the receiver enough money to enable him to purchase the Bonneville mortgage. The court approved this as all the bondholders were acting together and the sale of the premises in this way could be had in this court; moreover, it was evident that none but the bondholders would be likely to buy the property.

April 20, William F. Allen was made permanent receiver.

Before this time the court had declined to make the receivership permanent because there had been no real assurance of reorganization.

June 2, the New England Syndicate trustees assigned the Bonneville mortgage to Allen, Receiver.

June 15, they returned to the subscribers to the New England Syndicate, including Norton, ninety per cent. of the amounts paid on their subscriptions, the remaining ten per cent. (which was to cover the expenses of the managers) they said they hoped to get from the Reorganization Committee and forward later.

The new Reorganization Committee was then without the funds necessary to meet its obligations or to enable it to bid at the sale of the property. Accordingly it and the Bondholders' Committee issued a series of notices to all bondholders, which Norton admits he received, explaining the situation and representing the absolute necessity that the bondholders should contribute if they expected the property to be bought in for their benefit. These were dated September 1, 1911, June 7, and 14, 1912. All efforts to carry out any of the proposed agreements having fallen down because of the failure of the bondholders to contribute and the sale of the property having been fixed for June 28, 1912, a meeting of bondholders was held June 20th, at which a new syndicate plan was adopted for buying the property for the equal benefit of all bondholders who should come into the plan. A copy of this plan was sent to

every bondholder, including Norton, with a letter saying, "This supersedes all prior plans proposed which it has been found impracticable to carry out."

In addition to these notices which Norton admits he received, there is proof that a circular of the Bondholders' Committee dated April 4, 1911, was mailed to him, which he does not specifically deny having received. This circular explained in detail exactly what the new Reorganization Committee and the managers of the New England Syndicate proposed to do about the Bonneville mortgage. It also invited the deposit of bonds and stock and a subscription for expenses.

June 28th, the mortgaged premises were sold for $150,000 to the new syndicate of bondholders by a special master appointed by this court.

July 8th, a motion to confirm came on for hearing which was adjourned so that notice might be sent to all bondholders to appear and make objection, if any they had.

July 18th, no one appearing objected to confirmation.

July 24th, the sale was confirmed by the court.

The receiver thereupon distributed the proceeds of sale except a sum of $7,425 reserved for special purposes, of which $6,389.92 remained in his hands when

August 30th, Norton obtained this order to show cause.

[1] Counsel for Norton contends that I must take as true for the purposes of this motion all allegations of fact contained in his affidavits. This is an error. The subject under consideration is an order to show cause and I must decide it on the affidavits of both parties as well as upon anything relevant in the record of the cause.

[2] Next he says that the court was without power to authorize the receiver to borrow money to buy the Bonneville mortgage. He likens this order to an issue of receiver's certificates displacing existing liens in the case of a private corporation. There is no similarity whatever between the two cases. The order the court made displaced no existing lien and created no new one. It was obviously important to protect the corporate mortgage by getting control of the prior lien mortgage. In this way the sale of the premises could be removed from the state court and had in this court. All bondholders were cooperating harmoniously and the order made was for the benefit of every one concerned. Of course, the receiver was bound to hold the mortgage as security for the lenders of the money he borrowed to buy it, until they were repaid.

[3] Finally it is urged that, even if inadequacy of price is not enough to vacate the sale, it will, if accompanied even by a little fraud, be sufficient ground for doing so. But I do not see any fraud. The New England Syndicate agreement, while contemplating foreclosure for the benefit of the syndicate, was made for the protection of the subscribers, and the trustees were authorized to use the mortgage in any way for that purpose. Every one at the meeting at the Hotel Astor, including Norton, saw the advisability of the bondholders acting together and using the Bonneville mortgage for the common benefit. I think it was within the power of the trustees to assign the mortgage. At all events, they clearly acted without fraud.

With respect to inadequacy of price, a public sale properly advertised and fairly conducted, as this one was, is perhaps the best possible test of value. It may be that the Seaboard Company had spent $700,000 at Alsen, but the plant was uncompleted and unless it was finished and in operation had only the value of agricultural land. A large sum of money was needed to complete it, and then its value would depend on whether it proved to be a profit making operation. All the bondholders, including Norton, had notice of sale and an opportunity to object to confirmation, but none of them made any objection.

Substantially the whole purchase price having been distributed, Norton, as owner of one bond for $1,000, asks to have all that has taken place in the last three years undone because the new reorganization agreement differs in some particulars from the plan outlined at the Hotel Astor meeting, of which differences he had no notice. It was plainly contemplated at that meeting that modifications would be made and I think the modifications made entirely reasonable and in furtherance of the object of the meeting.

Norton's real grievance is that, not having contributed one penny to save the property or taken the trouble (to adopt his own account) to understand the notices sent him, he finds his bond almost worthless because he did not come into any plan for purchasing the property. I cannot accept the excuse, if it is an excuse, that he did not understand the notices he received. They were perfectly inconsistent with the foreclosure of the Bonneville mortgage by the trustees of the New England Syndicate for the sole benefit of that syndicate.

It is also impossible to believe that knowledge of the modifications of the plan outlined at the Hotel Astor meeting would have caused him the least disquietude.

Judicial sales would be of very little value if they were to be vacated for such reasons as given in this case. I think the application entirely without merit, and the motion is denied.

Charles L. Withrow, of New York City, and Spotswood D. Bowers, of Bridgeport, Conn., for appellant Norton.

Morris & Plante, of New York City (Guthrie B. Plante, of New York City, of counsel), for Allen.

Orlando P. Metcalf, of New York City, for Fidelity Trust Co.

Herbert Noble and Charles J. Hardy, both of New York City, for Purchasing Syndicate.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

PER CURIAM. We entirely concur with the reasoning by which Judge Ward reached the conclusion that this bondholder's application should be denied. The order is affirmed, with costs.

In re AMERICAN ELECTRIC TELEPHONE CO.

GRANT v. BURNS.

(Circuit Court of Appeals, Seventh Circuit. January 6, 1914.)

No. 2003.

BANKRUPTCY (§ 157*)—DIVIDENDS—GARNISHMENT OF TRUSTEE.

Under Bankr. Act July 1, 1898, c. 541, § 47, cl. 2, 30 Stat. 557 (U. S. Comp. St. 1901, p. 3438), requiring a trustee to close the estates as expeditiously as is compatible with the best interests of the parties in interest, and clause 9 directing the trustee to pay dividends within 10 days after they are declared by the referee, the bankruptcy court, in the absence of statutory authority, has no jurisdiction to permit the garnishment of a declared dividend, especially as against the rights of a creditor's assignee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 237, 238; Dec. Dig. § 157.*]

Original Petition to Review and Revise in Matter of Law the Order of the District Court of the United States for the Eastern Division of the Northern District of Illinois; George A. Carpenter, Judge.

In the matter of bankruptcy proceeding of the American Electric Telephone Company. On petition of George P. Grant, Jr., to review and revise in matter of law certain orders of the District Court of the Northern District of Illinois, etc., sustaining a garnishment of the trustee in bankruptcy for the benefit of Peter C. Burns, of dividends

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

payable by the trustee to Jesse P. Lyman and assigned to petitioner. Petition sustained, and motion to dismiss granted.

On February 9, 1911, one Jesse P. Lyman filed his claim against said bankrupt's estate amounting, with interest calculated to January 1, 1911, to $72,307.50, which was in due course allowed. On June 19, 1911, Lyman duly assigned his said claim to George P. Grant, Jr. On April 1, 1912, Lyman was advised of the filing of the assignment, with the information that unless objections were presented within ten days Grant would be subrogated to his rights in said claim. No objection was filed. On May 14, 1912, an order of distribution was declared of the bankrupt estate, being a first and final dividend of 13.98 per cent, whereby the court found that Grant was entitled to receive a dividend of $10,108.63 upon his claim. The trustee thereupon and on May 16, 1912, proceeded to draw his check in Grant's favor for that sum, but did not deliver the check to Grant because one Peter C. Burns on May 18, 1912, filed in the District Court his petition setting out that Lyman was a resident of Massachusetts; that he was indebted to petitioner in a sum in excess of $35,000; that he had no property in Illinois; that he had instituted attachment proceedings in the state court, and now prayed the court for leave to serve the trustee as garnishee. The court, without notice to Grant, granted such leave upon petitioner's complying with the terms provided in the statutes of Illinois. Burns summoned the trustee and Lyman as garnishees, and afterward made Grant a party to the state court suit, claiming that the assignment was without good and sufficient consideration; that it was invalid and illegal and made for the purpose of hindering and delaying him (Burns) in the collection of his claim against Lyman. Both Lyman and Grant appeared in the attachment proceeding on June 17, 1912, and caused the attachment suit to be removed to the District Court. On October 16, 1912, Grant filed a written motion in the District Court asking the court to vacate its order of May 18, 1912, granting leave to serve the trustee as garnishee, having previously and on April 7, 1912, moved the court to have the said dividend paid to him (Grant). Thereupon, and on September 28, 1912, Grant filed his interplea setting up the assignment by Lyman to him and claiming to be entitled to the dividend. Burns filed an answer denying the sufficiency of the alleged assignment to Grant. On April 7, 1913, the court denied Grant's motions to vacate its order of May 18, 1912, and to order the fund distributed to him (Grant) to which orders denying said motions Grant duly excepted. Thereupon this petition to revise and review said judgment, as provided in paragraph 24b of the act of 1898, was filed. The petitioner, Grant, it is claimed by the respondent, having erroneously failed to file the answer of Burns and certain evidence heard by the District Court on the hearing of the motions, the same were filed herein by respondent. These the petitioner moves this court to strike from the files. Petitioner seeks to have the several orders of the District Court revised and reviewed in matter of law, upon the grounds:

(1) That it was error on the part of the District Court by its order of May 18, 1912, to permit the trustee in bankruptcy to be garnisheed in an independent proceeding, in a state court, having no relation to the bankruptcy proceedings with reference to funds held by him for distribution to creditors, and thereafter to deny petitioner's motion to vacate the order of May 18, 1912.

(2) That such order was made in a proceeding to which petitioner was not a party and of which he was not advised at the time it was entered.

The motion to strike out the answer of Burns and certain other matters is based upon the ground that they are irrelevant and immaterial, because Grant's rights herein in question were fixed as of the date of the order permitting the garnishment on May 18, 1912, and because the matters here presented involve only questions of law.

Sears, Meagher & Whitney, of Chicago, Ill. (N. C. Sears, J. F. Meagher, and J. J. Guinan, all of Chicago, Ill., of counsel), for petitioner.

William B. Jarvis, of Chicago, Ill., for respondent.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

KOHLSAAT, Circuit Judge (after stating the facts as above). The main question here presented is whether or not it was error for the District Court to permit the introduction into this bankruptcy proceeding of an independent and entirely irrelevant matter. For respondent it is claimed that by analogy the law and practice relative to permitting suits against receivers is applicable to trustees in bankruptcy. If this be so, then the District Court had the power, in its legal discretion, to permit the garnishment of the trustee. Undoubtedly the bankruptcy court has power to permit suit against its trustee or receiver with reference to liens upon or title to specific property claimed by the trustee. This, however, is not such a case. Here the respondent sought to create a lien. The effect is to inject into the bankruptcy proceedings a suit to enforce payment of a claim against a creditor of the bankrupt, a matter in which the trustee was not concerned and one neither covered nor contemplated by the bankruptcy act. Clause 2 of section 47 of the Act July 1, 1898, c. 541, 30 Stat. 557 (U. S. Comp. St. 1901, p. 3438), requires the trustee to "close up the estate as expeditiously as is compatible with the best interests of the parties in interest." Clause 9 of said section directs the trustee to "pay dividends within ten days after they are declared by the referee."

It is apparent that any attempt to adjust the rights of a creditor of the bankrupt as against the rights of one seeking to enforce a claim against the creditor's dividend must, when carried out to its logical result, place an additional burden upon the bankruptcy court and work a delay in the settlement of the estate. It is conceivable that garnishment proceedings may be prolonged for years, so that the court may be congested with unfinished business which in no way concerns the bankruptcy cases so remaining undisposed of, thus becoming an independent collection tribunal, whereas it was the purpose of the act, as stated in Wood v. Wilbert, 226 U. S. 384–387, 33 Sup. Ct. 125, 127, 57 L. Ed. 264, "to secure an equality of distribution of the estate of the bankrupt among his creditors." In the present case, the rights of Grant as assignee of Lyman are involved and would have to be adjusted.

As long ago as 1879 it was held (In re Cunningham, Fed. Cas. No. 3,478) that garnishment of a dividend in a bankruptcy cause could not be entertained; that it would work delay; and that the court knew no law or usage which would justify the court in making an order directing the assignee (trustee) to pay the creditor's dividend to the party garnisheeing, as a matter of comity.

In Re Kohlsaat, Fed. Cas. No. 7,918, the court refused to give leave to attach the dividend of a creditor of the bankrupt on the ground that it was "no part of the province of this court to become the stakeholder for parties litigant in a state court." "Whereas, in this case," says the court in Re Hollander (D. C.) 181 Fed. 1020, "the petitioner neither claims title to nor specific lien upon the fund in question, and has not procured the appointment of a receiver, who has succeeded to the creditor's title, the court cannot be asked to suspend or deny the right of the creditor to receive his dividend."

The Circuit Court of Appeals for the Ninth circuit, in Re Argonaut Shoe Co., 187 Fed. 784, 109 C. C. A. 632, held, in a case similar to

the present case, that "the right to garnishee funds in custodia legis must depend upon express statutory authority," and that "the distribution of the assets of the bankrupt, therefore, cannot be stayed or prevented by the process of a state court, the object of which is to withhold a dividend from a creditor entitled thereto for the security of a plaintiff pending litigation."

In the case of In re Kranich, 182 Fed. 849, the District Court, upon a different state of facts from those here obtaining, permitted a garnishment proceeding to be enforced, basing its judgment upon the ground that the only objector had failed to establish his right to the fund, and the fact that a judgment had been rendered in the state court and that the trustee was not opposing the garnishment. The court insisted, however, that the allowance must be accepted as purely ex gratia.

In Re St. Albans Foundry Co., 4 Am. Bankr. Rep. 594, the referee permitted the garnishment of a dividend where the bankrupt had been served as garnishee previous to the bankruptcy proceedings.

Upon principle, however, we are of the opinion and hold that the question involved is not affected by any rule of comity, but is one of right; that it is not within the power of a bankruptcy court, in the absence of statutory authority, to permit the garnishment of a declared dividend, especially where, as in the present case, the rights of an assignee are involved; that the entertainment of an application to withhold distribution is contrary to the language and spirit of the bankruptcy act; that to aid a state court attachment by withholding the payment to the creditor gives entrance to a parasite upon the bankruptcy proceedings which may seriously affect the efficiency of the act and should not be tolerated.

We think it was error on the part of the District Court in the present case to refuse to direct the trustee to deliver the check for the dividend to Grant in accordance with his motion and to permit the same to be held to await the result of the attachment proceedings.

The petition to review and revise is sustained, with direction to the District Court to grant petitioner's motions to vacate the order of May 18, 1912, and direct the check for said dividend to be delivered to the petitioner and make such further order in the premises as may be necessary to fully carry out this order.

MOY GUEY LUM v. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. January 6, 1914.)

No. 2000.

1. ALIENS (§ 32*)—DEPORTATION OF CHINESE—REVIEW OF PROCEEDINGS TO DEPORT.

A commissioner's finding, affirmed by the District Court, that a Chinese person is unlawfully within the United States, is conclusive unless the commissioner and the court arbitrarily ignored the evidence and entered judgment in defiance thereof.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 84, 92, 93–95; Dec. Dig. § 32.*]

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

2. ALIENS (§ 32*)—DEPORTATION OF CHINESE—WEIGHT AND SUFFICIENCY OF EVIDENCE—"SATISFACTORY EVIDENCE."

The statute requiring a Chinese person sought to be deported to establish by affirmative proof to the satisfaction of the judge or commissioner his lawful right to remain in the United States does not invest the judge or the commissioner with arbitrary power, but only requires proof which ordinarily satisfies an unprejudiced mind beyond a reasonable doubt; this constituting "satisfactory evidence."

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 84, 92, 93–95; Dec. Dig. § 32.*

For other definitions, see Words and Phrases, vol. 7, pp. 6335, 6336.]

3. ALIENS (§ 32*)—DEPORTATION OF CHINESE—WEIGHT AND SUFFICIENCY OF EVIDENCE.

In a proceeding to deport a Chinese person, who claimed to be a citizen by reason of his birth in the United States, evidence *held* insufficient to establish his citizenship beyond a reasonable doubt, and hence the finding of the commissioner and District Court that he was not lawfully entitled to remain in the United States would not be disturbed.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 84, 92, 93–95; Dec. Dig. § 32.*

What Chinese persons are excluded from the United States, see note to Wong You v. United States, 104 C. C. A. 538.]

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois; J. Otis Humphrey, Judge.

Proceeding by the United States to deport Moy Guey Lum. An order of deportation was affirmed by the District Court, and defendant appeals. Affirmed.

Appellant, who is a Chinese person, was ordered to be deported by the commissioner. Subsequently the District Court affirmed the order of deportation, which judgment is assigned as error. The cause is before us on appeal from that order.

On the hearing before the commissioner, appellant testified that he was, at the time of his arrest, 20 years of age; that his father, Moy Nie Yin, was then, and for some time previous thereto had been, a merchant in Philadelphia, Pa., and had lived in this country more than twenty years. He further testified on the trial that he was born in Philadelphia; that he returned to the United States in the year 1911; that his mother had died ten years prior to the time of his trial; that he had corresponded with his father, who had returned to Philadelphia; that after his mother's death he had lived with his grandmother; that his father had sent him money from time to time. He further testified that his father had told him not to return to the United States, but that funds had been saved up out of moneys sent by his father sufficient to provide him with transportation and pocket money. According to his account, he feared he would not be admitted to the United States, not having the statutory certificate of residence, and therefore bought a ticket in China for Vera Cruz, Mexico, via Vancouver and Montreal. From Vera Cruz he went to a town in Mexico just across the border line from El Paso, Tex., where he worked two months in a Chinese grocery store. From that town he entered the United States surreptitiously under the tutilage of a Chinaman named Yee, and arrived in Chicago after a two days' trip as a stowaway in a box or baggage car, where he was arrested. In his statement before the Chinese inspector, appellant made a somewhat different statement; in substance, that he had lived over a laundry in Philadelphia for a good many years, "just loafing around," but did not know the street; that he "was little then"; that he did not remember when he went to China or with whom; he was then two or three years old; that since he came back he had been living in the

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

United States in different places—a long time in Philadelphia. When asked if he meant that he "went to China when you were little and returned when two or three years old and have been living here ever since?" he answered, "Yes." He said he left Philadelphia over ten years ago and had been living in San Francisco over ten years, which city he had left over ten days ago; that he did not know the name of the town where he entered the baggage car; that he hid in the baggage car because he had no money to pay car fare; that he was never in Mexico; and that he had no certificate of residence because "I was little then and my father didn't secure me any." On the hearing of the cause, Moy Nie Yin, the alleged father of the appellant, was sworn and testified that he had lived in Philadelphia since he came, with his wife, to the United States, Kwang-hsu 7th, with the exception of a short time, when he stayed in New York to collect accounts; that he was the owner of the Chinese grocery business which he conducted; that the young man, Moy Guey Lum, then on trial, was his son; that appellant was born in Philadelphia Kwang-hsu 17th, where he lived with witness until four years of age, when he was taken to China by his parents; that after six months witness returned to Philadelphia where he had lived substantially ever since; that he had corresponded with his wife and son before the wife died and with appellant thereafter, and sent him money. The witness further testified that appellant had written a letter within the last year stating that he, the son, wished to come to the United States, but that he had written to him that he did not want him to come; that he wanted him to go to school in China, and knew nothing of appellant's coming until he heard he had been arrested in Chicago. On cross-examination, when shown his certificate of residence, which recited that in 1894 he had resided two years in New York, witness denied that such was the case and said the paper was procured by his cousin; that he only stayed in New York while making collections. He further testified that the accused was 20 years old, and that he had no other children. Moy Wing was sworn, and testified that he had known Moy Nie Yin since Kwang-hsu 16th, in Philadelphia; that he knew the boy and had known his mother in her lifetime; that she had borne a son to Moy Nie Yin in Philadelphia (this appellant); that witness worked in that city a few months after the child was born and then came to Chicago; that he afterwards saw Moy Nie Yin here on his way to and on his return from China; that when he went to China his wife and appellant, then about four years old, were with him; that appellant was born while witness was in Philadelphia; and that he had not seen him since he was four years old until the present time. Wong Kong, being sworn, stated that he never had known Moy Nie Yin; that he lived in Portland, Or.; that appellant's father sent $50 to witness with which to procure $100 Mexican money and take it to appellant in China, which he did.

The District Court, on appeal taken to it, affirmed the order of deportation made by the commissioner as above stated.

Benjamin C. Bachrach, of Chicago, Ill., for appellant.

James H. Wilkerson, U. S. Atty., Walter P. Steffen and Lin William Price, Asst. U. S. Attys., and John Byrne, all of Chicago, Ill., for the United States.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

KOHLSAAT, Circuit Judge (after stating the facts as above). In United States v. Wong Kim Ark, 169 U. S. 649, 18 Sup. Ct. 456, 42 L. Ed. 890, the court, after quoting the first clause of the fourteenth amendment to the Constitution reading as follows, viz., "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state in which they reside," says, "and, this being true, the Chinese Exclusion Acts do not apply to him." The defendant in that case was the child of Chinese parents who, at the time of defendant's birth, had a permanent

residence in California and were engaged in commercial pursuits and not in any diplomatic or official capacity. The parents returned to China, but the son remained in California. When about 21 years of age he departed for China on a visit with the intention of returning. The court, on page 705 of 169 U. S., page 478 of 18 Sup. Ct. (42 L. Ed. 890), further says the question there presented was "whether a child born in the United States, of parents of Chinese descent, who, at the time of his birth, are subjects of the Emperor of China, but have a permanent domicile and residence in the United States, and are there carrying on business, and are not employed in any diplomatic or official capacity under the Emperor of China, becomes at the time of his birth, a citizen of the United States," and thereupon decrees that under such circumstances he does become a citizen. This ruling was followed in Chin Bak Kan v. United States, 186 U. S. 200, 22 Sup. Ct. 891, 46 L. Ed. 1121; Re Giovanna (D. C.) 93 Fed. 660; Lee Sing Far v. United States, 94 Fed. 836, 35 C. C. A. 327.

[1] The question before us, therefore, is whether there was evidence before the commissioner and the District Court sufficient to establish to the satisfaction of the commissioner and District Court that respondent was lawfully entitled to remain in the United States.

Under the statute, a Chinese person must be adjudged unlawfully within the United States unless he "shall establish by affirmative proof to the satisfaction of such justice, judge or commissioner, his lawful right to remain in the United States." The decisions are numerous to the effect that in this class of cases, where the facts have been already determined by two judgments below, the appellate court cannot properly re-examine them. This language is used by the United States Supreme Court in Chin Bak Kan v. United States, supra. Where the question is one of fact as to whether the respondent is a native of this country, it has been held in some of the federal courts that the decision of the District Court will not be reversed on appeal. Yee Yet et al. v. United States, 175 Fed. 565, 99 C. C. A. 187; Chew Hing v. United States, 133 Fed. 227, 66 C. C. A. 281; Eng Choy v. United States, 175 Fed. 566, 99 C. C. A. 188.

In Lee Ah Yin v. United States, 116 Fed. 614, 54 C. C. A. 70, the court, on appeal, re-examined the facts, notwithstanding the judgment of the District Court affirming the order of deportation entered by the commissioner, and decided that such facts did not justify it in disturbing the judgments of the lower tribunals.

[2, 3] Undoubtedly the language of the statute requiring that a Chinese person "shall establish by affirmative proof to the satisfaction" of the judicial officer before whom he is examined that he is entitled to remain in the United States should not be construed to invest that officer with arbitrary power. "By satisfactory evidence, which is sometimes called sufficient evidence," says Greenleaf on Evidence, vol. 1, § 2, "is intended that amount of proof which ordinarily satisfies an unprejudiced mind beyond reasonable doubt." The testimony had before the commissioner in the present case cannot be said to settle the question of citizenship of appellant beyond a reasonable doubt. The representations made by appellant to the inspector, introduced in evi-

dence, discloses statements entirely at variance with his testimony before the commissioner. When asked what he did in Philadelphia, he replied, "Nothing, just loaf around." When asked, "When did you come from China?" he answered, "When I was two or three years old." When asked, "Where have you been living in the United States since you came back?" he replied, "Different places * * * long time in Philadelphia. * * * Left Philadelphia over ten years ago." He further said he had been living in San Francisco since leaving Philadelphia; that he left there ten days ago; that he had lived there more than ten years, on Jackson street. He is made to say that he went to China when he was little and returned when he was two or three years old and had been in the United States ever since. If he told the truth before the commissioner, all of the above statements were false. As admissions, however, they serve to discredit the story he told the commissioner. Furthermore, his testimony as to the route he took in coming to this country was so remarkable as to justify the commissioner in scrutinizing his statement very closely. The further fact that he entered the United States surreptitiously was rightly taken into consideration by the commissioner. While the testimony of the alleged father seems on its face to be devoid of suspicious indicia, it must be remembered that the commissioner had the witness before him and was able to form an opinion as to his truthfulness from his conduct on the stand. The fact that the witness' certificate of residence stated that he had lived two years in New York prior to the issuance thereof, whereas he states that he never had lived in New York, may have cast some discredit upon his testimony in the mind of the commissioner and the District Court. The father had not seen the son for about sixteen years according to his own statement. Moy Wing, likewise, had not seen the appellant for the same period. He identified appellant only upon the father's statement. Wong Kong had never met the father until the time of the trial. He saw the boy in China about a year before the trial and gave him funds sent by the father. He himself did not know the appellant prior to that time.

We have nothing to do with the weight of the evidence. Unless we can see from the record that the commissioner and the court arbitrarily ignored the evidence adduced and entered judgment of deportation in defiance thereof, we are not at liberty to interfere. Under the facts of the present case, we are unable to say that the appellant has proved beyond a reasonable doubt that he was entitled to remain in the United States.

Such being the case, the judgment of the District Court is affirmed.

AMERICAN CEREAL CO. v. LONDON GUARANTEE & ACCIDENT CO.

(Circuit Court of Appeals, Seventh Circuit. January 6, 1914.)

No. 2029.

1. INSURANCE (§ 435*)—LIABILITY INSURANCE—LIABILITIES COVERED—"CONTINGENT LIABILITY."

Under a contract to indemnify plaintiff against loss arising solely from its contingent liability as owner for injuries to any person during the construction of a building, resulting from the negligence of any contractor or subcontractor, and containing an agreement that the work was to be done by contract at the risk of the contractor or subcontractors and that assured had not and would not voluntarily assume any liability for loss on account of injuries by reason of the negligence of any contractor or subcontractor, the insurer was liable only for injuries for which plaintiff was contingently liable as owner, and not for injuries for which he was directly liable as doer or causer of the negligent act, since a "contingent liability" is one depending upon an uncertain event (citing Words and Phrases, vol. 2, p. 1501).

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1144; Dec. Dig. § 435.*]

2. INSURANCE (§ 629*)—ACTIONS—DECLARATION—LOSS AND CAUSE THEREOF.

In an action on a contract indemnifying the owner of a building from loss arising solely from its contingent liability as owner for injuries caused by the negligence of any contractor or subcontractor, a declaration, alleging that O. suffered injuries by reason of the construction of such building from which he thereafter died, and that his administrator had sued such owner and others for damages for causing his death, failed to show that the owner was "contingently liable" for the injuries, since they might have been due to the fault of himself or of others for whose negligence he was not answerable as owner.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1575–1580, 1584–1586, 1592, 1598; Dec. Dig. § 629.*]

3. INSURANCE (§ 629*)—ACTIONS—DECLARATION—LOSS AND CAUSE THEREOF.

In an action on a contract to indemnify plaintiff against loss arising from its contingent liability as owner of a building for injuries due to the negligence of any contractor or subcontractor, a declaration, alleging injuries caused by the construction of such building, for which insured and others were sued, without showing that insured was contingently liable therefor, and further alleging that the insurer assumed the obligation to defend the action and conducted the defense until after the trial thereof before a jury, that after the trial the insurer so carelessly and negligently conducted the defense as to cause the defendants other than insured to be discharged and relieved, and that after the trial the insurer abandoned the defense of the action and refused to defend it further, failed to show facts estopping the insurer from relying on its nonliability under the policy, except for injuries for which insured was contingently liable; since, if insured and others were directly liable, there being no contribution or recovery over among the joint tort-feasors, the dismissal of such other defendants did not injure insured, and, it not being alleged that a verdict was returned or judgment entered against insured, it was not a violent supposition that the submission of the case was set aside and that insured came into charge of the defense de novo, and hence it did not appear that it was misled or injured by the insurer undertaking the defense of the action.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1575–1580, 1584–1586, 1592, 1598; Dec. Dig. § 629.*]

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

In Error to the District Court of the United States for the Eastern Division of the Northern District of Illinois; Geo. A. Carpenter, Judge.

Action by the American Cereal Company against the London Guarantee & Accident Company. Judgment for defendant on demurrer, and plaintiff brings error. Affirmed.

Jones, Addington, Ames & Seibold, of Chicago, Ill. (Keene H. Addington and Walter Hamilton, both of Chicago, Ill., of counsel), for plaintiff in error.

Robert J. Folonie, of Chicago, Ill. (F. J. Canty, of Chicago, Ill., of counsel), for defendant in error.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

BAKER, Circuit Judge. Plaintiff in error filed a declaration in three counts against defendant to recover on an indemnity contract. A demurrer to each count was sustained, plaintiff declined to plead further, and the judgment to which this writ of error is addressed was thereupon entered.

[1] In the third count the contract is set out in hæc verba. For the sum of $50 defendant agreed to indemnify plaintiff for one year "against loss arising solely from its contingent liability as general contractor or owner from common law or any statute for damages on account of bodily injuries, fatal or nonfatal, accidentally suffered by any person or persons during the construction of the building described in the schedule hereinafter given, and resulting from the negligence of any contractor or subcontractor engaged in the construction of said building, subject to the following special and general agreements, which are to be construed as coördinate, as conditions."

The schedule showed that plaintiff was the owner of the building.

Special agreement B reads:

"If the assured is the owner of the building mentioned in the schedule, it is agreed that all the work of constructing the same is to be done by contract at the risk of the contractor or subcontractors and that the assured has not and will not by contract or otherwise voluntarily assume any liability for loss on account of bodily injuries suffered by any person or persons by reason of the negligence of any contractor or subcontractor."

General agreement 2 is as follows:

"If thereafter any suit is brought against the assured to enforce a claim for damages on account of an accident covered by this policy, the assured shall immediately forward to the head office of the company for the United States of America every summons or other process as soon as the same shall have been served on him, and the company will at its own cost defend against such proceedings in the name and on behalf of the assured, or settle the same, unless it shall elect to pay to the assured the indemnity provided for in clause A of the special agreements as limited therein."

From the explicit terms of this contract it is clear that there could be no obligation on the part of defendant to indemnify plaintiff unless during the construction of the building by an independent contractor some one accidentally suffered bodily injury through the negligence of the contractor or a subcontractor, for which negligence plaintiff was nowise directly liable as doer or causer of the negligent act, but only

"contingently" liable as owner of the building. Compare London Guarantee Co. v. Cereal Co., 251 Ill. 123, 95 N. E. 1064, where this very form of indemnity contract was under consideration. See, also, Allen v. Gilman, McNeil & Co., 145 Fed. 881, 76 C. C. A. 265, 7 L. R. A. (N. S.) 958; Connolly v. Bolster, 187 Mass. 266, 72 N. E. 981; Frye v. Bath, Gas & Electric Co., 97 Me. 241, 54 Atl. 395, 59 L. R. A. 444, 94 Am. St. Rep. 500; Cushman v. Carbondale, 122 Iowa, 656, 98 N. W. 509; Carter v. Ætna Life Insurance Co., 76 Kan. 275, 91 Pac. 178, 11 L. R. A. (N. S.) 1155.

A "contingent" liability is one that depends upon an uncertain event, as the liability of an indorser to respond for the default of the maker. 2 Words and Phrases, 1501; State ex rel. Breeden v. Sheets, 26 Utah, 105, 72 Pac. 334; Rosenbloom v. Travelers' Insurance Co., 38 Misc. Rep. 744, 78 N. Y. Supp. 1135. Plaintiff bargained to be saved from loss, not through its own negligence, but only through its contingent liability as owner of the building for negligent acts of the independent contractor or of those under him.

[2] Plaintiff's only allegations tending to show a "contingent liability" on its part were the following:

"That during the month of November, 1899, and within the period covered by said contract of indemnity, one W. L. Overhouser, a resident of said city of Cedar Rapids, did accidentally suffer bodily injuries during and by reason of the construction of said buildings mentioned and described in said contract of indemnity; that thereafter and during, to wit, the said month of November, 1899, said W. L. Overhouser died as the result of such injuries; that thereafter one Henry Overhouser, as administrator of the estate of said W. L. Overhouser, did institute a certain action against the plaintiff and others for the purpose of recovering damages for causing, as alleged, the death of said W. L. Overhouser."

Plaintiff failed to charge that Overhouser was injured through the negligence of an independent contractor or a subcontractor under circumstances which would make plaintiff contingently liable as owner. For aught that appears, Overhouser may have been injured through the fault of himself or of others for whose negligence plaintiff as owner was not answerable over. There is an utter failure to bring the alleged breach within defendant's promise.

[3] Notwithstanding this failure to make out a case under the contract, plaintiff insists that subsequent allegations in this count preclude defendant from relying upon the terms of the contract. These allegations are:

"That the defendant assumed the obligation to defend said action, took charge and control of the defense thereof, and conducted the same until after the trial thereof before a jury impaneled for that purpose; and notwithstanding, although the plaintiff did fully, and at the time and times specified in said contract of indemnity, keep and perform all things in said contract of indemnity mentioned, on its part to be kept and performed, the defendant, after the trial of said cause, so carelessly, negligently, and improperly conducted the defense of said action as to cause the defendants to the same other than the plaintiff to be discharged and relieved therefrom, and did after the trial of said action abandon the defense of the same and notify the plaintiff that it would thereafter be required to defend the same upon its own account and at its own expense; that the plaintiff protested against such action, but, notwithstanding such protest, the defendant refused further to defend said action or to assist in the defense thereof and denied and disclaimed all liability of

every kind and character under and by virtue of said contract of indemnity; that the plaintiff did, by reason of the action of the defendant in so refusing further to defend said action, undertake the defense thereof, and in that behalf incurred and disbursed, to wit, the sum of one thousand dollars ($1,000), and that the plaintiff did finally settle and compromise said action for, to wit, the sum of twenty-five hundred dollars ($2,500), which said sum was a fair and reasonable amount to be paid in compromise and settlement of said action."

But there is no estoppel unless plaintiff has been misled and injured. Connolly v. Bolster, 187 Mass. 266, 72 N. E. 981; Employers' Liability Assurance Corporation v. Chicago & Big Muddy Hole Co., 141 Fed. 692, 73 C. C. A. 278; Empire State Surety Co. v. Pacific Nat. Lumber Co., 200 Fed. 224, 118 C. C. A. 410. If defendant, outside of its contract, assumed the defense of a personal injury case in which plaintiff "and others" were directly liable, the dismissal of the others could not injure or prejudice plaintiff, for there could be no contribution, or liability over, among the joint tort-feasors. If defendant's interposition in the Overhouser case prevented plaintiff from presenting fully its defense, or in any way prejudiced plaintiff in the final results of that case, a different question from the one before us would be presented. But defendant notified plaintiff "after the trial" that defendant would withdraw from the case, and thereupon plaintiff "undertook the defense." The pleader seems to have been very careful not to allege that "after the trial" a verdict was returned and a final judgment entered against plaintiff. If, in truth, "after the trial" the submission of the Overhouser case was set aside and plaintiff came into charge of the defense de novo, and if defendant had been misled into undertaking the defense by plaintiff's representation that the building was being erected by an independent contractor in accordance with the terms of the indemnity contract, when plaintiff was actually constructing the building itself, not only was there no injury suffered by plaintiff, but defendant was amply justified in withdrawing. The allegations of this count are no bar to believing that the foregoing supposititious circumstances may have been the actual circumstances. And that the supposition is not a violent one may be learned by consulting the facts in the case of London Guarantee Co. v. Cereal Co., 251 Ill. 123, 95 N. E. 1064.

Though the first and second counts do not set out the indemnity contract in hæc verba, they rely upon an undertaking of defendant "to indemnify plaintiff against loss arising from the contingent liability of plaintiff for damages on account of bodily injury accidentally suffered by any person during the construction of the building." As the averments respecting the injury of Overhouser are the same as in the third count, there is a failure to show any "contingent liability" of plaintiff; and as the allegations respecting estoppel are also identical with those in the third count, defendant was at liberty to withdraw from the Overhouser case without creating a liability over and beyond its contractual liability.

The judgment is affirmed.

MULTNOMAH MINING, MILLING & DEVELOPMENT CO. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. January 5, 1914.)

No. 2265.

1. MINES AND MINERALS (§ 45*)—MINING CLAIMS—FRAUDULENT ENTRY—EVIDENCE.

In a suit to set aside certain patents for ground entered as mining claims, evidence *held* to warrant a finding that there had never been a discovery of mineral thereon, and that the claims had been entered because of a water power thereon, and not for mining.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 131; Dec. Dig. § 45.*]

2. MINES AND MINERALS (§ 17*)—MINING CLAIM—DISCOVERY.

The discovery of mineral, essential to valid mining location on public land, is not satisfied by a finding of traces of gold, but mineral must be found in sufficient quantities to justify a man of ordinary prudence, not necessarily a skilled miner, in the expenditure of his time and money in the development of the property.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 24–28; Dec. Dig. § 17.*

Sufficiency of discovery of mineral characteristics to support mining location, see note to Lange v. Robinson, 79 C. C. A. 6.]

Appeal from the District Court of the United States for the Northern Division of the Eastern District of Washington; Frank H. Rudkin, Judge.

Suit by the United States of America against the Multnomah Mining, Milling & Development Company, to cancel certain patents to ground entered as mining claims. From a judgment for plaintiff, defendant appeals. Affirmed.

A. G. Elston, of Spokane, Wash., for appellant.

Oscar Cain, U. S. Atty., and Edmond J. Farley, Asst. U. S. Atty., both of Spokane, Wash.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge. The appellant had acquired patents to two placer claims, aggregating 257 acres of land, the locations having been made in 1901 and 1902, and the patents having been issued on October 31, 1904. One was known as the Peabody claim, and the other as the Wickham claim. The Peabody claim extends about a mile on both sides of the Nespelem river, just above its juncture with the Columbia river, and the Wickham claim lies to the northwestward thereof, and the main portion of both lies about 70 feet above the Columbia river. In the Peabody claim the Nespelem river has a fall of 170 feet. The appellee brought a suit to set aside the patents on the ground of fraud, alleging that said lands were not mineral lands, that no mineral in paying quantities had ever been discovered thereon, and that the patents had been obtained upon false affidavits. The appellant denied the allegations of fraud, and denied its knowledge of any

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

fraud in the acquisition of the patents. Upon these issues the court below found for the appellee, and decreed that the patents be canceled.

[1] The testimony is voluminous and conflicting upon the issues of fraud. We find it amply sufficient, however, to sustain the decree of the court below. Impartial and competent witnesses who were employed by the government to inspect the land of these placer claims, made careful investigation, and found no evidence of mineral sufficient to justify exploitation or development. The witnesses for the appellant were the officers and employés of that company. They testified to having found small quantities of flake and "flour" gold, and in one instance a small piece of gold which they call a "nugget," but which in some mining districts would be called coarse gold, but the extremely scant quantities found, and the testimony adduced, only tend to confirm the conclusions reached by the witnesses for the government. There is doubtless in the land in controversy a small quantity of fine gold, such as may be found in all the lands along the Columbia river from its headwaters to the ocean. But the proof is convincing that no gold in paying quantities has been discovered on these claims. If the land included in these placer claims was mineral land, or contained mineral sufficient to justify mining, that fact was capable of demonstration. The suit to set aside the patents was brought in March, 1908. The testimony of the appellant was taken in July, 1909. In the interval between those dates, there was ample time for the development and ascertainment of the mineral value of the land. For one month in that interval, the appellant did operate a sluice box, at which three men worked, but the quantity of gold produced was so inconsiderable as to indicate the futility of further operation. We have carefully considered the contention of the appellant that while the ground may not be operated at a profit by panning or sluicing, it might be successfully mined by the hydraulic process. But the suggestion is a mere conjecture, based upon no tangible or scientific evidence, and it does not avail to sustain the validity of mining claims which were so evidently initiated without the discovery which the law requires.

Other facts adduced in evidence tend strongly to corroborate the conclusion that the lands were entered in fraud of the land laws of the United States, and that the purpose of the placer claimants was not to mine the placer claims, but to secure control of the valuable water power of the Nespelem river, and incidentally to use the lands covered by the placer claims for raising fruit, a purpose to which they were adapted, and to which other lands similarly situated along the Columbia river in that region have been devoted. Among the items of evidence which may be adverted to as supporting this conclusion is the fact that in all the years since their location no mining has been done on these claims; that upon the issuance of the patents in 1904, all exploitation of the claims as placer ground was abandoned; that in September, 1902, after these claims had been located, the articles of incorporation of the appellant were amended so as to give the company power to acquire lands for town-site purposes, rights of way for ditches, canals, water courses, and reservoirs, to contract for and maintain electric franchises, and maintain and operate saw mills, etc. This

amendment of articles foreshadowed the purpose for which these claims had been located—the development of the water power of the Nespelem river, and the distribution of water for irrigation, and electricity for power and other purposes. Expressing this purpose, the appellant printed and circulated to its stockholders and others literature with the heading "Land Irrigation and Water," in which it was said that:

"All along the basin of the Columbia the peculiar conditions of soil and climate create the most favorable conditions known for the production of all kinds of fruit"

—and reference was made to the lands above and below Wenatchee, which "are to-day held at from $500 to $3,000 per acre," and it was said:

"Any company so situated as to be able to irrigate land on the Columbia basin by water power or otherwise have an immense fortune in their grasp."

Again:

"We have acquired the great water power of the Nespelem river, constructed a dam across it above the falls, with head gate, flume," etc.

There was nothing in the literature so issued directing attention to the gold placer claims in controversy, or expressing the purpose of the appellant to mine the same.

[2] The appellant relies upon United States v. Iron & Silver Min. Co., 128 U. S. 673, 9 Sup. Ct. 195, 32 L. Ed. 571, in which it was held that while misrepresentations knowingly made by an applicant for mineral patent as to discovery of mineral will justify the government in moving to set aside the patent, yet the burden of proof is upon the government, and the presumption that the patent was correctly issued can be overcome only by clear and convincing proof of the fraud alleged. But in our opinion the proof in the case at bar fully meets the test as stated in that decision. In Steele v. Tanana Mines R. Co., 148 Fed. 678, 78 C. C. A. 412, we held that an appropriate discovery of mineral is necessary to the lawful location of a placer claim, and that it was not sufficient if the locator in panning upon the claim in most instances secured colors of gold, "and in some instances fairly good prospects of gold," following Chrisman v. Miller, 197 U. S. 319, 25 Sup. Ct. 468, 49 L. Ed. 770, and the doctrine announced in 1 Lindley on Mines, § 336, and cases there cited, which doctrine was approved in Chrisman v. Miller as follows:

"The facts which are within the observation of the discoverer, and which induce him to locate, should be such as would justify a man of ordinary prudence, not necessarily a skilled miner, in the expenditure of his time and money in the development of the property."

In the present case the proof is convincing that there was not only no discovery, but that there was never at any time any intention on the part of the locators or the appellant to mine the so-called placer claims.

The decree is affirmed.

FLEITMANN v. UNITED GAS IMPROVEMENT CO. et al. (two cases).

(Circuit Court of Appeals, Second Circuit. January 13, 1914.)

Nos. 92, 93.

1. MONOPOLIES (§ 28*)—ACTIONS FOR DAMAGES—FORM OF REMEDY.

Under the Sherman Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 210 (U. S. Comp. St. 1901, p. 3202) § 7, providing that any person injured by any violation of that act may sue therefor and recover threefold the damages by him sustained, the action to recover treble damages must be an action at law in which defendants have the constitutional right to a jury trial, and hence a minority stockholder in a corporation could not maintain a suit in equity on behalf of the corporation for such relief upon the corporation's refusal to sue.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 18; Dec. Dig. § 28.*

Rights and liabilities of parties contracting with trusts or combinations in restraint of trade, see note to Chicago Wall Paper Mills v. General Paper Co., 78 C. C. A. 612.]

2. MONOPOLIES (§ 28*)—ACTIONS FOR DAMAGES—FORM OF REMEDY.

Where the sole relief prayed in a bill by a minority stockholder of a corporation was that the defendants be decreed to pay over to the corporation treble the damages sustained by a violation of the Sherman Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), it could not be construed as a bill to require the corporation, which was made a party, to sue the other defendants for such damages.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 18; Dec. Dig. § 28.*]

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

Suit by William M. Fleitmann on behalf of himself and all other stockholders of the Consolidated Street Lighting Company who shall elect to come in and contribute to the expense of the action against the United Gas Improvement Company and others. From decrees dismissing the bills on motions of the defendants, Welsbach Street Lighting Company of America and Arthur E. Shaw, respectively, complainant appeals. Affirmed.

Complainant brought suits in equity on his own behalf and on behalf of all other stockholders of the Consolidated Street Lighting Company, not to recover personal damages or a personal judgment, but to compel defendant to pay to the Consolidated Company the amount for which defendant would be liable at law in a direct action by that corporation, because of violations of the Sherman Anti-Trust Act, whereby the Consolidated Company, of which complainant is a minority stockholder, has, it is alleged, been driven out of business.

The opinion of Judge Coxe in District Court, mentioned in the opinion, was as follows:

The defendants, the Welsbach Street Lighting Company of America and Arthur E. Shaw, move to dismiss the bill on the following grounds:

First.—The bill fails to state a cause of action.

Second.—The court has no jurisdiction to grant the relief prayed for.

Third.—Failure to comply with equity rule No. 27.

The relief prayed for by the complainant is that the defendants, other than the Consolidated Street Lighting Company, may be decreed to pay over to

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

said company the sum of $3,000,000 treble damages under section 7 of the Anti-Trust Law, and the costs of this action.

The bill alleges that the complainant is a stockholder in the defendant, the Consolidated Company, and, prior to 1906, the defendants, other than said company, entered into a conspiracy to control, throughout the United States, the business of securing contracts for municipal lighting and supplying lamps and other lighting accessories. This conspiracy was, it is alleged, carried out by organizing other, apparently independent and competing, companies, but which were in fact under the control of the defendants other than the Consolidated Company. It is asserted that by means of such dummy corporations, the conspiring defendants endeavored to monopolize interstate commerce in the materials necessary for carrying out public lighting contracts. That these defendants, realizing that the Consolidated Company would be a strong competitor in the business of municipal lighting, agreed and conspired together to prevent the Consolidated Company from carrying on such business in the United States and to drive said company out of business. It is alleged further that, in pursuance of the said conspiracy, the said defendants acquired, through fraud and fraudulent representations, a majority of the stock in said Consolidated Company and placed in control thereof creatures of their own and adopted every method in their power to wreck and destroy the said Consolidated Company. That they succeeded in accomplishing this result and, in 1910, caused the Consolidated Street Lighting Company to discontinue its operations and abandon its business; the result being that the business has been destroyed and the stock is worthless. The bill also alleges that prior to this suit, the plaintiff demanded of the officers of the Consolidated Company that they would bring an action asking relief similar to that now demanded, but they have refused to bring such action. It is alleged that but for the unlawful acts of the defendants, the property, good will and assets prior to the commencement of this suit would have been worth $1,000,000.

The foregoing statement shows sufficiently the intent and purpose of the action.

The question presented by these motions, briefly stated, is whether, when it appears that a number of individuals and corporations have conspired together to wreck a corporation and have succeeded in doing so, a single minority shareholder of such corporation, after the directors and majority shareholders have declined to act, can maintain a suit in equity and recover threefold damages against the conspirators under section 7 of the Anti-Trust Act.

So far as the seventh section of the act is concerned, it has been uniformly construed to refer only to an action at law. It permits a person—which word, by the eighth section, includes a corporation—to bring an action at law to recover treble damages. Nowhere in the act is the right given to an individual to proceed in equity. Blindell v. Hagan (C. C.) 54 Fed. 40; s. c., 56 Fed. 696, 6 C. C. A. 86; Greer, Mills & Co. v. Stoller (C. C.) 77 Fed. 1; Gulf, C. & S. F. Ry. Co. v. Miami S. S. Co., 86 Fed. 407, 30 C. C. A. 142; National Fire Proofing Company v. Mason Builders' Association et al., 169 Fed. 259, 94 C. C. A. 535, 26 L. R. A. (N. S.) 148.

In National Fire Proofing Co. v. Mason, cited above, the Circuit Court of Appeals for this circuit said, at page 263 of 169 Fed., at page 539 of 94 C. C. A. (26 L. R. A. [N. S.] 148):

"With respect to the federal statute, it is not obvious in what way a trade agreement between builders and bricklayers, relating to their work in the state of New York, can be said to directly affect interstate commerce; but the consideration of this question is not necessary, because a person injured by a violation of the federal act cannot sue for an injunction under it. The injunctive remedy is available to the government only. An individual can only sue for threefold damages."

These authorities would seem to dispose of these motions. An individual cannot maintain a suit in equity under the Anti-Trust Act. The complainant is an individual, and this is such a suit. An individual can sue only for threefold damages under the act, and this must be in a suit at law. The complainant here is suing for threefold damages in a suit in equity. The defendants are entitled to have the facts passed on by a jury, but here they

are deprived of such right. In short, the complainant is asking relief under a statute, the provisions of which he has failed to follow.

The Consolidated Company could bring an action at law under the permission implied in section 8, but where in the law is the right given to a single shareholder to maintain such an action? A law which grants such drastic relief must be strictly construed; the right to maintain an action not mentioned in the law cannot be implied. It will not do to say that the extraordinary remedy here invoked is necessary and should be implied. If such tremendous power is to be given a single shareholder, the appeal should be made to the legislative and not the judicial branch of the government. It is unnecessary to determine whether a single shareholder can maintain an action at law under the seventh section for the reason that this is not such an action. Other questions have been discussed but I do not deem it essential or wise to extend this decision beyond the precise point involved.

What I decide is that an equity suit cannot be maintained under section 7 of the Anti-Trust Act by a single stockholder to recover threefold damages for injuries sustained by his corporation.

The motions to dismiss the bill are granted.

Hirsch, Scheuerman & Limbury, of New York City (Henry L. Scheuerman, of New York City, of counsel), for appellant.

Hatch & Sheehan, of New York City (Edward W. Hatch, of New York City, of counsel), for appellees.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

PER CURIAM. The opinion of Judge Coxe, sitting in the District Court, which sufficiently sets forth the allegations of the bills and in which we concur, will be found above.

[1] We are clearly of the opinion that an action to recover treble damages under section 7 of the act must be an action at law, where defendants have the constitutional right to a jury trial.

[2] The sole relief prayed in these bills is that the defendants, other than the Consolidated Company, be decreed to pay over to the Consolidated Company treble the damages it has sustained by some violation of the Sherman Act. We find no authority which gives to a court of equity the jurisdiction to make such a decree. There is no prayer for relief which would warrant such a construction of the bill as would merely require the Consolidated Company to sue the other defendants for treble damages under the statute.

We think the dismissal was proper, and affirm the decrees, with costs.

THOMAS v. SOUTH BUTTE MINING CO.

(Circuit Court of Appeals, Ninth Circuit. February 2, 1914.)

No. 2269.

1. MINES AND MINERALS (§ 34*)—PLACER CLAIMS—PATENT—RIGHTS CONVEYED.
Patents to placer claims issued by complainant's grantors conveyed all the mineral therein, including veins or lodes not known to exist at the time of the respective application for the patent.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 81–86; Dec. Dig. § 34.*]

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

2. MINES AND MINERALS (§ 16*) — MINERAL LODE LOCATION — CHARACTER OF GROUND.

The fact that a lode claim is located is not proof that the ground on which it is located contains a vein or lode within Rev. St. § 2333 (U. S. Comp. St. 1901, p. 1433), providing for the location of lode mining claims on public land, since the mere location of an alleged vein or lode is not sufficient to prove that a vein or lode is known to exist, which can only be established by evidence of a discovery of mineral of sufficient value to justify expenditure of extraction.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 21–23; Dec. Dig. § 16.*]

3. MINES AND MINERALS (§ 38*)—MINING CLAIMS—CERTIFICATE OF LOCATION—DISCOVERY—PRESUMPTIVE EVIDENCE.

Where mining claims have passed out of the hands of the original owners, have stood unchallenged for many years and have been developed to a considerable extent, the certificate of location, if in due form, is presumptive evidence of discovery and of valid location; but, in the absence of grounds for indulging such presumption, the location notice when recorded is only prima facie evidence of what the statute requires it to contain, and which is therein sufficiently set forth.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 87½–113; Dec. Dig. § 38.*]

Appeal from the District Court of the United States for the District of Montana; Frank S. Dietrich, Judge.

Suit by the South Butte Mining Company against Thomas D. Thomas. Judgment for complainant, and defendant appeals. Affirmed.

Thomas D. Thomas, of Oakland, Cal., in pro. per.

John A. Shelton, of Butte, Mont., for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge. The appellee brought a suit against the appellant to quiet its title to certain placer claims in the state of Montana. The appellant answered and filed a cross-bill, alleging that within the boundaries of the patent claims he had located the Resurrection quartz lode mining claim; that the placer patents under which the appellee claimed excepted and reserved veins or lodes of quartz or rock in place bearing gold, silver, cinnabar, lead, tin, copper, etc., which were known to exist within the lands described in the placer patents at the date of the applications therefor; that certain veins or lodes did exist at such dates, and were known to exist by the applicants; that one of such veins so known to exist extends through the Resurrection quartz lode mining claim, which was located by the appellant on December 1, 1909, and the appellant alleged that he had made discovery thereon, and had regularly thereafter performed the necessary annual work on said claim. The appellant prayed that the appellee's bill be dismissed, and that his title to the Resurrection claim be quieted. Upon the issues evidence was offered by the appellee showing its title to the lands described in the bill by virtue of placer patents issued at different dates, all of which were prior in time to the location of the Resurrection lode claim, and testimony was given that the Resurrection lode claim was within the boundaries of said lands.

The proof of the appellant consisted of a certified copy of the certificate of location of the Resurrection lode claim, recorded on January 7, 1910, and an amended statement of the location thereof, recorded January 26, 1910; a certified copy of the location notice of the Morning Star lode claim, of date July 2, 1877; a certified copy of the location notice of the Green copper lode claim, of date January 1, 1891; a certified copy of the location notice of the Pay Streak lode mining claim, of date August 2, 1881; also a map purporting to show the location of these various lode claims, and showing that the Pay Streak lode claim covered a portion of the ground which was subsequently embraced within the Resurrection quartz lode mining claim; that the Green copper lode claim adjoined the end thereof, and that the Morning Star was distant therefrom. The other documentary evidence offered by the defendant was immaterial to the issues raised in the pleadings and to the question which is before us for decision. The appellant offered no evidence whatever other than the copies of the location notices of the three lode mining claims to prove that at the time when the grantors of the appellee made applications for the placer patents any veins or lodes of quartz or other rock in place bearing valuable mineral deposits were known to exist.

[1] The sole question presented for decision is the question of law whether upon the evidence the court below erred in decreeing to the appellee the relief which was prayed for and dismissing the appellant's cross-bill. The patents to the placer claims issued to the appellee's grantors conveyed all the mineral therein, including veins or lodes not known to exist at the time of the respective applications for patent. Sullivan v. Iron Silver Mining Co., 143 U. S. 431, 12 Sup. Ct. 555, 36 L. Ed. 214. By introducing those patents in evidence the appellee established, prima facie, title to all the lands described therein, including all ores and minerals lying within the boundaries thereof. Iron Silver Mining Co. v. Mike & Starr Gold & Silver Mining Co., 143 U. S. 394, 401, 12 Sup. Ct. 543, 36 L. Ed. 201.

[2] The evidence submitted by the appellant was insufficient to overcome the prima facie case so made, and this for two reasons: First, the application for the appellee's placer patent for the land within which the Resurrection claim is located is prior by 4 years to the Pay Streak location, and 14 years prior to the Green copper location; second, the mere fact that mineral lode locations were made is not proof that the ground on which they were located contained a vein or lode within the meaning of section 2333 of the Revised Statutes (U. S. Comp. St. 1901, p. 1433). A mere location of an alleged vein or lode is not sufficient to prove that a vein or lode was known to exist. Migeon v. Montana Central Ry. Co., 77 Fed. 249, 23 C. C. A. 156. The lode or vein which is known to exist so as to be excluded from the patent must be one which contains mineral of such extent and value as to justify expenditures for the purpose of extracting it. Migeon v. Montana Central Ry. Co., 77 Fed. 249, 23 C. C. A. 156; Casey v. Thieviege, 19 Mont. 342, 48 Pac. 394, 61 Am. St. Rep. 511.

[3] Where mining claims which have passed out of the hands of the original owners have stood unchallenged for years, and have been

developed to a considerable extent, the certificate of location, if in due form, may be deemed presumptive evidence of discovery and of a valid location. Vogel v. Warsing, 146 Fed. 949, 77 C. C. A. 199; Cheesman v. Hart (C. C.) 42 Fed. 98. But in the absence of such grounds for indulging a presumption in favor of the integrity of the location, it is held that the location notice is, when recorded, prima facie evidence only of what the statute requires it to contain, and which is therein sufficiently set forth. Strepey v. Stark, 7 Colo. 614, 5 Pac. 111; Flick v. Gold Hill & L. Min. Co., 8 Mont. 298, 20 Pac. 807; Bizmarck Gold M. Co. v. North Sunbeam Gold Co., 14 Idaho, 516, 95 Pac. 14. Revised Statutes, § 2324 (U. S. Comp. St. 1901, p. 1435) require that the certificate of location shall contain the names of the locators, the date of the location, and such a description of the claim by reference to some natural object or permanent monument as will identify it. The certificates of prior lode locations submitted in evidence by the appellant complied with the statute under which they were made. But they are not proof of discovery or of the existence of a vein or lode which would justify exploitation, and especially should this be held where there is no evidence that the claims were ever developed, and that they were not abandoned.

The decree is affirmed.

METROPOLITAN STOCK EXCHANGE v. GILL, Internal Revenue Collector.

(Circuit Court of Appeals, First Circuit. February 3, 1914.)

No. 957.

On rehearing. Reversed and remanded.

For former opinion, see 199 Fed. 545, 118 C. C. A. 19.

Gilbert F. Ordway, of Boston, Mass. (Clark & Ordway, of Boston, Mass., on the brief), for plaintiff in error.

James S. Allen, Jr., Asst. U. S. Atty., of Boston, Mass. (Asa P. French and William H. Garland, both of Boston, Mass, on the brief), for the United States.

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

BINGHAM, Circuit Judge. On October 24, 1912, a decision was rendered in this case reversing the judgment of the Circuit Court in favor of the defendant, Gill, and remanding the case to the District Court for further proceedings in conformity with the decision and the agreement of the parties. Since then a petition for rehearing has been filed by the defendant, in which the position was taken that this court erred when it declined to follow the decision of the Circuit Court of Appeals for the Second Circuit in Municipal Telegraph & Stock Co. v. Ward, 138 Fed. 1006, 70 C. C. A. 284, and stated as its reason that the facts there presented were essentially different from those in this case. In support of this contention the defendant has produced a copy of the record of the Circuit Court in the Ward Case, which he

claims discloses that the facts in the two cases are in all essential particulars the same. In order to arrive at a satisfactory conclusion as to this matter, it is necessary to ascertain what the questions in the two cases are, and whether they arise in the same way.

It appears from the record in this case that the Circuit Court, on October 28, 1907, pursuant to an agreement of the parties, sent the case to an auditor to report the facts, and that on October 5, 1911, the auditor, having heard the parties and their evidence, filed his report, in which he set forth in detail the plaintiff's method of doing business with its correspondents and customers, and specifically found that:

"The taking of an order to buy or sell for a customer by the correspondent, and the transmission of it to the plaintiff, and the acceptance and filing of it by the latter, constituted one and the same transaction."

The cause was then continued to the October term, 1911, when it was set down for trial by jury. At the trial the plaintiff offered in evidence the report of the auditor, with the exhibits annexed thereto, and the testimony of two witnesses. The defendant called three witnesses, who testified as to the method pursued by the plaintiff in the conduct of its business, and he also took the stand in his own behalf. At the close of all the evidence the court directed the jury to return a verdict for the defendant, which was done, and the plaintiff excepted. On November 24, 1911, the plaintiff filed its bill of exceptions, setting forth the auditor's report, the exhibits, and the testimony of the witnesses examined before the jury; and on December 5, 1911, the same was allowed. In the bill of exceptions was embodied an agreement of the parties, in which it was stipulated that, if the ruling of the court—

"directing a verdict for the defendant was wrong as a matter of law, the judgment of the Circuit Court * * * [was] to be reversed, with directions to enter judgment for the plaintiff * * *. upon the declaration; if said instruction was right, the judgment of the Circuit Court * * * [was] to be affirmed."

It is thus seen that the question of law raised by the plaintiff's exception to the order of the court directing a verdict for the defendant was whether, on the evidence presented before the jury, all reasonable men must reach the conclusion that the correspondents, in receiving and transmitting orders to the plaintiff for the purchase and sale of stocks, and in receiving acceptances, acted as principals and not as agents, and that there were two transactions of purchase and sale, one between the plaintiff and its correspondents, and one between each correspondent and his customer. If the evidence was conflicting, and reasonable men might differ as to the conclusion to be reached, the court committed an error of law in withdrawing the case from the jury and directing a verdict for the defendant.

It is so evident that the Circuit Court erred in directing the jury to return a verdict for the defendant that it is unnecessary to again state the evidence. It is sufficiently set forth in the prior opinion rendered in this case. Moreover, the report of the auditor, which was introduced in evidence before the jury, made a prima facie case in favor of the plaintiff. On this evidence alone it should have been left to the jury,

under proper instructions, to say whether what took place between the plaintiff, the correspondents and the customers constituted one or two independent transactions. And in determining the question the jury should have been instructed that if they found the correspondents acted as agents for the plaintiff, or the customer, or for both, they would be warranted in concluding that there was but one transaction; but if they found that the correspondents acted as principals they might conclude that there were two transactions, and that their verdict should be for the plaintiff or the defendant, according as they found that what was done constituted one or two transactions.

When the case was previously before this court it would seem from the decision then rendered that the court was of the opinion that no other conclusion could be drawn from the evidence than that the correspondents acted as agents, and that in the purchase and sale of stock there was but one transaction. It was unnecessary, in view of the agreement of the parties above set forth, for the court to have gone to this length. The position there taken, however, seems to be fully supported by the decison in Board of Trade v. Hammond, 198 U. S. 424, 25 Sup. Ct. 740, 49 L. Ed. 1111, where the Supreme Court, on facts almost identical with those here presented, but, if anything, less favorable to the plaintiff, held that no other conclusion could be reached than that the correspondents were agents of the Hammond Company.

Then, again, the original record of the Ward Case discloses that this court did not err in declining to follow the decision in that case, as the facts there presented are different from those here under consideration. In that case trial by jury was waived, and the facts were found by the court. On pages 27 and 28 of the record it appears that the court found the following facts: "That the plaintiff dealt with its various correspondents as principals"; "that none of the correspondents were agents of the plaintiff"; "that there was no contractual relation between the plaintiff and the customers of the correspondents"; and that "the transactions between the correspondents and their customers and between the correspondents and plaintiff were distinct and independent."

In the Ward Case the question was whether there was any evidence from which these findings could be made; while here the question is whether such findings are the only conclusions that could be drawn from the evidence. If the same facts might be found from the evidence, it does not follow that they must be. This court, therefore, was clearly right in reversing the judgment of the Circuit Court and remanding the case for further proceedings in conformity with the decision and the agreement of the parties.

Ordered, this 3d day of February, 1914, that, inasmuch as the judgment entered in this cause on October 24, 1912, has heretofore been annulled by an order for a rehearing, it is now here again adjudged as follows:

The judgment of the Circuit Court is reversed, and the case is remanded to the District Court for further proceedings in conformity with this opinion and the agreements of the parties; and the plaintiff in error recovers its costs in this court.

COPPER RIVER & N. W. RY. CO. v. REED.

(Circuit Court of Appeals, Ninth Circuit. February 9, 1914.)

No. 2301.

1. MASTER AND SERVANT (§ 265*)—DEATH OF SERVANT—EMPLOYERS' LIABILITY ACT—ACTIONABLE NEGLIGENCE.

Decedent and his firemen were operating a rotary snowplow over defendant's railroad in Alaska, when a wooden bridge gave way under the engine, due to the burning off of certain supports under it, causing the engine to turn over and kill deceased. *Held*, that such facts were sufficient to show actionable negligence on the part of the railroad company.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 877–908, 955; Dec. Dig. § 265.*]

2. APPEAL AND ERROR (§ 263*)—INSTRUCTIONS—EXCEPTIONS—TIME.

Objections to instructions cannot be considered on a writ of error, where no exceptions were taken thereto while the jury were at the bar.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1516–1523, 1525–1532; Dec. Dig. § 263.*]

3. APPEAL AND ERROR (§ 264*)—DAMAGES—APPORTIONMENT.

Where no exception was taken by either party to the form of the verdict in an action for wrongful death, and by the terms of Act Cong. April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp. 1911, p. 1322), as amended by Act April 5, 1910, c. 143, 36 Stat. 291 (U. S. Comp. St. Supp. 1911, p. 1324), there could be but one recovery for the injury complained of, the fact that the damages were not apportioned by the verdict between decedent's widow and children as they should have been was not reversible error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1533–1535; Dec. Dig. § 264.*]

In Error to the District Court of the United States for the Third Division of the Territory of Alaska; Peter D. Overfield, Judge.

Action by Mrs. E. A. Reed, as administratrix of the estate of J. E. Reed, deceased, against the Copper River & Northwestern Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

W. H. Bogle, Carroll B. Graves, F. T. Merritt, and Lawrence Bogle, all of Seattle, Wash., and R. J. Boryer, of Cordova, Alaska, for plaintiff in error.

J. H. Cobb, of Juneau, Alaska, for defendant in error.

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

ROSS, Circuit Judge. This action was brought under the Employers' Liability Law of April 22, 1908 (35 St. Lg. 65), as amended by the act of April 5, 1910 (36 St. Lg. 291); sections 1 and 2 of the first mentioned act being as follows:

"Sec. 1. That every common carrier by railroad while engaging in commerce between any of the several states or territories, or between any of the states and territories, or between the District of Columbia and any of the states or territories, or between the District of Columbia or any of the states or territories and any foreign nation or nations, shall be liable in damages to any

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

person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employé, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employé; and, if none, then of such employé's parents; and, if none, then of the next of kin dependent upon such employé, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employés of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Sec. 2. That every common carrier by railroad in the territories, the District of Columbia, the Panama Canal Zone, or other possessions of the United States shall be liable in damages to any person suffering injury while he is employed by such carrier in any of said jurisdictions, or, in case of the death of such employé, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employé; and, if none, then of such employé's parents; and, if none, then of the next of kin dependent upon such employé, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employés of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

Section 2 of the act of April 5, 1910, is as follows:

"That said act be further amended by adding the following section as section nine of said act:

"Sec. 9. That any right of action given by this act to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband or children of such employé, and, if none, then of such employé's parents; and, if none, then of the next of kin dependent upon such employé, but in such cases there shall be only one recovery for the same injury."

The action was brought by the widow of the deceased, Reed, as administratrix of his estate, for the benefit of herself as survivng widow and her two minor children named in the complaint, to recover damages growing out of the death of her husband and father of the two children, while in the employ of the railway company as a locomotive engineer, by reason of this alleged negligence on its part:

"That on the date aforesaid (the date of the decedent's death) defendant had negligently allowed its roadbed to get out of repair, the ties to be burned and destroyed by ashes and cinders, negligently allowed by defendant to be dumped upon the roadbed, and otherwise suffered to become utterly unsafe and unfit as a roadbed over which cars and locomotives were to be operated, so as to render the same extremely hazardous to the said J. E. Reed, and other employés of the defendant operating its said engines. That on or about the said date, while plaintiff's intestate, in pursuance of the duties of his employment, was driving an engine over defendant's said road, by reason of the unsafe and hazardous condition of said track, said engine was derailed and plaintiff's intestate was killed. That said fatality was due solely to the negligence of the defendant in failing to keep and maintain its roadbed in a reasonably safe condition for the operation of its trains thereon, and without any fault or negligence whatever on the part of the said deceased."

The answer of the railway company put in issue its alleged negligence, and set up the affirmative defenses of assumption of risk by the deceased, and that his death was caused by his own negligence and that of his fellow servants.

[1] The accident happened on the 1st of January, 1912, on that portion of the railway company's road extending from Cordova to Tiekel

in Alaska, and occurred at the time the deceased and his fireman were operating a rotary snowplow which at the moment of the accident was passing over a wooden bridge some of the supports of which had been burned, resulting in the turning over of the engine and the death of the engineer.

It is contended on behalf of the appellant railway company that there was no sufficient evidence of any negligence for which the company is chargeable in law, and that therefore the judgment should be reversed, with directions to the trial court to dismiss the action, but we are unable to take that view of the evidence. It is further insisted for the appellant that the judgment should be reversed, and the cause at least remanded for a new trial because of the erroneous instruction of the jury by the court in respect to the measure of damages, and because the jury did not, by its verdict, apportion the damages awarded between the widow and the children in whose behalf the action was brought.

[2, 3] None of the instructions given by the court to the jury can be considered by us, for the reason that they were not seasonably excepted to. See the recent decision of this court in the case of Arizona & New Mexico Railway Co. v. Clark, 207 Fed. 817, 125 C. C. A. 305, and cases there cited. It is true that the damages awarded by the jury should have been by its verdict apportioned between the widow and children (Gulf, Colorado, etc., Ry. Co. v. McGinnis, 228 U. S. 173, 175, 33 Sup. Ct. 426, 57 L. Ed. 785), but no exception appears to have been taken by either party to the form of the verdict, and by the very terms of the statute under which the action was brought there can be but the one recovery for the injury complained of. We do not therefore see that the appellant has been injured by the omission referred to.

The judgment is affirmed.

FIRST NAT. BANK OF FT. WAYNE, IND., v. LIBRARY BUREAU.

(Circuit Court of Appeals, Seventh Circuit. January 6, 1914.)

No. 1990.

1. CONTRACTS (§ 335*)—BUILDING CONTRACTS—SUFFICIENCY OF COMPLAINT.
   In an action on a building contract, a complaint was not demurrable, though it showed a delay in completing the work, that by the contract $25 was to be paid as liquidated damages for each day's delay, unless the contract time was extended by the architect on written request of the contractor, and that no such request had been made or extension granted, where it also showed an unpaid balance of the contract price exceeding such liquidated damages for the delay shown.

   [Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1664–1676; Dec. Dig. § 335.*]

2. APPEAL AND ERROR (§ 907*) — PRESUMPTIONS IN SUPPORT OF JUDGMENT — OMISSION OF EVIDENCE FROM RECORD.
   Where, in an action on a building contract, a complaint showed a delay in completing the work, a provision in the contract for liquidated damages for each day's delay unless it was extended by the architect on written request of the contractor, and that no such request was made or exten-

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

sion granted, defendant pleaded a counterclaim for such liquidated damages, and plaintiff in reply to the answer and in answer to the counterclaim pleaded a waiver of the condition with respect to the time of completion, that defendant had affirmatively requested that the work done after the stipulated time of completion should not be undertaken and proceeded with until after such date, and that defendant accepted the work as fully completed in accordance with the contract, it would be presumed, where the evidence was not in the record, that a motion to modify a judgment for the unpaid balance of the contract price by deducting such liquidated damages was properly overruled, since evidence of a waiver and acceptance might properly have been received under the issue made on the counterclaim, even if not admissible under the complaint, and, if received, it would not have been error for the trial court to treat the complaint as amended so as to allege waiver and acceptance.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2899, 2911–2915, 2916, 3673, 3674, 3676, 3678; Dec. Dig. § 907.*]

In Error to the District Court of the United States for the District of Indiana; Albert B. Anderson, Judge.

Action by the Library Bureau against the First National Bank of Ft. Wayne, Ind. Judgment for plaintiff, and defendant brings error. Affirmed.

Wm. J. Vesey, of Ft. Wayne, Ind., and Merrill Moores and Walter Myers, both of Indianapolis, Ind., for plaintiff in error.

John Morris and William P. Breen, both of Ft. Wayne, Ind., for defendant in error.

Before BAKER and SEAMAN, Circuit Judges, and CARPENTER, District Judge.

BAKER, Circuit Judge. Defendant in error, plaintiff below, engaged by a written contract to do the interior finish for the banking room of defendant at Ft. Wayne, Ind. In the contract it was provided that plaintiff should complete its work by November 15, 1909. But the work was not in fact finished until May 1, 1910. Defendant failed and refused to pay the balance of the agreed price; and plaintiff brought this action upon the contract.

In its complaint plaintiff set out that the contract price was $34,000 and that $27,500 had been paid, leaving a balance of $6,500 due and unpaid. Plaintiff also disclosed the fact in its complaint that the completion of the work was delayed a period of 166 days, namely, from November 15, 1909, to May 1, 1910, and that by the terms of the contract plaintiff was to pay defendant $25 as liquidated damages for each day's delay, unless the contract time had been extended by the architect on written request of plaintiff, and that no such request had been made and no such extension had been granted.

[1, 2] Defendant has been seeking in this court to reach the question of plaintiff's liability for the liquidated damages on account of the delay. The first attempt was by calling attention to defendant's demurrer to the complaint. But as the complaint showed defendant's liability for $2,350 of the contract price over and above the $4,150 which defendant says is due to it for damages, it is evident that the court committed no error in overruling the demurrer which was ad-

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

dressed to the complaint on the ground that it failed to state a cause of action. The other way in which defendant sought to present the question was by calling attention to a motion which had been presented to the trial court to modify the judgment. In June, 1912, judgment was entered for plaintiff in the sum of $8,758. In October, 1912, defendant moved the court to modify the judgment by deducting therefrom $4,150, being the amount claimed for liquidated damages at $25 a day for 166 days. It is evident that the finding and judgment gave plaintiff the unpaid balance of the contract price, together with interest, without the deduction demanded by defendant in its motion. No bill of exceptions containing the evidence is in the record. Nothing but the pleadings, rulings thereon, and judgment have been presented to us. Among the pleadings we find that defendant filed an answer and also a counterclaim based upon the alleged liability of plaintiff to defendant for liquidated damages at the rate of $25 a day for the 166 days extending from November 15, 1909, to May 1, 1910, and that plaintiff in reply to the answer and likewise in answer to the counterclaim pleaded that defendant prior to November 15, 1909, had waived the condition with respect to the time of completing the contract, and, further, that defendant had affirmatively requested plaintiff that the part of the work which was not done until after November 15, 1909, should not be undertaken and proceeded with until after November 15, 1909, and that such work so undertaken on defendant's request could not reasonably be completed before May 1, 1910, and that on May 1, 1910, defendant accepted the work as having been fully completed in accordance with the contract. It is therefore manifest that evidence respecting defendant's waiver and acceptance might properly have been heard under the issue made on defendant's counterclaim, even if it were to be conceded that an objection to evidence respecting a waiver by defendant offered under plaintiff's complaint, might have been successfully interposed. And if evidence of that character was in fact introduced, it would not have been error for the trial court to treat the complaint of plaintiff as having been amended so as to include an allegation of waiver and acceptance. In other words, on the present state of the record, all presumptions being in favor of the correctness of the judgment of the trial court, we must presume that evidence was presented which justified a finding that defendant had waived the time condition and had accepted the work as fully completed under the contract, and consequently that the motion to modify the judgment or to compel a remittitur by plaintiff was properly overruled.

The judgment is:

Affirmed.

BLAKE et al. v. BALTIMORE & C. S. S. CO. OF BALTIMORE CITY et al.

(Circuit Court of Appeals, Fifth Circuit. February 10, 1914. Decree Modified March 3, 1914.)

No. 2502.

SALVAGE (§ 34*)—RIGHT TO COMPENSATION—NATURE OF SERVICES.

A steamer by going out of her course to the assistance of a schooner which, though afloat, was lying in a dangerous anchorage, in response to her strenuous call for help, and by skillfully towing such schooner out of danger into safe waters, rendered a salvage service of meritorious character for which it was entitled to compensation and reward beyond the actual expense for deviation and the actual value of the towage services.

[Ed. Note.—For other cases, see Salvage, Cent. Dig. §§ 80–83; Dec. Dig. § 34.*

Salvage awards in federal courts, see note to The Lamington, 30 C. C. A. 280.]

Appeal from the District Court of the United States for the Southern District of Georgia; Emory Speer, Judge.

Suit by the Baltimore & Carolina Steamship Company of Baltimore City and others against William L. Blake and others. From a decree in favor of the libelants (203 Fed. 189), defendants appeal. Modified.

Daniel H. Hayne, of Baltimore, Md., and Wm. Garrard, of Savannah, Ga., for appellants.

Edw. S. Elliott, of Savannah, Ga., and Geo. Weems Williams, of Baltimore, Md., for appellees.

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

PARDEE, Circuit Judge. Upon careful consideration of the evidence in the light of the briefs, we concur with the district judge in holding that the services rendered by the steamer Theodore Weems, in going out of her course to the assistance of the schooner Fred A. Davenport on her strenuous call for help when lying in a dangerous anchorage in and among Frying Pan Shoals off the Carolina coast, and in skillfully towing the said Davenport out of danger into safe waters, was a successful salvage service of very meritorious character for which the Weems is entitled to compensation and reward beyond the actual expenses for deviation and the actual value of towage services rendered; and the only open question is the amount of the salvage award.

The appellants contend that the only services the Weems rendered the Davenport were towage services, and that the amount allowed by the District Court, $6,500, is excessive and out of proportion to the services actually rendered, the risk taken, and the values of the vessels and cargoes involved.

The appellees stress the dangerous situation of the Davenport the night before when the call for help was sent out, and contend that on the arrival of the Weems the Davenport was practically aground and pounding on the shoal lumps in the vicinity, and that the Weems with

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

great difficulty extricated her before she was able to tow her out to safe waters.

We think it is clear from the evidence that, whatever may have been the Davenport's condition the night before or when her first call for assistance was sent out, at the time the Weems arrived the Davenport was afloat, and, although in a dangerous position, needed nothing but towage services to take her out of danger into safe waters.

While this is the case, we find that the services actually rendered by the Weems by reason of the call for assistance, the dangerous waters navigated, and the skillful pilotage required, were extraordinary towage services, and even upon a quantum meruit would be well compensated and require, say, an allowance of $250 for towage per se, $500 for deviation, and $1,250 for risk to steamer and cargo, amounting to $2,000; and doubling that amount for salvage reward, making $4,000, about 9 per cent. of the value of the Davenport, cargo and freight (which we find to be $44,000) would we think be a liberal allowance to the Weems in the premises, and be fully adequate as a reward for assisting a vessel in danger and distress and encourage others to do likewise.

For these reasons the decree of the District Court is amended by reducing the amount of recovery from $6,500 to $4,000, and as amended is affirmed.

As pending this appeal the appellants took additional evidence, the value of which is not apparent, thus increasing the costs in this court, the costs of this court will be equally divided.

Modification of Decree.

In passing upon this case we only considered and decided the amount of salvage to be awarded. In determining this amount we considered, among other matters, the deviation, the risk to the Weems and cargo, and the towage services; but we made no specific allowance for either risk, cargo, or towage.

We find, however, that our former decree was not sufficiently specific. In reducing the bulk amount of salvage awarded, we overlooked the necessity of changing other figures in the decree amended, particularly in relation to the disposition of the amount awarded between the owners of the Weems and the master and crew of the same—a matter not referred to in the assignments of error nor on the hearing nor in the briefs.

To correct this omission our former decree is set aside, and in lieu thereof:

It is now ordered and adjudged that the decree of the District Court be, and the same is, amended so as to read as follows:

"This case having been heard on the pleadings and proof, and having been argued by the proctors of the respective parties, and due deliberation being had in the premises, it is now ordered, adjudged, and decreed by the court, in accordance with its opinion heretofore filed, that libelants, to wit, the Baltimore & Carolina Steamship Company of Baltimore City, a corporation duly incorporated under the laws of the state of Maryland, and C. H. Lewis, master of the steamship Theodore Weems, do recover against the respondents, William L. Blake, as managing owner of the schooner Fred A. Davenport and freight, and Maryland Steel Company, owner of cargo, claimants, as princi-

pals, and the United Fidelity & Guaranty Company as surety, the sum of four thousand ($4,000.00) dollars, and that said respondents, to wit, the said William L. Blake, as managing owner as aforesaid, and Maryland Steel Company, as principals, and the United States Fidelity & Guaranty Company, as surety, do pay the said libelants the said sum of four thousand ($4,000.00) dollars, together with costs to be taxed. It is further ordered that out of the said sum of four thousand ($4,000.00) dollars, the said Baltimore & Carolina Steamship Company do have the sum of three thousand and eighty ($3,080.00) dollars, the said C. H. Lewis, master, do have the sum of $120.00, and the other officers and all members of the crew of said steamship do have each one month's wages, which will aggregate the sum of eight hundred dollars."

And as amended the same is affirmed. The costs of this court to be equally divided.

The petitions for rehearing are denied.

In re DONNELLY.

(Circuit Court of Appeals, Sixth Circuit. February 17, 1914.)

No. 2312.

BANKRUPTCY (§ 465*)—DISMISSAL—STIPULATIONS—TERMINATION OF CONTROVERSY.

Pending an appeal from an order adjudging D. a bankrupt, appointing a receiver of his estate, and directing the assignee of an insolvent banking company to release to the trustee certain properties embraced in preferences made by the bankrupt to the company, a stipulation was filed that the order be reversed and the proceedings dismissed, showing that there was practically no unpaid claim either proved or provable against the bankrupt's estate which was not represented in the stipulation. *Held*, that under such circumstances the appeal would be dismissed without review of the merits.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 927; Dec. Dig. § 465.*]

Appeal from the District Court of the United States for the Western Division of the Northern District of Ohio; John M. Killits, Judge.

In the matter of bankruptcy proceedings of Michael Donnelly. From an order (193 Fed. 755), adjudging Michael Donnelly a bankrupt and appointing a receiver and directing the assignee of a banking company to release to the trustee certain properties embraced in preferences found to have been made by the bankrupt to the company, an appeal was taken. Dismissed on stipulation.

Doyle & Lewis, Ralph Emery, and Kohn, Northup & Morgan, all of Toledo, Ohio, for appellant.

Benjamin F. James, of Bowling Green, Ohio, and Judson R. Linthicum, of Napoleon, Ohio, for appellees.

J. A. Barber and G. W. Kinney, both of Toledo, Ohio, for Security Savings Bank & Trust Co.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

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

PER CURIAM. This is an appeal from an order entered in the court below, March 1, 1912, adjudging Michael Donnelly a bankrupt, appointing a receiver of his estate, and directing the assignee of the Citizens' State Banking Company (pursuant to an offer made in his answer and intervening petition) to release to the trustee in bankruptcy, when selected, the properties embraced in certain perferences found to have been made by the bankrupt to such banking company. After the appeal was perfected and briefs were filed, counsel for appellant proposed to file a stipulation that the order of the court below should be reversed and the bankruptcy proceedings dismissed. This was objected to on the ground that the stipulation was not signed by counsel for all parties in interest. Thereupon it was ordered that the parties present the stipulation to the District Court, and their respective claims as to what further signatures were necessary. Distinct questions were stated in the order and findings requested touching such controversy. Later the District Judge reported his findings, with a transcript of the testimony taken upon the subject; and such findings, in substance, show that the signatures to the stipulation fail to disclose assent as respects two matters of the estate of Matthias Reiser, deceased, and also of certain creditors in small amounts, whose names are given in a list embodied in the answer of the bankrupt, but whose claims were found to have been satisfied. The Reiser estate had proved only one claim, and the court found that the amount due had been tendered, and the tender kept good by deposit of the money with the clerk of the court, and, further, that if computation should show any variance from the true amount due, the difference would be amicably adjusted. The other matter relating to the Reiser estate concerns its interest as a stockholder and creditor of the Citizens' State Banking Company. The assets of that company seem to be in the hands of a state insolvency assignee, who is administering the estate under supervision of a state court. The insolvent bank is a creditor of the bankrupt, Donnelly, and counsel for the assignee of the bank have in its behalf signed the stipulation in dispute; and it is, in effect, stated in one of the findings that it is only in the contingency of an improvident adjustment being made of the claim of the banking company against the bankrupt that the Reiser estate, or any interest disclosed by its counsel, could "be prejudiced by a dismissal of the Donnelly bankruptcy proceedings." It hardly need be said, however, that this court cannot indulge in a presumption that the state court would suffer such a contingency to arise. It results, practically, that there is no unpaid claim, either proved or provable, against the estate of the bankrupt which is not represented in the stipulation. In such circumstances we do not conceive that this court ought to determine the appeal upon its merits, and perhaps thereby subject the estate to the costs and delays of bankruptcy proceedings. It is an established practice to reverse a judgment or decree on stipulation. Ney Mfg. Co. v. Garver Bros. Co. (no opinion filed), C. C. A. 6th Cir., of date November 2, 1909; Coggeshall v. Hartshorne, 154 U. S. 533, 14 Sup. Ct. 1198, 15 L. Ed. 261; Woodman Pebbling Machine Co. v. Guild, 154 U. S. 597, Appx., 14 Sup. Ct. 1216, 21 L. Ed. 743; Adams Express Co. v. Ver-

vaeke, 229 U. S. 627, 33 Sup. Ct. 773, 57 L. Ed. 1357; Same v. Davidson & Son, 229 U. S. 629, 33 Sup. Ct. 776, 57 L. Ed. 1358; Same v. Wright, 229 U. S. 629, 33 Sup. Ct. 776, 57 L. Ed. 1358; Same v. Solomon, 231 U. S. 758, 34 Sup. Ct. 324, 58 L. Ed. ——.

Hence, without passing upon the merits of the case, we hold that the order of the court below must be reversed, and the cause remanded at the costs of appellant, with direction to dismiss the case.

THOMPSON v. AUTOMATIC FIRE PROTECTION CO.

(Circuit Court of Appeals, Second Circuit. January 13, 1914.)

No. 81.

1. SPECIFIC PERFORMANCE (§ 71*)—PATENTS—CONTRACT TO ASSIGN.

A contract, whereby defendant agreed to work for complainant on inventions and to assign to him any invention or patentable improvements he might make during such employment, outside of his regular working hours, for which complainant agreed to pay him an unnamed compensation, was valid and subject to specific performance.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 1204; Dec. Dig. § 71.*]

2. PATENTS (§ 203*)—PATENTABLE INVENTIONS—ASSIGNMENT—NOTICE TO ASSIGNEE.

Where S. contracted to work on certain inventions and to assign any invention or patentable improvement that he might secure during such employment to complainant, and before assigning an invention to defendants informed them that complainant had forced him to assign other patents, and that he wanted to keep the patent on the particular invention away from complainant, though he felt under some obligation to offer it to him, such information constituted notice to defendants of complainant's rights under the contract.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 290–294; Dec. Dig. § 203.*]

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

This cause comes here upon appeal from a decree of the District Court, Eastern District of New York, which ordered the specific performance by defendant Shipman of a contract between him and the complainant under which Shipman was to work out certain improvements on Thompson's inventions in automatic sprinkler alarm apparatus and to assign the improvements made to Thompson. The issues also involved the determination of the validity of certain assignments and agreements which the defendant company had subsequently secured from Shipman. The District Court held that Thompson's right to receive an assignment of the improvements and patent therefor was superior to those of defendant company which, it was held, had sufficient notice of Thompson's right to put it on guard. The opinion of Judge Chatfield will be found in 197 Fed. 750.

Griggs, Baldwin & Pierce, of New York City (Martin Conboy, of New York City, of counsel), for appellant.

Duncan & Duncan, of New York City (Frederick S. Duncan and Harry L. Duncan, both of New York City, of counsel), for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

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

LACOMBE, Circuit Judge (after stating the facts as above). The facts will be found set forth with sufficient fullness in Judge Chatfield's opinion; they need not be repeated here at length.

[1] It is contended that the contract is not one which a court of equity should enforce. As testified to by complainant, and there is no contradiction of his testimony, it provided that Shipman should undertake to perfect inventions which Thompson had already started and should assign to the latter whatever he might discover or invent along the line of fire protection devices. Shipman was in the employ of a company of which Thompson was president; his work was to be done outside of his regular working hours; Thompson was to pay him for the time he put on this outside work and if any invention proved valuable was to pay him such further sum as might in Thompson's judgment be correct according to the value of the results of his work. This contract was perhaps a hard one, but we find nothing extraordinary about it, no doubt many such contracts are made with employés. It did not as defendants contend mortgage Shipman's inventive genius for all time; he could cease doing the extra work any time he pleased and thus terminate the contract. If before he did so discontinue, he found out anything patentable, assisted thereto in a field he had never worked in, by the disclosures of what Thompson had already accomplished, there seems to be nothing unconscionable in requiring him to turn it over. If in fact he was not paid for his extra work, he had a good cause of action for it. Evidently the reason Thompson did not pay him for his extra time was because he (Thompson) had some fair ground for suspecting that Shipman was planning to get the better of him.

Thompson's testimony as to the making of the contract is to some extent corroborated by other witnesses to whom Shipman, long before any controversy arose, made explanations as to how it happened that he had Thompson's models and papers on his own desk.

[2] The crux of the case is whether defendants had notice of the arrangement with Thompson sufficient to put them on inquiry, before they took assignment from Shipman. The evidence is not very strong, but defendants themselves admit that Shipman told them Thompson had forced him to assign other patents and that he wanted to keep this patent away from Thompson. Also that he felt under some obligation to offer it to Thompson.

It seems to us that a business man of reasonable care and prudence would, under these circumstances, before putting his money into an enterprise, have gone to Thompson and asked him if he was making any claim to this invention of Shipman and, if he said he was, would have asked him what was the nature of his claim, so that the inquirer might advise himself whether he could safely purchase.

We concur with Judge Chatfield, who has fully discussed the facts. The decree is affirmed, with costs.

WIGGINS FERRY CO. v. LEVINSON et al.

(Circuit Court of Appeals, Eighth Circuit. February 2, 1914.)

No. 3909.

1. APPEAL AND ERROR (§ 232*) — INSTRUCTIONS — OBJECTIONS NOT RAISED AT TRIAL.

The Missouri Supreme Court having held that a recovery for wrongful death under Rev. St. Mo. 1909, § 5425, providing that the offending corporation shall forfeit and pay, as a penalty for every such person so dying, not less than $2,000, and not exceeding $10,000, in the discretion of the jury, was penal up to $2,000, but was remedial and compensatory to the extent of the amount allowed in excess of that sum, the trial court in an action for death charged that if the jury found for plaintiffs, they should assess their damages at not less than $2,000 nor more than $10,000. Defendant's counsel excepted to the expression "assess as damages," on the ground that the court "has characterized the statute as compensatory, and that the amount rendered is as damages rather than a penalty," at which time counsel were contending that the whole statutory recovery was penal. *Held*, that such objection was insufficient to sustain a contention on a writ of error that the term "damages" did not properly express the double character of the recovery as determined by the state Supreme Court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1351, 1368, 1426, 1430, 1431; Dec. Dig. § 232.*]

2. APPEAL AND ERROR (§ 1068*)—REVIEW—DAMAGES—INSTRUCTIONS—PREJUDICE.

The Missouri Supreme Court, having held that Rev. Stats. 1909, § 5425, providing for a recovery of not less than $2,000 nor more than $10,000, was penal up to $2,000 and remedial as to the balance and plaintiffs having recovered $4,000, defendant was not prejudiced by an instruction that if the jury found for plaintiff, they should assess their "damages" at not less than $2,000, nor more than $10,000, because the word "damages" did not properly characterize the dual character of the recovery.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4225–4228, 4230; Dec. Dig. § 1068.*]

In Error to the District Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

Action by Max Levinson and another against the Wiggins Ferry Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

T. M. Pierce, of St. Louis, Mo. (J. L. Howell and W. M. Hezel, both of St. Louis, on the brief), for plaintiff in error.

David Goldsmith, of St. Louis, Mo., for defendants in error.

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

HOOK, Circuit Judge. A ferryboat belonging to the Wiggins Ferry Company collided with and sunk a skiff in the Mississippi river at St. Louis, Mo., and Julius Levinson, a minor, who was in the skiff, was drowned. His parents sued the company, charging negligent management of the ferryboat, and had a verdict and judgment for $4,000.

The action was brought under a Missouri statute (section 5425, R.

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

S. 1909) which provides that an offending corporation "shall forfeit and pay as a penalty, for every such person * * * so dying, the sum of not less than two thousand dollars and not exceeding ten thousand dollars, in the discretion of the jury." In Boyd v. Railway, 249 Mo. 110, 155 S. W. 13, the Supreme Court of Missouri authoritatively held that a recovery under this section "is penal up to the sum of $2,000, but to the extent to which a plaintiff may recover, if at all, in excess of $2,000 * * * is remedial and compensatory."

[1] The trial court charged the jury that if they found for the plaintiffs they should assess their damages at not less than $2,000 nor more than $10,000. Counsel for defendant excepted to the expression "assess as damages" upon the ground that the court "has characterized the statute as compensatory, and that the amount rendered is as damages rather than a penalty." At that time counsel were erroneously contending in the trial court that the recovery authorized by the statute was wholly penal, and in no part compensatory; but now they say that the term "damages" does not properly express its double character as determined by the Supreme Court of the state.

[2] Passing the inquiry whether the charge of the court does not show that it used the term "damages" as synonymous with "amount of recovery," we think that under the circumstances of the time counsel for defendant did not sufficiently direct the court's attention to the particular objection now urged. Moreover, the verdict and judgment for $4,000 must have been, according to counsel's contention, for compensatory damages, and since the facts which warranted such damages would, under the statute, have required the assessment of a penalty of at least $2,000 in addition, it would seem defendant was not prejudiced, whatever view might be taken. Another part of the charge of the trial court is criticised, but no sufficient exception was taken to it, and it is not assigned as error in accordance with the rules.

The judgment is affirmed.

In re STRAUSS.

Petition of SPENCE.

(Circuit Court of Appeals, Second Circuit. January 13, 1914.)

No. 95.

BANKRUPTCY (§ 455*)—ORDERS APPEALABLE.

Where, on appeal from a referee's order denying the application of a bankrupt's trustee to introduce certain testimony and allowing the claim, the district judge remanded the proceeding to the referee, with instructions to allow the trustee full latitude of inquiry with regard to the claim, but did not pass on the merits of the application to confirm the referee's report, the order was interlocutory and not appealable.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 916; Dec. Dig. § 455.*]

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

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

In the matter of bankruptcy proceedings of Joseph W. Strauss. On petition of Harry M. Spence to revise an order of the District Court reversing the order of the referee denying the trustee's application to introduce certain testimony, and allowing the claim. Dismissed.

This cause comes here upon petition to revise an order of the District Court, Southern District of New York, sitting in bankruptcy. Upon an examination of the claim of Harry M. Spence, an alleged creditor before the referee, the latter excluded testimony which the trustee sought to introduce, and allowed the claim. The trustee thereupon brought the matter before the District Judge, who reversed the order of the referee denying his application to introduce the testimony and allowing the claim. The District Judge remanded the proceeding to the referee, with instructions to "allow the trustee full latitude of inquiry with regard to the claim of Spence," providing, further, that the trustee be allowed to add the defense of payment should he be so advised. This order Spence seeks to revise on petition to this court.

Olcott, Gruber, Bonynge & McManus, of New York City (Irving L. Ernst and David W. Kahn, both of New York City, of counsel), for petitioner.

Oscar Wagner, of New York City (Rudolph Marks, of New York City, of counsel), for respondent.

Before LACOMBE, COXE, and WARD, Circuit Judges.

PER CURIAM. The District Judge did not pass on the merits of the application to confirm the referee's report. He merely sent the matter back to the referee, with instructions to take testimony which had been offered and excluded, and then to pass upon the whole case. Such a direction should not be brought here for review. When the record is complete and has been passed upon by the referee and the District Judge, it may properly be brought here. It would inaugurate an intolerable practice if mere rulings as to admission or rejection of testimony were brought here in advance of a decision on the merits of the question to the elucidation of which the testimony was offered.

The petition is dismissed.

INTERNATIONAL CURTIS MARINE TURBINE CO. et al. v. WILLIAM CRAMP & SONS SHIP & ENGINE BLDG. CO.

(Circuit Court of Appeals, Third Circuit. February 16, 1914.)

No. 1622.

1. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—STEAM TURBINE.

The Curtis patent, No. 566,969, for an elastic-fluid turbine, covers an improved turbine of the impulse type, theretofore represented solely, so far as a practical mechanism was concerned, by the invention of De Laval, which, owing to the high speed developed, could be utilized only in turbines of small size, while the opposite or reaction type was similarly represented by that of Parsons, which, owing to various defects, could be applied only to those of large size. While these inventors were pioneers in the art, and their inventions noteworthy and meritorious, Curtis succeeded

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

in blending the advantages and avoiding the disadvantages of both, and his patent discloses a principle and means of operation applicable to turbines of all sizes consisting, "broadly stated, of pressure-staging an impulse turbine, the velocity compounding thereof and the abstraction at each passage of the steam of substantially all, or the principal part, of the vis viva developed at the preceding stage." Such patent was not anticipated and discloses invention of high order; also, *held* infringed.

2. PATENTS (§ 235*)—INFRINGEMENT—MACHINERY—SIMILARITY.
The test of infringement of a patented machine is not its physical appearance, but the principle on which it operates.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 371; Dec. Dig. § 235.*]

3. PATENTS (§ 16*)—INVENTIONS—ELEMENTS.
The inventive element of a patented device or machine may consist in the conception of a novel abstract idea, or in the practical means of applying what has theretofore been but a mere abstract idea. In the former, the conception of the abstract idea necessarily involves the details of utilizing it; but in the latter, it does not.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 14, 15; Dec. Dig. § 16.*]

4. PATENTS (§ 312*)—SUIT FOR INFRINGEMENT—PROOF OF INFRINGEMENT.
Where a defendant, in its proposal for a government contract, which was accepted, specified a machine which as described would infringe complainant's patent, the court is justified in finding infringement, in the absence of evidence from defendant showing what it did in fact furnish.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 543–549; Dec. Dig. § 312.*]

5. PATENTS (§ 328*)—VALIDITY—STEAM TURBINE.
The Curtis patent, No. 595,435, for an elastic-fluid turbine claims 1 to 4, inclusive, covering generically the use of cut-off devices in a steam turbine of the impulse, pressure-staging type, whereby different chambers can be operated or by-passed as desired, are void as too broad in view of the prior steam art.

6. PATENTS (§ 288*)—SUIT FOR INFRINGEMENT—EQUITY JURISDICTION.
A court of equity is not without jurisdiction of a suit for infringement of a patent because the alleged infringement by defendant consists in its contracting to furnish the infringing devices to the United States government as a part of the equipment of a naval vessel, and entering upon the work of their construction, nor is it deprived of jurisdiction to hear and decide the suit because prior to the hearing the devices were installed and delivered to the government, and an injunction cannot properly be granted.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 460–466; Dec. Dig. § 288.*]

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

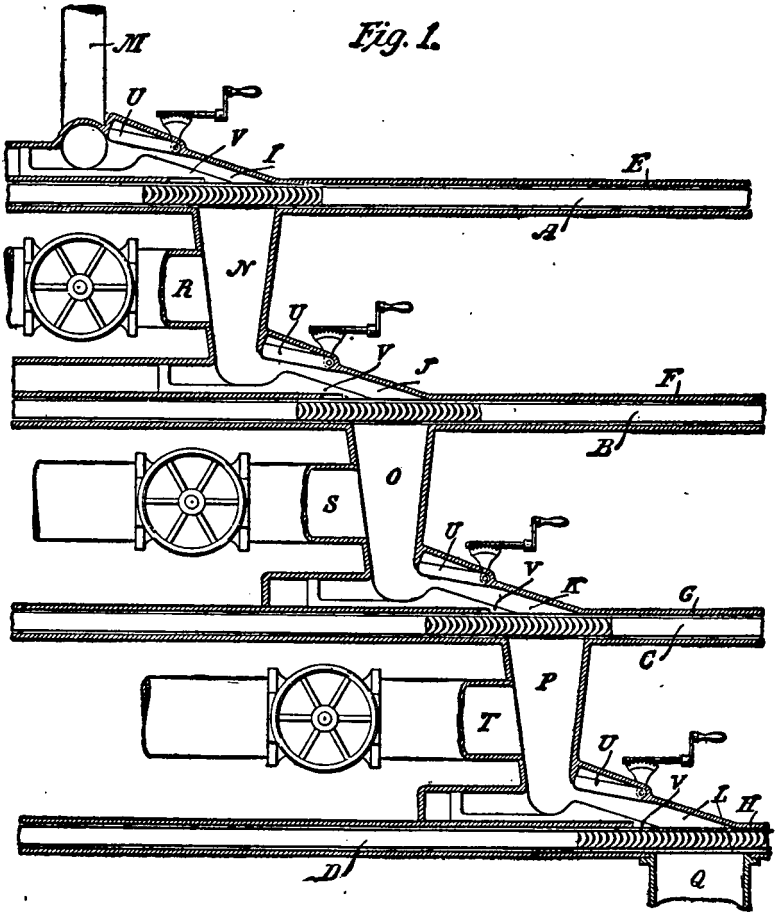
Suit by the International Curtis Marine Turbine Company and the Curtis Marine Turbine Company of the United States against William Cramp & Sons Ship & Engine Building Company. Decree for defendant was reversed on appeal (202 Fed. 932, 121 C. C. A. 290), and on certiorari to the Supreme Court the decree of the Circuit Court of Appeals was reversed (228 U. S. 650, 33 Sup. Ct. 722, 57 L. Ed. 1003),

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

and on a second hearing in the Circuit Court of Appeals the decree was reversed and the case remanded, with instructions.

See, also, 176 Fed. 925.

The following is a diagram of the patent in question:



C. Bradford Fraley, of Philadelphia, Pa., and Richard N. Dyer and Frederick P. Fish, both of New York City, for appellants.

Dickson, Beitler & McCouch, of Philadelphia, Pa., Edwards, Sager & Wooster, and James R. Sheffield, all of New York City, for appellee.

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

BUFFINGTON, Circuit Judge. In the court below the International Curtis Marine Turbine Company, the owner of certain patents, and

the Curtis Marine Turbine Company, exclusive licensee thereunder for marine propulsion, brought suit against the William Cramp & Sons Ship & Engine Building Company for infringement thereof. The claims involved are 1 to 11, inclusive, of patent No. 566,969, granted September 1, 1896, to Charles G. Curtis for an elastic-fluid turbine, and the first four claims of patent No. 595,435, granted December 14, 1897, to said Curtis for an elastic-fluid turbine also.

After final hearing the court below entered a decree dismissing the bill. On appeal this court (202 Fed. 932, 121 C. C. A. 290) reversed such decree in part and affirmed it in part. On certiorari the Supreme Court held (228 U. S. 650, 33 Sup. Ct. 724, 57 L. Ed. 1003)—

"that the case was tried and disposed of below by a court organized, not in conformity to law, but in violation of the express prohibitions of the statute."

It further held:

"Our duty is not to hold the case upon the docket, for ultimate decision upon the merits, but to at once reverse and remand to the court below, so that the case may be heard by a competent court, conformably to the requirements of the statute."

In accordance therewith the case has been heard again by this court as properly constituted. The importance of the case and the complexity of its subject-matter—the steam turbine art—has led to our giving unrestricted time and most careful consideration to its argument, and must serve to explain the length and detail of this opinion.

[1] A rotary steam engine had been the engine builder's goal, for the advantage of rotary over reciprocating machinery movement is self-evident. In the hydraulic field the rotary principle had been effectively used in wheels and in many effective types of turbines, which are really jacketed water wheels. In this latter branch the advance was marked and the conservation of power, simplicity of parts, saving of space, and other desirable features of water turbines seemed to disclose the means by which steam could be similarly employed to move turbines. Theoretically the analogy between the use of steam and water in the same mechanical form of structure seemed clear. But such analogy was a mere surface and therefore a misleading one. In reality steam and water are, from the standpoint of motive power, essentially different. The motive power of water is gravity, or pressure exerted in one direction; of steam it is expansion, or pressure exerted in all directions. The laws of hydraulics, as applied to water wheels, were well known and comparatively simple, while, as the outcome proved, the laws of steam as applied to turbines were not known or appreciated. Moreover, water is unchanging in volume under different pressures; thus the velocity of the flow or jet of a stream is in inverse proportion with the cross-section of path provided for it. But when velocity is developed by diminution of pathway, it must be at the expense of a local deficit of pressure. Whenever the path contracts, velocity increases, and pressure diminishes by a determinable amount. But with steam all is different. Only in few instances does steam act in the same way as water, and even where it does there is always present an intricate and mathematically-inexpressible relationship between

steam volume and pressure to complicate the relation between cross-section of path and velocity of flow. Experience has further shown that steam turbines involve further perplexities in the form of absorption of energy caused by virtually every bend, change of cross-section and tiny eddy.

That steam could be used as a propulsive rotary force was of course well and long known. From the record before us we learn that a crude form of steam turbine was described by Hiero of Alexandria 120 years before Christ. It used steam as a kicking or propulsive force from which the discharging wheel reacted in the same way that rearwardly discharged water drives in the opposite direction an ordinary rotary lawn sprinkler. So also, as early as 1629, the turbine of Branca, an Italian, showed how steam could be jetted against a vane to produce forward rotary motion. But while these two, almost forgotten, instances strikingly show that the two broad principles of operation on which, as we shall see, all modern turbine development is based were thus known, no practical and efficient steam turbine, working on either principle, was developed prior to 1884. And this absolute dearth of outcome cannot be attributed to lack of effort, for in 1896, the date of the first patent in suit, Sosnowski's Treatise Roues et Turbines a Vapeur gave a list with illustrations of 300 prior steam turbines. Apart, however, from those of the two inventors, Parsons and De Laval, referred to hereafter, no one had, in this broad field of effort, produced a practical and efficient device. The magazine Engineering, in an issue of August, 1894, said:

"Most engineers who are approaching middle age can remember when the idea of making a successful steam turbine was classed with the search for the philosopher's stone. It was known of course that such a motor could be readily made to work, but the consumption of steam was excessive because the motive fluid left the apparatus at a high velocity and with much of its energy unutilized. * * * What was wanted was to construct a wheel that would run several times as fast as the spindle of a mule, and most mechanics regarded the matter as impossible."

The experts appointed by the Court of Commerce of the Canton of Zurich, Switzerland, in certain litigation involving steam turbines, reported that "the art of steam turbines was first brought into existence by Parsons and De Laval." Indeed, this is, in substance, conceded by respondent's expert, who, in answer to the question whether he agreed with the statement made by Neilson in his work on Steam Turbines (4th Ed., 1908) that the Parsons and De Laval turbines were the only two turbines which had been made on other than an experimental scale up to 1895–96, said:

"Limiting your question to steam turbines I should answer it that the Parsons steam turbine and the De Laval steam turbine are the only ones that I know of that were being manufactured prior to 1896 that are being manufactured for commercial use to-day."

Passing by, therefore, the fruitless effort of prior inventors we take up the practical and effective stage of the steam turbine art with Parsons and De Laval. Parsons, the real pioneer of one branch of the art, was a British subject who in his English patent, No. 6735 of 1884, gave the world its first effective steam turbine. A study of this patent

shows that Parsons disclosed no undiscovered law of nature or any novel principle. His basic principle of operation was the reaction shown in prior devices, but, this being the first real practical and efficient device in a barren field of effort, Parsons has been justly regarded as the pioneer of the steam turbine art. As well as said by one of complainants' witnesses:

"It can therefore be said that, although Parsons did not introduce principles not known prior to his invention, he designed an efficient reaction turbine, whereas, in all the structures devised previously no efficient conversion of the energy of the steam into mechanical work was possible."

To the same effect is the testimony furnished by respondent in the address of Rateau, a French savant, in his Chicago address in June, 1904, who, in speaking of the production of an unworkable speed where steam expansion takes place in a single stage of a single wheel, says, evidently from the context, referring to Parsons:

"A consideration of these circumstances has induced inventors to divide the expansion of the steam into successive stages, and thus to produce turbines with multiple wheels, which are nothing but a series of simple turbines mounted upon the same shaft and driven successively by the same current of steam. This design of multiple turbines is by no means novel. It will be sufficient to mention the name of Tournaire, a French mining engineer, whose theoretical description to the Academy of Science in 1853 of a reaction turbine with multiple wheels is surprising when the description is compared with the Parsons turbine brought into use 30 years later."

Parsons used a large outer shell or chamber provided with a central shaft, and adapted to receive steam peripherally at one end and exhaust at the other. Mounted on a shaft were a number of sets of moving vanes properly angled, through which the steam passed as an annulus, thereby imparting motion. The outer ends of the moving vanes of each set fitted closely to the shell, prevented steam escape, and necessitated it going through the inter-vane passages. Following each set of movable vanes were corresponding sets of stationary vanes attached to the shell at substantially such an opposite angle as deflected the steam and caused it to pass through a succeeding set of movable vanes, so corelated to the first movable set as to coact in revolving the shaft. The power of steam to impart motion is based on pressure, and pressure is but expansion restrained. It follows, therefore, that, in the principles of operation of Parsons' turbine, as the steam passed from the high pressure end of the chamber through the successive sets of movable vanes to the exhaust, it expanded, decreased in pressure, and imparted rotary motive power to the movable vanes. And just as in a common lawn sprinkler the passage of the water through a turned passage caused the wheel to kick or react in a contrary direction, so in Parsons' turbine the expansive force of the volume of steam passing through a revoluble vane, angled at the discharge, reacts and causes the vane to rotate in a course opposite to the line of discharge. It is this drop of pressure, and the consequent different stages of pressure between the inlet and outlet side of the movable vane, that characterizes and is the differentiating earmark of reaction turbines. This drop

pressure, as the underlying principle of the reaction turbine, is well set forth by complainant's expert, who says:

"The essential difference between reaction and impulse turbines is the one as to how mechanical work is obtained from the energy of the steam. In both types of turbines the initial energy is in the shape of steam under high pressure, either in a dry or saturated or superheated condition. In a reaction turbine this steam is permitted to pass through a number of rows of buckets in such a manner that the pressure of the steam on the entering side of the bucket is quite different from the pressure of the steam upon the leaving side of the bucket, and rotation, that is, mechanical work, is secured, due to the drop of pressure of the steam in passing through the bucket."

It follows, therefore, as stated in Jude on The Theory of Steam Turbines—London, 1906—page 16, and conceded by respondent's expert, that:

"In the reaction turbine there is a transformation of potential energy into kinetic energy within the rotating member."

But such turbines have other characteristics. For example, from this pressure drop in reaction turbines it follows that the entire steam passage between the movable vanes must be filled with steam, and as stated by M. Rateau:

"It is of course necessary, in order to produce a good dynamic efficiency, to operate in such a manner that the peripheral speed of the turbine be not much inferior to the circulation speed of the steam."

It will thus be seen that what Parsons did was to take the well-understood principle of a reaction turbine and its single chamber, with a single wheel which operated at an unworkable speed, and by increasing the number of such wheels in effect subdivide an entire chamber into a number of separate, pressure-staged sections. Such, in reality, was the effect of the pressure being different on the opposite sides of every set of movable vanes.

The practical result obtained by Parsons by this pressure-staging was to reduce the speed of a reaction turbine to practical workable limits. It will, of course, be noted that the Parsons or reaction pressure turbine operated on a fundamentally different principle from a turbine, for example, of Branca's type. In the latter the propulsive force is the impact or impulse of a jet of steam against the movable vane. The steam is blown against the vane in the form of a jet, in a manner resembling the impulse given to a projectile by an explosion in the barrel of a gun. This is well stated by complainant's expert, who says:

"The powder charge on being fired develops a large pressure in a confined space similar to the pressure of steam in a boiler and steam pipe. The projectile is forced outward by the expansion of this charge, that is, the pressure energy available is utilized in producing movement of the projectile. The projectile is moved by the reaction of the charge just as the buckets of a reaction steam turbine are moved, due to the reaction of the steam. In both the gun and reaction turbine the energy in the form of pressure acts by reaction upon the piece on which work is to be performed, in one case causing linear motion, in the other case circular motion, and in both cases the initial pressure drops to the pressure of the exhaust or atmosphere. The energy represented by the drop of pressure from initial to exhaust is used to produce mechanical work. In both the gun and reaction turbine an important requirement for an efficient conversion of pressure energy into work by the reaction principle is close clearance between the moving and stationary parts so as to

prevent leakage of the pressure energy. After the projectile leaves the gun it possesses velocity energy. This is similar to the velocity energy of the steam jet as it leaves the nozzles of an impulse turbine. The nozzles give the steam a large velocity at the expense of the pressure energy of the steam; that is, the steam in passing through the nozzle drops in pressure from the initial pressure to the exhaust pressure and in expanding to the exhaust pressure produces a high velocity of the steam."

It will thus be seen that the impulsive force is created, not in the vane passage, but in the passageway into the chamber. This is conceded by respondent's expert, who, following Jude's work cited above, says:

"In the impulse turbine the transformation of potential energy into kinetic energy takes place wholly or only in fixed passages prior to entry into the rotating member."

As therefore vane motion in impulse turbines is caused by the jet impulse as distinguished from the expanding volume of the passing steam in a reaction turbine, it follows that the entire vane passageway of the former need not be filled. It also follows that the jet speed must be greater than the vane speed, otherwise no power would be drawn from the jet by the vane. It is proper to say that in making these general statements as to these two types of turbines, we have not overlooked the fact that reaction turbines may have some impulse, and impulse ones some reaction. But such respective reaction and impulse are negligible. This is well stated by complainant's expert, who says:

"The facts of the case are that it is an accepted fact among all engineers conversant with the steam turbine art that the impulse turbine derives its power chiefly from the impulse effect of the steam; some impulse turbines may work with a very slight reaction effect, and that all reaction turbines abstract work chiefly from the reaction force of the steam, although every reaction turbine has a small amount of impulse due to the velocity of steam flowing through the turbine. This is absolutely necessary because if there was no velocity of flow, steam would not pass through a reaction machine. The velocities in a reaction turbine are extremely low, and therefore the impulse effect is small, whereas the velocities in an impulse turbine are extremely high and the reaction effect or pressure drop of the steam while passing through an impulse turbine is so slight that it is entirely negligible."

But up to and succeeding Parsons, patented impulse turbines had been as inefficient as reaction ones had been before Parsons made the latter practical. This inefficiency of impulse turbines was due to the characteristics of steam subjected to the structural limitations, the restricted passageway, which created the jet. This is clearly explained by complainant's expert, who says:

"When water, steam or any other fluid in a reservoir approaches a constricted outlet, it must do so along converging lines. Although there may be no converging solid walls, and the outlet may be even a plane orifice, the cross-section of the path of the fluid, converging simultaneously toward the outlet from all directions, is a decreasing one. Hence the fluid undergoes acceleration as it approaches. To supply the kinetic energy involved in the acceleration, its pressure must decrease. In the case of water, as already noted concerning the Pelton (water) wheels of the West, there is no known limit to the intensity of pressure which can be converted completely and efficiently into velocity by such a simple constriction of path. With steam, however, this conversion can proceed only until the initial pressure has fallen by some 43 per cent., *with a conversion of something like 15 per cent. of the available*

potential energy into kinetic form. Beyond this point no further reduction of pressure against the outlet can further accelerate the flow. The reason for this is that the reduction in pressure upon the steam approaching the outlet leads to an increase in its volume, and this increased volume accentuates the congestion. Up to the so-called 'critical' point, this increase of congestion is not enough to more than hinder and complicate the acceleration. At the critical point, however, it becomes prohibitive. The steam expands too rapidly to get out of its own way, until the constriction has been passed. * * * The critical pressure occurs, with fair constancy, at about 43 per cent. of the initial absolute pressure. The critical velocity is usually found between 1,350 and 1,400 feet per second, ranging upwardly toward 1,500 feet under high initial pressures and downwardly toward 1,300 feet under initial pressures below atmospheric. The critical area varies widely, from small under high pressure to large under low pressure."

Stating this in terms of plain working result, the impulse turbine of the old art could only utilize 15 per cent. of the potential possibility of steam, a result which, apart from other objections, barred its practical use. It will thus be seen that no matter what the form of prior impulse turbines, or how instructive and prophetic, read in the light of after discoveries, the statements of their inventors may appear, they were all in reality and necessarily ineffective because they were, in the then knowledge of steam, based on a principle of operation that could only end in failure.

In this barred state of the impulse turbine art came the radical, and at the time inconceivable, disclosure of De Laval. Like all great inventions it was simple, but with that simplicity was a practical change that scientifically and commercially was startling. Mechanically all De Laval did to the single-vaned impulse turbine was simply to diverge or widen the constricted outlet end of the steam passage of the old art. In steam dynamics his great discovery was that, beyond the critical point of steam, velocities can be accelerated at the expense of pressure energy, if the pathway is diverged, instead of constricted. Before his disclosure it was supposed, and not without some basis for such supposition, that a diverging nozzle would retard steam from creating kinetic energy, for such seemed the effect of a diverging outlet on a jet of water, and we now know that an extension of De Laval's diverging nozzle beyond limits now well understood makes his process ineffective. So revolutionary was De Laval's theory that the application for an American patent upon it was met by the objection of the Patent Office that:

"The object of applicant's alleged invention will apparently be defeated by the construction shown and claimed, since the fall of pressure due to expansion will necessarily lessen the velocity of the steam at the point of impact with the wheel, and consequently the 'vis viva' of the steam will tend to be a minimum rather than a maximum."

To this De Laval replied:

"The characteristic feature of applicant's invention may be expressed in a few words, thus: He expands the steam *before* it reaches the turbine and converts its pressure into velocity before the steam is required to do any work, while heretofore the steam was principally expanded in the turbine or other engine which was actuated by the pressure of the expanding steam. Applicant has made the discovery that by a flaring nozzle practically all the pressure can be converted into velocity, while before it could only be expanded down to 57.7 per cent. of the initial pressure, and that a jet can be

produced which is no longer capable of expansion, but which has an enormous velocity, and the vis viva of which can be economically utilized."

Since, as will hereafter appear, the patent of Curtis is based wholly on a turbine of the De Laval type, the fact of De Laval's absolute departure from all prior inventive effort is vital to a just appreciation of what Curtis subsequently did to supplement and utilize De Laval's discovery. This warrants our dwelling in such detail on the revolutionary character of De Laval's work. This is fairly stated by complainant's witness, who says:

"De Laval's original application, which was filed May 1, 1889, was met by the examiner by complete skepticism as to its operativeness. The effect of the conical convergence of the nozzle was held by the examiners to be the exact opposite of that alleged by De Laval. Further, the figure 57 per cent., which appeared in the application as a measure of the pressure which could not be converted into velocity in the ordinary converging nozzle, was not understood by the examiner, and an explanation was called for. The applicant was obliged to reply at length. The figure '57 per cent.' was supported by a reference to the treatise on Thermodynamics by Professor Herrmann, of Chemnitz (Berlin, 1879). The examiner's misapprehension as to the action of the diverging nozzle was explained by pointing out that even Professor Zeuner, who was then one of the greatest living authorities on thermodynamics, had committed himself in his publications to the same error—an error, indeed, which was then universally prevalent. * * * This debate continued year after year, and might have extended indefinitely had not the showing made at the Chicago World's Fair removed the question from the field of academic dispute. The patent was finally allowed June 4, and issued June 26, 1894."

De Laval's diverging nozzle resulted in producing an impulse single-vaned machine of a phenomenal character, in that the now utilized power of the steam produced a speed beyond all past experience, and so high as not to be permissive on account of stress on revolving parts.

But noteworthy and meritorious as were the contributions of Parsons and De Laval to the turbine art, their labors still left many serious objections to their turbines, which they were unable to remove. As has been justly said in testimony quoted below, this was not to be wondered at. In the reaction turbine, as we have seen, the steam is not jetted, but is admitted at initial pressure around the whole periphery of the chamber, or substantially so, and the creation and imparting of its kinetic power depends on its passage through inter spaces of the movable vanes. Such steam as does not go by that passage is lost. To insure, therefore, such intervane passage, and to prevent passage through the clearance between the ends of the moving vane and the chamber shell, is imperative. Owing to metallic contraction and expansion and other causes this was attended with grave difficulty, and sometimes resulted in stripping the revolving vanes. Clearance escapes, owing to the principle of operation of a reaction turbine, could not be avoided. They could only be measureably minimized by the most careful construction. Moreover, the intra-chamber, drop-pressure feature of the Parsons chamber, subjected it to the mechanical objection of axial or endwise thrust. This was due to the fact that there was a difference in pressure—a pressure drop—between the inlet and outlet side of each series of vanes. As the relative proportion of

clearance loss to vane-capacity increased as the vane diminished in height, the reaction turbine was restricted to large sizes. All this is clearly shown by complainants' witness, who says of the Parsons turbines, that:

"Relying as it did upon reaction, (it) developed its power by the pressure of the steam upon its vanes. There was a drop in pressure between the inlet and exit of each vane, consequently, clearance spaces must be as fine as possible, in order to prevent excessive leakage. At the time rotative speeds were very high compared with machinery other than steam turbines. Consequently it was extremely delicate and sensitive to derangement by steam erosion, intrusion of foreign substances, etc. The fact that it relied upon reaction also necessitated a vane speed virtually equal to the steam speed. This need for high peripheral speed prohibited the reduction of wheel diameters. Therefore, since the current of steam must occupy the entire periphery simultaneously, the radial dimension of the steam current in the earlier stages of the machine, was narrowly restricted. This minuteness also exaggerated the relative part played by the clearance spaces and their leakages."

While these objections of clearance, axial thrust, and prohibitive use of small wheels due to the use of the reaction principle were avoided in De Laval's single-vaned turbine by use of the impulse principle, yet it also revealed serious objections, due to its principle of operation. The tremendous speed it developed forbade utilization of that speed in large wheels, and necessitated the noneconomic practice of counteracting or neutralizing it even in the small wheels where it could be used. It should here be noted, as throwing light on the novel character of Curtis' subsequent work, that this excessively high speed of turbines was accepted as an insurmountable evil incident, and the whole trend of the engineering profession was to accept it as such. Thus in respondent's proofs Rateau's address (heretofore referred to) says:

"The Girard screw-wheel, which succeeded so well as a hydraulic motor, has given no public results as a steam apparatus. The failure of the tests which I just related, should not of course be in the least surprising. The problem was, in fact difficult to solve, *because in order to secure an economical operation, it is absolutely necessary to attain very high speeds of rotation.* * * * If steam turbines are compared with ordinary motors, both advantages and disadvantages are found. I would emphasize as the principal disadvantages of turbines resulting from the great velocity of rotation: (1) Heating of the bearings; (2) *the difficulty of driving shafts rotating at lower speeds;* (3) the difficulty of using a condenser. I put aside for the moment the question of consumption of steam."

De Laval himself sought in different ways to control the high speed he generated in his single-vaned turbine. In order to lessen the strain on parts, he devised a flexible central shaft so small in diameter that when running at very high speed such shaft and the whole rotating unit did not rotate around its geometric center, but tended to approach the center of gravity of the rotating system. As it was impossible to operate machinery by direct connection with the high-speeded turbine, he was driven to devise special reducing gears which were bulkier than the motor. Indeed, as showing the grave nature of the speed problems which were never overcome, it will be noted that the only effort of De Laval, as shown in his German patent, No. 84,153, to eliminate rather than accept these nonworkable speeds was his device to reduce the velocity of the jet itself before it entered the wheel vane by mass

compounding it with some passive liquid such as superheated water or other desired fluids to reduce its acceleration in the nozzle. In the same line of relief Bollman, of Austria, in his patents in many countries in Europe, beginning in 1894 and ending with his American patent, No. 584,203, of 1897, sought to introduce a mixture of air. In his work on the Steam Turbine (2d Ed., 189), Stodola says:

"The majority of the older patents showed lack of knowledge of the steam flow. One idea especially led inventors on in spite of constant failure; to decrease the velocity of the steam by mixing it with fluids or gases."

After showing that even if they had succeeded, "there must be [in one particular one cited] a loss of kinetic energy that would amount to one-half to three-fourths of the available work," Stodola says:

"As patents are being taken up to the present time on this useless idea, it is well to investigate it somewhat more closely. The mixing of fluids must give, besides the loss due to shock, a poor performance in the blade channels, because the individual drops of the 'rain of this mixture' must become separated from the steam mass on account of the sharp bending of its path."

Notwithstanding then the elimination in De Laval's impulse turbine of the objectionable features of wheel-clearance, axial-thrust and non-use in small wheels, which lessened the efficiency and scope of the Parsons reaction turbine, the De Laval single-vaned impulse wheel was, by its high speed, also restricted in scope in that such speed prohibited its use in large turbines and prevented its use in small ones except when accompanied by supplemental speed-reducing gearing. It will thus be noted that great as the contributions of Parsons and De Laval were to the turbine art, the devices of both had grave limitations. On the one hand, De Laval could not utilize all the kinetic force his impulse turbine could call into play, and on the other hand, the limitations of axial thrust and clearance measureably counteracted and inefficiently lessened the kinetic energy the Parsons reactive type produced. The practical result was the restriction of Parsons to the field of large turbine effort, of De Laval to small, and that a field for further inventive effort remained is foreshadowed by respondent's proof where Rateau in his Paris address of 1890, already referred to, says:

"Is it then impossible to properly satisfy at once these two conditions: *To utilize high speeds of flow* and avoid too great losses in power? Probably not. I am even convinced that for this class of motor, as in the case of hydraulic motors, it will be possible without too great difficulty to obtain an efficiency of 75 per cent. *However this may be, the scheme which will give this result is yet to be found.*"

[2] In this state of the art Curtis devised the turbine covered by patent 566,969; and, before discussing what the device of that patent is, let us state clearly what it is not. So far as turbines meet the eye they are all substantially similar, but the real test of a machine is not its physical appearance, but the principle on which it works. Now of the Curtis device a few things are basic. Its principle of operation is not by pressure, for Curtis has no intrachamber change or stage of pressure, and because it has no pressure passages it has no clearance and no axial thrust. Manifestly, therefore, it is not a reaction turbine, and the pressure principle of operation of that machine was not used in it. It

follows, therefore, that whatever the success of Parsons in developing that principle was in reaction turbines, it did not anticipate or preempt the field of impulse turbines to which Curtis addressed himself. On the other hand, while Curtis' is an impulse machine, patterned after and indeed making De Laval its avowed foundation, and using the nonconverging nozzle invention of De Laval to create kinetic force, yet, at a vital point, a radical departure is made from De Laval, and on that departure Curtis' device rests. For the principle of operation of Curtis' turbines is such, and herein lies his novel and valuable contribution to the impulse turbine art, with its nonclearance, nonaxial thrust, simple and rugged parts, that instead of extracting *initially*, as De Laval has done, a kinetic force so great as to require neutralization or reduction, and, using it only on one vane and at a single pressure stage, he only extracts—and that by degrees—such power as is needed, a process termed hereafter pressure-staging, and as such requisite power is so extracted by degrees, he utilizes the whole of such extracted graded power by a process hereafter called velocity-compounding. If these facts be established, it follows that Curtis was not anticipated by either Parsons or De Laval, in that he gave to the art a low-speed, impulse turbine, which while using the general principle of pressure-staging as Parsons had done, so used it as to avoid clearances, axial thrust and exclusion from the field of small turbines, and while extracting kinetic power by a nonconverging nozzle as De Laval had done, avoided the creation of high speed, wasteful nonuse of potential power, and exclusion from the field of large turbines. His device was more; in that in a turbine of simple parts and rugged construction Curtis combined the excellencies and avoided the faults of both his predecessors. This in no wise reflects on the merit of those pioneers, as is conceded by complainants' expert. Indeed, how radical was the departure of Curtis from prior developments is simply but forcibly summed up in Curtis' own testimony. He says:

"After giving the subject a great deal of thought, it seemed to me that it would be possible to devise a machine which could be run at a much lower speed of revolution than any turbine which I was aware of, that would have an even higher efficiency, sufficiently high to enable it to take the place of the steam engine in large units. At the same time the machine could be made very rugged and mechanically simple, and the necessity for small blade or bucket clearance eliminated. I remember being very much struck with the fact that no machine having these characteristics had yet been produced, although a great amount of thought and experiment seemed to have been devoted to the subject."

He then in effect adds with commendable frankness that he took up the problem, not as one of pioneer work, but only as an improver on De Laval, saying:

"I was particularly impressed with the fact that no turbines had been built based upon the principle of staging or pressure compounding, what might be called generally the De Laval type of turbine, and it seemed to me that this principle offered the true solution of the problem."

It thus appears that the goal Curtis had in view was an impulse turbine which would work efficiently at a shaft speed so low as to not require speed-reducing gear, but would hold in reserve the poten-

tial power of the passing steam until its use was required at a subsequent stage. To do this he devised the novel scheme of subdividing, in an impulse turbine, the available energy of the steam, in transit, into a number of steps, or stages. This was effected by producing several successive chambers, connected by diverging or parallel nozzles. In this way it will be seen that, instead of using one chamber and one nozzle whereby the steam was expanded from initial to exhaust pressure, Curtis took what was the exhaust steam of De Laval's single chamber (which exhaust steam, as we have seen, had additional unutilized kinetic power which De Laval failed to utilize), and by means of interchamber nozzles he so treated the steam that it could be reused in a second nozzle and chamber, and indeed, in successive ones, with the result that he utilized, in stages, the kinetic energy which De Laval had lost. It will then be seen that he subdivided the available energy steam which De Laval found of nonavailable speed into a number of pressure steps or stages, so that a single nozzle would no longer have to expand the steam from initial to exhaust pressure, but a series of nozzles could successively expand it to intermediate stages until it finally dropped to exhaust pressure. The result of these subdivision stages of pressure reduced the steam velocity of an impulse turbine to a practical bucket speed, instead of attempting, as De Laval did, to increase his bucket speed to equal high steam speed. De Laval's turbine attained commercial efficiency by reason of his use of a rotating element which permitted extremely high bucket speed. But Curtis attained commercial efficiency by such a relatively low bucket speed as required no special mechanical expedients, and thereby secured an economical co-ordination of steam and bucket speed. But. as we later show, his disclosure was more than the mere duplication of De Laval's nozzle and chamber. Curtis co-ordinated his own several pressure stages so as to secure such subdivision of energy between the chamber stages that while taking the steam in succession and operating with the same shaft speed, the several stages were adapted to give an efficient abstraction of energy. Thus the several stages, while operating separately in an efficient manner, also co-ordinately and collectively operated to give over-all efficiency. This co-ordination involved such a proportioning of the nozzles and buckets of the several stages that the several stages, while under conditions of fixed shaft speed rotation, were nevertheless adapted to accommodate the steam flow, at the successively diminished pressure, so that the steam speed produced by the successive nozzles bore substantially the same relation to the bucket speed of all other stages. This was more than the mere physical duplication of De Laval's single chamber. It is true it involved the thought of the duplication of chambers, but to that duplication it coupled the inventive, novel, and practical disclosure of utilizing pressure by stages in impulse turbines, and so co-ordinating that subdivided pressure in successive chambers that, while using the steam in chamber-succession and operating at the same shaft speed, the several steam stages were adapted to give an efficient abstraction of energy, and while

each individual chamber operated efficiently, they all operated collectively and harmoniously to give a total of over-all efficiency.

"This," as was well said by complainants' witness, "involved such a proportioning and relation of the nozzles and buckets of the several stages that the stages were, under these conditions of fixed shaft speed rotation, adapted to accommodate the steam flow at the successively diminished pressures, and also so that the steam speed produced by the successive nozzles should bear substantially the same relation to the bucket speed for each stage as for all the other stages."

It will thus be seen that Curtis efficiently and for the first time practically co-ordinated different pressure stages in an impulse turbine, and effected such a subdivision of energy between the stages that the different chambers, while utilizing the steam in transit at different stages and on the same shaft, were by their interchamber jet connection adapted to secure and utilize an efficient and complete abstraction. While each, in a sense, operated independently, yet their coordination was such that all worked unitedly to give a satisfactory total efficiency. The mode of doing so Curtis clearly outlined in his patent:

"The method by which the turbine of my present invention operates consists in converting the pressure of the fluid into vis viva by stages and utilizing the vis viva developed at each stage by passing the fluid through rotating vanes, the speed of revolution of which is adapted to abstract substantially all or a large portion of the velocity. In practicing this method I first convert a definite amount of the initial pressure of the fluid into vis viva by passing a jet of fluid through a nozzle or passage properly proportioned to give the desired result, and I deliver the flowing jet to a movable element of the apparatus consisting of one or more circular ranges of vanes forming passages through which the jet passes and in which its direction of flow is changed, so as to extract its velocity wholly or largely whereby the vis viva developed in the nozzle or passage is wholly or largely converted into mechanical rotation. The fluid issues from this movable element into a stationary passage, which is so proportioned as to convert a further definite amount of the pressure remaining in the fluid into vis viva, and which delivers the fluid in a jet to the second movable element consisting of one or more circular ranges of vanes, by which the direction of the flow of the jet is changed, and its velocity is again wholly or largely extracted, whereby the vis viva developed in the intermediate passage is converted wholly or largely into mechanical power. The energy of the fluid may be converted into mechanical power in two or more such steps or stages, but it is essential that the various stages be so co-ordinated that the flow through the apparatus shall be continuous. To this end the successive working passages to which the jet is admitted in the movable elements of the apparatus are enlarged in cross-section, and correspond in size with the discharging ends of the successive stationary passages, and in each element in which vis viva is developed provision is made for carrying the same mass of fluid as is admitted to the first nozzle or passage, having regard to the volume and velocity. * * * The velocity developed and utilized at each stage may be the same, in which case the speed of the several movable elements will also be the same, or the former may not be the same, in which case the latter will also vary. The movable elements may be mounted on the same or different shafts. If they are mounted on the same shaft, but have different rates of motion, their diameters should be different, so that the speed at the shaft may be the same. * * * The pressure of the fluid jet is not reduced during its passage through the utilizing vanes, except to the extent necessary to supply what may be called the 'frictional consumption of energy' in the passage through the vanes. The passage must be enlarged in proportion thereto. * * * Figure 2 is a view similar to Fig. 1, showing a nozzle with parallel walls in-

stead of diverging walls. * * * K is a pipe or conduit leading from the steam boiler or other source for supplying the fluid under pressure. This pipe terminates in a nozzle L, which may have diverging sides, as in Fig. 1, or parallel sides, as in Fig. 2."

Practical working directions are also given:

"For purposes of illustration we will assume that the apparatus of Fig. 1 is designed to work between a boiler pressure of 150 pounds and an exhaust pressure of 2 pounds; these pressures being absolute and not by gauge (this exhaust pressure corresponding to about 26 inch of vacuum). The pressures existing at the discharging ends of the nozzle L and of the nozzles of the intermediate stationary passages M, N, and O will be such as to develop practically equal velocities at the delivery end of each of these nozzles; this velocity being, roughly, 1700 feet per second. The apparatus of Fig. 2 is intended to represent a noncondensing turbine, operating between a boiler pressure of 150 pounds (absolute), and an atmospheric exhaust, say 16 pounds pressure. In this case the pressures at the discharge ends of the nozzle L and of the nozzles of the intermediate stationary passages M, N, and O will likewise be such as to develop practically equal velocities at each nozzle, and in this case such velocity will be roughly 1300 feet per second."

It will thus be seen that the question whether a divergent or parallel expansion nozzle is required depends upon whether or not the velocity for which it is designed is above or below critical velocity, or what is the same thing, upon whether the lower pressure into which the steam is delivered at each stage is less or more than 58 per cent. of the higher pressure of the stage from which it comes. If the velocity desired is less than the critical velocity, the fall in pressure will be to a lower pressure, which is more than 58 per cent. of the higher, and therefore a divergent nozzle will not be used, as a straight nozzle will give all the velocity required. On the other hand, if a higher velocity than the critical is desired, the fall in pressure must be to a point less than 58 per cent. of the higher pressure, and a divergent nozzle is needed to fully convert such fall of pressure into velocity.

A second disclosure of Curtis' patent was velocity-staging or velocity-compounding. Prior to Curtis' patent it had been suggested that the potential velocity remaining in the exhaust steam from De Laval's turbine should be utilized by a second or third application of the jet to a second or third set of vanes. From this it is contended that Curtis' velocity-compounding is simply the multiplication of De Laval's single vanes. Had this been all Curtis did we may assume that De Laval or other inventors would have so duplicated. But the very fact they did not is in itself proof that more than mere duplication was involved in the intervening years between De Laval and Curtis. In point of fact no one prior to Curtis showed how such duplication could be practically done, and with good reason, for we now know that, in the absence of since discovered knowledge in the steam art, no such duplication was possible. At that time the knowledge of steam friction and rotation losses was not such as to make possible the utilization of succeeding velocity stages in impulse turbines. Indeed, before the possibility of such utilization could exist, a knowledge of steam friction and rotation was a sine qua non to determining the proper design of buckets of succeeding rows; and, in fact, the angles of the guide vane edges, and also the angles of the bucket of a sec-

ond and succeeding rows, depend on the velocity of the steam at such point. Undoubtedly the proofs show that in 1895, Sosnowski, in a paper on De Laval's Turbine, read before the Civil Engineering Society of France, suggested the velocity-compounding of that turbine. He stated that the steam on leaving the first row of buckets could be redirected against the second row, and in this way steam velocity that would otherwise be lost could be utilized. But neither he nor any other engineer showed how this could be practically accomplished. Public statement of such desiderata, in the absence of any solution, evidences the need of invention to answer it. And such inventive act had to await further knowledge in the steam art before it had any possible working basis. As said by one of complainant's witnesses:

"It was not until after the experiments of Odell in 1904, described in Stodola's Steam Turbine, page 134, and experiments by Stodola (see page 130) that the losses due to steam friction and the rotation losses were sufficiently determined to enable a correct design of a single pressure stage impulse turbine having two or more velocity stages. * * * No practical use was made of the velocity-compounding suggestion, nor could have been made, until it was made by Curtis, when his pressure-compounding scheme made velocity-compounding feasible."

And by another:

"This plan of repeated application of a steam jet to moving vanes, commonly called 'velocity-compounding,' is now known to have been always impracticable when applied to a jet embodying kinetically the entire energy of the steam because of the very great friction losses involved when steam speeds were so very high. When these steam speeds had been suitably reduced by pressure-staging, however, as now provided in the Curtis specification, the velocity-compounding of an impulse turbine became, for the first time, profitable and practicable."

Indeed, the seemingly inevitable loss of residuary potential velocity in the exhaust steam of a single impulse turbine was recognized by De Laval himself, for in an article by Olssen, published in the Swedish Engineering Journal, Teknisk Tids Krift, of February 11, 1893, and republished in a pamphlet distributed by De Laval at the Chicago Exhibition, is described the function of an ejector which partially exhausted the pressure within the chamber whereby supposed additional efficiency of the turbine was thought to result. Simply stated, the velocity compounding of Curtis' patent consists in venting the force of the steam jet on two or more successive sets of movable vanes in a series of single, pressure-staged chambers, and Curtis for the first time instructed the art how, by means of suitably designed movable and stationary vanes, a jet could be efficiently carromed and recarromed from successive movable to stationary vanes in such a chamber.

In this connection two things should be borne in mind: First, that at the date of Curtis' invention, and indeed until some time thereafter, owing to the fact that the losses due to steam friction and rotation were not then known, the duplication of vanes—which is velocity-compounding—in the single staged high speed impulse turbine of De Laval was impossible; and, second, that without such knowledge Curtis, by subdividing such impulse turbine into a number of pressure-

staged chambers, was able, in spite of the lack of such data and knowledge, through the lessened speed he obtained by pressure-staging, to multiply the vanes—and thus velocity-compound—not in a single stage impulse turbine, but in the separate pressure-staged chambers of a subdivided impulse turbine. Why the effect of this double or triple division of a jet upon two or three vanes in a pressure-staged chamber is such as to make three such velocity-stagings reduce periphery speeds as much as nine pressure-staged chambers is to us inexplicable, but such is its really wonderful effect.

Velocity compounding is thus set forth in the patent:

"I deliver the flowing jet to a movable element of the apparatus consisting of one or more circular ranges of vanes forming passages through which the jet passes, and in which its direction of flow is changed, so as to extract its velocity wholly or largely, whereby the vis viva developed in the nozzle or passage is wholly or largely converted into mechanical rotation. The fluid issues from this movable element into a stationary passage, which is so proportioned as to convert a further definite amount of the pressure remaining in the fluid into vis viva, and which delivers the fluid in a jet to the second movable element, consisting of one or more circular ranges of vanes, by which the direction of the flow of the jet is changed, and its velocity is again wholly or largely extracted, whereby the vis viva developed in the intermediate passages is converted wholly or largely into mechanical power. The energy of the fluid may be converted into mechanical power in two or more such steps or stages, but it is essential that the various stages be so co-ordinated that the flow through the apparatus shall be continuous."

This brings us to the question, Was Curtis' disclosure of thus pressure staging an impulse turbine alone, or the combining of such pressure staging with velocity-compounding inventive? After a patient and thorough study of this record, we are satisfied it was. When Curtis started the work which eventuated in this patent the steam turbine problem was involved in complexity and uncertainty. The pioneer work of Parsons and De Laval was based on machines wholly unlike in basic principle of operation, and this dissimilarity rather tended to confuse and mislead those who sought improvement in lines common to both. Indeed, as noted in the earlier part of this opinion and justly stated by complainants' witness:

"* * * The successes and distinctive spheres of these two leaders tended to lead away from the path Curtis followed of blending the advantages and avoiding the disadvantages of both. Each of these inventors and those who followed the path of each would be led in the same way—had had too great success along his own line to think of abandoning or fundamentally modifying or departing from the basic principle that had led him to success. Instead each naturally went ahead to perfect the details devised to overcome the defects developed by the application of his basic principle—De Laval in devising reducing gear, flexible shaft, and the reduction of speed by mass-compounding his working fluid; Parsons turning to his balance piston against axial thrust in place of the median-steam introduction of his original disclosure and striving to minimize clearance steam escapes. Designers, less original than these turbine leaders, naturally also looked at the art from the standpoint of one or the other of these men, and worked for a future along these lines."

The situation is in our judgment most fairly summarized by a witness of complainants, who says:

"The laws of steam action in these turbines was but dimly perceived, except that speeds must be kept down; and, since, in the entire history of steam

motors up to that date, the desideratum had always been to get rotative speeds up, past experience served only to puzzle rather than to help. The state of public opinion at that date may be had by a glance over the pages of the papers by Mr. K. Sosnowski, civil engineer, presented to the Société d'Encouragement Pour L. Industrie Nationale in 1896 (revised and published in book form in 1897 under the title Roues et Turbines a Vapeur), which was generally accepted by later writers as historically sound. Almost every conceivable combination and arrangement had been proposed or tried, but more or less blindly, and with universal futility. All that was plain, as the result of this, was that departure from Parsons or De Laval toward any novel principle of action must call for a thorough redesign of the entire machine and a departure into unknown territory."

As we have seen, Parsons and De Laval were pioneers in their several spheres, but they did not block the way to further advance. Curtis' advance consisted in giving to the art a device which, by its construction and mode of operation, avoided difficulties individually incident to both Parsons' and De Laval's turbines. Compared with Parsons, he eliminated clearances and avoided axial thrusts; compared with De Laval, he avoided the wasteful method of creating high speed initially and neutralizing it by reducing gears. Curtis, obtaining low speed initially, extracted subsequently the whole working force of the steam. As compared with both, he mechanically compacted his working parts and space into smaller compass, and in his turbine disclosed a principle applicable, as Parsons' was, to turbines of large size, and applicable, as De Laval's was, to those of small size. He gave the art a type of turbine which efficiently and for the first time showed working results different from any theretofore disclosed in the turbine art. We are clear in the conclusion that his device was not the work of a mere constructor in his art, but that of a reconstructor, who brought originality of conception, unlooked for and unsuspected lines of action and creative novelty in the disclosures he made. These features, coupled with his departure from beaten paths, and the novel and useful results he obtained by methods not before known, evidence the inventive nature of his work. We have no hesitation in holding his patent valid unless anticipated.

In taking up that question we limit ourselves to the measure of the scope of alleged anticipation in the prior art, contended for by one of respondent's experts, who said:

"The true state of the art in 1896 is that represented by Moorhouse, Harthan, Mortier, and De Laval, plus the same developed knowledge on which Curtis relies."

Now there is no proof that any of these men, save De Laval, produced a practical, efficient turbine, and there is a statement by the same witness:

"I do not know that the machines of Harthan, Tournaire, and Moorhouse were ever put into practical use, nor do I know if at their respective dates the engineering knowledge as to steam flow through nozzles, etc., was adequate to permit successful practical use of these machines,"

—which virtually admits they did not. A British patent, No. 144 of 1858, followed by an American one, was granted to the Harthans for a motive power engine to be worked either by air or steam, "whereby

the expansive and reactive force of the propelling medium is brought into play." A study of this patent shows that the Harthans did not purport to disclose any new principle of operation, but their device was based on the form of their buckets and the general arrangement of their machinery. If those features involved any new principle of operation, the patentees neither knew nor claimed it, or, indeed, anything save their peculiar bucket form, for they say:

"We are aware that rotary engines, consisting of wheels having a number of projections formed or fitted into their peripheries and actuated by the impingement of steam or air against such peripheral projections or chambers, have long been known in this country, and therefore we lay no claim to the principle of such arrangement * * * but what we consider to be novel and original, and therefore claim * * * is, firstly, the system or mode of obtaining motive power by causing steam or air to impinge upon a series of chambers with *curved bottoms* arranged round a wheel, at or near the periphery thereof, as herein described."

A study of the patent shows that these curved bottom chambers, which the Harthans regarded as peculiar to their wheel, are particularly described. Their device is described as made—

"* * * with a number of *peculiarly* constructed projections forming chambers somewhat similar to the buckets of an overshot water wheel. * * * The bottom or lower part of each chamber is made of a curved or nearly semicircular form, the curve commencing immediately at one side of the mouth, and terminating in the same lateral line, so as to extend from side to side of the chamber, or in the direction of the axis of the wheel * * * a jet or jets of steam is or are brought to play into these spaces or chambers entering therein nearly at a tangent to the periphery of the wheel. * * * The steam or air on issuing from the jet enters the spaces or chambers on one side, impinges against and passes over surfaces of the curved bottoms thereof, and issues out on the other side of the spaces nearly in an opposite direction to that at which it entered, thus imparting its force to the wheel by pressure and reaction and causing it to revolve."

These and other references thereto show that the operative element which characterized the Harthan turbine was the curved bottom of their chamber, and that all other features to which allusion is made were mere incidents thereto. The device left no impress on the art during the years that passed before Parsons first utilized the turbine, and we are therefore warranted in accepting, as an explanation of its nonuse, the statement of one of complainant's expert witnesses, who says:

"As to his simple impulse wheel, it is now common knowledge, and in Harthan's day was technical knowledge, that a jet from a converging nozzle could not convert into kinetic form more than about 15 per cent. of the energy potential in the steam. Hence the net efficiency of a wheel driven thereby could not exceed 10 or 12 per cent., a quite useless figure."

It is contended, however, that Harthan's disclosed velocity-compounding in their wheel, and in support thereof attention is called to their language:

"Fig. 6 represents a detail of a third modification, where we propose to employ two wheels *CC'*, each precisely similar to the wheel in the last described arrangement, both of such wheels being fast on one shaft *D*. A space is left between the contiguous falls of these wheels for the reception of four or more returning chambers *d*, *d*, the bottom of which are curved in a direction opposite to that of the bottoms of the chambers *c*, *c*, in the

wheels. * * * The jet on being first introduced impinges against the curved buttoms of the chambers in the wheel *c'*, and is then diverted against the fixed chambers *d*, *d*, whence it is again diverted onto the curved bottoms of the chambers in the second wheel *c*, and finally passes off by the escape pipe in the manner described."

To the lay mind and apart from all expert speculation in the matter, it would seem that when Harthan's single impulse wheel was not practically efficient, a mere suggestion of employing two wheels, "each precisely similar to the wheel in the last described arrangement," would tend rather to duplicate than eliminate the objections to the one. But laying aside this simple lay view and taking up the speculative one, it seems to us that the very most that may be said of Harthan's is the statement of Stodola in the 1910 edition of Die Dampfturburen, that the—

"predecessors of Curtis are John and Ezra Harthan in their English patent, No. 144 of 1858 (Fig. 695). The use of two velocity stages in an impulse turbine is here for the first time clearly proposed, the enlarging of the cross-section, and, moreover, even the divisions of the drops in pressure are particularized."

[3] But assuming they were predecessors, wherein did they precede Curtis? Stodola says they suggested for the first time the use of two velocity stages in an impulse turbine. But there are some inventions the inventive element of which consists in the conception of the novel abstract idea as contrasted with others wherein the invention consists in the practical means of applying what had theretofore been but a mere abstract idea. In the former the conception of the abstract idea necessarily involves the details of utilizing it. In the latter it does not. Here, as Stodola says, the Harthans for the first time may have clearly proposed two velocity stages in an impulse turbine, but, coupled with the proposal were no practical, efficient means of obtaining such stages, and tested by the common-sense truism, "By their fruits ye shall know them," we are unable to find in the disclosures of this patent, or by any results flowing therefrom, anything to minimize the value of the work of such men as Parsons, De Laval, and Curtis, who entered a field that, inventively, was barren. Nor does it serve to minimize the work of these men to say there was no call for high speed turbines, and therefore the quiescence of the art from Harthans to Parsons has no significance. For it will be observed, as the current of events narrated above shows, that when the call for turbines came Parsons had years and years of patient pioneer work in the field of reaction turbines following even the grant of his patent, before it was commercially and successfully applied, while in the impulse field De Laval's work was, as we have seen, so revolutionary that his disclosure was regarded as an impossibility by the patent authorities. In the face of the expenditure of such subsequent study and effort by engineers of all countries, to now contend that the vital features of pressure-staging and velocity-compounding were anticipated, disclosed, and utilized by Harthans in a fruitless patent, wherein the only characteristic claim was for curved bottom buckets, is a contention to which we cannot assent. On the contrary, we adopt, without here discussing the reason-

ing and illustration thereto warranting, the contention and conclusions of a witness for complainants, who says:

"As to Harthan's velocity compounded wheel, even if it were equipped with a De Laval nozzle, it could not be passably efficient when built according to Harthan's instructions. Harthan specifies that the two wheels, and the intermediate guides as well, are to be alike; whereas it was well known, even in 1858, that abstraction of vis viva in successive stages can be accomplished efficiently only when the first, second, and third sets of vanes are markedly dissimilar. * * * As to Harthan's list of possible modifications, he plainly classes them of quite incidental value. All but the last we now know to be trivial in their import. As to the last suggestion for the connection by piping of a number of separate casings, in each of which rotates an impulse wheel, through which casings the steam passes in series from boiler to condenser, * * * we now know that such a series of turbines would be practically inoperative. Its adjustments of relative pressures and speeds would be such unstable equilibrium that the slightest of the ordinary variations in actual service would put it out of commission. * * * In contrast with this, Curtis' invention, as disclosed in patent 566,969, lay in first defining the problem in hand as the simultaneous reduction of wheel speeds, steam leakage, and delicacy of structure, and then in describing the combination of pressure staging with impulse action, aided by velocity compounding as the means thereto."

We next turn to the American patent to Moorhouse, No. 195,630, of 1877, for which same device his British patent of 1876 was granted, which is alleged to anticipate the pressure staging of Curtis. There is no statement in the patent as to whether Moorhouse's principle of operation was to be applied to reaction or impulse turbines, and whether he made use of the pressure or velocity of the steam. There is no reference anywhere to any jet, or impulsive action of steam. On the contrary, that his turbine was operated by pressure difference, rather than by velocity, is indicated where he says:

"The openings in the dividing plates between the several compartments are arranged so that the driving fluid, in its passage through them, operates upon the vanes or buckets upon the turbine wheel in the compartment into which it is passing, and the turbine wheel is thus with a force proportioned *to the difference in pressure of the driving fluid* in the two compartments. By the novel arrangement described, the difference of pressure between each two adjoining compartments is comparatively small, and it is thus possible to actuate the turbine wheels and the driving shaft at a moderate speed, which is impracticable where high pressure steam is used to drive a single turbine."

He further adds:

"If steam of 96 pounds per square inch is admitted through the inlet pipe *h*, the openings in the first dividing plate are of such area that its pressure is reduced to 92 pounds in the second compartment; and in its passage it drives the first turbine wheel with an effective pressure of 4 pounds per square inch only. In the same way it passes through all the other compartments in succession, its pressure being reduced 4 pounds per square inch in each, but its volume being increased proportionately by expansion."

In the British patent Moorhouse states the drop in pressure is one not only to the area openings, but as well to the compartment capacity, saying—

"the openings being of such area, and the compartments of such relative capacity, that the steam expands to a calculated extent in its passage."

But not only does this strongly suggest that Moorhouse's was a reaction turbine, but in his British patent he refers to the description he has given in language which can be predicated on a reaction, but not on an impulse turbine, which, as we have seen, to be efficient cannot travel at over half the speed of the impelling steam. That language is:

"It is not necessary that the turbine wheels should be made to travel at the same speed as the steam which actuates them, as assumed in the foregoing description."

It is true the language following:

"They may be made to travel at a less speed than that of the steam, and very good results may be obtained when the velocity of the wheels is half that of the steam,"

—might be applied to an impulse turbine, as contended by respondent's experts; but, as it is undoubtedly referable as well to the reaction turbine of his "foregoing description," we think it would be a strained construction to apply the language in its juxtaposition to any other type of turbines, and Stodola, page 83, says:

"Moorehouse (Figs. 169 and 170) counts only upon pressure stages."

We, therefore, conclude that whatever principle of operation Moorhouse had in view, he threw no light on applying it to an impulse turbine. And this conclusion as to impulse turbines becomes more significant when the Moorhouse patent is considered with special reference to De Laval's type of impulse turbine, of which type the Curtis is, as we have seen, an improvement. For it must be conceded that whatever principle of pressure-staging Moorhouse disclosed, anything he disclosed was not applicable to the high speed impulse turbine which De Laval produced by his nozzles where there is no pressure difference at the inlet and outlet ends of the moving vanes, for, prior to De Laval, as we have seen, no one (and of course, Moorhouse) dealt with the then unknown condition of a pressure drop created solely in the nozzles. And, indeed, Gentsch, who in his Dampfturburen (an authority quoted by one of the respondent's witnesses as "a well-known member of the German Patent Office and a very high authority on steam turbines"), while classifying Moorhouse's turbine as an impulse one, wholly disassociated him and other designers from the De Laval type, saying:

"The steam which expands outside the nozzles, and which in the free jet wheels is mostly made to perform work during the period of expansion, is able to convert only a small portion of its pressure energy into current energy, so that the working of the velocity turbines hitherto discussed has not given a satisfactory economical result. * * * A better state of things was produced for the first time by the invention of De Laval."

Finding, then, as we do, that the disclosures of the Moorhouse patent had no helpful bearing or practical effect on the impulse turbine art, and supported in that conclusion by the fact that its vagueness is such that fair-minded witnesses in this record greatly differ as to what its disclosures really are, we are not warranted in attributing to it any effect in the way of vitiating, or even minimizing, the work of Curtis. We pass on to the Mortier article.

In 1890, Rateau, a French savant, read before the Society of Mineral Industries of France, two papers on the Parsons' turbine, which had been lately exhibited at the Paris Exposition. In his first paper Rateau discussed that turbine, stating its advantages and disadvantages. Several members expressed their views upon it, following whom M. Mortier stated "that this form of motor utilizes the complete expansion of steam," whereupon the president inquired "What advantage is gained by using the steam in the form of velocity instead of using it in the form of pressure?" Mortier's subsequent remarks were evidently prepared with reference to this question, and in order to gather their significance, it is important to determine what the president's question raised, and how it was understood by those present, and how it was acted upon. That it meant a comparison of the worth of a reciprocating engine and some turbine is clear. But what turbine? Respondent contends it covered impulse turbines. We cannot accede to this view. The question was raised by the president, not by Mortier, and, as we have seen, was called forth by the assertion of Mortier, who was apparently completely satisfied with the Parsons turbine: "This motor utilizes the complete expansion of steam." Mortier was seeking or suggesting no other form or type of turbine, and the president, then, in substance, put the question as one between the Parsons turbine and a reciprocating engine. Certainly Rateau so understood the question, for he answers "that he intends to treat this question and to *complete* his communication (which was based wholly on the Parsons turbine) at a future meeting"; and the society so understood, for its minutes state:

"Order of the day for the meeting of April 12, 1890: The Parsons' Steam Turbine."

Moreover, Rateau's subsequent paper was based on the question between Parsons and the reciprocating engine, opening with the statement:

"I wish to-day to enter upon some considerations, theoretical for the most part, which will permit me to compare *this new kind of motor* with ordinary steam engines and to arrive at an estimate as to the probable future in store for it."

As if to emphasize and limit himself to this single issue, he announces his satisfaction with the Parsons machine, saying: "New types will undoubtedly succeed one another, and there is reason to expect within a short time the complete solution of the question *already fitly* answered by the Parsons system," and disposed of another type (Dow's) lately introduced, which he estimates as "* * * inferior, from various points of view, to that of M. Parsons," and of which "* * * in its present condition the system would not be of a nature to be widely introduced in practical industry." He then takes up the Parsons, as the turbine basis of comparison with a reciprocating engine, and states his conclusions, which need not be quoted.

The minutes then state, "Continuing the preceding communication, M. Mortier gives the following information on the same subject." Without entering upon a discussion of Mortier's statements and calculations, it suffices to say that to us the inherent proofs of the pro-

ceedings show that they are directed to the Parsons type, which, as we have seen, was a reaction turbine. There was nothing in the subject before the society to suggest the introduction or discussion of impulse turbines. That meeting was discussing a particular reaction turbine; it was practical and efficient; the society had seen it operate. It was the contrast of this practical device with steam engine practice that body was discussing. There was no necessity for discussing impulse turbines, for no one had then produced one that was practical and efficient. And, as we have seen, no engineering basis of fact existed prior to De Laval for any speculation as to the future of the impulse turbine. If the striking effects of pressure-staging and velocity-compounding impulse turbines, which afterwards gave them efficient working value, were then realized and disclosed by M. Mortier's paper, he neither claimed them in his paper, his subsequent acts were in conflict with such a claim, and the engineering world ignorantly suffered years to pass, and misguided efforts, in other directions, to be made in the face of such disclosures. Indeed, if Mortier's address be assumed to apply to impulse turbines and to disclose Curtis' mode of overcoming their failings, Mortier's subsequent acts are inconsistent with such assumption. When he subsequently took up the subject of minimizing steam speed it was not, as shown by his two French patents of 1894 and 1895, on the principle of operation now alleged to have been disclosed by him, to wit, the principle of eliminating such speed, but on the principle of controlling such speed by mixing live steam with hot water or exhaust steam. This system, which as now known resulted in a loss of from one-half to three-quarters of available steam energy, shows that Mortier, instead of anticipating Curtis in his disclosure, followed in the lead of those inventors of whom Stodola said:

"The majority of the older patents showed lack of knowledge of the laws of steam flow. One idea especially led inventors on, in spite of constant failure, *to decrease the velocity of the steam by mixing it with fluids or gases.*"

[4] We next turn to the question of infringement. The disclosures of Curtis' patent, as we have seen, consisted, broadly stated, of pressure-staging an impulse turbine, the velocity-compounding thereof and the abstraction, at each passage of the steam, of substantially all or the principal part of the vis viva developed at the preceding stage. Without discussing the proofs in detail, we may say we find these features in the respondent's turbines. The proofs show the proposals made by them to the government for equipping certain vessels with turbines and a guaranty that certain results will be obtained. We are warranted therefrom in assuming the respondents meant to comply with their representations and contract guarantees, and, in the absence of any proof by them tending to give the court light on exactly what form of turbine they are constructing, we are, under the authorities (Peifer v. Brown [C. C.] 85 Fed. 780; Celluloid Co. v. Arlington Co. [C. C.] 85 Fed. 449) justified in resting on the proofs of complainants before us. These show that the principle of operation of respondents' turbine is distinctively impulse, that it is multi-pressure-staged, having 32 pressure-stages, 12 stages having two velocity rows each, and 20 stages one row each. On the same shaft is

mounted also a reversing multi-pressure-staged turbine having three pressure stages with two velocity rows each, and the rest with one. We agree with the deductions drawn by complainants, based on calculations on data as to bucket speed and steam speed furnished by complainants' witnesses, that the abstraction of vis viva by respondent's turbines is substantially and practically complete, the unused velocity amounting to 2.29 per cent. the energy, and this conclusion is confirmed by the standard of efficiency guaranteed to the government by the respondent under the designed full speed conditions. That when operated under other conditions such turbines might abstract lesser amounts of vis viva does not free the turbine of its infringing character. Being designedly made capable of infringement, its capacity to so infringe warrants the conclusion that it does infringe. It is contended, however, that infringement of the Curtis patent is not established unless there is an absolute and total abstraction of vis viva. We find no warrant for this contention in the specification or claims of that patent, and we find no ground in reason or thermodynamic practice for such extreme contention. The economies of fuel, power, and indeed all motive mechanism, are necessarily only approximately perfect. Waste, loss of motion and power are incident to all mechanical, thermal, and motor operations, and the effort is to reach substantial, practical results rather than absolute, theoretical ones. And such substantial abstraction was the measure Curtis disclosed in his specification.

"My object is to develop mechanical power from steam or other elastic fluid under pressure by *utilizing a large proportion of its vis viva in a turbine*, whose speed of rotation shall be low. * * * I deliver the flowing jet to a movable element of the apparatus consisting of one or more circular ranges of vanes forming passages through which the jet passes and in which the direction of flow is changed, *so as to extract its velocity wholly or largely whereby the vis viva developed in nozzle or passage is wholly or largely converted into mechanical rotation.*"

And the same thing is embodied in several claims in the words:

"Said vanes being adapted to abstract at each passage therethrough substantially all or the principal portion of the vis viva developed at the preceding stage."

In the same way we find no warrant in the patent for restricting the nozzles or passageways to the expansion pipe. We have already pointed out earlier in this opinion that the patentee stated parallel and diverging nozzles were alternative constructions. It is contended, however, that Curtis by his definition of expansion nozzles in another application to which this patent refers so restricted himself. But the fact is that this definition was not originally embodied in that application, and its subsequent introduction in such former application was for reasons involved in that particular application. Just principles of construction do not necessitate it, being by mere general reference specifically applied to a patent which expressly negatived, both in specification and figures, any such restricted meaning. The partial peripheral introduction of the steam has been emphasized in complainants' testimony as a feature of marked advantage in impulse turbines, and

whch distinguished them from the reaction type. In his specification Curtis lays stress on this feature as one characteristic of all his passages, and as distinguished from introduction in annular form, saying:

"It is the design of my present invention, as of the apparatus of my prior application referred to, to employ at the delivery end of the nozzle and in the working passages a 'jet' of steam or other elastic fluid, i. e., a practically solid stream of fluid having an oblong form in cross-section, whose thickness bears a considerable proportion to its width, so that its cross-sectional area will be large compared with its perimeter as distinguished from an annular film of elastic fluid whose cross-sectional area is small compared with its perimeter. By this means the frictional retardation is greatly reduced and the efficiency is largely increased."

It is manifest, therefore, that a turbine which while it delivers "a fluid jet to a portion of the vanes within the first shell," but not to the succeeding ones, does not infringe a claim, one of the elements of which is "intermediate passages connecting the different shells together and delivering the fluid jet to a portion of the vanes of the different sets in succession." Gauged by these general conclusions, we find that, with the execption of the seventh and tenth, all of the claims charged are infringed.

[5] We next turn to patent No. 595,435, the first, second, third, and fourth claims whereof are alleged to be infringed. The object of Curtis, as stated in his application, was—

"to produce an elastic turbine operating under conditions of high efficiency in which variations in speed may be effected without great variations in the efficiency of operation."

This he accomplished by constructing and arranging the fluid passages of the turbine and their connections in such a way that the elastic fluid may be caused to traverse the movable vanes a greater or less number in succession. He states:

"The general plan of the elastic-fluid turbine being such as is described in patent No. 566,969, issued to me September 1, 1896."

The proofs show that for efficient operation the vane velocity should be about one-half the velocity of the steam action upon the vanes where the velocity is abstracted by a single set of vanes, and in like proportion if the velocity is fractionally abstracted by two or more sets of vanes, velocity compounded, and consequently, generally speaking, the vane velocity should be higher the fewer the number of stages into which the pressure drop is divided. This principle is used by Curtis, whose device, shown in the accompanying figure 1 is so arranged that the number of stages into which the pressure drop is divided may be varied according to the rotary speed at which it is desired the motor should be driven, a less number of stages being used for higher speeds, and a greater number for lower speeds. The wheels or sets of vanes, which are described as mounted on a common shaft, are contained in separate casings, and the steam from the boiler is delivered to the nozzle *I*, to act upon the vanes in the first casing, in which the pressure is lower than in the boiler, and from which the steam passes by passage *N* through the nozzle *J*, in passing

through which it expands and acquires velocity and enters the second casing, to act upon the wheel vanes therein, and so on to the third and fourth casings, from which the fully expanded steam is delivered through the exhaust passage *Q*. Provision is made for controlling the steam passages so that the steam may be made to have a less number of expansion stages, this provision being shown in the foregoing figure as afforded by the exhaust passages *RST*, each provided with a shut-off valve. These passages respectively communicate with the connecting passages *NOP*, between the successive stages so that, if, for example, the valve and exhaust passage *T* is open, the steam will exhaust at the end of the third stage, and the fourth stage and parts pertaining thereto will be cut out of action. By the division of the pressure drop into three stages, the velocity of each stage will be increased as compared with that produced when four stages are used, being about four-sevenths instead of one-half of the velocity due to the total drop. Similarly, if the valve in the passage *S* were opened, steam would exhaust at the end of the second stage and the velocity in the two stages would be about five-sevenths of that due to the total drop, and if the valve in the passage *R* were opened the entire pressure drop would be used at a single stage, giving a steam velocity, and consequently an efficient wheel velocity, almost double that produced when the four stages are used. It will thus be seen that what Curtis really disclosed is simply taking and equipping with cut-off devices, a multi-staged turbine of the type of the patent we have already described, and fitting it with devices whereby different chambers could be operated or by-passed as desired. The particular means employed by him are embodied in claim 6, which is not charged to be infringed. Assuming, for present purposes, that such device is patentable, and that Curtis is entitled to a monopoly of a specific device embodying a combination of parts as will control the use of the several chambers of a turbine, it does not follow that he is entitled to such generic claims as are here involved, and which, if sustained, would give him a monopoly of all turbines using controllable passages whereby the steam is made to act upon movable vanes a greater or less number of times in succession. In view of the recognized practices of steam control and the special character of Curtis' device, it would be a perversion of patent law and principles to make this control device of his a basis for monopolizing the whole field of steam passage control by inclusive claims such as are here involved. Accordingly, we hold these four claims invalid.

[6] It remains to consider another question presented by the record. The infringement complained of is referred to in paragraph 21 of the bill, which avers that defendant did, before the beginning of the suit—

"* * * offer in writing, accompanied by plans and specifications, to make for, and to sell to, the United States government, elastic-fluid turbines for propelling ships—or, in other words, for marine propulsion other than automobile torpedoes—employing and containing the inventions set forth in each and all of the several letters patent; that the offer so made by the defendant has been accepted by the United States government; that the defendant is at present under contract to make such infringing elastic-fluid tur-

bines; that the work of construction of such infringing turbines is now being proceeded with by said defendant within the eastern district of Pennsylvania, and elsewhere in the United States, for the purpose of furnishing the same to the United States government under the said contract; that all of said acts and doings by the defendant have been and are without license or allowance, and against the will of your orators, and in violation of their rights; and that the defendant is threatening to carry on its aforesaid acts to a large extent in violation and infringement of the rights and privileges of your orators, and to their great and irreparable loss and injury," etc.

Accordingly, paragraph 23 prays defendant may be decreed to account and pay over all such gains and profits as have accrued or may accrue "by reason of any such infringement," and also account for and pay over all damages sustained or to be sustained "by the said unlawful acts"; and a perpetual injunction is prayed to restrain the defendant from "directly or indirectly making, constructing, using, vending, delivering, working, or putting into operation or use, or in anywise counterfeiting or imitating, the said several inventions, or in any elastic fluid turbines made in accordance therewith, or like or similar to those which the defendant has contracted to make for the United States government in infringement of the said several letters patent," etc.

It is also prayed—

"that any elastic-fluid turbines or parts thereof infringing any or all of the said several letters patent mentioned, and which may be in the possession of the defendant, shall be destroyed, or delivered up to your orators or an officer of this court to be so destroyed."

The bill also prayed formally for a preliminary injunction, but no motion was made for this relief. Since the litigation began, the two torpedo boat destroyers referred to have been finished and delivered to the government, and the plaintiffs do not now ask that the decree shall in any wise be directed against these vessels, or against the government in respect thereof. The bill contains no averment that the defendant is building or threatening to build infringing turbines for commercial use; only certain ships of war are involved in the suit; and, for reasons to be briefly stated, we are of opinion that no injunction should now be granted. We do not agree that the court below should have dismissed the bill for want of jurisdiction. Neither the United States nor one of its officers is a party defendant, but the suit is brought solely against a private corporation that had contracted to do certain public work.

The bill was filed in 1909, and we think there was then no doubt that the court below had the right to entertain it. It had been much debated, and had been variously determined, how far an injunction might interfere with the acts of government officers, who in their official capacity were infringing or were threatening to infringe the rights of patentees. The Supreme Court had refused to permit a plaintiff to interfere with property owned by the government and in its actual possession, but no such decision had ever been made concerning property that was still in the course of preparation for public use by a contractor with the government. The facts in Dashiell v. Grosvenor, 13 C. C. A. 593, 66 Fed. 334, 27 L. R. A. 67, present this

situation as nearly as any other case, and it may be worthy of note that the Supreme Court took jurisdiction of that dispute on the merits, and decided the question of infringement. On the face of such a bill as is now presented, the controversy is primarily between individuals, and no reason is perceived why the equitable jurisdiction of a court does not attach. There may be sufficient reasons of public policy to induce the refusal of relief by injunction, either at a preliminary stage or after final hearing; but this is a separate question, distinct from the principal matters of dispute, and does not operate retroactively to take away the power of the court to hear and determine the controversy on its merits. The relief to which a plaintiff would ordinarily be entitled in a suit between individuals may be denied in a particular case for special reasons, as it may be denied where no question of public policy can possibly arise; but, we repeat, this of itself does not oust the court of its equitable jurisdiction to hear and decide the suit.

But since the suit was brought, the act of 1910 has been passed, and has been interpreted by the Supreme Court in the recent case of Crozier v. Krupp, 224 U. S. 290, 32 Sup. Ct. 488, 56 L. Ed. 771. This statute, we think, furnishes a practical solution of the questions arising upon this branch of the case. Even if the plaintiffs did not disclaim the desire to interfere with the government's possession of the vessels, there is no longer any ground upon which a final injunction can be properly rested, even in a suit against a contractor with the government, where the dispute concerns such property as vessels of war. If the United States has infringed, or shall hereafter infringe, the patents that we have been considering, the act of 1910 permits the plaintiffs to sue in the Court of Claims. Crozier v. Krupp, supra. And if the defendant shall undertake to infringe hereafter by making offending turbines for commercial use, relief can be obtained by another suit.

The plaintiffs are entitled to a decree sustaining patent No. 566,969 so far as indicated in the foregoing opinion, and ordering an account, but an injunction will be denied. Accordingly, the decree entered in the District Court is now reversed, with the costs of this court, and the case is remanded, with instructions to enter a decree in accordance with this opinion. We leave the question of costs in the District Court to be disposed of by that tribunal.

ELECTRIC STORAGE BATTERY CO. v. PHILADELPHIA STORAGE BATTERY CO.

(District Court, E. D. Pennsylvania. January 27, 1914.)

No. 741.

1. PATENTS (§ 311*)—SUITS FOR INFRINGEMENT—SPECIAL DEFENSES.
Under Rev. St. § 4920 (U. S. Comp. St. 1901, p. 3394), which provides that the defendant, in a suit for infringement, may, on 30 days' notice, prove certain special defenses under the general issue, or may plead such defenses and give proof thereof under like notice in the answer, such defenses not pleaded, and in the absence of the required notice will not be considered if objection is made, or where there is nothing to indicate that complainant has waived his right to notice.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 541, 542; Dec. Dig. § 311.*]

2. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—STORAGE BATTERY.
The Dodge patent, No. 1,000,330, for improvements in secondary or storage batteries, consisting of a wood separator, which has previously been treated as described in the specification, to deprive it of such of its constituents as would deleteriously attack lead when subjected to electrolytic action, while leaving those constituents which beneficially affect a negative pole plate, was not anticipated, discloses patentable invention, and is valid, also *held* infringed.

3. PATENTS (§ 62*) — EVIDENCE OF ANTICIPATION — MEASURE OF PROOF REQUIRED.
When an unpatented device, the existence and use of which are proven only by oral testimony, is set up as a complete anticipation of a patent, the proof sustaining it must be clear, satisfactory, and beyond reasonable doubt.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 78; Dec. Dig. § 62.*]

In Equity. Suit by the Electric Storage Battery Company against the Philadelphia Storage Battery Company. On final hearing. Decree for complainant.

Augustus B. Stoughton, of Philadelphia, Pa., for plaintiff.
Cyrus N. Anderson, of Philadelphia, Pa., for defendant.

THOMPSON, District Judge. This suit is based upon the alleged infringement by the defendant of a patent to Norman Dodge, assignor to the Electric Storage Battery Company of Philadelphia, No. 1,000,330, for improvements in secondary or storage batteries. The application was filed June 9, 1904, and the patent issued August 8, 1911. As set out in the specification:

"The object of the invention is to provide a satisfactory and efficient wood separator and to provide for treating the same in such a way as to make it practically successful in its application to lead storage batteries."

The single claim in the patent calls for:

"A storage battery separator consisting of a sheet of fine grain wood having its natural structure and containing its cellulose and fibrous constituents and constituting a diaphragm impervious to battery sediment and primarily deprived of such of its constituents as would deleteriously attack lead when subjected

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

to electrolytic action and retaining such of its constituents as beneficially affect a negative pole plate."

Referring in the specification to the term "such of its constituents as would deleteriously attack lead," the specification recites:

"The wood separator which is adapted to constitute a diaphragm impervious to battery sediment is primarily deprived of such of its constituents and wood acids as would in the operation of a battery attack lead. Acetic acid is a type of the wood acids referred to, and if the latter were present they would in the operation of the battery either attack the positive lead pole plate, causing its disintegration, or perhaps by oxidation escape without doing injury, but the only successful course is to primarily deprive the wood of such acids."

The specification then describes two ways for the accomplishment of the result: First, the wood is soaked in a sulphuric acid water solution of, for example, 1.2 specific gravity at normal temperature for two days, more or less; and, second, the wood is soaked in an alkaline solution, such as a 3 per cent. solution of caustic potash, at normal temperature, for about 24 hours. Subsequently the wood is washed as in running water for 48 hours, more or less.

Referring to the language in the claim "such of its constituents as beneficially affect a negative pole plate," the specification recites:

"Although the wood is by the described treatment deprived of certain of its constituents, still it retains others of its constituents, some or all of which beneficially affect the operation of the battery, more particularly in respect to the capacity and life of the negative pole plates."

Referring to the "fine grain wood" mentioned in the claim, the specification mentions bass, birch, cherry, white pine, poplar, and Oregon pine as types of such wood.

The defense set up in the answer is that the patent is invalid for lack of patentable novelty on account of the prior art, for lack of patentable subject-matter, in that the patented separators were known and used in the prior art, and for want of invention. The answer denies infringement.

To establish the defenses set up in the answer, the defendant has introduced evidence consisting of prior patents, printed publications of the complainant, in which it is alleged the subject-matter of the patent is described, evidence of prior knowledge and use by employés of the Helios-Upton Company and its officers and customers, and prior knowledge and use by complainant and its employés and by other corporations.

[1] Before discussing the construction of the patent, two of the defenses discussed in the defendant's brief and at the argument and arising under section 4920, Rev. St. (U. S. Comp. St. 1901, p. 3394), will be considered. They are stated in the defendant's brief as follows:

(1) Invalidity in that, for the purpose of deceiving the public, the description and specification filed by the patentee in the Patent Office was made to contain less than the whole truth relative to his invention or discovery.

(2) Invalidity in that, for the purpose of deceiving the public, the description and specification filed by the patentee in the Patent Office

was made to contain more than is necessary to produce the desired effect.

Section 4920 provides that these defenses, inter alia, may be proved at the trial as special matter, where the defendant has given notice in writing to the plaintiff or his attorney 30 days before trial. The final paragraph of the section provides:

"And the like defenses may be pleaded in any suit in equity for relief against an alleged infringement; and proofs of the same may be given upon like notice in the answer of the defendant, and with the like effect."

The defendant did not plead either defense.

These statutory defenses are based upon the purpose of deceiving the public. No testimony was introduced by the defendant to sustain either defense or to show that there was any purpose on the part of the complainant or patentee of deceiving the public. The purpose of section 4920 is to give the complainant notice of what he is to meet at the trial. If, without such notice, evidence is introduced at the trial or during the taking of testimony to support a statutory defense not pleaded, such evidence will be stricken out and not considered by the court, if proper objection is made. While evidence of matters of special defense not pleaded in the answer will be considered, where relevant, if the evidence relating thereto has not been objected to at the time of the hearing upon the ground of waiver of notice, I think it is not within the purpose or spirit of section 4920 to consider, at final hearing, defenses of this nature without notice, where there is nothing to indicate that the complainant has not waived its right to notice. The consideration of the case will therefore be confined to the defenses set up in the answer upon proper statutory notice, or otherwise raised by the pleadings.

[2] As stated by defendant's witness Paige:

"The problem presented in the patent in suit is to deprive a piece of wood of acetic acid or the constituents of the wood from which acetic acid may be formed."

It will be seen that this statement does not cover the whole problem.

Under the claim of the patent, we find that it consists of a sheet of fine grain wood,

(a) Having its natural structure, and

(b) Containing its cellulose and fibrous constituents, and

(c) Constituting a diaphragm impervious to battery sediment, and

(d) Primarily deprived of such of its constituents as would deleteriously attack lead when subjected to electrolytic action, and

(e) Retaining such of its constituents as beneficially affect a negative pole plate.

It is conceded that wooden separators in secondary batteries are not new. They had been in general use, perforated, or impervious to battery sediment, for a length of time considerably more than two years prior to the filing of the application for the patent. The difficulty in the use of wooden separators consisted principally in the action of the sulphuric acid or electrolyte upon the incrusting substance of the wood, known as lignone, the effect of which is the formation of acetic acid, which attacks the positive plates of the battery and destroys its effi-

ciency. The object of the defendant's patent is to produce a separator impervious to battery sediment (thus avoiding short circuiting), from which such of its constituents (to wit, constituents forming acetic acid) as deleteriously attack the lead are primarily removed (that is, removed prior to the use of the separator in the battery). It appears to be conceded by both parties that, after a portion of the substance producing acetic acid is removed, the retention in the separator of the remaining portion is beneficial to the negative pole plates of the battery. The patentee, accordingly claims a separator primarily treated in such manner as to deprive the wood of such of its constituents as would deleteriously attack lead (in the positive pole plate), retaining, however, such of its constituents as beneficially affect the negative pole plate. It is obvious, from an examination of the specification and from the testimony of the complainant's witnesses, that the treatment of the wood in sulphuric acid, followed by rinsing in water, or by the other method described, treatment in an alkaline solution, as caustic potash or caustic soda, followed by rinsing in water, does have the effect of taking out of the wood a part of the constituents which form acetic acid, and that, unless the wood is so treated, the acetic acid which is formed by the action of the electrolyte fluid deleteriously attacks the positive pole plate by disintegrating the lead. It is undisputed that by the method of treatment described in the specification not all of the constituents which would form acetic acid, which in turn would deleteriously attack lead, are removed from the complainant's separator, and it is established by the evidence that the alleged infringing separator of the defendant also, by the treatment to which it is subjected, is not deprived of all of the constituents which would form acetic acid and which in turn would deleteriously attack lead. The defendant, therefore, contends that the method of treatment to which complainant subjects its separators, although in accordance with the method described in the specification of the patent, except in the fact that caustic soda is the alkaline solvent used instead of caustic potash, is not within the claim of the patent, inasmuch as the claim is based upon the separator being "primarily deprived of such of its constituents as would deleteriously attack lead when subjected to electrolytic action." It is contended by the defendant that, inasmuch as acetic acid is admittedly the derivative of the constituents of the wood which deleteriously attacks lead, unless all of such constituents are removed from the wood primarily (that is to say, before emersion in the electrolyte and use in the battery), the complainant's separator is not within the claim of the patent. In this attempted construction, I think sight is lost of the connection of the words of the claim "when subjected to electrolytic action." There is ample proof in the testimony of both the defendant's and complainant's witnesses that, if the wooden separators before treatment are placed in secondary storage batteries and subjected to electrolytic action, the deleterious effect of the acetic acid derived from the wood is apparent and results in the disintegration of the positive pole plate. When, however, the wooden sheet or separator has been treated as described in the specification and is placed in the electrolyte fluid of the battery, although a part of the constituents of the wood which form

acetic acid are present and are acted upon by the sulphuric acid in the battery, they are apparently broken up into other forms, which are not deleterious to lead when subjected to electrolytic action, and the lead of the positive pole plates is not deleteriously affected by action upon it of such remaining constituents.

It therefore appears that the wooden separator, although it contains a part of the same class of constituents which have been removed, has been deprived of and does not contain such of its constituents as would deleteriously attack lead when subjected to electrolytic action. There is no testimony on the part of either the complainant or the defendant explaining why depriving the wood of only a part of its constituents which would form acetic acid renders the remaining part of those constituents harmless to lead when subjected to electrolytic action. Having proved the fact, it is not incumbent upon the complainant to show why nor how the effect is produced. It has shown by the discovery or invention that it is produced, and what it has shown, I think, clearly brings its separator, treated by the methods described in the specification, within the claim of the patent as being primarily deprived of such of its constituents as would deleteriously attack lead when subjected to electrolytic action. The defendant urges that the patent is invalid, owing to the fact that the final paragraph of the claim of the patent, "and retaining such of its constituents as beneficially affect a negative pole plate," constitutes an amendment which was not contained in the claim as originally filed. As stated in the specification:

"Although the wood is by the described treatment deprived of certain of its constituents, still it retains others of its constituents, some or all of which beneficially affect the operation of the battery, more particularly in respect to the capacity and life of the negative pole plates."

No witness was called on behalf of the complainant who had knowledge or could explain what constituents of the wood, different from those forming acetic acid, remained which exercised the beneficial effect described and claimed. It is claimed by the defendant, and the claim is borne out by inspection of the file wrapper, that the original application for the patent in suit did not describe or even suggest a separator "retaining such of its constituents as beneficially affect a negative pole plate." The insertion of this language in the claim is not, I think, such a change in the application as to invalidate the patent under the rule that an applicant for a patent may not, by amendment, insert in his original application new matter constituting a different invention, and thus, after his application has been long pending, obtain a patent for an invention made by others after the filing of the application. The insertion of the clause in question in the claim does not add to or take anything from the complainant's separator. There is nothing in this language to change the structure nor to alter, in any respect, the treatment of the wooden sheet. It is claimed by the complainant's witnesses and corroborated by those of the defendant that there are ingredients in wood which have a beneficial effect upon the negative pole plate of the battery, increasing its life and capacity. Neither set of witnesses has with certainty explained what the beneficial constituents are, and I think it may be safely stated that they do not know. According to complainant's witnesses, the fact has been demon-

strated, however, that there is such beneficial effect in wood, as the beneficial effect has been obtained by placing in a battery sawdust or shavings of wood, and the conclusion may therefore be drawn that the beneficial action is not caused by the use of the wood as a diaphragm but caused by some unknown chemical constituent. It is claimed by the complainant and conceded by the defendant that such constituents as are beneficial remain in the wood after the treatment, which removes, to the extent obtained by the process, the constituents deleterious to lead, described in the complainant's patent. That wood has these beneficial properties was known prior to the complainant's invention; that they remain in the wood is an incident of the treatment, but the clause does not broaden the effect of the claim. It may well be construed as meaning that, while the wood, by being subjected to the treatment, is primarily deprived of its harmful constituents, it is not thereby deprived of such of its constituents, which were present before the treatment, as beneficially affect a negative pole plate, but that as to such constituents the wood remains the same as before the treatment. This is not a claim of anything new but is merely descriptive of one of the unchanged properties of the wood in respect of its beneficial constituents after the treatment has deprived it of its harmful constituents.

The complainant, having offered his patent in evidence, is, by the well-known rules of law in relation to patents, entitled to the presumptions that the patent is valid; that the device described and claimed is patentable generally; and that the patentee was the original and first inventor of what is described and claimed. The evidence offered to overcome these presumptions will next be considered.

As to the prior patents which disclose inventions for reducing wood to pulp by the use of dilute sulphuric acid or alkali, I think they may be dismissed as being irrelevant in defense for the reason that in none of them was there any use of these processes to adapt the wood so treated to making a separator such as is disclosed by the complainant's patent. That caustic soda, caustic potash, or sulphuric acid would have the effect of disintegrating some of the constituents of the wood was well known, but such process as forming part of a treatment to primarily remove the constituents, which would deleteriously attack lead when subjected to electrolytic action in a storage battery, had not been applied in any of such patents. Moreover, the wood, by the processes in these patents, had lost its natural structure, and there is nothing to identify it with the patent in suit, except that acid or alkali solutions of various degrees of strength are used in connection with various mechanical processes in reducing the wood to pulp. Other patents were offered in evidence relating to storage batteries and describing separators of various sorts of natural wood. None of these patents describe a process of treatment of wood separators nor describe a wood separator having the essential characteristics of that treated by the process described in complainant's patent, and which accord with its claim. As tersely stated by complainant's counsel, the patent in suit does not claim any process, but describes a process consisting in two steps: First, soaking wood separators in a mild acid or alkali solution (of not exceeding 100 degrees Fahrenheit); and, second, washing the

separators so soaked, as with running water, for the purpose of making a wood separator characterized by the fact that it must be kept wet and by the fact that it is efficient and practical in use and retains all the excellence, chemical, structural, and physical, of wood, but is primarily deprived of constituents which after chemical change, and when subjected to electrolytic action in the use of the battery, would attack and disintegrate the lead of the positive pole plates.

We find, in the patents offered to prove anticipation, natural wood treated in various ways to prevent warping, from which, however, the deleterious constituents have not been extracted; natural wood structurally reduced to a fiber or pulp or an impalpable mass, which therefore do not come within the terms of the patent in that the wood does not retain its natural structure; wood kiln-dried to reduce its internal resistance to the passage through it of the electric current, the wood not being deprived thereby primarily of its harmful constituents; wood boards saturated with concentrated sulphuric acid, which do not anticipate the patent in that the wood is not washed, as in running water, for the purpose of removing the sulphuric acid and the acids formed from the constituents of the wood; Yucca palm wood, boiled to remove starch and non-fibrous portions, which, it appears, is not impervious to battery sediment. It does not appear that any of the patents offered to show prior art produced a separator having the advantages of complainant's separator, nor do they show a separator treated as in the patent in suit. It does appear, by publications of the complainant offered in evidence by the defendant, that efforts were being made more than two years prior to the application for the Dodge patent by the complainant and by its customers under its direction to perfect a process by which a wooden separator could be used without the well-recognized injurious effect upon the lead in the positive pole plate. That these attempts were not successful is apparent from the instructions issued by the complainant and the correspondence offered in evidence. The evidence of the use of complainant's wooden separators by the New York Electric Vehicle Transportation Company and the manufacture by the Helios-Upton Company of wooden separators is not sufficiently clear and definite, in my opinion, to establish the fact that the separators in either instance embodied the invention covered by the claims of the patent in suit. It is apparent from the record that a practical, efficient, and commercially successful wooden separator, which would obviate the "wood trouble" so well known in the art, was being persistently sought after, and that the complainant, among others, was experimenting with the end in view of solving the problem. It is apparent that it was solved by the Dodge patent, and that that patent has been a commercial success.

The defendant claims that, even if the patent is valid, it has not infringed, because in the process described in the patent the wood is soaked in a sulphuric acid water solution or in an alkaline solution, such as a 3 per cent. of caustic potash, and the defendant does not soak its separators in either of the solutions specifically mentioned, but, while it uses an alkaline solution, it uses caustic soda which is not mentioned in the patent. It is apparent from an examination of the specification that caustic potash is mentioned as an example of an al-

kaline solution which may be used. It is shown by the evidence that each of these substances, caustic potash or caustic soda, will extract from the wood the lignone, which is the constituent containing acetic acid. Caustic potash is more expensive than caustic soda, and a stronger solution of it must be used, but caustic soda is included within the term "alkaline solution," and is clearly an equivalent of caustic potash for the purpose for which the alkaline solution is used, so that the mere substitution of one equivalent for another is immaterial, either in its use by the complainant or by the defendant.

[3] When an unpatented device, the existence and use of which are proven only by oral testimony, is set up as a complete anticipation of a patent, the proof sustaining it must be clear, satisfactory, and beyond a reasonable doubt. The Barbed Wire Patent, 143 U. S. 275, 12 Sup. Ct. 443, 450, 36 L. Ed. 154. As the court said in that case:

"The doctrine was laid down by this court in Coffin v. Ogden, 18 Wall. 120, 124 [21 L. Ed. 821], that 'the burden of proof rests upon him [the defendant]. and every reasonable doubt should be resolved against him. If the thing were embryotic or inchoate, if it rested in speculation or experiment, if the process pursued for its development had failed to reach the point of consummation, it cannot avail to defeat a patent founded upon a discovery or invention which was completed, while in the other case there was only progress, however near that progress may have approximated to the end in view.' This case was subsequently cited with approval in Cantrell v. Wallick, 117 U. S. 689, 696 [6 Sup. Ct. 970, 29 L. Ed. 1017], and its principle has been repeatedly acted upon in the different circuits. Hitchcock v. Tremaine, 9 Blatchf. 550 [Fed. Cas. No. 6,540]; Parham v. American Button-Hole Machine Co., 4 Fish. 468 [Fed. Cas. No. 10,713]; American Bell Telephone Co. v. People's Telephone Co. [C. C.] 22 Fed. 309."

From the whole record, my conclusion is that the defendant has not sustained the burden of proof to overthrow the presumption of the validity of complainant's patent, and that the patent is good and valid in law, and the defendant has infringed, as alleged in the bill.

A decree for an injunction and accounting may be entered.

ILLINOIS SURETY CO. v. CITY OF GALION et al.

(District Court, N. D. Ohio, E. D. May 25, 1913.)

No. 130.

SUBROGATION (§ 8*)—SURETY—FUNDS OF MUNICIPALITY—RIGHTS OF ASSIGNEE.

A construction company, having a contract to build a sewage disposal plant for a city, in order to obtain funds, having given a bond with complainant as surety, contracted with a bank that it should furnish labor and materials for the work and receive estimates due from time to time, to apply on its indebtedness to the bank, which was a creditor of the company at the time of the transaction. *Held*, that the relation of the construction company and the bank was that of debtor and creditor only, and that the equities of the surety under its right of subrogation to the rights of the contractor were superior to those of the bank, so that the bank was only entitled to such part of a final payment under the contract

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

as remained after payment of all claims for material and labor arising under the contract.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. § 19; Dec. Dig. § 8.*]

In Equity. Suit by the Illinois Surety Company against the City of Galion and others. Decree for complainant.

J. H. Wenneman, of Cleveland, Ohio, and A. J. Hopkins, of Chicago, Ill., for complainant.

Carl Gugler, City Sol., and W. J. Geer, both of Galion, Ohio, for defendants.

DAY, District Judge. It appears that the city of Galion, desiring to construct a sewage disposal plant, went through the usual procedure required by law, and finally let the contract to the United States Construction Company. This contract was secured by a bond upon which the complainant, the Illinois Surety Company, was surety. The bond was signed by the surety company on the 28th day of May, 1910, and it provided, among other things, that the construction company should pay all just and legal claims for labor performed upon, and for materials and supplies furnished for, the work specified in the contract calling for the construction of the sewage disposal plant.

About this time the construction company was a debtor of the First National Bank of Galion. It desired further credit, which was at first refused; but later the bank entered into a contract with the construction company on the 3d day of December, 1910. The bank notified the surety company of the condition of affairs and of the entering into this contract, but received no response from the surety company. Under this contract between the bank and the construction company the bank agreed to furnish labor and material for the sewage disposal job, and to receive the estimates due from time to time from the city of Galion to apply on the indebtedness of the United States Construction Company to the bank, which was a debtor of the bank at the time of this transaction.

The amount of the final estimate has been paid by the city into the registry of this court, and the questions which arise are on the distribution of this fund. The bank claims that it is entitled to have this money belonging to the city paid to it, that it is entitled to have its claims paid either by the contractor or by his bondsman, and that, by virtue of having paid for work and labor, it is subrogated to all the rights of the original creditors. The surety company claims that this fund is in equity subject to the payment of any unpaid material and labor claims that went into the construction of the sewage disposal plant, and that its equities are superior to the bank's equities.

It is conceded by counsel for the bank that if the testimony in this case establishes the relationship of debtor and creditor, as between the First National Bank and the United States Construction Company, that it would be entitled to nothing more out of the fund now in court than the surplus left after paying all the other claims for labor and material which are yet unpaid. The cashier of the bank testified that

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

all of the money paid by the bank was paid under the contract that it had with the United States Construction Company.

When these various claims for labor and materials were paid, a paper introduced as Exhibit 4 was taken from the laborers or materialmen by the bank. It is claimed, on behalf of the bank, that it was an equitable assignment of the claim so paid. Without going into a detailed enumeration of the authorities, I am of the opinion that this did not constitute an assignment. It appears to me that, bearing in mind the situation of the parties, their relations with one another, and the necessities of the situation, the contract between the bank and the construction company was an agreement on the part of the bank to furnish to the construction company money to finance the contract, for which the construction company was to execute evidence of indebtedness to the bank. This transaction created the relation of debtor and creditor between the bank and the construction company for all the claims that have been paid.

The equity of the surety company is superior to that of the bank advancing this money to the contractor, and the surety company is subrogated to the rights of the contractor, but the bank is not. Henningsen v. United States Fidelity & Guaranty Co., 208 U. S. 404, 28 Sup. Ct. 389, 52 L. Ed. 547; Prairie State Bank v. United States, 164 U. S. 227, 17 Sup. Ct. 142, 41 L. Ed. 412; Hardaway v. National Surety Company, 150 Fed. 465, 80 C. C. A. 283; United States v. Rundle, 107 Fed. 227, 46 C. C. A. 251, 52 L. R. A. 505. It was the business of this bank to loan money, and not, as a national bank, to supply labor and material, to a contractor.

I am of the opinion that the fund now in court is subject to the payment of all unpaid labor and material claims that went into the work of construction of the sewage disposal plant at Galion, and that the complainant has a right in equity to see that this money, which has been paid into court, should be applied to the liquidation of all claims for material and labor that have arisen under the contract in question, and that the bank is not entitled to anything more out of the fund in court than such rights as it might properly assert to the surplus remaining after all the other claims have been paid.

A decree may be entered in conformity to this memorandum.

In re GOLDSTEIN et al.

(District Court, E. D. New York. February 6, 1914.)

ALIENS (§ 68*)—NATURALIZATION PROCEEDINGS—LIMITATION.

Under the Naturalization Law (Act June 29, 1906, c. 3592, § 4, 34 Stat. 596 [U. S. Comp. St. Supp. 1911, p. 529]), providing that to be admitted to citizenship an alien shall declare on oath his intention of becoming a citizen at least two years prior to his admission, provided that no alien who in conformity with the law in force at the date of his declaration has declared such intention shall be required to renew such declaration, and not less than two years or more than seven years after he has made

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

such declaration of intention shall make and file a petition in writing for admission to citizenship, signed in his own handwriting, provided that if he has filed his declaration before the passage of that act he shall not be required to sign it in his own handwriting, where aliens who had filed their declaration of intention to become citizens prior to the taking effect of that act for more than seven years after its taking effect filed no application for admission to citizenship, they could not be admitted without a new declaration of intention, since the petition can be made only under that law, and while the old declaration, if used in time, avoids the necessity for a new declaration, it has no greater effect or wider use than a declaration under the new law.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 138–145; Dec. Dig. § 68.*]

Applications by David Goldstein, Andrea De Concilio, Ignazio Malato, and Paul Strecker, respectively, for admission to citizenship. Applications denied, and petitions dismissed.

Applicants in pro. per.

William J. Youngs, U. S. Atty., and Reuben Wilson, Asst. U. S. Atty., both of Brooklyn, N. Y., opposed.

CHATFIELD, District Judge. The above-named applicants obtained what are known as "first papers," that is, filed their declaration of intention to become citizens and to renounce allegiance to their former sovereign, prior to the 28th day of September, 1906, upon which day the present naturalization law (34 Stat. at Large, 596) went into effect.

This law provides in section 4:

"That an alien may be admitted to become a citizen of the United States in the following manner and not otherwise. First. He shall declare on oath before the clerk of any court authorized by this act to naturalize aliens, or his authorized deputy, in the district in which such alien resides, two years at least prior to his admission, and after he has reached the age of eighteen years," etc. "Provided, however, that no alien who, in conformity with the law in force at the date of his declaration, has declared his intention to become a citizen of the United States shall be required to renew such declaration. * * * Second. Not less than two years nor more than seven years after he has made such declaration of intention he shall make and file, in duplicate, a petition in writing, signed by the applicant in his own handwriting," etc. "Provided, that if he has filed his declaration before the passage of this act he shall not be required to sign the petition in his own handwriting."

Each of the applicants above named filed his petition under the second paragraph just quoted, more than two years after the making of the declaration of intention under the former law, but more than seven years after the filing of his declaration, and also more than seven years after the day on which the present law went into effect.

The government contends that the law allows the use of the old declaration of intention (which did not contain statements as to all the matters required in the present form) only in place of and to the extent to which a new declaration could be available under the present statute. It is evident that no petition for final hearing can be made except under the provisions of the present law. An applicant who had

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

filed one of the old declarations could use that at once, and hence could avoid waiting two years after filing a new declaration, but must still use the old form of declaration as a basis for his compliance with the present law in other respects. This satisfies the requirement that no new declaration will be needed in addition to the old one; but does not mean that the old paper is of any greater effect, or has any wider use, than the new one.

The provision that no new declaration is needed, and that the old declaration may be used, is followed by the provision that "such declaration" must be used within seven years. These words "such declaration" expressly include the declarations of that class of applicants who need not sign their name because they have declarations made before the passage of this act.

The beginning of the period of seven years in such cases cannot be postponed beyond the date when the law made all old declarations in effect as if taken out on or dated from the day when the new law went in force. From that date all declarations capable of use under the new law are covered by a seven-year statute of limitations.

The Congress might have provided that a new declaration be taken out by all applicants, or the law might have been made to read that no naturalization at all should be possible, and thus repeal the previous statute in toto.

This was evidently felt to be undesirable, and the present act was designed to provide for and protect those who already had first papers. But no intention on the part of Congress is indicated to vary the limitation of time after which a new statement of intention will be required as a prerequisite from any applicant for final papers.

If application has been made within seven years and denied, the statute of limitations may have been extended in such cases as the court might feel should be reopened, upon payment of a new fee and the filing of a new petition for final papers; but, if no application of any sort was made for seven years, it would seem that the right to use the old papers has been lost.

The decision of the District Court for the Southern District of New York, In the Matter of Charles Yunghauss, 210 Fed. 545, decided January 26, 1914, seems to be correct in every way, and uniformity of ruling is thus secured.

The applications will be denied, and the petitions dismissed.

LOWE et al. v. SWINEHART TIRE & RUBBER CO.

(District Court, S. D. New York. February 18, 1914.)

1. ATTACHMENT (§ 251*)—CONCLUSIVENESS OF ADJUDICATION.

The dissolution of an attachment on motion is not a final adjudication of any fact in the action, even though it depends upon a provisional inquiry into the merits, and involves consideration of matters which would afterwards arise upon the trial.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 890–892, 896, 898; Dec. Dig. § 251.*]

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

2. CORPORATIONS (§ 669*)—FOREIGN CORPORATION—ACTION—SPECIAL APPEARANCE.

Where defendant, a foreign corporation, appeared specially and procured the vacation of an attachment on the ground that the attachment papers did not state a cause of action, it was not thereby precluded from moving to dismiss the complaint on the ground that the court had no jurisdiction over defendant; since, while the submission of any point to the decision of the court gives it power to make that decision finally effective by a complete disposition, the determination invoked by defendant was one which, if unsuccessful, would not have been conclusive, and it was therefore not in the position of one who invokes the court to decide a point while reserving the right to make the decision nugatory if unsatisfactory.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2641, 2642; Dec. Dig. § 669.*]

At Law. Action by John Z. Lowe and others against the Swinehart Tire & Rubber Company. On motions by defendant to dismiss, and by plaintiff for leave to enter judgment. Motion to dismiss granted, and motion to enter judgment denied.

The plaintiff began the action by attachment in the state court against the defendant, a foreign corporation. The defendant, appearing specially for the purpose, removed to this court, and then moved to vacate the attachment, upon four grounds: First, that the court had no jurisdiction; second, that the attachment papers were insufficient; third, that no grounds were shown for an attachment; fourth, that the moving papers did not set forth a cause of action. Annexed to the defendant's papers was an affidavit setting forth matter relevant to the question of damages. Judge Ward vacated the attachment because the papers did not, in several particulars, state a cause of action. Thereafter the defendant moved to dismiss, and the plaintiff for leave to enter judgment.

Joseph M. Hartfield, of New York City, for plaintiff.
Stapleton & Briggs, for defendant.

HAND, District Judge (after stating the facts as above). [1] It would not be asserted, I suppose, that the decision upon the motion to dissolve the attachment was a final adjudication of any fact in the action. No one supposes that it dispenses with proof upon the trial, or that any one may use it to help him out in the contest over the merits of the controversy. All it decides is whether the defendant's property shall be held pendente lite and to await the final decision of the cause itself. It is quite true that that question itself may, and in this case did, depend upon a provisional inquiry into the merits, and involved consideration of matters which would afterwards arise upon the trial, but that inquiry and that consideration are informal in character and inconclusive in effect.

[2] Courts will, of course, not let suitors play fast and loose; they will not offer themselves for only so long as the result suits the defendant, and so they have jealously insisted that the submission to their decision of any point in the cause shall entrain their power to make that decision finally effective by a complete disposition. Such an implication is necessary to prevent the abuse of the right of recourse to the courts. We sometimes say that the defendant, by contesting a point in the cause, has consented to the jurisdiction, but this

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

is a fiction, as is proved by the fact that the most elaborate precautions to show the contrary do not avail the defendant.

Where, however, the question contested is of the court's having personal jurisdiction, obviously the defendant must have the power to make a contest, or the matter will be taken against him as of course, and so the rule is well settled in such cases. If the question be to release his property from attachment, there are undoubtedly cases which hold that, even for that limited purpose alone, he raises at his peril any question which would be relevant to the main controversy (Raymond v. Nix, 5 Okl. 656, 49 Pac. 1110), yet it seems hardly just to expose a defendant to that choice. The determination which he invokes is not, as I have shown, one which, if unsuccessful, would in any event be conclusive. It would not bind him if he afterwards intervened to contest, nor his property if he allowed a default to be taken, since no determination is in that case necessary. He is therefore not in the position of one who invokes a court to decide a point in the controversy, while reserving his right to make the decision nugatory if it prove unsatisfactory. In the case of Davis v. C., C., C. & St. L., 217 U. S. 157, 174, 30 Sup. Ct. 463, 54 L. Ed. 708, 27 L. R. A. (N. S.) 823, 18 Ann. Cas. 907, the Supreme Court decided that a motion to vacate an attachment supported by three affidavits did not constitute an appearance. It is true that the invalidity of the attachment did not touch the merits; but, as I think I have shown, it never can, since any decision involves only the question of the release of the property from levy. I think that therefore the distinction is not good which would limit the right to vacate the attachment only to questions which will not be considered in disposing of the cause.

The motion to dismiss will be granted; that to enter judgment denied.

In re KALMANOWITZ et al.

(District Court, E. D. New York. January 29, 1914.)

1. BANKRUPTCY (§ 136*)—ADMINISTRATION OF ESTATE—RECOVERY OF ASSETS.
Where proceedings by a trustee as originally instituted combined a claim that the present business conducted by the bankrupts' wives was a subterfuge for the concealment of assets from the bankrupts' creditors, with a claim that the bankrupts had concealed the assets of their previous business, but it appeared that the only concealment of assets was by the bankrupts themselves, the proceeding could be maintained only as one to compel the bankrupts to account for the assets which they previously possessed.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 233, 235; Dec. Dig. § 136.*]

2. BANKRUPTCY (§ 136*)—ADMINISTRATION OF ESTATE—CONCEALED ASSETS.
An application to compel bankrupts to turn over concealed property was not maintainable, where neither the report of the commissioner nor the proof accurately showed just what or how much property had been concealed.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 233, 235; Dec. Dig. § 136.*]

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

3. BANKRUPTCY (§ 136*) — ADMINISTRATION OF ESTATE — RECOVERY OF CONCEALED PROPERTY—CONTEMPT.

Where creditors seek to recover withheld assets or their value, the burden is on them to present evidence clearly establishing at least a minimum value, and they cannot supply lack of such proof by seeking to hold the bankrupts liable to imprisonment for failure to obey the orders of the court to surrender such property.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 233, 235; Dec. Dig. § 136.*]

4. BANKRUPTCY (§ 136*)—WITHHELD ASSETS—CONTEMPT.

Punishment for bankrupts' failure to satisfactorily account for assets unless pursuant to a prosecution under criminal statutes can only be imposed as a result of the contempt proceeding, which can only be sustained on proof of a failure to comply with a definite order requiring the surrender of some describable assets.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 233, 235; Dec. Dig. § 136.*]

In Bankruptcy. In the matter of bankruptcy proceedings of Kalman Kalmanowitz and another. Proceeding by the trustees to recover certain assets from the wives of the bankrupts, and to compel the bankrupts to deliver the same to the trustees. Remanded for further proceedings.

Henry B. Singer, of New York City, for trustee.
Abraham Vogel, of New York City, for bankrupts.

CHATFIELD, District Judge. [1] The proceeding as originally instituted combined a claim that the present business conducted by the wives of the bankrupts was really a subterfuge for the concealment of assets to which the creditors of the bankrupts were entitled, with a claim that the bankrupts had concealed the assets of their previous business.

The report of the special commissioner and the previous record show that any concealment of assets was by the bankrupts themselves. The proceeding can be maintained, therefore, only as one to compel the bankrupts to turn over or account for the assets which they previously possessed, and the proof does not justify an order (in place of an equity action) taking the property in the hands of the wives, upon the theory that their title is fraudulent. To this extent the report of the commissioner should be confirmed.

[2] As to the application to compel the bankrupts to turn over property, neither the report of the commissioner nor the proofs show accurately just what and how much property was concealed; and, while the finding that the bankrupts have not explained the disappearance of what assets they appear to have had is supported by the testimony, it is impossible to make an order directing them to turn over any specific amount, or any definitely described assets.

[3] If the object sought is to obtain an order directing the bankrupts to disclose what they did with the property which has disappeared, then the present record would justify an order directing further accounting, and punishment for failure to account might follow. If, however, the creditors undertake the burden of proving that cer-

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

tain assets have disappeared, and seek to recover those assets or their value, they must present evidence clearly establishing a minimum value at least. They cannot supply the lack of proof by seeking to get the bankrupts liable to imprisonment for failure to obey the orders of the court.

[4] Punishment for failure to satisfactorily account for assets (unless prescribed and prosecuted under the criminal statutes) can be imposed only as a result of a contempt proceeding. In a proceeding to compel the turning over of property, however, some definite order, that some describable assets should be turned over, is necessary before contempt of that order can occur. The two proceedings should be kept distinct.

In the present matter, the creditors will be allowed to take further testimony, or present definitely to the court proof of just what property it is now alleged the bankrupts concealed. Owing to the changes upon these issues (as shown upon the argument of the motion) from the questions of fact passed upon by the commissioner, his findings upon these questions will be disregarded, and the issue of what property the bankrupts should be ordered to turn over, or for which they must account, will be taken up on the complete record, including the testimony now ordered taken.

The bankrupts and any other witnesses desired will be ordered to appear in court to proceed with the hearing.

UNITED STATES v. POWERS-WEIGHTMAN-ROSENGARTEN CO.

(District Court, S. D. New York. October 17, 1913.)

COMMERCE (§ 33*)—TRANSPORTATION WITHIN STATE—SHIPMENT OF ADULTERATED OR MISBRANDED ARTICLES—"INTRODUCTION."

The Insecticide Act of 1910 (Act April 26, 1910, c. 191, 36 Stat. 331 [U. S. Comp. St. Supp. 1911, p. 1368]), prohibiting the introduction into any state or territory or the District of Columbia from any other state or territory or the District of Columbia of any insecticide, etc., which is adulterated or misbranded, and providing that any person who shall ship or deliver for shipment from any state to any other state any such article so adulterated or misbranded shall be guilty of a misdemeanor, was not violated by shipping and delivering a certain insecticide for shipment from a point in New York to another point in the same state by a railroad passing through other states en route to the destination, since "introduction" means the bringing into a state of the prohibited article in such a way that it may become a part of the general property in such state, and the mere passing of goods through the state en route to destination does not make them part of the general property of such states.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 26, 81; Dec. Dig. § 33.*]

The Powers-Weightman-Rosengarten Company was informed against for violating the Insecticide Act of 1910. On demurrer to the information. Demurrer sustained.

Robert P. Stephenson, Asst. U. S. Atty., of New York City.

Cardozo & Englehard, of New York City, for defendant.

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

HUNT, Circuit Judge. Demurrer to an information containing three counts, each charging a violation of the second section of the Insecticide Act of 1910 (36 Stat. 331). Each count of the information charges that the defendant—

"did ship and deliver for shipment from the city of New York, state of New York, via the Delaware, Lackawanna & Western Railroad Company, through the states of New Jersey and Pennsylvania, to the city of Buffalo, in the state of New York, consigned to Plimpton, Cowan & Co., a certain insecticide," etc.

The demurrer is based upon the ground that the information does not allege facts sufficient to constitute a violation of any of the laws of the United States, and in particular not of the act of Congress known as the Insecticide Act of 1910, in that it appears upon the face thereof that the alleged insecticide referred to in each of the counts of the information was shipped from the city of New York to another city in the state of New York, namely, the city of Buffalo, and not from the state of New York to any other state or territory, or the District of Columbia.

The relevant portion of the insecticide statute reads as follows:

"The introduction into any state or territory or the District of Columbia from any other state or territory or the District of Columbia, or from any foreign country, or shipment to any foreign country, of any insecticide, or Paris green, or lead arsenate, or fungicide which is adulterated or misbranded within the meaning of this act is hereby prohibited; and any person who shall ship or deliver for shipment from any state or territory or the District of Columbia to any other state or territory or the District of Columbia, or to any foreign country, or who shall receive in any state or territory or the District of Columbia from any other state or territory or the District of Columbia, or foreign country, and having so received, shall deliver, in original unbroken packages, for pay or otherwise, or offer to deliver, to any other person, any such article so adulterated or misbranded within the meaning of this act, or any person who shall sell or offer for sale in the District of Columbia or any territory of the United States any such adulterated or misbranded insecticide, or Paris green, or lead arsenate, or fungicide, or export or offer to export the same to any foreign country, shall be guilty of a misdemeanor, and for such offense be fined," etc.

It is clear that under the statute, to constitute guilt, there must have been an *introduction* into a state, territory, or the District of Columbia, from "any *other* state or territory or the District of Columbia," of the misbranded or adulterated insecticide. The second clause of the language quoted declares it a misdemeanor for any person to "ship or deliver for shipment from any state * * * to any *other* state * * * any such article." (Italics are mine.) As I read the statute, "introduction" means a bringing into another state of the prohibited article in such a way as that it may become a part of the general property within that state. Mere passing of the goods through other states en route to the state of destination does not make them part of the general property of those states. U. S. v. Four Bottles (D. C.) 90 Fed. 720.

My conclusion is that the statute was not meant to cover a shipment by a shipper who sends goods from one point to another point in the same state merely because the shipment is by a route through other states. Whether or not such a shipment is interstate commerce is not directly involved, for the reason that the language of the statute does

not attempt to cover a case such as we have under consideration. People v. Abramson, 208 N. Y. 138, 101 N. E. 849. It would also seem that the precise relationship of the carrier to such a shipment is aside from the point necessary for decision. We may assume that Congress could prohibit such a shipment as is involved herein, but it has not done so; hence the cases of Lehigh Valley v. Pennsylvania, 145 U. S. 192, 12 Sup. Ct. 806, 36 L. Ed. 672, and Ewing v. Leavenworth, 226 U. S. 464, 33 Sup. Ct. 157, 57 L. Ed. 303, and Hanley v. Kansas City Southern, 187 U. S. 617, 23 Sup. Ct. 214, 47 L. Ed. 333, have little direct application. The case of U. S. v. Delaware, Lackawanna & Western (C. C.) 152 Fed. 270, was one where the power of Congress was involved with respect to the regulation of the conduct of railroad carriers transporting goods passing through a state en route between two points in another state.

As the information fails to show a shipment from one state to another, there is no offense stated. The demurrer is therefore well taken and must be sustained.

SPRAGUE v. L. D. MARGOLIS CO.
In re EASTERN TEA & COFFEE CO.

(District Court, D. Massachusetts. August 6, 1913.)

No. 456.

BANKRUPTCY (§ 301*)—RECEIVERS—APPOINTMENT FOR INDEPENDENT CORPORATION.

Where respondent corporation carried on an independent business, at least to some extent, and had goods honestly belonging to it, and creditors to whom it was indebted, and was not insolvent, a receiver would not be appointed for its property, in order to assist the trustee of M., who was the controlling factor in respondent company, in tracing property which he fraudulently concealed through it from his creditors.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 464; Dec. Dig. § 301.*]

In Bankruptcy. In the matter of bankruptcy proceedings of the Eastern Tea & Coffee Company. Application by Rufus B. Sprague, trustee, etc., for the appointment of a receiver for the L. D. Margolis Company. Denied.

Friedman & Atherton, of Boston, Mass., for plaintiff.
Guy A. Ham, of Boston, Mass., for defendant.

MORTON, District Judge. The respondent corporation carries on a business which was to some extent, at least, independent of the Eastern Tea & Coffee Company, having goods honestly belonging to it and creditors to whom it is indebted. There is no allegation that it is insolvent. Margolis has been and is the controlling factor in it. There is no doubt that it was used by him to conceal property from his creditors. The principal reason urged for the appointment of a receiver is to assist the trustee in bankruptcy of Margolis in tracing property fraudulently concealed from his creditors by Margolis through the

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

agency of the respondent corporation. The interest of Margolis as a stockholder in the respondent corporation has, of course, passed to his trustee in bankruptcy. It does not seem to me that a receiver ought to be appointed simply for the purpose of getting evidence; nor, upon the allegations in the bill, do I think that a receiver ought to be appointed for the purpose of winding the corporation up at the present stage of the litigation.

The application for the appointment of a receiver at this time is therefore denied.

ST. LOUIS, I. M. & S. RY. CO. v. BELLAMY et al.

(District Court, E. D. Arkansas, W. D. January 17, 1914.)

1. COURTS (§ 508*)—JURISDICTION OF FEDERAL COURTS—INJUNCTIONS.

Rev. St. § 720 (U. S. Comp. St. 1901, p. 581), does not prohibit a federal court from enjoining the prosecution of a suit in a state court which would interfere with the execution of one of its own decrees in a suit of which it had prior jurisdiction, and such injunction may be granted on a supplemental bill ancillary to the main suit, although the suit in the state court was commenced before the supplemental bill was filed and by one not a party to the original suit.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1418–1423, 1425–1430; Dec. Dig. § 508.*]

2. COURTS (§ 508*)—JURISDICTION OF FEDERAL COURTS—INJUNCTION.

A federal court, which has taken jurisdiction to determine the question of damages growing out of its issuance of an injunction, has exclusive authority to pass on all questions involved in that inquiry, and, when a large number of persons were affected by the injunction, it may enjoin suits brought by any of them in state courts to enforce their claims.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1418–1423, 1425–1430; Dec. Dig. § 508.*]

3. COURTS (§ 508*)—REVERSAL—PROCEEDINGS—AFTER REMAND.

Complainant railroad company commenced a suit in the federal court against the Railroad Commissioners of a state to enjoin the enforcement of a schedule of rates and fares established by the Commission. A preliminary injunction was granted on the giving of a bond by complainant to the United States in the sum of $200,000, conditioned that if it should be finally determined that the injunction should not have been granted complainant would pay to the parties entitled thereto any excess of rates or fares collected above those enjoined. Later an additional bond was required and given running to the defendants in the suit in the sum of $800,000, similarly conditioned. A permanent injunction was granted, but the decree was reversed by the Supreme Court, with direction to dismiss the bill without prejudice. *Held*, that under Equity Rule 10 (29 Sup. Ct. xxvi), providing that "every person not being a party in any cause * * * in whose favor an order shall have been made, shall be enabled to enforce obedience to such order by the same process as if he were a party to the cause," the court had jurisdiction to retain the cause after dismissal of the bill for the purpose of enforcing the claims of all shippers and passengers under the bonds, and that in aid of such jurisdiction it had power to enjoin individual claimants from maintaining separate suits in the state courts.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1418–1423, 1425–1430; Dec. Dig. § 508.*]

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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 St. Louis, Iron Mountain & Southern Railway Company against George W. Bellamy and others, Railroad Commissioners of Arkansas, and others. On supplemental bill for injunction. Injunction granted.

See, also, 230 U. S. 553, 33 Sup. Ct. 1030, 57 L. Ed. 1625; 187 Fed. 290.

This proceeding arose out of the Arkansas railroad rate cases which have been pending in this court for some time. The original suit was brought by the railroad company against the Railroad Commissioners of the state and two persons who are alleged to be shippers of freight and passengers on the road, as representatives of the shippers and passengers affected by the suit.

The plaintiff now files a supplemental bill as ancillary to the original proceeding, in which it sets out the filing of the original action; that on September 3, 1908, upon a hearing, after due notice to the defendants, a temporary injunction was granted by Judge Van Devanter, then one of the circuit judges for this circuit, enjoining the enforcement of the freight tariff and two cents a mile passenger rate. That order required that the complainants execute a bond to the United States in the penal sum of $200,000, conditioned that it would keep a correct account showing the difference between the rate actually charged by complainants after the granting of said injunction and that which would have been charged had the rates inhibited by said order of injunction been applied, and that if it should finally be decided that the order inhibiting the enforcement of the then existing rates should not have been made that the complainants would, within a reasonable time to be fixed by the court, refund in every instance to the party entitled thereto the excess as charged over what would have been charged had the inhibited rate been charged. In pursuance of this order complainant filed a bond conditioned as therein provided. (The opinion of the court granting that temporary injunction is reported in 163 Fed. 141.)

On February 18, 1909, an application was made to the judge now presiding for a modification of the temporary injunction, and on the 1st day of June, 1909, the temporary injunction formerly granted was modified, and a further order entered requiring complainant to execute an additional bond to the defendants in the sum of $800,000, conditioned that complainant should refund to all shippers of freight and passengers the amounts collected in excess of the rates fixed by the laws of the state of Arkansas, if it should be finally determined that the temporary injunction was improperly granted. 168 Fed. 720. A bond in conformity with this order, and reciting the conditions, was filed on the 5th day of July, 1909. On April 4, 1911, this court entered a final decree making the injunction perpetual and releasing the bond for injunction filed in said cause and the sureties thereon from further liability. 187 Fed. 290. Upon appeal to the Supreme Court the decree of the Circuit Court was reversed and the court directed to dismiss the bill without prejudice. 230 U. S. 553, 33 Sup. Ct. 1030, 57 L. Ed. 1625. On July 18, 1913, the mandate of the Supreme Court having been filed, this court entered an order dismissing complainant's aforesaid bill without prejudice and dissolving the temporary and permanent injunctions theretofore granted. It was further ordered, over complainant's objection, that said cause be referred to a special master appointed by the court for the purpose of determining the damages sustained by the defendants acting for the benefit of all persons, shippers, consignees, and passengers, who have sustained any damage by reason of the granting of said injunction. The order directed the special master to give notice by publication in a number of newspapers in the various counties through which the road ran that all persons having any claims against complainant by reason of the granting of said injunction should present the same to him on or before the 1st day of November, 1913, by filing with him the evidence, or such proof as might be in their possession, of their claims, and directing the master to make a report of his findings to the court. Afterwards the time within which such claims were to be filed was extended to January 1, 1914.

The supplemental bill further charges that the defendant Howard H. Gallup, notwithstanding the aforesaid proceedings and orders of this court to

present the claims to the special master, instituted an action in the chancery court of Baxter county, Ark., to recover from the railroad company the sum of $6,000 for charges alleged to have been made by the railroad company from the time the temporary injunction was first granted in 1908 to the time of the final dissolution on July 18, 1913; that W. J. Metcalf, who is also made a defendant in this proceeding, and a large number of other persons who were passengers or shippers on complainant's railroad during the time said order of injunction was in force, are threatening to institute similar suits in the various courts of the state.

It is also charged that a very large number of claims for refund of charges in excess of the inhibited rates during the time said orders of injunction were in force, amounting to more than one-half million dollars, have been filed before the special master appointed in this cause and are now under investigation by said master, which proceeding involves a very large amount of expense in the way of master's costs and expenses; that in many instances duplicate claims covering the same shipment have been filed by parties severally claiming to be entitled to the alleged excessive charges, and it will be necessary to determine who among said claimants is entitled to recover any allowance that may be made by the special master in that behalf; that many claimants who were denied the right to recover by the master are threatening to bring independent suits against complainant for the recovery of the claims so presented to and refused by the master, and complainant represents that unless an order is issued in this cause enjoining and restraining proceedings for the recovery of such overcharges during the pendency of the aforesaid proceedings, and while said orders of injunction were in force, many thousands of suits will be instituted against complainant by passengers and shippers of freight during the time the injunction was in force; that the complainant would be required to produce its books and records in defending each of the numerous cases brought against it for the purpose of showing the difference between the inhibited rates and those actually charged by it, and will be put to great expense and greatly harassed by being compelled to defend such a multitude of suits; that many of the suits so instituted would embrace claims that have already been passed upon by the special master appointed in the aforesaid cause, and in many of which allowances have been made to other parties who were adjudged in said proceeding to be entitled to reparation on account of the alleged overcharges, and thereby complainant will be exposed to great loss and damage by reason of double recoveries in favor of different parties upon the same claim, or else put to very great expense, trouble, and hazard in order to prevent great and irreparable loss and injury by reason of actions based upon claims presented to and allowed by the special master under the reference made to him; that the expense involved in the defense of such suits as will be instituted against it unless a restraining order is issued will be very great and involve great and serious loss to complainant without regard to the result of said litigation, notwithstanding the fact that this court has taken jurisdiction for the purpose of assessing the damages which accrued to shippers and passengers on account and by reason of said injunctions.

A copy of the complaint filed by the defendant Gallup in the chancery court of Baxter county, filed as an exhibit to the bill, shows that it is in the nature of a bill of discovery; it being alleged that the plaintiff Gallup cannot state the exact amount of such excess charges, and therefore prays for an accounting and a discovery of the amount of such payments.

The prayer of the supplemental bill is that these defendants, and all other persons having claims of that nature, be enjoined from instituting or prosecuting to judgment any action or actions for the recovery of such overcharges.

The order of reference to the special master directs him, among other things, to report separately all claims which arose under the first temporary injunction granted by Judge Van Devanter; next, all claims which arose under the bond executed in pursuance of the order made by the court on June 1, 1909; and, next, all claims which arose after the final decree making the injunction permanent was rendered on April 4, 1911, until the dissolution of the injunction and dismissal of the bill.

The defendant Gallup filed a motion to dismiss upon the ground that the complainant was not entitled to any relief upon the facts stated in the sup-

plemental bill, and also filed a plea setting up the fact that his suit in the chancery court of Baxter county had been instituted prior to the filing of the supplemental bill, and an answer admitting all of the allegations set up in the supplemental bill.

The defendant Metcalf only filed a motion to dismiss the supplemental bill upon the ground that it does not state facts which would entitle complainant to relief.

A temporary restraining order was granted, and the cases have now been heard upon the pleadings and the motions to dismiss; the question before the court being whether the injunction should be made perpetual.

Among the rules of the Circuit and District Courts of this circuit is the following, promulgated on November 7, 1900 by the judges then composing the Circuit Court:

"In all cases in which an injunction has been granted, and a bond executed by the complainants, damages sustained by the party enjoined, in case the injunction is dissolved, may be assessed in the same proceeding, either by the court or by reference to a master, and judgment entered in the same action against the sureties on the bond; provided, however, that unless the damages are thus assessed in the cause, or a judgment entered that the party enjoined is entitled to no damages by reason of the improper granting of the injunction, he may proceed on the bond in an action at law without any further order or leave of the court."

Moore, Smith & Moore, of Little Rock, Ark., for complainant.

Allyn Smith, of Cotter, Ark., for defendants Gallup and another.

J. M. Hill, of Ft. Smith, Ark., for Railroad Com'rs.

Morris M. Cohn, Cockrill & Armistead, and Rose, Hemingway, Cantrell & Loughborough, all of Little Rock, Ark., amici curiæ for other shippers not parties to this bill.

TRIEBER, District Judge (after stating the facts as above). The argument of the numerous counsel took a very wide range, and a great many questions were discussed. Among others were the liability on the bonds, the liability of the railroad company regardless of the bond, before the final decree making the injunction perpetual was rendered by this court, and the liability of the railroad company on the bonds, as well as individually, for the excess rates collected after the injunction had been made perpetual by this court, and up to the time it was dissolved and the bill dismissed in obedience to the mandate of the Supreme Court. As these questions will have to be determined when the report of the special master comes up for hearing, the court deems it unnecessary to determine them in this proceeding. The only question properly before the court is whether this supplemental bill can be maintained as an ancillary proceeding to the original bill, and, if so, whether it is the duty of the court, in order to prevent the many thousands of suits which might be instituted in the different courts of the state to recover these overcharges, to enjoin the parties having these claims and determine the entire matter in the proceeding now pending in this court to ascertain the liability of the railroad company for the wrongful injunction.

[1] It is claimed that, the suit of the defendant Gallup having been instituted in the chancery court of Baxter county before the filing of this bill, no injunction can be issued by this court to stay that action, as that is expressly prohibited by section 720, Rev. St. (U. S. Comp. St. 1901, p. 581). That section does not apply to a proceeding which

is ancillary to a cause of which the court had original jurisdiction. As stated in Gunter v. Atlantic Coast Line, 200 U. S. 273, 292, 26 Sup. Ct. 252, 259 (50 L. Ed. 477):

"The proposition that the eleventh amendment, or section 720 of the Revised Statutes, controls a court of the United States in administering relief, although the court was acting in a matter ancillary to a decree rendered in a cause over which it had jurisdiction, is not open for discussion"—citing Dietzsch v. Huidekoper, 103 U. S. 494, 26 L. Ed. 497; Prout v. Starr, 188 U. S. 537, 23 Sup. Ct. 398, 47 L. Ed. 584; Julian v. Central Trust Co., 193 U. S. 93, 112, 24 Sup. Ct. 399, 48 L. Ed. 629.

To these cases may be added Root v. Woolworth, 150 U. S. 401, 14 Sup. Ct. 136, 37 L. Ed. 1123; Lang v. Choctaw, etc., R. Co., 160 Fed. 355, 87 C. C. A. 307; Mound City v. Castleman, 187 Fed. 921, 110 C. C. A. 35.

In Root v. Woolworth the supplemental bill was filed several years after a decree in the original case had been rendered establishing the title of the grantor of the plaintiff in the supplemental bill. The jurisdiction of the court to grant such relief was attacked upon several grounds by the defendant; one of them being that there was no diversity of citizenship between the plaintiff and defendant in the ancillary proceedings, but the court held:

"The bill being ancillary to the original proceedings of Morton v. Root, and supplementary to the decree rendered therein, can be maintained without reference to the citizenship or residence of the parties. There is consequently no force in the objection that the court below had no jurisdiction in this case because the appellee and the appellant were both citizens of Nebraska."

Another objection was that the proceeding should have been an action of ejectment on the law side of the court. The court in overruling that objection held:

"If the bill in the present case could be properly considered as an ejectment bill, the objection taken thereto by the defendant would be fatal to the proceeding; but, instead of being a bill of this character, it is clearly a supplemental and ancillary bill, such as the court had jurisdiction to entertain. * * * It is well settled that a court of equity has jurisdiction to carry into effect its own orders, decrees, and judgments which remain unreversed when the subject-matter and the parties are the same in both proceedings."

The court, after quoting section 338 of Story's Equity Pleading, proceeded:

"The jurisdiction of courts of equity to interfere and effectuate their own decrees by injunction or writs of assistance in order to avoid the relitigation of questions once settled between the same parties is well settled."

Nor is it necessary that the parties be the same.

"It is equally clear," the court in that case held, "that his assignee or privy in estate has the right to the same relief that Morton (the original party, and Woolworth's grantor) could have asserted"—quoting as authority for this rule of law section 429, Story's Equity Pleading.

Upon the same principle it has also been held that, if a state court refuses to grant a petition for removal to a federal court, when the petition and bond show that the cause is one properly removable, and a transcript of the record has been filed in the national court to which it was sought to have it removed, that court may by a proceeding an-

cillary in its nature grant an injunction restraining the plaintiff from proceeding with his cause in the state court without violating section 720, Rev. Stat. French v. May, 22 Wall. 250, note, 22 L. Ed. 857; Traction Co. v. St. Bernard Mining Co., 196 U. S. 239, 245, 25 Sup. Ct. 251, 49 L. Ed. 462.

For these reasons, if the court has jurisdiction to maintain this ancillary proceeding, the fact that the defendant Gallup had, before the filing of this supplemental bill, instituted his action in the state court, would not prevent this court from enjoining him from prosecuting that action by reason of the provisions of section 720, Rev. Stat.

Has the court jurisdiction to entertain the supplemental bill?

As this is an ancillary proceeding, the jurisdiction of the court depends upon the jurisdiction of the original cause, regardless of the fact that it would have no jurisdiction if this were an original proceeding.

In Riggs v. Johnson County, 6 Wall. 166, 187 (18 L. Ed. 768), it was held that:

"Process subsequent to judgment is as essential to jurisdiction as process antecedent to judgment, else the judicial power would be incomplete and entirely inadequate to the purpose for which it was conferred by the Constitution."

In Lamb v. Ewing, 54 Fed. 269, 4 C. C. A. 320, the Circuit Court of Appeals for this circuit held:

"The rule is well settled that, where a court rightfully takes jurisdiction over the parties and the subject-matter of a controversy, it has the right not only to render judgment in the first instance, but also to secure to the prevailing party the fruits of such judgment, and the original jurisdiction is a continuing one for that purpose; and as corollaries to the general rule it is also equally well settled that, where third parties have rights in or claims to property taken into the possession of the court under process issued against the original parties, such third parties may intervene in the proceedings for the protection of their rights; and, further, that, where the process of the court is wrongfully and illegally used to the injury of a third party, the latter may appeal to the court for proper redress. If the federal courts were deprived of the power to protect third parties against injury resulting from the enforcement of process issuing from such courts by reason of the citizenship of the injured party, or because the amount of the injury was less than $2,000, it would work great hardship upon the individual citizen and be a most serious blot upon the system of federal jurisprudence. The power of the courts of the United States in these particulars is as ample as that of the courts of the state, and the technical question of jurisdiction is solved by the ruling that in all ancillary or auxiliary proceedings for the enforcement of judgments rendered, and in proceedings for the protection of the rights of third parties the jurisdiction is supported by that of the original action or suit."

See, also, Reilly v. Golding, 10 Wall. 56, 19 L. Ed. 858; Cooke v. Avery, 147 U. S. 375, 390, 13 Sup. Ct. 340, 37 L. Ed. 209; Camp v. Boyd, 229 U. S. 530, 551, 33 Sup. Ct. 785, 57 L. Ed. 1317; Tyler Mining Co. v. Last Chance Mining Co., 90 Fed. 15, 32 C. C. A. 498; Lea v. Deakin (C. C.) 13 Fed. 514; Coosaw Mining Co. v. Farmers' Mining Co. (C. C.) 51 Fed. 107; Redlich Mfg. Co. v. John H. Rice & Co. (C. C.) 203 Fed. 722; Files v. Davis (C. C.) 118 Fed. 465.

In Russell v. Farley, 105 U. S. 433, 445, 26 L. Ed. 1060, a leading case on this subject, it was held, Mr. Justice Bradley delivering the

opinion of the court, that the right of the court to settle the liability of the parties in an injunction proceeding was inherent in every court of chancery, and does not depend on any provision in the bond nor on the existence of an express law or rule of court.

One of the principal questions involved in this proceeding is the construction of the effect of the final decree rendered in the main cause.

In Tullock v. Mulvane, 184 U. S. 497, 505, 22 Sup. Ct. 372, 375 (46 L. Ed. 657), it was held that an action on an injunction bond given in a cause pending in a court of the United States raises a federal question, and therefore a judgment of the highest court of the state on such a bond is subject to review on error by the Supreme Court. In that case the opinion was delivered by Mr. Justice, now Mr. Chief Justice, White, and it was held:

"It is settled that such court (meaning the national court in which the injunction bond had been given) has the inherent right to set the bond aside and to determine in its discretion whether a recovery could be had upon it"—citing Russell v. Farley, supra.

A similar conclusion was reached in M., K. & T. Ry. Co. v. Elliott, 184 U. S. 534, 22 Sup. Ct. 446, 46 L. Ed. 673, which was on error to the highest court of the state of Missouri, and Leslie v. Brown, 90 Fed. 171, 32 C. C. A. 556; National Foundry Co. v. Oconto Water Supply Co., 183 U. S. 216, 233, 22 Sup. Ct. 111, 46 L. Ed. 157.

[2] This court, having taken jurisdiction for the purpose of determining the question of damages growing out of the injunction, clearly has the exclusive right and authority to adjudicate and pass upon all questions involved in that inquiry; and especially is this true in a case like the one at bar, where there are probably 50,000 claims for overcharges, all arising out of the injunction granted by this court in the original cause. To prevent such a multiplicity of suits would be sufficient to justify a court of equity to maintain jurisdiction of an ancillary proceeding in which all these matters can be determined in one reference. Concurring opinion of Mr. Justice Miller in Chicago, etc., Ry. Co. v. Minnesota, 134 U. S. 418, 460, 10 Sup. Ct. 462, 702, 33 L. Ed. 970, approved in Ex parte Young, 209 U. S. 123, 166, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764.

[3] It is further contended that in the bond for $200,000 the United States is the sole obligee, and in the second bond for $800,000 the Railroad Commissioners of the State of Arkansas and the two other defendants named as representatives of the shippers as a class were the only obligees, and for this reason the defendants in the supplemental bill, not having been parties of record in the original proceeding, have no standing in that case, and are therefore remediless so far as there is a liability on the bonds. Therefore it is claimed that this court is without jurisdiction to maintain an ancillary bill against shippers not parties to the bonds, and their only remedy is by independent actions against the railroads.

Even if it were true that the bonds were only the ordinary injunction bonds "to pay the defendants all damages they may sustain by reason of the granting of the injunction, if upon final hearing it should

be determined that the injunction was improperly granted," this contention of the defendants Gallup and Metcalf could not be sustained. In an action of this nature, against public officers who by law fix carriers' rates, shippers and passengers are quasi parties to the suit. Southern Railway Co. v. Railroad Comm. of Alabama (D. C.) 196 Fed. 558, 561. The Railroad Commissioners are not acting for themselves in this proceeding, nor for the state as a state, for neither could be benefited or injured pecuniarily no matter what the result of the litigation may be. Their only interest is that of the state in a governmental sense. They merely act as trustees for the shippers and passengers on these roads, and represent them in the same manner as the trustee of a railroad mortgage represents the holders of the bonds secured by the mortgage. Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362, 390, 14 Sup. Ct. 1047, 38 L. Ed. 1014; Missouri, etc., Ry. Co. v. Missouri Board of Comm., 183 U. S. 53, 59, 22 Sup. Ct. 18, 21 (46 L. Ed. 78).

In the last-cited case it was said:

"It is not an action to recover any money from the state. Its results will not inure to the benefit of the state as a state in any degree. * * * The parties interested are the railway company, on the one hand, and they who use the bridge, on the other; the one interested to have the charges maintained as they have been, the other to have them reduced in compliance with the order of the Commissioners. * * * It is true that the state has a governmental interest in the welfare of all its citizens, in compelling obedience to the legal orders of all its officials, and in securing compliance with all its laws. But such general governmental interest is not that which makes the state, as an organized political community, a party in interest in the litigation. * * * The interest must be one in the state as an artificial person."

But, aside from this, each of the bonds in this case expressly provides that it is for the benefit of all shippers and passengers. The conditions in the first bond are:

"If it should eventually be decided that so much of this order as inhibits the enforcement of existing rates should not have been made, the said complainant shall, within a reasonable time to be fixed by the court, refund in every instance to the party entitled thereto the excess it charged over what would have been charged had the inhibited rates been applied."

And in the other bond the condition is:

"If it should eventually be decided that so much of this order as inhibits enforcement of the rates prescribed * * * the complainant shall refund to the owners and holders of the certificates issued by it (showing the excess payments) the excess charges as shown by the same."

It will thus be seen that when the temporary injunction was granted by the court it reserved to itself the right to require the railroad and the sureties on its bonds to "refund in each instance to the party entitled thereto" the moneys collected in excess of the enjoined rates as directed by the court. The orders of the court and the bonds given in pursuance thereof are just as much for the benefit of every shipper and passenger as those who were made parties defendants to the suit as representatives of all shippers and passengers. To have made all shippers and passengers parties to the original action would, of course, have been, if not impossible, at least impracticable, for it would have necessitated making every inhabitant of the state, and even nonresi-

dents, parties defendants. To avoid this, and by authority of Equity Rule 48 (29 Sup. Ct. xxxi), then in force, the bill made two shippers and passengers defendants as representatives of all other shippers and passengers. In West v. Randall, 2 Mason, 181, Fed. Cas. No. 17,424, it was held by Mr. Justice Story that even in the absence of such a rule that course would be a proper one.

Equity Rule 10 (29 Sup. Ct. xxvi), then in force, provided:

"Every person, not being a party in any cause, who has obtained an order, or in whose favor an order shall have been made, shall be enabled to enforce obedience to such order by the same process as if he were a party to the cause."

And it has been held that bidders or purchasers at a foreclosure sale, although not parties to the suit, are entitled to appeal as to matters affecting them. Blossom v. Milwaukee, etc., R. Co., 1 Wall. 655, 17 L. Ed. 673; Kneeland v. American L. & T. Co., 136 U. S. 89, 10 Sup. Ct. 950, 34 L. Ed. 379.

In re Farmers' Loan & Trust Co., 129 U. S. 206, 213, 9 Sup. Ct. 265, 266 (32 L. Ed. 656), Mr. Justice Miller said:

"But the doctrine that, after a decree which disposes of a principal subject of litigation and settles the rights of the parties in regard to that matter, there may subsequently arise important matters requiring the judicial action of the court in relation to the same property and some of the same rights litigated in the main suit, making necessary substantive and important orders and decrees in which the most material rights of the parties may be passed upon by the court, and which, where they partake of the nature of final decisions of those rights, may be appealed from, is well established by the decisions of this court."

In that case a mandamus was granted to the judges of the Circuit Court to grant an appeal from an order made after final decree, and while the cause was pending on appeal in the Supreme Court.

Suppose the court, when it granted the temporary injunction, had required the railroad company to deposit in the registry of the court all the excess charges, to be there impounded until the final determination of the cause. Can there be any doubt of the power of the court in that case to have enjoined shippers from maintaining independent suits in other courts for the recovery of such excess charges? When the court, instead of requiring such deposits, exacted a bond to do the same thing, why does not the bond take the place of the money, and authorize the court to do what it would have done if the money were in the registry? This objection must therefore be overruled.

On the part of some of the shippers counsel concede that the court would have the right to retain jurisdiction of the ancillary proceeding, but insist that the injunction be granted only upon condition that complainant will not contest its liability but only the amounts claimed. There can be no doubt that the court in granting an injunction has the power to impose reasonable conditions, as the writ of injunction is not a writ of right but one of discretion; but that does not mean an arbitrary discretion, dependent solely on the whim of the chancellor. It means a sound, judicial discretion, informed and directed by the established principles, rules, and practice of equity jurisprudence. This question was fully discussed in the opinion filed in this case in 168 Fed. 720, where many authorities are cited. To grant an in-

junction upon such conditions that the party asking it waive its defense and concede its liability, when that liability is one of the main questions in issue, would be a travesty on justice and as much a deprivation of its property without due process of law as was the act condemned in Hovey v. Elliott, 167 U. S. 409, 17 Sup. Ct. 841, 42 L. Ed. 215. Of what benefit is the injunction to the complainant if at the same time it must, in effect, pledge itself to confess judgment?

If the defendants had suggested to the court that there is some doubt as to the solvency of the complainant or its ability to pay any decree that may be finally rendered against it, the court would no doubt have required a bond conditioned that it would satisfy any decree which may be finally rendered against it; but no such demand nor suggestion was made.

The object of this ancillary proceeding is to determine whether the plaintiff is liable, and, if so, to whom and for what sums. The jurisdiction might also be maintained upon the ground that when a court of equity once obtains jurisdiction it has the right to retain it for the purpose of settling all matters arising by reason of the litigation. Dewing v. Perdicaries, 96 U. S. 193, 24 L. Ed. 654; Gormley v. Clark, 134 U. S. 338, 10 Sup. Ct. 554, 33 L. Ed. 909; United States v. Union Pacific R. Co., 160 U. S. 1, 16 Sup. Ct. 190, 40 L. Ed. 319; Hopkins v. Grimshaw, 165 U. S. 342, 17 Sup. Ct. 401, 41 L. Ed. 739.

The decisions of the Supreme Court in Re City of Louisville, 231 U. S. 639, 34 Sup. Ct. 255, 58 L. Ed. ——, and in Re John Engelhard & Sons Co., 231 U. S. 646, 34 Sup. Ct. 258, 58 L. Ed. ——, opinions filed January 5, 1914, and just to hand, are very much in point and, in the opinion of this court, sustain the conclusions reached herein.

The court fully realizes that the question of jurisdiction of a national court in cases of this nature is always a delicate one. But, as stated by Chief Justice Marshall in Cohens v. Virginia, 6 Wheat. 264, 404 (5 L. Ed. 257):

"It is most true that this court will not take jurisdiction if it should not; but it is equally true that it must take jurisdiction if it should. The judiciary cannot, as the Legislature may, avoid a measure because it approaches the confines of the Constitution. * * * We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution. Questions may occur which we would gladly avoid; but we cannot avoid them. All we can do is to exercise our best judgment, and conscientiously to perform our duty"—quoted and followed in Ex parte Young, supra.

As the parties agreed in open court that a final decree may be entered, the defendants declining to plead further, a perpetual injunction is granted, restraining these defendants and all other persons similarly situated from instituting or maintaining any suits for excess of charges collected by the complainant during the pendency of this injunction.

BYRD v. HALL et al.

(District Court, E. D. Missouri, S. E. D. September 15, 1913.)

No. 57.

1. JUDGMENT (§ 743*)—CONCLUSIVENESS—MATTERS CONCLUDED.

In a suit by creditors to set aside an alleged fraudulent conveyance, a judgment was rendered for plaintiffs setting aside the conveyance and a motion for a new trial made, which was not acted upon for a number of years. After the judgment the grantor's administrator presented his petition to the probate court, referring to the judgment, setting out the names of the judgment creditors who procured it, and praying for an order for the sale of the land conveyed, and the application of the proceeds, after the payment of costs, to the claims of such judgment creditors allowed by that court, and a sale was had. On a trial, after the granting of such motion for a new trial, the proceedings in the probate court leading up to the administrator's deed and the deed itself were received in evidence over the objection of the grantee's heirs that the administrator could not question the acts of his decedent, but was bound by his deed; that if the deed was fraudulent, the administrator had no authority to treat the land as a part of the estate; that the purchaser was one of the plaintiffs in the suit, and bought subject to the results of the litigation; that the judgment was set aside on a motion filed at the term at which it was rendered; that the purchaser bought the land while the motion for a new trial was pending; and that the petition to the probate court failed to confer authority on that court, and showed want of jurisdiction on its face. On appeal to the Supreme Court of the state judgment was rendered for plaintiffs, and the grantee's heirs moved to modify the judgment so as to allow them to pay the debts due plaintiffs and issue an execution for the sale of so much of the lands as would be necessary to pay off and discharge plaintiffs' judgments, only in case defendants failed to pay such judgments, and alleged in their motion that the deed was valid between the parties and binding upon the administrator, and could not be called in question by him though fraudulent, which motion was denied. *Held* that the judgment in that action was conclusive against the right of the grantee's heirs to maintain ejectment against the purchaser at the administrator's sale, on the ground that the land was not assets of the estate, and that the administrator could not pass title thereto though authorized by the probate court; that question having been involved in the former suit.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1252, 1253, 1275–1277, 1284; Dec. Dig. § 743.*]

2. JUDGMENT (§ 828*)—UNITED STATES COURTS—AUTHORITY OF DECISIONS OF STATE COURTS.

The decision of the Supreme Court of a state as to the validity of an administrator's deed was binding on the United States courts, as they possess no revisory powers over the decisions of the state Supreme Court.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1504–1509; Dec. Dig. § 828.*]

3. ESTOPPEL (§ 92*)—GROUNDS OF ESTOPPEL—ACCEPTANCE OF BENEFITS.

After a judgment in a suit by judgment creditors to set aside an alleged fraudulent conveyance which set aside such conveyance except as to 2,000 acres of the land conveyed, the grantor's administrator obtained authority from the probate court to sell the land as to which the conveyance was set aside and apply the proceeds to the payment of such plaintiffs' judgments against the grantor. The 2,000 acres excepted by the judgment were sold, and the proceeds appropriated by the heirs of the grantee. *Held*, that by thus accepting the terms of the decree, such heirs

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

were estopped to attack the validity of the title under the administrator's deed, on the ground that the land fraudulently conveyed was not assets of the grantor's estate, and could not be sold by the administrator, though authorized by the probate court.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 260–263; Dec. Dig. § 92.*]

4. ADVERSE POSSESSION (§ 13*)—ELEMENTS.

Where, in ejectment, it appeared that defendant and those under whom it claimed had been in possession of the lands in question, claiming title thereto, for more than 10 years next before the commencement of the suit, it was entitled to judgment.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 65, 67–76; Dec. Dig. § 13.*]

At Law. Ejectment by Abraham R. Byrd against George Allen Hall and another. Judgment for defendants.

See, also, 196 Fed. 762, 117 C. C. A. 568.

R. B. Oliver, of Cape Girardeau, Mo., and Wilson Cramer, of Jackson, Mo., for plaintiff.

Martin L. Clardy, of St. Louis, Mo., R. A. Anthony, of Fredericktown, Mo., J. T. McKay, of Kennett, Mo., and Charles W. Bates, of St. Louis, Mo., for defendants.

DYER, District Judge. Litigation touching the lands in controversy in this case has extended over a period of more than 35 years. It began in the circuit and probate courts of Dunklin county, and by changes of venue and otherwise was considered by the circuit courts of Howell and Jefferson counties, and from thence by the Supreme Court of Missouri.

The history of the contest is an interesting one, and is well stated by the Supreme Court in the case of St. Francis Mill Co. et al. v. Sugg et al., 206 Mo. 148, 104 S. W. 45.

In 1910 the plaintiff, who claims title under and from the heirs of Wiley P. Sugg, instituted in this court the present action. The case was tried here in 1911, and resulted in a judgment for the defendants. From this judgment the case was taken to the Circuit Court of Appeals for the Eighth Circuit. That court reversed the judgment of this court and remanded the case, with directions to grant a new trial. Byrd v. Hall, 196 Fed. 762, 117 C. C. A. 568. After the mandate of the Court of Appeals, setting aside the former judgment of this court and ordering a new trial, was received and duly entered, the defendants asked and obtained leave to file, and did file, an amended answer, to which the plaintiff filed a reply. The petition, the amended answer thereto, and the reply made the issues upon which the evidence now in the record was introduced.

The plaintiff insisted and now insists that with the exception of certain pleas touching the 24 and 30 year statute of limitations, there are no changes either in the pleadings or the evidence from those contained in the former transcript of this court, and upon which the Court of Appeals passed. For that reason the plaintiff contends that these questions were all adjudicated and finally settled by the judgment of the

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

Court of Appeals, and that therefore the parties hereto are concluded from any further consideration of the questions involved. If this contention is true, then it becomes the plain duty of this court to find the issues, upon this branch of the case, in favor of the plaintiff and enter a judgment accordingly. With this contention of the plaintiff, however, the court does not agree.

The question that the Court of Appeals decided, as this court understands the decision, was that land conveyed in fraud of creditors did not, upon the death of the fraudulent grantor, become *general assets* of his estate, and that any sale of such lands by the administrator was ineffective to pass the title, notwithstanding an order of the probate court of Dunklin county directing the sale. This decision, of course, was made upon the facts as then disclosed in the record before the court.

The amended answer of the defendants and the evidence given in support thereof are essentially different from those appearing in the former record.

[1] The facts as now pleaded and shown by the evidence in the case to be true are to the effect that prior to the death of William S. Sugg, in 1873, certain of his creditors, to wit, St. Francis Mill Co., Crow, McCrerry & Co., Sanford, Wells & Co., Moody Michel & Co., Miller, Rehm & Co., Hickman & Sipple, J. Weil & Co., Snody & Parish, Jones, Tapp & Co., and Bamberger-Bloom & Co., sued and obtained large judgments against him in the circuit court of Dunklin county; that after these judgments were obtained William S. Sugg died, and B. T. Walker (his brother-in-law) was appointed by the probate court of Dunklin county administrator of the estate of the deceased. The said several judgments were duly presented to the probate court for allowance against Sugg's estate, and were duly allowed and classified under the law as of the fourth class. William S. Sugg in his lifetime, to wit, on the 24th day of May, 1871, conveyed by general warranty deed the lands now in controversy (and many more) to his brother, Wiley P. Sugg. After the above-mentioned creditors had sued and obtained judgments against William S. Sugg, as before mentioned, and after the death of William S. Sugg in 1873, the said judgment creditors began a suit by filing a bill in equity in the circuit court of Dunklin county against Wiley P. Sugg to set aside a deed from William S. Sugg to him (dated May 24, 1871), on the ground of fraud. This suit was instituted in the year 1875. In 1876 Wiley P. Sugg, the defendant in that suit, died intestate. The suit was thereafter revived against the widow and children of Wiley P. Sugg. This suit finally resulted in the judgment of August 20, 1880, setting aside the deed of William S. to Wiley P. Sugg, except as to about 2,000 acres. After the rendition of this judgment, to wit, on the 13th day of December, 1880, Benjamin T. Walker, administrator of the estate of William S. Sugg, presented his petition to the probate court of Dunklin county, in which he referred to the decree of August 20, 1880, and set out the names of the judgment creditors who had procured the same, and prayed the court for an order of sale. The concluding portion of this prayer is as follows:

"And your petitioner further prays for an order authorizing and directing him to pay out of the proceeds of the sale of this land: First, the costs incurred by plaintiffs in procuring decree in circuit court, and to be allowed by you in your court; second, the costs of sale, and costs incurred in this court and to be allowed by you; third, a pro rata payment of the remainder of the cash on hand at time of sale, to be paid to plaintiffs in the aforementioned cause who have their claims allowed according to law in your court."

This petition was not in the evidence before this court at the former trial, and consequently not before the Court of Appeals, but is now for the first time brought to the attention of the court. It was, however, before the Supreme Court, as is shown by the record of that court now in evidence.

The prayer of the petition was granted, and the sale made in accordance with the laws of Missouri. At the sale, George Rogers, under whom the defendants claim title, became the purchaser, and a deed of the administrator to him, containing the statutory recitals, was made, delivered, and recorded. The proceedings of the probate court leading up to this deed and the deed itself were offered and received in evidence by the circuit court of Jefferson county, against the objections made at the time by the heirs of Wiley P. Sugg, who were then, as now, represented by the same distinguished counsel. The objection to the introduction of the deed to Rogers is important, as the court believes, as showing that the heirs of Wiley P. Sugg were then making the same claim to the lands uncovered by the decree of August 20, 1880, as they now and here assert.

The objections so made now appear *for the first time* in this case, and are as follows:

"We object for the reason that B. T. Walker, in the first place, as administrator of the estate of William S. Sugg, had no right, as administrator, to call into question the acts of his decedent; he was bound by the deed from W. S. Sugg to W. P. Sugg; in other words, if that deed was made fraudulently, he was bound by it. B. T. Walker, as administrator of W. S. Sugg, was bound by that deed, and had no authority, under the law, to treat that land as a part of the estate of W. S. Sugg.

"We object, further, because the alleged purchaser, at the sale of B. T. Walker, was one of the plaintiffs in this suit, the original plaintiff in the original petition; and, if he bought it at the sale of B. T. Walker, he bought it subject to the results of that litigation.

"We object to these deeds for the reason that the decree which undertook to set aside the deed from W. S. Sugg to W. P. Sugg and invest the title in W. S. Sugg was set aside by the order of the circuit court of Dunklin county upon a motion filed at the same term of court, at which the decree was rendered.

"We object, further, because it is shown that the purchaser, George Rogers, bought this land during the time the motion for a new trial was pending, which was filed to set aside the decree of August 20, 1880, by which the circuit court of Dunklin county undertook to set aside the deed from W. S. Sugg to W. P. Sugg.

"We object, further, for the reason that the petition was presented to the probate court for the sale of W. S. Sugg lands absolutely failed to confer any authority upon the probate court. The petition shows on its face the want of jurisdiction."

Supreme Court Transcript, pp. 895, 896.

These objections were before the Supreme Court of Missouri for consideration in the transcript from the Jefferson county circuit court.

They were necessarily considered by the Supreme Court and determined by its judgment.

The decision of the Supreme Court and the extent and scope of its decision in the case of St. Francis Mill Co. et al. v. Sugg et al., 206 Mo. 148, 104 S. W. 45, seems to have been well understood by the distinguished and learned counsel, then and now representing the heirs of Wiley P. Sugg. Fully understanding as they did the effect of that decision upon their clients, they sought by motion to obtain a rehearing, and failing in that, to have the court modify its judgment. That motion is as follows:

"If this court is unwilling to recall the majority opinion in this cause and refuses a rehearing, respondents respectfully ask the court to modify said opinion and its judgment so as to afford respondents an opportunity to pay off and discharge whatever sums of money may be due the appellants on their several judgments. That is to say, make an order directing the court to enter up a decree in which it shall ascertain and define the amounts due the several appellants on their several judgments, and then order and adjudge that, upon payment by the respondent of said judgments, with interest, the deed from William S. Sugg to Wiley P. Sugg shall be valid and binding, and that a day certain in the future be named in which respondents shall be permitted to make such payments, but that if the respondents fail, by the day named, to pay off and discharge such judgments and costs, then a special execution issue, directed to the sheriff of Dunklin county, authorizing and directing him to sell so much of said lands as will be necessary to pay off and discharge such judgments and costs, and that any balance of said lands, not required to be sold for the purpose aforesaid, be adjudged and decreed to have passed by said deed from William S. Sugg to said Wiley P. Sugg.

"However fraudulent the deed from W. S. Sugg to Wiley P. Sugg may have been, if found to have been fraudulent, it is valid as between the parties, and vested title in Wiley P. Sugg, and from him it has passed by descent to these respondents. None but judgment creditors could complain.

"This deed was equally binding upon the administrator of the estate of W. S. Sugg, deceased, and cannot be called in question by him, though fraudulent."

The Supreme Court denied the motion, although it raised practically the same questions as are here insisted upon. That motion was not before this court at the former trial, and consequently not before the Court of Appeals.

[2] Whether the Supreme Court was right or wrong in its judgment is not for this court to determine. It is the court of last resort in the state, and its decisions upon matters of local concern are binding upon this court.

This court as the Supreme Court of the United States has decided—

"possesses no revisory power over the decisions of the Supreme Court of the state, and any argument to show that that court mistook the law and misjudged the jurisdictional fact would have been out of place. There were no facts before the Circuit Court (U. S. Circuit) which were not before the Supreme Court of the state when its judgment was pronounced." Galpin v. Page, 18 Wall. 365, 21 L. Ed. 959.

[3] The question of title to the lands in dispute was before the courts of Missouri for 30 odd years. The decree of the Dunklin county circuit court (August 20, 1880) excepted 2,000 acres of land, conveyed by the deed of William S. to Wiley P. Sugg. These lands were accepted and sold by the heirs of Wiley P. Sugg, and the proceeds thereof ap-

propriated to their own use. They accepted the terms of that decree, and should be bound by it. The lands now in dispute are a part of the same lot, and were sold after that decree by the administrator of W. S. Sugg to Rogers for the purpose of paying judgment debts—debts that formed the basis for the decree.

These facts were all before the Supreme Court of the state when its decision was rendered in 1897. Many and very important of these facts have never been before the court until now.

The Supreme Court, speaking of the decree of August 20, 1880, said:

"These plaintiffs were there at that time of full age, and represented by counsel. They permitted the decree to be thus entered. By their agreement it was thus entered. Under the record in this case the heirs of W. P. Sugg have sold at least 700 acres of this exempted land. Other portions may have been sold and passed into the hands of innocent persons upon the faith of this decree entered by the consent and agreement of these plaintiffs. If the defendants have sold this 2,000 acres, they are estopped, and by the actions of the plaintiffs in agreeing to this decree they should not be permitted to reap the benefits, especially as against innocent purchasers if such there be, and 700 acres at least have been sold. To give plaintiffs this 2,000 acres would be inequitable. To disturb these titles at this date would work a hardship. The other titles under this same decree of 1880 have passed as if no deed had been made. For the reasons heretofore given this case should be and is reversed, but, it being one in equity, we will direct a judgment in conformity with our views of the equities of the case, and one which will in no wise disturb the titles. We have the whole case before us," etc.

The *complete* record of the Supreme Court in that case is now for the first time before this court. It is replete with all of the proceedings of the probate court of Dunklin county touching the lands in dispute—the proceedings of the circuit court of that county touching the same lands; the complete proceedings in the circuit court of Jefferson county; the injunction proceedings by the plaintiffs against these defendants; the deed of Walker to Rogers; the opinion of the Supreme Court (206 Mo. 148, 104 S. W. 45); the motion of plaintiffs to modify the decree and the order denying the motion. The Supreme Court of Missouri seems to have settled this case against the plaintiffs.

Upon the pleadings as they *now* stand, and upon the evidence as it *now* appears, the court finds that the plaintiffs are not entitled to recover in this action. Various objections were made during the trial to the introduction of evidence. The court did not at the time rule upon the questions, but reserved the same until now. All such objections are now overruled and exceptions allowed.

[4] There are other questions raised by the pleadings and evidence in the case that it is probably my duty to consider and decide. The first of these is the statute of limitations—sometimes called a statute of repose. This section (section 6) was bought by George Rogers at the sale made by the administrator of William S. Sugg in January, 1882. In 1884 this land was assessed to Rogers, and from that time to the time of his death the taxes were annually paid by him. He died in 1895. His will, devising these lands to his wife, Sue B. M. Rogers, was dated March 15, 1895. The taxes for that year were paid by his executor. On the 16th of August, 1897, Sue B. M. Rogers sold and conveyed these lands to J. E. Thomas, who, on the 13th of September

of the same year, sold and conveyed the same lands to John W. Vail, J. E. Thomas, and John A. Cook, a copartnership. On the 15th of June, 1898, Vail, Thomas and Cook sold and conveyed these lands to the defendant herein, the Decatur Egg Case Company, a corporation. From that time until and after the institution of this suit in 1910 the defendants paid all taxes. In 1898 (after it purchased the land) the Decatur Egg Case Company built two houses upon the land. One of these burned, but the other was continuously occupied by the tenants of the defendants. In 1898 the plaintiffs undertook to assert ownership and possession by running a single wire around the section. They thus *fenced in* the tenants of defendant. This wire was immediately cut by the defendant, and it continued to occupy the land and to cut timber thereon. These, then, being the conditions, the plaintiffs in 1899 commenced an injunction suit in the Howell county circuit court to prevent the defendant from cutting the timber on the section. An injunction bond was required by the law to be given by the plaintiffs, and Byrd (the plaintiff here) was surety on the bond. The entire record in that case is now for the first time in evidence here. In the former trial the bond only was offered. An examination of the petition in that case, signed by the same attorney now representing the plaintiffs, shows that the plaintiffs set out with great particularity the claim made by the defendant to this land. The answer of the defendant set up ownership of the land in dispute.

In July, 1909, by agreement of counsel, the Howell circuit court entered a decree in favor of the defendant, dissolved the temporary injunction previously granted, and assessed damages in favor of the defendant for the sum of $500. In that suit the plaintiffs made the same claim to the land that they here make.

Considering all the evidence touching this particular defense, the court finds that the defendant, the Decatur Egg Case Company, and those under whom it claims, had been in possession of the lands in question, claiming title thereto, for more than 10 years next before the commencement of this suit, and for that reason the verdict should be and is in favor of the defendants.

Upon the whole case the court finds:

First. That the title to the lands in dispute has been adjudicated by the Supreme Court of Missouri adversely to the plaintiff, and those under whom he claims and that adjudication is binding upon this court.

Second. That the plaintiff by his action and the action of those under whom he claims title is estopped from now claiming title to the lands in dispute.

Third. That the statute of limitations, interposed as a defense in this case, is good and sufficient, and is sustained by the evidence in the case.

A judgment will be entered in favor of the defendants.

VALVOLINE OIL CO. v. HAVOLINE OIL CO. et al.

(District Court, S. D. New York. December 23, 1913.)

1. TRADE-MARKS AND TRADE-NAMES (§ 93*)—UNFAIR COMPETITION—EVIDENCE CONSIDERED.

The adoption and use by defendant of the word "Havoline" in its corporate name and as a name for gas engine and automobile lubricants *held* not to constitute unfair competition with complainant, the Valvoline Oil Company, which with its predecessor had for many years used the name "Valvoline" as a trade-mark for illuminating and tempering as well as lubricating oils, where it was shown that the name of defendant's predecessor which first adopted the name was the Havemeyer Oil Company, that the suffixes "oline" and "line" were in common use for oils of all descriptions, and that defendant had not imitated complainant's packages nor used other means to deceive purchasers, but had largely advertised its name and products and built up a business therein on their merits which greatly exceeded complainant's in the same lines.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 104–106; Dec. Dig. § 93.*]

2. TRADE-MARKS AND TRADE-NAMES (§ 59*) — INFRINGEMENT — "VALVOLINE" AND "HAVOLINE."

The word "Havoline," as a name for gas engine and automobile lubricants, *held* not an infringement of the trade-mark "Valvoline," as applied to lubricating, illuminating, and tempering oils.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 68–72; Dec. Dig. § 59.*]

3. TRADE-MARKS AND TRADE-NAMES (§ 86*) — SUIT FOR INFRINGEMENT — LACHES.

A delay of several years before commencing suit for infringement of a trade-mark, with knowledge that the defendant was openly using the alleged infringing name and expending large sums in advertising its product thereunder, constitutes such laches as to require a court of equity, in view of modern business conditions, to deny injunctive relief as well as an accounting.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 95; Dec. Dig. § 86.*]

In Equity. Suit by the Valvoline Oil Company against the Havoline Oil Company and the Indian Refining Company of New York. Decree for defendants.

Steuart & Steuart and Sidney R. Perry, all of New York City, for complainant.

Henry B. Brownell and John P. Bartlett, both of New York City, for defendants.

MAYER, District Judge. The suit is brought to enjoin defendants from using the word "Havoline" on gas engine and automobile lubricants. The complainant claims that this word infringes its trade-mark "Valvoline," used on oils in general, including lubricating oils of various kinds, and also illuminating and tempering oils. In addition, complainant alleges unfair competition arising through the use of the word

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

"Havoline" and in the use of the corporate title "Havoline Oil Company."

The bill also charges infringement of complainant's emblem trademark by reason of the use by defendants of an emblem bearing the word "Havoline." These emblem marks are as follows:

The following is complainant's emblem mark:

The following is defendant's emblem mark:

The defenses are: (1) No infringement; (2) no unfair competition; and (3) laches.

Complainant's business of manufacturing and selling lubricating oils, greases, and other petroleum products was founded in 1868 by its predecessors Leonard & Ellis, a partnership. In 1873 this firm adopted and used as a trade-mark for its goods, the word "Valvoline." This trademark was registered in the United States Patent Office, October 14, 1873, No. 1,502, and again on May 31, 1881, No. 8,289. In 1901 the complainant corporation was organized, and in due course became the successor in business of Leonard & Ellis, and the owner by assignment of the trade-mark registrations. Complainant, in its name, registered the trade-mark "Valvoline" in the United States Patent Office, February 4, 1902, No. 37,754, again May 29, 1906, No. 53,237, and again October 23, 1906, No. 56,816. Complainant does not confine its mark to lubricating oils, but also uses it on illuminating and tempering oils, while defendants' mark "Havoline" has always been confined to automobile and gas engine lubricants. The validity of and title to the trademark "Valvoline" was established in the Circuit Court of the United States for the Southern District of Ohio as far back as 1889. Leonard v. White's Golden Lubricater Co., 38 Fed. 922.

[1] Complainant has done a considerable business throughout the United States and in other parts of the world in its oils generally, and "Valvoline" has been exhibited and displayed at various expositions and has received awards and medals for excellence. In 1904 Havemey-

er Oil Company, defendants' predecessor, adopted the mark "Havoline." The cable address of this company was "Havoil," which was adopted about the time of the organization of the Havemeyer Oil Company in 1901. This cable word "Havoil" was coined from the first syllable "Hav" of the name "Havemeyer" and the word "oil."

At the time that the word "Havoline" was adopted, the suffix "oline" or "line" had become familiar in connection with oils and oil products. The first use of this suffix seems to have been in the word "Cosmoline" in 1870, and since then trade-marks have been registered for use in connection with various kinds of oils, some of which are as follows:

"Puroline," registered 1871, No. 164, for illuminating oils or burning fluids.

"Amberline," registered 1871, No. 163, for lubricating oil.

"Carboline," registered 1873, No. 1,133, for coal oil, i. e., illuminating oil.

"Septoline," registered 1876, No. 4,003, for illuminating oil.

"Roseoline," registered 1880, No. 7,833, for lubricating and illuminating oils, etc.

"Hanoline," registered 1895, No. 26,686, for illuminating oil.

"Vacuoline," registered 1896, No. 28,937, for oils and lubricants of all kinds.

"Cycoline," registered 1896, No. 29,179, for illuminating oil.

"Fusoline," registered 1899, No. 32,592, for lubricating oil.

"Autoline," registered 1905, No. 47,509, for lubricating oils.

It is true that some of these marks were used in connection with illuminating and not lubricating oils, and that the marks registered under the act of 1870 come within the decision of the Supreme Court in the Trade-Mark Cases, 100 U. S. 82, 25 L. Ed. 550, declaring that act unconstitutional, and it is also true that there is no evidence of the actual use in commerce of these marks except "Cosmoline" and "Autoline." These facts, however, do not affect the proposition that the suffix "oline" or "line" had become so well known and familiar that when the Havemeyer Oil Company used that suffix it was using a familiar suffix—all to the point that there was not any purpose or intent to appropriate the particular ending of the mark used by the Valvoline Oil Company.

On April 9, 1907, the mark "Havoline" was registered (No. 61,806). In the same year the Havoline Oil Company was organized by the owners of Havemeyer Oil Company and, later, acquired the title to the Havoline mark and now holds it.

In October, 1909, Indian Refining Company of New York (organized in May of that year) purchased all of the capital stock of Havoline Oil Company; the purchase price being $150,000, which covered the stock of both of these companies. In 1910 Havemeyer Oil Company was dissolved. Since June, 1909, Indian Refining Company of Maine has been the exclusive manufacturer of the Havoline products. The Maine corporation owns all the stock of a New York corporation of like name which is a defendant here.

The testimony establishes a course of business by the owners of "Havoline" which demonstrates that they were developing their product

on its own merits and seeking to acquire a trade individuality for "Havoline" as against competitors, including complainant. With a single exception (to be later commented upon), there is nowhere in this record that evidence which is so often found in trade-mark or unfair competition cases. There is no invasion of the other's territory by tricky or unfair means, no misleading by similarity of appearance in the packages or containers in which the product is put up, no specious effort at artificial differentiation when the real purpose is to appropriate another's ability, effort, and commercial success.

On the other hand, it is plain that "Havoline" has succeeded because its owners have employed energetic, up-to-date business methods and have expended substantial sums to make their product widely known. Of course, success in business does not last long unless the public is satisfied with the price and quality of the article, and, in these directions also, good judgment seems to have been exercised by the "Havoline" owners. The sales of "Havoline" show the progress made in a business less then eight years old when the testimony in this record was taken (1905–1912). The later sales and receipts were as follows:

	Barrels	Amount
1909	20,000	$400,000.
1910	28,000	$415,000.
1911	23,000	$375,000.
1912 (8 mos.)	25,000	$350,000.

Respecting the business of complainant, Mr. Ellis, its president, was asked these questions and gave these answers:

"X-Q. 337. How much Valvoline oil marked "Motor oil" did the Valvoline Oil Company sell in the year 1911; that is, about how much? A. I can only guess at that, and I would say a good deal more than a thousand barrels, in one kind of a container or another.

"X-Q. 338. And, roughly speaking, would you say between one and two thousand barrels? A. Yes, possibly more. I didn't prepare myself for such questions, as I didn't think they would be asked in a trade-mark suit.

"X-Q. 339. In your answer to X-Q. 240, you say, 'On second thought, I wouldn't be surprised if 25 per cent. of the sale was still branded "'Gas Engine Cylinder Oil."' When you say '25 per cent. of the sale,' what were you referring to, the sale of what? A. I was referring to all the oil that was sold for automobiles, marine engines, and stationary gas engines, similar to automobile engines, and motors of all kinds, operated by gasoline or naphtha or kerosene, or fuel oil."

Thus, it appears that the sales of "Havoline" were far in excess of "Valvoline" motor oil.

Of course, the amount of sales is not a standard whereby to determine whether competition is unfair, but in this case it is of service, with other facts, in ascertaining whether "Havoline" was marketed on its own merits or on the reputation of complainant.

The advertising of complainant has been comparatively small, while that of defendants has been extensive and has invaded every field of advertisement for this kind of product. From about $5,000 spent in 1909, the advertising expenditures rose to over $25,000, in 1911. I think it may fairly be said that including 1912, at least $100,000 has been spent in advertising "Havoline."

Advertisements have been inserted in leading magazines of general

interest, as well as in magazines specially devoted to automobiling, motor boating, and sports generally. Tour books and display racks have been distributed, and there has been extensive outdoor advertising, including road signs, devices such as pennants, placards, and the like at athletic games and sporting events.

The owners of famous motor boats, as well as noted aviators and automobile racers, have used "Havoline." Men of this kind know what they are doing. Their sports are perilous, and, when they buy oil for their engines, it is to be presumed that they understand what article they are buying.

The colors on the "Valvoline" and "Havoline" cans are different, the wording is different, and the arrangement is different.

"Valvoline" has used the catch phrase, "Best by every Test," while "Havoline" has endeavored to make familiar, "It makes a difference."

How any one can be mistaken in readily distinguishing "Valvoline" as sold in the market from "Havoline" as sold in the market, I cannot understand. It is true that in a few inconspicuous instances defendants used the phrase, "Best by every Test."

This was done by an advertising manager now dead. Whether his course was due to an excess of zeal or to a supposed right cannot now be determined; but, when it is noted that this phrase was not used on defendants' containers, that defendants' efforts have been to make the public familiar with its own slogan, and that the instances were so few, the conclusion must follow that this conduct of the advertising manager is of no importance on the question of unfair competition.

In view, then, of the course of the business of these litigants above outlined, and the manner and method of sale of the products, this is not a case of unfair competition.

[2] We then come to the question of trade-mark infringement. I am of the opinion that the words are distinct from each other and that there is no confusion. There are, of course, many cases in the books in which the courts have made clear that they cannot be deceived by disingenuous distinctions (N. K. Fairbank Co. v. Central Lard Co. [C. C.] 64 Fed. 133, and many others which could be cited); but here there is a real distinction in sound, in appearance, and, popularly speaking, in meaning.

If I did not know anything about motor oils, and some one told me to buy "Valvoline," the word "valve" would be impressed on my mind. True, "Valvoline" has been held not to be descriptive, yet just as the English court held (Leonard & Ellis' Trade Mark, L. R. 26 Ch. Div. 288, and In re Leonard & Ellis v. Wells, L. R. 26 Ch. Div. 288) that the word meant valve oil, so would I, as a purchaser, think that it had something to do with valves. Of course, I would soon discover that "Valvoline" had a wider meaning, but when I heard "Havoline" I would think that it was some coined word or perhaps some technical term, and it would not suggest "Valvoline" to me.

Thus it seems by every test, including that indicated by Judge Lacombe in National Biscuit Co. v. Baker (C. C.) 95 Fed. 135 (Uneeda and Iwanta), that there is no infringement here.

I have examined the instances in this record of alleged confusion, for in doubtful cases actual instances of confusion may be helpful in arriving at a correct decision; but I am not impressed with the testimony on this branch of the case. Without analyzing the record in detail, it may be said that thoughtless errors by very inattentive people cannot be the standard in dealing with an article of this character, nor can a wholesaler be held responsible because an occasional unscrupulous dealer without his knowledge or consent tries to deceive the purchasing public.

[3] Holding these views, it is not necessary to discuss at length the question of laches. However, in a case so thoroughly prepared as this by both sides, counsel are entitled to the view of the trial judge on an important question.

The testimony is that a retail store for the sale of "Havoline" products was opened in 1906 on Broadway in the center of the automobile district in New York City. This store has been maintained ever since. Complainant knew of defendants' mark in 1906 and knew that it was being used continuously ever since.

"X-Q. 261. When did you first hear of the Havoline brand of motor oil? A. I can't remember in regard to the word 'motor oil,' but in regard to Havoline oil it may have been Havoline Cylinder, or it may have been Havoline oil plain, or it may have been Havoline motor oil, which I can't remember, but as I remember it first it was Havemeyer Oil Company's Havoline oil, of some grade I do not remember. It was the same year that they established their depot on Broadway near Sixty-Fourth or Sixty-Third street. I called in on them at the time I first saw it and notified them that that was too similar a brand to our Valvoline brand, and that, if they intended to register it, I should oppose it, and I found out afterwards that it had just been registered or, in other words, the advertising time that I could oppose it had expired within a very few days previously. Hence, this suit; otherwise I would have opposed it at the time they tried to register it, the same as I did 'Wolverine,' which latter trade-mark was applied for by the same man, Mr. Tomlinson.

"X-Q. 262. Whom did you see when you called in on them, as stated in your last answer? A. I do not know that I asked him his name; I asked him if he represented the Havemeyer Oil Company that was selling Havoline oil. He said he did.

"X-Q. 263. Do you now know whom it was that you saw at that time? A. No, I have not inquired since."

The notice to the unidentified person at the Broadway depot cannot be regarded as binding on defendant, but it does show knowledge by complainant of the use of the word "Havoline."

I think we must realize modern conditions. Men can build up new businesses these days in a period of time which would have seemed amazingly short years ago. It is true that mere acquiescence will not preclude injunctive relief, but, whether a case falls within the principle of Menendez v. Holt, 128 U. S. 523, 9 Sup. Ct. 143, 32 L. Ed. 526, or within Richardson v. Osborne (C. C.) 82 Fed. 92, affirmed 93 Fed. 828, 36 C. C. A. 610, depends, of course, on the particular facts and circumstances. Where a trade-mark is bodily appropriated, as in Menendez v. Holt, the courts will grant injunctive relief, although in some instances denying an accounting. See, also, Mosler v. Lurie, 209 Fed. 364, 126 C. C. A. 290 (C. C. A. 2d Circuit) decided November 11, 1913.

But this is not such a case. It must be admitted, even if it were to be held that the defendants infringed complainant's trade-mark, that the question involved is seriously debatable.

I am of opinion that equity as applied to modern business developments requires that, in this particular case, injunctive relief in any event be denied. No satisfactory explanation is given for the delay, and, during that time, the defendants have spent thousands of dollars to create a valuable asset in the word "Havoline." Complainant is not uninformed, as in Mosler v. Lurie, supra, but is a business corporation in this very same kind of business.

There are cases where delay is excusable because it is necessary to obtain essential testimony or because a person unfamiliar with the subject-matter is ignorant of his rights, or where there is some situation that shows that a defendant should not be permitted to go on with his own wrongful conduct just because he has continued it for a long time.

But it cannot be equitable for a well-informed merchant with knowledge of a claimed invasion of right, to wait to see how successful his competitor will be and then destroy with the aid of a court decree, much that the competitor has striven for and accomplished—especially in a case where the most that can be said is that the trade-mark infringement is a genuinely debatable question.

It is not unlikely that, had complainant in 1906 properly notified defendants' predecessor, the latter would just as soon have adopted some other mark; and, if not, then the controversy could have long since been decided without substantial loss to anybody.

I think there will be very little protection for investors, if, after finding that a duly registered trade-mark has been extensively advertised, that no suit has ever been commenced in respect thereof, that there has not been any appropriation of the name of a company or its brands or trade-mark by an obvious simulation, they nevertheless are subjected to a decree which seriously impairs the value of the property they have acquired.

That complainant, in any event, would not be entitled to an accounting, is clear under the authority of Menendez v. Holt, supra, and Mosler v. Lurie, supra, and for the reasons outlined I am also satisfied complainant is not entitled to prevail on any theory.

The bill is dismissed, with costs.

AMERICAN SIGN CO. v. ELECTRO-LENS SIGN CO. et al.

(District Court, N. D. California, Second Division. November 3, 1913.)

No. 15,602.

1. ACTION (§ 24*)—ACTION AT LAW—EQUITABLE DEFENSES—FRAUD.
In an action in the federal courts on notes given for deferred payments on the purchase price of certain territorial rights or privileges under patents owned by plaintiff, defendant was entitled to plead, as a defense at law, failure of consideration based on fraud inducing the making of the contract, and was not required to sue in equity to obtain relief on such ground.
[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 153–155; Dec. Dig. § 24.*]

2. SET-OFF AND COUNTERCLAIM (§ 29*)—DAMAGES FOR FRAUD.
In an action on notes given for the purchase price of certain patent rights and privileges, a claim for damages for fraud inducing the making of the contract was relevant to and dependent on the transaction which was the basis of plaintiff's cause of action within Code Civ. Proc. Cal. § 442, and was therefore properly set up as a counterclaim.
[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. §§ 49–51; Dec. Dig. § 29.*]

Action by the American Sign Company against the Electro-Lens Sign Company, and others. On demurrer to defendant's defense and counterclaim and motion to strike. Motion denied, and demurrer overruled.

Willard P. Smith and Judson W. Reeves, both of San Francisco, Cal., for plaintiff.

W. W. Sanderson, of San Francisco, Cal., for defendants.

VAN FLEET, District Judge. [1] The action is to recover on promissory notes made by the defendant corporation and indorsed by its codefendants for deferred payments on the purchase price, under a contract of sale, of certain territorial rights or privileges under patents owned by the plaintiff; and the primary question presented by the demurrer and motion to strike interposed by plaintiff to the answer and cross-complaint is whether in an action at law in this court on a contract not under seal the defense of failure of consideration based on fraud inducing the making of the contract can be interposed, the contention of plaintiff being that such a defense has no competent place on the law side in a federal court, but is cognizable only in equity.

The substantive question has given rise to some difference of view and decision in the lower federal courts, arising largely, I think, out of an unwarranted extension in some cases of the principles announced in the case of George v. Tate, 102 U. S. 564, 26 L. Ed. 232, the leading case relied upon by plaintiff to sustain its contention. That case was an action to recover on a bond given to prevent the levy or execution of a writ of attachment, wherein the defendants answered that they were induced to enter into the bond by the false and fraudulent representations of the plaintiff's assignors. The trial court excluded evi-

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

dence of the alleged fraud, and the Supreme Court in sustaining this ruling used this language:

"Proof of fraudulent representations by Myers & Green, beyond the recitals in the bond, to induce its execution by the plaintiff in error, was properly rejected.

"It is well settled that the only fraud permissible to be proved at law in these cases is fraud touching the execution of the instrument, such as misreading, the surreptitious substitution of one paper for another, or obtaining by some other trick or device an instrument which the party did not intend to give. Hartshorn et al. v. Day, 19 How. 211 [15 L. Ed. 605]; Osterhout v. Shoemaker et al., 3 Hill (N. Y.) 513; Belden v. Davies, 2 N. Y. Super. Ct. 466; Franchot v. Leach, 5 Cow. (N. Y.) 506. The remedy is by a direct proceeding to avoid the instrument. Irving v. Humphrey, 1 Hopk. Ch. (N. Y.) 284."

The plaintiff construes this language as announcing the broad doctrine that fraud in procuring the making of a contract, regardless of whether it is one under seal or not, may never be availed of in a federal court to avoid its obligation, otherwise than by bill or other appropriate method on the equity side. And this is the view of that case adopted in Levi v. Mathews, 145 Fed. 152, 76 C. C. A. 122, cited by plaintiff, and some others of like character. These cases need not be particularly considered further than to say that, while some of them, like Levi v. Mathews, involved contracts under seal, and others contracts not under seal, they proceed alike upon the theory that the question as to the existence of any distinction in the nature of the contract in that regard is concluded by the language of George v. Tate, and are decided in obedience to what is conceived to be the rule there announced.

Is that case justly susceptible of the interpretation thus sought to be put upon it? With the greatest respect for the courts entertaining that view, I find myself wholly unable to give it my acquiescence. To my mind, it is based upon a misapprehension which overlooks the character of the case with which the court was dealing. It is a cardinal rule in construing the language of a decision that it must be read with particular reference to the facts before the court, and this principle, as it appears to me, must be wholly ignored to give the language of that case the sweeping effect contended for. The instrument there in suit was a bond under seal, a specialty, and it was with reference to the rights of the parties under such a contract that the court was speaking. When therefore, in announcing the applicable rule of law, the court employs the somewhat general and comprehensive expression, "It is well settled * * * *in these cases,*" etc. (italics ours), we are bound, not only in fairness but in obedience to the rules of construction, to confine the application of its language to the class of cases represented by the one before the court—cases involving sealed instruments. And that this class was what the court had in mind, and all it had in mind, is, I think, conclusively evidenced by the character of the cases referred to as authority for the rule announced. All the cases cited by the court involved contracts under seal: Hartshorn v. Day, an assignment of a patent under seal; Osterhout v. Shoemaker, a deed; Belden v. Davies, a release under seal; Franchot v. Leach, a formal contract for the sale of land; Irving v. Humphrey, a composi-

tion and release by creditors. And all of them confine the discussion of the rule in its application to that class of contracts. As thus, in Hartshorn v. Day:

"The general rule is that, in an action upon a sealed instrument in a court of law, failure of consideration, or fraud in the consideration, for the purpose of avoiding the obligation, is not admissible as between the parties and privies to the deed," etc.

These considerations, it seems to me, show very clearly the proper limitations of the rule the court was declaring in George v. Tate, and that it had application alone to contracts under seal. And, thus construed, the case but announces a principle then old and familiar with reference to that class of contracts; whereas the construction contended for would commit the court to a doctrine not only at variance with that obtaining at common law, but with the rule prevailing in most, if not all, of the states of the union.

That courts of law have concurrent jurisdiction with courts of equity in matters of fraud in all instances where the relief sought is such that a court of law, with its more rigid remedies, is capable of affording it, has long been established; and that this principle has application to actions and proceedings in federal courts, notwithstanding the method of our procedure which requires the separate administration of legal and equitable remedies, has been recognized in repeated decisions of the Supreme Court. Thus in Buzard v. Houston, 119 U. S. 347, 7 Sup. Ct. 249, 30 L. Ed. 451, where the bill sought to set aside the written assignment of a contract alleged to have been obtained by fraudulent representations, and to restore the complainant to his original contract, the court dismissed the bill because the remedy at law was adequate, and said:

"In cases of fraud or mistake, as under any other head of chancery jurisdiction, a court of the United States will not sustain a bill in equity to obtain only a decree for the payment of money by way of damages, when the like amount can be recovered at law in an action sounding in tort or for money had and received. * * *

"The present bill states a case for which an action of deceit could be maintained at law, and would afford full, adequate, and complete remedy. * * * If the plaintiffs should be ordered to be reinstated in all their rights under that agreement, and permitted now to tender performance thereof on their part, the only relief which they could have in this suit would be a decree for damages to be assessed by the same rules as in an action at law. * * * If the exchange of the contracts was procured by the fraud alleged, it would be no more binding upon the plaintiffs at law than in equity; and in an action of deceit the plaintiffs might treat the assignment of the contract with Mosty as void, and, upon delivering up that contract to the defendant, recover full damages for the nonperformance of the original agreement. * * * A judgment for pecuniary damages would adjust and determine all the rights of the parties, and is the only redress to which the plaintiffs, if they prove their allegations, are entitled."

So in Equitable Life Assur. Soc. v. Brown, 213 U. S. 25, 29 Sup. Ct. 404, 53 L. Ed. 682, which was a bill brought by a policy holder against an insurance company for an accounting and the appointment of a receiver because of fraud and misfeasance of its officers, and in which the complainant contended that there was a relation of trust between the company and himself, the bill was held to sustain no ground

for equitable intervention because complainant's remedy, if he had one, was at law; and it is said:

"If it be held that there is no trust, then it follows that the suit cannot be maintained in equity on the sole ground of fraud. Such a ground for the maintenance of the suit (even if complainant could otherwise maintain it) is a mere incident to the main ground set forth in the bill. Equity does not now take jurisdiction in cases of fraud where the relief properly obtainable on that ground can be obtained in a court of law, and where, so far as necessary, discovery may be obtained as well as in equity. Rev. Stat. § 724 [U. S. Comp. St. 1901, p. 583]; United States v. Bitter Root Co., 200 U. S. 451 [26 Sup. Ct. 318, 50 L. Ed. 550], and cases cited."

In Union Pacific Ry. Co. v. Harris, 158 U. S. 326, 15 Sup. Ct. 843, 39 L. Ed. 1003, the action was to recover damages for personal injuries, and the defendant set up a written release in bar of the action, to which a replication was filed averring, as ground of avoidance of the release, that plaintiff's mind at the time of its execution was enfeebled by opiates, shock, and pain to the extent that he was unable to enter into contractual relations; that the minds of the parties never met on the principal subject embraced in the release; and that the release was obtained through misrepresentation and fraud. The defendant at the trial moved the court to instruct the jury that the release was a complete bar to the action, which instruction the court declined to give, but submitted to the jury the question of fraud in obtaining it, and its action in that regard was sustained; the Supreme Court saying:

"As there was evidence tending to sustain plaintiff's contention in relation to the validity of the release, the instruction was properly refused."

The same principles find ample support in the decisions of other federal courts.

In Wagner v. National Life Ins. Co., 90 Fed. 395, 33 C. C. A. 121, an action was brought on a policy of life insurance on which was an indorsement releasing the defendant from liability, and it was held that the plaintiff was entitled to show that the indorsement had been procured by fraud; Judge Taft, delivering the opinion of the Circuit Court of Appeals for the Sixth Circuit, saying:

"Except for the peculiar sanctity anciently attaching to a sealed writing at common law, which is now disappearing, it is difficult to see how there could be any doubt about the right in an action at law to avoid a release by a reply of fraud. The release or surrender is a contract (and in the case at bar not under seal), in which, for a valuable consideration, the releasor agrees to give up all claim and interest in his right of action. In the case of a contract of sale of personal property, a party may, by tendering back either the money or the property, as the case may be, rescind the sale for fraudulent misrepresentation as to any material fact inducing him to enter into the contract, and, if sued on the contract, may plead such rescission and justify it. Why may not one on the same ground and in the same way rescind a release, or, when it is produced against him as a bar to an action, avoid it by showing the fraud? * * *

"Our conclusion is therefore that it is proper in a suit at law for the plaintiff to meet a plea of release by a replication that the release was obtained by fraud, whether the fraud is in the execution, or in misrepresentation as to material facts inducing execution. We are glad to come to this conclusion, because it avoids circuity of action, and thus facilitates the administration of justice. Of course, cases may be conceived where the avoiding of a release

may concern the rights of others not parties, or may involve the application of peculiarly equitable doctrines of confidential relations, and the like, and thus present issues which only a chancellor, with his flexible procedure and careful discrimination, can properly adjust and decide. In such cases the parties can be remitted to equity. But where the issue is simply one of fraudulent misrepresentation, it may be as well tried to a jury as to a court of equity, for fraud is an issue of which courts of law and equity, from time immemorial, have had concurrent jurisdiction. We find no reason therefore to modify the remark made by this court, speaking through Judge Lurton in Lumley v. Railroad Co., 43 U. S. App. 476, 489, and 76 Fed. 73 [22 C. C. A. 67], where he said: 'If the release had in fact been procured by fraud, he (the plaintiff) could have shown this at law, if the fact that the release was under seal had been out of the way.' The remark was perhaps not necessary to the case then before the court, but in this case, where the question calls for decision, we have no difficulty in confirming it."

In Second Natl. Bank v. Pan-American Bridge Co., 183 Fed. 391, 105 C. C. A. 611, an action at law on a building contract where the contract required the contractor to obtain the architect's acceptance of the building as a condition precedent to his right to final payment therefor, it was held that the contractor could show that the architect's certificate required as a condition precedent to action was fraudulently withheld, and was not required to go into a court of equity to avoid the effect of his failure to obtain it; and it is said:

"We cannot accede to the proposition that resort to equity is necessary in order to avoid the effect of failure to obtain the architect's certificate. The contention most strongly urged seems to be that the plaintiff must, as condition precedent to recovery on the contract, procure the setting aside of the contract provisions requiring such certificate, although the suggestion is also made that the architect's action needs reforming. Neither of those contentions is, in our opinion, maintainable. The plaintiff does not attack the validity of the contract provision requiring the architect's certificate as a condition precedent to recovery. Nor is there any certificate of the architect standing in the way and requiring reformation. The plaintiff's complaint in this respect is not that the contract is wrong, nor that any certificate of the architect is wrong. Its grievance is that the architect has improperly refused, as alleged, to accept the work and to certify accordingly."

And after discussing George v. Tate and other cases urged in support of defendant's contention, it is said:

"The right of a party to a building contract to show in an action at law thereon that the certificate required by the contract as a condition precedent to action was fraudulently withheld has been at least impliedly recognized in numerous cases, several of which are cited in another branch of this opinion, and has never, so far as we have seen, been denied."

In Such v. Bank of State of New York (C. C.) 127 Fed. 450, the plaintiff sought by his bill to have annulled and set aside a release given by him to the defendant in full settlement of all transactions with the bank, upon the ground that the making of the release had been procured by fraudulent misrepresentations. Judge Wallace held that the release, not being under seal, could be avoided at law in a federal court for the fraud inducing the making, and that the facts did not entitle the maker to resort to equity for its cancellation. After considering George v. Tate and Hartshorn v. Day, referred to in that case, he says:

"These are the only cases in which the question has been considered by the Supreme Court. Following these decisions, the rule obtains in this cir-

cuit that to avoid the effect of a release under seal by one who alleges that it was obtained by fraud relating to the consideration, and not merely to the execution of the instrument, resort must be had to a court of equity."

And proceeding to discuss a number of other cases upon the subject, including Buzard v. Houston, supra, Judge Wallace concludes:

"There is no more reason why the party who has executed an instrument like the receipt in the present case should be precluded in a court of law to show fraud in its consideration than there is where the maker of a promissory note, who asserts fraud in the consideration, should be precluded. In the absence of any decision by the Supreme Court or by this court that a party who by a false representation has been induced to make an unilateral agreement in the nature of a release, not under seal, cannot avoid it at law, the conclusion is reached that the complainant is not entitled to resort to equity to vacate the receipt given to the defendant."

The same principles are recognized by Judge Morrow in Mahr v. Union Pac. R. Co., 170 Fed. 699, 96 C. C. A. 19; and also in Lumley v. Wabash R. Co., 76 Fed. 66, 22 C. C. A. 60.

In Hill v. Northern Pac. Ry. Co., 113 Fed. 914, 51 C. C. A. 544, Judge Ross, while adverting to the question, determined that it did not arise upon the facts, and the court for that reason refrained from expressing any conclusion.

These considerations would seem to fully sustain the contention of the defendants that the issues tendered by their answer and cross-complaint constitute a competent answer in a court of law to the plaintiff's demand. Indeed, it is quite obvious, from the authorities referred to, that it would be idle and fruitless to send them to a court of equity with their grievance, since it could not there be entertained. They seek nothing but that which a court of law is fully competent to afford them—compensation by way of damages for the loss alleged to have been suffered through plaintiff's fraud.

[2] The further objections urged to the cross-complaint are without merit. The matter alleged is clearly relating to or depending upon the transaction counted upon by plaintiff within the meaning of the Code provision on counterclaim. C. C. P. § 442. The fact that the action is founded upon the notes rather than the original contract can make no difference in this regard. It is the same as if plaintiff were suing on the contract for a balance of purchase price not represented by notes. Nor do I think the cross-complaint improperly unites different and inconsistent causes of action.

The motion to strike will be denied, and the demurrer overruled.

Let an order be entered to that effect.

PACIFIC GAS & ELECTRIC CO. v. CITY AND COUNTY OF SAN FRANCISCO.

(District Court, N. D. California, Second Division. December 17, 1913.)

No. 27.

1. INJUNCTION (§ 153*)—TEMPORARY INJUNCTION—GAS RATES—IMPOUNDING FUNDS—BONDS.

Where complainant gas and electric company filed a bill to restrain the enforcement of a city ordinance fixing rates for the fiscal year beginning July 1, 1913, on the ground that the rates were confiscatory, and applied for a temporary restraining order pending the application for an injunction pendente lite, complainant, as a condition to the granting of such order, would not be required to pay into court the excess of the rates charged over those fixed by the ordinance for the benefit of consumers in case the bill should be dismissed, but would be required to file monthly statements and execute bonds from time to time for the refund of such excess in case relief should be denied.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 338, 339; Dec. Dig. § 153.*]

2. GAS (§ 14*)—RATE ORDINANCE—JURISDICTION.

While a court of equity may restrain the enforcement of an ordinance fixing rates to be charged by a public service corporation which are confiscatory or unreasonable, the court may not itself fix a reasonable rate.

[Ed. Note.—For other cases, see Gas, Cent. Dig. §§ 10–11; Dec. Dig. § 14.*]

3. INJUNCTION (§ 153*)—PUBLIC SERVICE CORPORATION—RATES.

Where a public service corporation sued to restrain the enforcement of a rate ordinance passed for the fiscal year beginning July 1, 1913, on the ground that it was confiscatory, and applied for a temporary restraining order until an application for an injunction pendente lite could be heard, the court, as a condition to the granting of such order, could not direct that the rates to be charged in the meantime should not exceed those fixed in an ordinance for the preceding year, which had expired, but could vacate the restraining order and leave complainant at the mercy of the ordinance sought to be annulled, in case it sought to charge an obviously unconscionable rate, under the rule that he who seeks equity must do equity.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 338, 339; Dec. Dig. § 153.*]

In Equity. Suit by the Pacific Gas & Electric Company against the City and County of San Francisco. On application of defendant to impound certain funds pendente lite. Denied, and order entered requiring complainant to give bonds.

William B. Bosley and C. P. Cutten, both of San Francisco, Cal., for complainant.

Percy V. Long, City Atty., and Jesse H. Steinhart, Asst. City Atty., both of San Francisco, Cal., for defendant.

VAN FLEET, District Judge. An ordinance of the board of supervisors of the defendant municipality, fixing gas rates for the fiscal year beginning July 1, 1913, being attacked by the bill as violative of complainant's rights under the fourteenth amendment to the Consti-

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

tution, a temporary restraining order was granted, arresting its enforcement until the application for an injunction pendente lite could be heard. The defendant, not being ready to proceed with the hearing of the latter application, asks that the restraining order be so modified as to require that the moneys collected by the complainant from the consumers, pending the restraint, in excess of the rates fixed by the ordinance, be impounded in a depositary, and retained under the control of the court until such time as it shall be eventually determined whether such fund is to go to the complainant or be returned to the consumers, dependent upon the determination of the question as to the validity of the ordinance.

[1] The motion being resisted by the complainant, the question presented is how best to maintain the status quo and preserve the respective rights of the parties, without injustice to either, while the validity of the ordinance remains in suspense. Different methods have been adopted by the courts to attain that end. Until comparatively recently, the usual, if not the invariable, practice has been to require a bond from the complainant utility for the benefit of the consumer, upon which, it being determined that the restraint was unwarranted, the latter may sue for any loss suffered through the ordinance rate being exceeded; and, in the larger number of cases, this method is substantially effective. In some instances, however, involving, like the present, large bodies of consumers, this mode of protection, while sufficient for the utility, has been deemed or found inadequate for the consumer, since where the amount of the loss to an individual consumer, as is not infrequently the case, is comparatively insignificant, it makes the expense of an action for its recovery onerous and burdensome, if not practically prohibitive, and thus leaves him without an efficient remedy. This being recognized, the courts, in seeking a more effective way to protect the consumers in such cases, have in a few instances adopted the impounding method now sought by the defendant. Such was the order in Consolidated Gas Co. v. Mayer (C. C.) 146 Fed. 150, involving gas rates in the City of New York, which was followed in Buffalo Gas Co. v. City of Buffalo (C. C.) 156 Fed. 370. Thereafter Judge Farrington adopted that course in the more recent case in this district of Spring Valley Water Co. v. City & County of San Francisco (C. C.) 165 Fed. 667; and this has been followed in the subsequent litigation between that corporation and the city, and in one or two other instances. It was thought and hoped that the tying up of the fund in this manner, besides affording fuller protection to the consumer, would have the effect of inducing a greater expedition of the parties in pushing the litigation to an early conclusion. But whatever the experience in other districts, this hope has not been realized here. The Spring Valley litigation, for instance, is apparently no nearer a condition of final determination than when it was begun. It is true perhaps with reference to that particular litigation that the indisposition of the parties to proceed to have the cases determined has, to some extent, arisen from the pending efforts to effect a transfer of the property of the water company to the city; but, whatever the cause of the long procrastination, it has resulted in the accumulation of a very

large fund under the impounding requirement, which has become a source or more or less anxiety and disturbance to the court. As such a fund is not regarded as a proper subject for the registry of the court, the only practical way of securing its safe-keeping is by requiring its deposit in a bank or banks; but, obviously, when so kept its safety can be no more assured than the solvency of the institution with which it is kept. In the Spring Valley Cases the fund has grown so great that the court has felt impelled, in order to avoid the risk necessarily incident to keeping the entire sum in one bank, to order its distribution among the different banks in the city designated as depositaries in bankruptcy; but manifestly this is but distributing the risk of loss, and not avoiding it. Moreover, since the fund must of necessity be deposited practically on call, the banks are not disposed, nor could they be expected, to pay more than a merely nominal rate of interest for the use of the money while in their hands. As a result, while the party eventually found entitled to the fund, whether it be the utility or the consumer, is deprived of the use of his money for an indefinite period, he can hope, at the end of the litigation, to receive little, if anything, more than the principal, with no adequate return for its use, which looks very much like taking a man's property without just compensation.

These are some of the defects developed in the practical working the impounding scheme. Others, I think, could readily be suggested if necessary.

Happily, however, I am of opinion that a more satisfactory solution of the question is afforded by the method adopted in the two very recent cases in the District of Arizona of Bonbright v. Geary et al. (Equity No. 9), and Kelley v. Geary et al. (Equity No. 10) 210 Fed. 44, decided on November 19th, since the present motion was submitted. In those cases injunctions were sought to restrain the enforcement of an order of the Corporation Commission of the state fixing electric light rates in the city of Phœnix. The motion for preliminary injunction was heard before three judges, the defendants being a state board. In granting the injunction careful consideration was given to the question presented here, and Judge Morrow, speaking for the court, said:

"In the meantime the status quo should be maintained. In making this order, however, we must take into consideration the possibility that upon a careful consideration of all the facts in the case the court may reach the conclusion that the findings and orders of the Corporation Commission are substantially correct, and for that contingency we must require security that will fully protect the customers of the company in their rates. This is an embarrassing and a difficult problem to deal with."

And referring to the difficulties arising under the impounding method, it is concluded:

"We have come to the conclusion, however, that the order we will make in this case will dispose of that question effectively and secure substantial justice to all concerned."

The court then proceeds to require the giving of a sufficient bond on the part of the Electric Company, with provision in the order that the company shall, on or after the first of each month, file with the clerk

of the court a sworn statement showing the actual amount collected from consumers during the month, and what would have been collected under the rates fixed by the suspended order; that upon final decree, if it shall be determined that the order of the Commission is valid, then the company shall, within a definite time to be fixed in the decree, pay into court the full amount collected by it in excess of the rates fixed by the order, together with legal interest thereon from the date of its collection, such amount, principal, and interest to be distributed and returned to the consumers through a special master to be named by the court.

It will be readily perceived, I think, that this method presents decided advantages to both parties over those derived from the impounding of the fund in a bank, and is no less secure. The complainant, being required to furnish adequate bonds to secure its eventual repayment, is given the use of the moneys collected pending the determination of its final destination, and it may thereby be employed for the benefit of the utility and the consumer, as well in the maintenance and upkeep of the plant, instead of lying idle, benefiting no one but the bank in which it would otherwise be deposited; and, upon its being determined that the utility has no right to the fund, it is required to pay it into court, with legal interest, to be returned to the consumer through the instrumentality of the court, and without the expense or necessity of an action for its recovery. If by reason of delays in prosecuting the suit the fund accumulates beyond the amount of the bond first required, it is always within the power of the court, upon proper suggestion, to require additional security to be given, and the amount thus kept fully covered and protected. In the end, if the consumer is adjudged entitled to a refund, he gets back, not only his principal, but an adequate compensation for its use; while the utility cannot complain, since, having had the use of a fund to which it is found not to have been entitled, it is but just that it should be required to pay for such use. This result would certainly seem to be more in accord with the principles of equity than that which may be had under the impounding requirement.

I am of opinion, therefore, that a modification of the present order to conform with that granted in the Arizona case will afford more effectual protection to both the defendant and its consumers than that requested by defendant.

[2] Defendant also asks that the order be further so modified as to prohibit the complainant, pending the restraint, from collecting rates in excess of those fixed by the board of supervisors for the previous fiscal year of 1912–1913. But obviously the court would not be justified in making such a modification. The ordinance fixing rates for that year has expired by limitation, and those rates, therefore, no longer exist as legal rates. For the court to so modify the order would be tantamount to itself undertaking to fix a rate, a thing which it may not competently do. Moreover, since the rates for that year, or the latter half of it, were substantially the same as the rates fixed by the present ordinance, such a modification would be practically equivalent to determining on this preliminary motion the substantive question in-

volved in the controversy—whether the rates of the present ordinance are such as to furnish adequate compensation for the service.

[3] But while the court cannot undertake to do what defendant asks in that regard, it is not without power to protect defendant and its consumers against any effort by complainant to charge a rate palpably and obviously unconscionable, since upon such fact being brought to its attention, it is always within the power of the court to vacate the restraining order and leave the complainant at the mercy of the ordinance sought to be annulled. He who seeks equity must do equity.

I deem it not inopportune to add that, in my judgment, the difficulties growing out of the question here presented could be largely avoided or reduced to a minimum by a greater diligence in pushing these rate-fixing cases to a conclusion. Indeed the question of maintaining the status quo only becomes a serious one because of the long delay usually experienced in having such cases prepared for final hearing—something for which, so far as my observation goes, there exists no adequate reason inhering necessarily in their nature. As counsel are well aware, this delay does not rest with the court. By reason of the fact that these cases usually involve numerous and complicated questions of fact, the Supreme Court has indicated that they are proper cases to be sent to the master for the taking of the evidence and finding the facts. Chicago, etc., R. Co. v. Tompkins, 176 U. S. 167, 20 Sup. Ct. 336, 44 L. Ed. 417. This can be done immediately the pleadings are in, and the master will be found ready and willing to give them early hearing; and when in a state for final hearing the court is always ready to lend its aid to facilitate a prompt determination. But beyond this the court is powerless, since it does not lie with it to prepare a case for presentation, nor can it decide it until ready for submission. I make these suggestions in no censorious spirit, but with the hope that in the future in disposing of this class of litigation, involving, as it always does, questions of public interest, it may be found compatible with the other obligations of counsel and the court to give it a readier disposition.

An order will be entered granting a modification of the restraining order in accordance with the suggestions herein indicated. Such an order counsel may prepare.

UNITED STATES v. FOSTER et al.

(District Court, D. Massachusetts. October 2, 1913.)

No. 641.

1. POST OFFICE (§ 4*)—POSTMASTERS—SALARY—STATUTORY PROVISIONS.

Under Act July 12, 1876, c. 179, § 5, 19 Stat. 80 (U. S. Comp. St. 1901, p. 2609), dividing postmasters into four classes, and defining the second class as including all those whose annual salaries are between $2,000 and $3,000, and Act March 3, 1883, c. 142, 22 Stat. 600 (U. S. Comp. St. 1901, p. 2619), providing that the respective compensation of postmasters of the first, second, and third classes shall be annual salaries assigned in even hundreds of dollars, to be ascertained and fixed from their respective

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

quarterly returns to the auditor at the rates therein specified, which are based on the gross receipts, and Rev. St. § 161 (U. S. Comp. St. 1901, p. 80), authorizing the Postmaster General to prescribe regulations not inconsistent with law for the governing of his department, the conduct of its officers and clerks, and the distribution and performance of its business, the Postmaster General had no authority to make a regulation that, in determining the gross receipts for the purpose of fixing a postmaster's salary, unusual sales of stamps should not be included, and that a statement of such sales should not be made to the auditor, but to the First Assistant Postmaster General, since the regulation is not an attempt to define "gross receipts" nor to clear up an ambiguity in the statute or supply details, but in effect makes salaries dependent, not upon gross receipts returned to the auditor as provided by statute, but upon such part of such gross receipts as, in the opinion of some departmental official, is not unusual, or for use outside the district.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. § 3; Dec. Dig. § 4.*]

2. POST OFFICE (§ 4*)—POSTMASTER GENERAL—REGULATIONS—VALIDITY.

That the validity of a regulation by the Postmaster General was unquestioned for a long time was of little force in determining its validity, where the only persons directly affected thereby were subordinate office holders, who would be very reluctant to attack the validity of a regulation made by their superior officer.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. § 3; Dec. Dig. § 4.*]

3. CONSPIRACY (§ 33*)—OFFENSES—CONSPIRACY TO DEFRAUD GOVERNMENT.

A conspiracy to secure for a postmaster a larger salary by purchasing at his office large quantities of postage stamps for use outside the territory served by such office was not a conspiracy to defraud the United States, since, as the statute makes the postmaster's salary dependent on the gross receipts, without excluding receipts from such sales, the postmaster was legally entitled to the salary which it was the object of the alleged conspiracy to secure, and a conspiracy to obtain by improper methods, what one is legally entitled to is not punishable as a conspiracy to defraud.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. § 60; Dec. Dig. § 33.*]

4. INDICTMENT AND INFORMATION (§ 147*)—DEMURRER—GROUNDS.

Where an indictment charged a conspiracy by a postmaster and others, the object of which was that the postmaster should make false returns to the First Assistant Postmaster General for the purpose of fraudulently increasing his salary by failing to report, in the gross receipts required to be made monthly, large and irregular sales of postage stamps for use outside the district served by such post office, the fact that no such report of gross receipts as was described in the indictment was required of the postmaster did not render the indictment demurrable, since its allegations on demurrer would be taken as true.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 490–494; Dec. Dig. § 147.*]

5. POST OFFICE (§ 36*)—OFFENSES—MAKING FALSE RETURN.

The making of a false return by a postmaster by failing to report large and irregular sales of postage stamps for use outside the district served by his office, the receipts from which, under departmental regulations, would be excluded in fixing his salary if so reported, was not punishable under Cr. Code, § 206 (Act March 4, 1909, c. 321, 35 Stat. 1128 [U. S. Comp. St. Supp. 1911, p. 1649]), providing that any postmaster or other person employed in the postal service, making or assisting in making a false return for the purpose of fraudulently increasing his compensation,

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

shall be punished as therein provided, since, as under the statute such receipts should not be excluded, the purpose of the false return was to secure for the postmaster only what he was legally entitled to receive; and hence a conspiracy, the object of which was the making of such false return, was not punishable as a conspiracy to defraud the United States government.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. § 56; Dec. Dig. § 36.*]

Harold A. Foster and others were indicted for conspiring to defraud the United States. On demurrer to the indictment. Demurrer sustained.

William H. Garland, Asst. U. S. Atty., of Boston, Mass.

Timothy Howard, of Worcester, Mass., and Philip Rubenstein and David A. Ellis, both of Boston, Mass., for defendants.

MORTON, District Judge: The first count of this indictment charges the defendants with having conspired to defraud the United States. The alleged object of the conspiracy was to obtain for the defendant Foster a larger salary as postmaster at North Brookfield than he was, by law and by the regulations of the Post Office Department, entitled to. This object was to be accomplished, according to the allegations of the indictment, in the following manner: One of the other defendants, Winchell, was to buy at the North Brookfield post office large quantities of stamps, which he was to send to the other two defendants, Edwards and Platt, at New York City, for use there. Foster was to include the proceeds of these sales in his returns of the gross receipts of the North Brookfield post office to the auditor for the Post Office Department, but was not to report the sales to the First Assistant Postmaster General as unusual ones, to the end that the receipts from such sales should be deemed to be part of the gross receipts of said post office, and consequently should be made in part the basis upon which Foster's salary was determined. It is alleged that the regulations of the department required large or unusual sales for use outside the district to be reported by the postmaster to the First Assistant Postmaster General, and further provided that such sales should not be included by the officials of the Post Office Department in the "gross receipts" upon which the postmaster's salary was fixed.

The defendants have demurred to this count on several formal or technical grounds, none of which seems to me to be well taken. The principal contentions of the defendants are that by statute Foster was entitled to a salary based upon "gross receipts"; that "gross receipts" included all sales, usual or unusual; that the regulations of the Postmaster General requiring unusual sales to be deducted from gross receipts for the purpose of fixing the postmaster's salary were contrary to the statute, and were invalid; that the effect of the alleged conspiracy, if successful, would be to procure for Foster only what he was legally entitled to, and not to defraud the United States.

[1] By the provisions of section 5 of the Act of July 12, 1876 (19

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

Stat. 80, c. 179 [2 U. S. Comp. Stat. 1901, p. 2609]), postmasters are divided into four classes. The second class is defined as including all those whose annual salaries are between $2,000 and $3,000. The salaries of the second class postmasters are fixed by the Act of March 3, 1883 (22 Stat. 600, c. 142 [2 U. S. Comp. Stat. 1901, p. 2619]), which is entitled "An act to adjust the salaries of postmasters," and provides, in substance, "that the respective compensation of postmasters of the second class shall be annual salaries assigned in even hundreds of dollars to be ascertained and fixed by the Postmaster General from their respective quarterly returns to the auditor * * * at the following rates, namely: Second class, gross receipts $8,000, and not exceeding $9,000, salary $2,000." The Postmaster General, as the head of a department, "is authorized to prescribe regulations, not inconsistent with law, for the governing of his department, the conduct of its officers and clerks, the distribution and performance of its business," etc. R. S. § 161 (U. S. Comp. St. 1901, p. 80). Under this last statute the Postmaster General made a regulation to the effect that in determining the gross receipts of a post office for the purpose of fixing the postmaster's salary, unusual sales of stamps should not be included, and that a statement of all such sales should be made monthly, not to the auditor (to whom gross receipts are reported), but to the First Assistant Postmaster General.

The crucial question upon the first count of the indictment is whether this regulation is valid. Congress itself has, by statute, undertaken to establish the salaries of second class postmasters. It has done so by reference to the "gross receipts" of their respective post offices, a definite and unambiguous expression. Such receipts are reported to the auditor every quarter, and the act explicitly makes these returns the basis for fixing salaries. Other statutes forbid postmasters from selling stamps or stamped paper at other than the regular prices, from soliciting business for their own offices, from selling outside their own districts, etc. Crim. Code, § 208 (Act March 4, 1909, c. 321, 35 Stat. 1128 [U. S. Comp. St. Supp. 1911, p. 1650]). The effect of the various statutes taken together is to make the salaries depend upon the gross receipts, and to prevent such receipts (and consequent salaries) from being increased by improper methods. The entire matter appears to be adequately covered by the statutes.

"The whole theory of the act of 1883 is that every postmaster shall receive a salary dependent upon and regulated by the amount of business done at his office. The intent of the statute in this respect appears so plain upon a careful reading of it that it is difficult to elucidate it by argument or illustration." Lamar, J., United States v. Wilson, 144 U. S. 24, 28, 12 Sup. Ct. 539, 541 (36 L. Ed. 332).

The regulation in question is not an attempt to define "gross receipts" (e. g., to say whether money order fees should be included therein), nor to clear up an ambiguity in the statute, nor to supply details lacking in the statute. The proceeds of the sales of stamps contemplated by the alleged conspiracy became part of the gross receipts of the North Brookfield office, and were to be so reported. The

effect of the regulation is to divide gross receipts into two parts, only one of which shall be considered in fixing salaries. The regulation assumes that some person in the department has the power to determine what sales shall be included in the "gross receipts" on which a salary is based. The effect of the regulation is therefore to make salaries dependent, not upon gross receipts returned to the auditor, as provided in the statute, but upon such part thereof as, in the opinion of somebody connected with the Post Office Department, is not unusual, nor for use outside the district.

An administrative officer has no right to substitute by regulation a different—even though it be a better—basis for fixing salaries than that explicitly provided by Congress. Regulations are valid only so far as they accord with, and carry out, and are not inconsistent with Acts of Congress dealing with the same questions. United States v. George, 228 U. S. 14, 33 Sup. Ct. 412, 57 L. Ed. 712; Morrill v. Jones, 106 U. S. 466, 1 Sup. Ct. 423, 27 L. Ed. 267; United States v. Eaton, 144 U. S. 687, 12 Sup. Ct. 764, 36 L. Ed. 591. The function of a regulation is to make a tight joint between the law and the subject-matter to which the law applies.

The regulation in question does not complete and carry out the plan of compensation provided in the statute—no regulation was necessary for that purpose—it ignores the returns of gross receipts to the auditor which the statute explicitly makes the basis for adjusting salaries, and it sets up instead a substantially different plan under which salaries are based, not upon gross receipts returned to the auditor, but upon "ordinary" or "usual" gross receipts as determined by the department.

[2] It seems to me that the regulation is inconsistent with the statute, and consequently invalid. I do not overlook the length of time during which the regulation has been in force without question, but the only persons directly affected by it were subordinate office holders, who would be very reluctant to attack the validity of a regulation made by their superior officer. Acquiescence under such circumstances amounts to very little.

[3] The object of the conspiracy, as alleged in the first count of the indictment, was to defraud the United States by securing for Foster a larger salary than he was entitled to under said regulation.

"The offense here charged is predicated both upon the violation of the law and of the regulations made by the Postmaster General in pursuance of them." Brief of United States Attorney.

If the regulation was invalid, Foster was legally entitled to the salary which it was the object of the alleged conspiracy to secure for him. A conspiracy to obtain by improper methods what one is legally entitled to is not punishable as a conspiracy to defraud. United States v. Biggs, 211 U. S. 507, 29 Sup. Ct. 181, 53 L. Ed. 305; Williamson v. United States, 207 U. S. 425, 28 Sup. Ct. 163, 52 L. Ed. 278. In Curley v. United States, 130 Fed. 1, 64 C. C. A. 369, relied on by the United States, the object of the conspiracy was to secure for Hughes a salaried position under the civil service to which he was not legally entitled. The court said (130 Fed. 11, 64 C. C. A. 379):

"The regulations and the requirements (which were subverted) * * * were founded upon law, and were such as the government had the right to enforce."

The decision seems to me in no way inconsistent with the views above expressed. The demurrer to the first count must therefore be sustained.

The second count charges a conspiracy between the same defendants to commit "the offense denounced by section 206 of the Criminal Code." That section provides, inter alia, that whoever, being a postmaster, shall, for the purpose of fraudulently increasing his compensation, make a false return, statement, or account, to any officer of the United States, shall be punished.

[4] Objection is made by the defendants to the certainty and formal sufficiency of this count, but in my opinion it properly charges a conspiracy by the defendants, the object of which was that Foster should make false returns to the First Assistant Postmaster General for the purpose of fraudulently increasing Foster's salary as postmaster, by knowingly and fraudulently failing to report to him, in the report of gross receipts required to be made monthly to the First Assistant Postmaster General, large and irregular sales of postage stamps to be made by Foster to the defendant Winchell for use in New York City outside the North Brookfield district.

It is said for the defendants that no such report of gross receipts as is described in the indictment was in fact required of Foster; that, under the law and the regulations of the department, gross receipts were reported quarterly to the auditor, and unusual sales were reported quarterly in a letter to the First Assistant Postmaster General. But such regulations and reports are matters of fact; the allegations in the indictment are explicit, and on demurrer must be taken as true. The question whether the failure to report to the First Assistant Posmaster General unusual sales falsified the report to the auditor also involves questions of fact which cannot be determined on demurrer.

[5] The crime denounced by section 206 of the Criminal Code includes two essential elements: (1) That a return shall be made which was known to be false; and (2) that such false return shall have been made "for the purpose of fraudulently increasing compensation." It is not criminal under said section to make a false return except for the purpose therein stated. From the allegations of the second count of the indictment it clearly appears that the purpose of the alleged false return was to secure for Foster only what he was, in accordance with the views hereinbefore expressed, legally entitled to receive. The making of a false return for such a purpose was not a crime under said section; and the alleged conspiracy to do so was not a conspiracy to commit the offense denounced thereby.

Demurrer sustained as to both counts of the indictment.

In re FARRELL et al.

(District Court, W. D. Washington, N. D. January 23, 1914.)

No. 5134.

1. TAXATION (§ 1*)—"TAX."

A "tax" is a pecuniary burden imposed for the support of the government. It is the enforced proportionate contribution of persons and property levied for the government's support and for all public things.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1; Dec. Dig. § 1.*

For other definitions, see Words and Phrases, vol. 8, pp. 6867–6886, 7813.]

2. COURTS (§ 366*)—FEDERAL COURTS—RULES OF DECISION—STATE STATUTES.

Federal courts will accept the construction which the state court has placed on state statutes.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 954–957, 960–968; Dec. Dig. § 366.*]

3. BANKRUPTCY (§ 346*)—CLAIMS—WORKMEN'S COMPENSATION ACT—CONTRIBUTIONS—"TAX."

The liability of an employer of labor to contribute assessments under the Workmen's Compensation Act (Laws Wash. 1911, p. 345) is not a "tax" within Bankr. Act July 1, 1898, c. 541, § 64a, 30 Stat. 563 (U. S. Comp. St. 1901, p. 3447), providing that the bankruptcy court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, state, county, district, or municipality in advance of the payment of dividends to creditors, since such assessments are not made a lien on any property, but are merely recoverable by the state against the defaulting employer by an action at law at the discretion of the commission and the Attorney General.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 535; Dec. Dig. § 346.*]

In Bankruptcy. In the matter of bankruptcy proceedings of J. M. Farrell and others. On objection of trustee to allowance of claim of State Industrial Insurance Department as one entitled to priority. Objections sustained.

W. V. Tanner, Atty. Gen., and John M. Wilson, Asst. Atty. Gen., for claimant.

Alderson & Murphine, of Seattle, Wash., for trustee.

NETERER, District Judge. The Industrial Insurance Department of the state of Washington filed with the referee in bankruptcy its verified claim in the amount of $365.78, which represents assessments made by the Industrial Insurance Department against the said bankrupts based upon their pay roll of workmen in extrahazardous employment in and about their business in the operation of a sawmill. This claim was filed by virtue of chapter 74 of the Laws of Washington 1911, p. 346. The state claims priority of payment of said amount under section 64a of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447]). The trustee "objects to the claim of the state of Washington for premium due the State Industrial Insurance Commission as a claim having a priority, for the reason that said claim does not constitute a claim having a priority within the

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

meaning of the bankrupt statute." The question to be determined is the status of this claim.

Section 64a of the Bankruptcy Act provides:

"The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, state, county, district, or municipality in advance of the payment of dividends to creditors."

The Workmen's Compensation Act, approved by the Governor March 14, 1911 (Laws of 1911, p. 345), requires all employers engaged in extrahazardous employments to pay certain amounts into a fund for the purpose of compensating injured workmen. Section 4 of this act, at page 352, provides:

"The fund thereby created shall be termed the 'accident fund' which shall be devoted exclusively to the purpose specified * * * in this act."

Section 8 of the act, page 362, provides:

"If any employer shall default in any payment to the accident fund, * * * the sum due shall be collected by action at law in the name of the state as plaintiff, and such right of action shall be in addition to any other right of action or remedy."

It is further provided that if injury occurs after demand for payment on default, the employer loses the benefit of the act. Section 21 provides:

"The administration of this act is imposed upon a department, to be known as the Industrial Insurance Department, to consist of three commissioners to be appointed by the Governor."

No method of collecting the assessments provided by the act is provided other than as set forth in section 8.

Article 7 of the Constitution of Washington, § 1, provides:

"All property in the state, not exempt under the laws of the United States, or this Constitution, shall be taxed in proportion to its value, to be ascertained as provided by law. The Legislature shall provide by law for an annual tax sufficient, with other sources of revenue, to defray the estimated ordinary expenses of the state for each fiscal year. And for the purpose of paying the state debt, if there be any, the Legislature shall provide for levying a tax annually, sufficient to pay the annual interest and principal of such debt within 20 years from the final passage of the law creating the debt."

[1] A "tax" is defined as a pecuniary burden imposed for the support of the government. United States v. Railroad, 17 Wall. 322, 326, 21 L. Ed. 597. It is the enforced proportionate contribution of persons and property levied for the support of government and for all public things. Opinion of Justices, 58 Me. 591; Cooley on Taxation, 1; Pacific Insurance Co. v. Soule, 7 Wall. 433, 19 L. Ed. 95; Springer v. United States, 102 U. S. 586, 26 L. Ed. 253.

"A 'tax' is a pecuniary burden laid upon individuals and property for the purpose of supporting the government." New Jersey v. Anderson, 203 U. S. 483, 27 Sup. Ct. 137, 51 L. Ed. 284.

The assessment in issue is not to relieve the general taxpayer, but rather to relieve the employer from liability for injuries sustained by employés in extrahazardous employments and to compensate such employés. It is an assessment against a class for the benefit of a class.

The Supreme Court of Washington, in State ex rel. Davis-Smith Co. v. Clausen, 65 Wash. 156, at page 203, 117 Pac. 1101, at page 1116 (37 L. R. A. [N. S.] 466), in passing upon the constitutionality of the Industrial Insurance Act, and considering it with relation to article 7 of the state Constitution, says:

"It is manifest that it is not a tax in the sense the word is used in the sections of the Constitution to which reference is here made. No accession to the public revenue, general or local, is authorized or aimed at. The purpose of the exaction is entirely different. It is to be used, not to meet the current expenses of the government, but to recompense employés of the industries on whom the burden is imposed for injuries received by them while engaged in the pursuit of their employments. It is the consideration which the owners of the industries pay for the privilege of carrying them on."

[2] Federal courts are always disposed to accept the construction which the state court has placed upon a state statute. Phœnix Railway Co. v. Landis, 231 U. S. 578, 34 Sup. Ct. 179, 58 L. Ed. ——; Sweeney v. Lommey, 22 Wall. 208, 213, 22 L. Ed. 727; Fox v. Haarstick, 158 U. S. 674, 679, 15 Sup. Ct. 457, 39 L. Ed. 576; Northern Pacific R. R. Co. v. Hambly, 154 U. S. 474, 479, 14 Sup. Ct. 983, 38 L. Ed. 1009; Copper Queen Mining Co. v. Arizona Board, 206 U. S. 474, 479, 27 Sup. Ct. 695, 51 L. Ed. 1143; Sante Fé County v. Coler, 215 U. S. 296, 305, 30 Sup. Ct. 111, 54 L. Ed. 202; Albright v. Sandoval, 216 U. S. 331, 339, 30 Sup. Ct. 318, 54 L. Ed. 502; Clason v. Matkov, 223 U. S. 646, 653, 32 Sup. Ct. 392, 56 L. Ed. 588; Seattle Benton & So. Ry. Co. v. State of Washington, 231 U. S. 568, 34 Sup. Ct. 185, 58 L. Ed. ——.

[3] It is manifest from a reading of section 64 of the Bankruptcy Act which was passed prior to the passage of the Industrial Insurance Act of Washington, that Congress intended to include within said section only such taxes as were required to be paid into a common fund for the support of the government, national, state, or municipal, and such a fund which would relieve the general taxpayer from a payment of an unfair proportion of the expenses in the operation of the government, or a tax which would be by operation of law a lien upon property of the bankrupt estate.

New Jersey v. Anderson, 203 U. S. 483, 27 Sup. Ct. 137, 51 L. Ed. 284, is cited by claimant in support of its contention. This was a tax levied upon the capital stock of a corporation organized in New Jersey, and which was doing business in Illinois. The Supreme Court in that decision said:

"Generally speaking, a tax is a pecuniary burden laid upon an individual or property for the purpose of supporting the government. We think this exaction is of that character. It is required to be paid by the corporation after organization in invitum."

The general assessment provisions of the Industrial Insurance Act does not assess a tax which is paid into a fund for the support of the government, but creates an "accident fund" for a special purpose, and that purpose is to relieve employers engaged in extrahazardous work from liability for negligence in the operation of their plants whereby injuries result to workmen, and to compensate such injured workmen. This assessment is not made a lien upon any property. The

act merely by the assessment gives the state a right of action against the defaulting concern which it may enforce by action at law at the discretion of the commission and the Attorney General. State ex rel. Rosbach v. Pratt, 68 Wash. 157, 122 Pac. 987.

The following cases cited in support of the state's contention are readily distinguished from the instant case, in that the taxes involved in them were levied upon property or franchises or capital stock in industrial concerns, which was required to be paid into a general fund, and were used to defray the general expenses of the government, and resulted in the benefit of all of the taxpayers of the several states: New Jersey v. Anderson, 203 U. S. 483, 27 Sup. Ct. 137, 51 L. Ed. 284; Otto F. Lange (D. C.) 159 Fed. 586; In re Industrial Cold Storage Co. (D. C.) 163 Fed. 390; City of Chattanooga v. Hill, 139 Fed. 600, 71 C. C. A. 584, 3 Ann. Cas. 237, 238; Hecox v. Teller County, 198 Fed. 636, 117 C. C. A. 338; In re Conhaim (D. C.) 100 Fed. 268; In re Halsey Elec. Generator Co. (D. C.) 175 Fed. 825, 23 Am. Bankr. Rep. 401.

I think the order of the referee was erroneous. An order may be presented allowing the claim of the state as a general claim, and denying priority of payment.

ARTHUR v. HARRINGTON et al.

(District Court, N. D. New York. February 27, 1914.)

1. BANKRUPTCY (§ 166*)—NOTICE TO OFFICER—ADVERSE INTEREST.
   Where a bankrupt was treasurer of a corporation, the fact that he knew himself to be insolvent at the time he made a payment on certain indebtedness to the corporation did not charge it with knowledge of such fact.
   [Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 250–253, 255–258; Dec. Dig. § 166.*]

2. CORPORATIONS (§ 428*)—KNOWLEDGE OF OFFICERS—NOTICE.
   Where the treasurer of a corporation informed its president of his insolvent condition prior to making an alleged preferential payment on his indebtedness to the corporation, the knowledge of the president was imputable to the corporation.
   [Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1748–1761; Dec. Dig. § 428.*]

3. BANKRUPTCY (§ 166*)—PREFERENCES—KNOWLEDGE OF INSOLVENCY.
   Where a debtor of a corporation was insolvent at the time he made an alleged preferential payment to it, it was not necessary that the corporation's president should have actual knowledge of the debtor's insolvent condition in order that the payment should be recoverable as a preference, but it was enough if he had reasonable cause to believe that such was the fact.
   [Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 250–253, 255–258; Dec. Dig. § 166.*]

4. BANKRUPTCY (§ 166*)—PREFERENCES—NOTICE OF INSOLVENCY.
   Mere nonpayment of a debt on demand, or circumstances which create a mere suspicion or fear that the debtor may be insolvent, are insufficient to charge the creditor with notice of his insolvency so as to render a pay-

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

ment on the debt prior to the debtor's bankruptcy recoverable as a preference.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 250–253, 255–258; Dec. Dig. § 166.*]

5. BANKRUPTCY (§ 164*)—PREFERENCES—NOTICE OF INSOLVENCY.

A bankrupt, who was treasurer of a corporation, had been indebted to it for a considerable time to the amount of $384. Repeated demands had been made on him for payment, and he informed the corporation's president that he was in financial difficulties. The corporation had never before declared more than 10 per cent. dividends, but after the treasurer's bankruptcy schedules were prepared—but before they were filed—a meeting of the directors was held at which a dividend of 20 per cent. was voted, with the understanding that the treasurer's dividend be credited on his account owing to the corporation. It was necessary that this be done in order to enable the corporation to pay the dividend, and immediately after the treasurer's check was executed it was indorsed by him and deposited to the corporation's credit in partial payment of the treasurer's debt. *Held*, sufficient to charge the corporation with knowledge that the payment would constitute a preference so as to render the same recoverable by the bankrupt's trustee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 267; Dec. Dig. § 164.*]

In Bankruptcy. Action by William M. Arthur, as trustee in bankruptcy of Walter C. Harrington, against Walter C. Harrington and the Rome Cement Stone Company to recover a preference. Judgment for plaintiff.

G. Linnemann Prescott, of Rome, N. Y., for plaintiff.
Stevens & Evans, of Rome, N. Y., for defendants.

RAY, District Judge. On the 21st day of December, 1911, Walter C. Harrington subscribed and swore to his petition and schedules in bankruptcy, and same were presented and filed in court on the 22d day of December, 1911. These, with other evidence in the case, show that he was then insolvent and had been for some time, and that he well knew this fact. On the 8th day of December, 1911, said Harrington was indebted to the Rome Cement Stone Company in the sum of $384. He was the secretary and treasurer of said company until January 22, 1912, and was one of its incorporators and its first president. H. C. Pendorf was the president of the defendant company, and a director and stockholder therein, as was also said Harrington. Pendorf and Harrington did substantially all the business for the company.

December 8, 1911, at a meeting of the board of directors of the company, a dividend of 20 per cent. was voted payable December 20, 1911, *it also being understood that W. C. Harrington's dividend be credited on his account owing the company,* some $384. This appears in the minutes of the meeting at which directors Smith, White, Bailey, Pendorf, and Harrington were present. The dividend was declared and paid, and the amount of Harrington's dividend was $352. It was paid by a check for $352, signed "W. C. Harrington, Treasurer of The Rome Cement Stone Company" and countersigned by "H. C. Pendorf, President," dated December 21, 1911, and payable to the order of W. C. Harrington. Harrington indorsed the check the same

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

day, very soon after it was signed, and turned it over to Pendorf, who deposited it to the credit of said Rome Cement Stone Company as a payment on Harrington's indebtedness to the company. Harrington was not only the secretary and treasurer of the company, but he kept books, and with Pendorf was largely its manager. This indebtedness of Harrington's had existed since October 1, 1910, and he had frequently been called on to pay, but had not. Harrington had pledged some of his stock for loans, and this was known to one or more of the directors. This was well known to the company. Pendorf, the president, and Harrington, the secretary and treasurer, were friendly, occupied the same office, and were much together in managing the affairs of this company.

Harrington well knew that he was insolvent when the arrangement for a dividend and its payment was made, and that it would work a preference, and there is no doubt that he intended to prefer, and knew that he was preferring, the company of which he was treasurer over his other creditors.

It is contended, however, by the defendant Rome Cement Stone Company that neither it nor its agent acting therein had reasonable cause to believe that the receipt and retention of this transfer of property represented by this check for this dividend would effect a preference, that is, enable the Rome Cement Stone Company to obtain a greater percentage of its debt than any other of the creditors of Harrington of the same class. Pendorf, the president, was sworn as a witness, and asked:

"Q. Do you recall any reason now why at that meeting on December 8th it should have been resolved that this money [referring to the dividend of Harrington] should be turned in on his account? * * * A. If I remember rightly, Mr. Prescott, because of the fact that Mr. Harrington and I had various talks about he paying something on his account long time before, during the summer, for instance, and early spring, I am very sure that that is the reason. I had asked him different times if he didn't think it would be advisable for him to square with the company during the summer and the spring and running into the fall; the account was getting an old one, and we were needing the money; our company was not a large one, and the funds were low."

This must have indicated to the president of the defendant company that Harrington was in want of ready money. The examination of Harrington discloses that he came to Rome about five years ago, with not over $300 to $500. He became a stockholder and an officer in the Rome Brick Company, but his evidence discloses that he was owing considerable sums, using his stock as collateral, and that such property as he had was mortgaged. The various directors of the Rome Cement Company deny that they had any knowledge of Harrington's insolvency, or knowledge of facts indicating such insolvency or serious financial trouble. Mr. Bailey, another director, says it was known that Harrington had been slow pay a good while. Mr. Smith, another director, says, in substance, that Mr. Harrington was the largest debtor to the company; that they often talked to him about the account and about his making a payment on it, and that he, Smith, suggested his turning in some of his stock in the company to pay it, and Harrington said he

did not know as that would be legal, and this led up to the suggestion by Smith that Harrington turn in his dividend. This was about double the size of any former dividend, and to make it Harrington's payment by means of his dividend was included as cash on hand, and in this way the large dividend was made possible. Mr. White, another director, says that the evening the resolution was passed it was talked of as "a way out of getting payment on Mr. Harrington's bill that was way past due, and had been trying to get for a long time." Also that he knew nothing of Harrington's financial standing; that he knew the account was of long standing, long owing the company, and that "the directors talked it over (the arrangement to make the dividend and turn Harrington's on his indebtedness) as a way to get it out of him." Also that the dividends before that had not been more than 10 per cent. Harrington himself testifies that he and Pendorf had talked of this indebtedness many times prior to December 8, and:

"Q. At any time previous to December 8, 1911, had you told Mr. Pendorf that you were in financial difficulty? A. I had."

He then says he so told Pendorf a month or more prior to December 8th.

"Q. Can you detail any of the conversation now? A. I don't recollect just how I broke the ice to him. I remember his making a remark, 'That is too bad.' I don't remember just exactly what I said."

This was some three weeks prior to the time Smith suggested the dividend and turning it on the debt. And again, when examined on behalf of the defendant company and his attention was called to certain statements made by Pendorf, Harrington said:

"I am not questioning that end of it; I am just making the assertion that Mr. Pendorf knew I was insolvent. Q. Prior to December 8, 1911? A. Prior to December 8th."

[1] The knowledge of Harrington himself that he was insolvent December 8th and from that time on, and that, turning the dividend in the way that it was done operated as a preference, was not the knowledge of the defendant company, and it cannot be imputed to such company, although Harrington was at the time its secretary and treasurer. Casco National Bank v. Clark, 139 N. Y. 307, 34 N. E. 908, 36 Am. St. Rep. 705; Merchants' National Bank v. Clark, 139 N. Y. 314, 34 N. E. 910, 36 Am. St. Rep. 710.

[2] But information conveyed by Harrington to Pendorf, the president of the company, that Harrington was in financial difficulties and insolvent was information to the company, and the knowledge of Pendorf may be imputed to the company. Collett v. Bronx, etc., 30 Am. Bankr. Rep. 598, 205 Fed. 370, 123 C. C. A. 392. Pendorf, as president of the company, represented it, and he had been informed by Harrington some weeks prior to December 8th that he, Harrington, was in financial difficulties and could not pay. It was after Harrington had thus informed the president of the company that Smith, a director, arranged for this large dividend of 20 per cent., twice the amount of any former dividend, and that Harrington should immediately pay it over to the company as a payment on his indebtedness to

the company and it was talked up and agreed upon and voted by the board of directors in Pendorf's presence, and on the 21st he signed the check and took it back and deposited it to the credit of the company as a payment by Harrington almost immediately. It may be that all the directors did not know of Harrington's financial trouble, but it is quite evident that Smith and Pendorf did. It was a transaction quite out of the ordinary, and such a proposition would excite some comment and curiosity. The transaction at the meeting of the board of directors December 8th corroborates Harrington in his statement that he had before that informed the president of his insolvency, and demands the inference that the board of directors, or some of them, had also been informed.

Harrington's petition and schedules were ready for filing when the checks in payment of the dividend were made out and signed, and when Harrington handed his check over to Pendorf, the president, who received it for the company and deposited it to his credit. But one conclusion is reasonable under this evidence, and that is that Pendorf, acting in the line of his duty as president and for the company, received the check of $352 from Harrington with knowledge of his financial difficulties and insolvency, and hence with reasonable cause to believe that the taking and use by the company of such check would effect and operate as a preference. The proof as to the assets and liabilities of Harrington showed that this payment, made on the eve of filing the petition, gives this defendant company a much greater percentage of its claim than the other creditors of the bankrupt will receive.

[3] It was not necessary that the president of the defendant actually *know* that Harrington was insolvent, or actually *know* that the taking and retention of the check would effect or work a preference. There was enough to establish reasonable cause to believe, and this is what the statute requires. The president having the information he did, enough to place a man of intelligence on inquiry, the defendant is chargeable with all the knowledge due inquiry would have disclosed. Stern v. Paper (D. C.) 25 Am. Bankr. Rep. 451, 183 Fed. 228; Tilt v. Citizens' Trust Co. (D. C.) 27 Am. Bankr. Rep. 320, 191 Fed. 441; Coder v. McPherson, 18 Am. Bankr. Rep. 523, 152 Fed. 951, 82 C. C. A. 99; Pittsburgh Plate Glass Co. v. Edwards, 17 Am. Bankr. Rep. 447, 148 Fed. 377, 78 C. C. A. 191; Forbes v. Howe, 102 Mass. 427, 3 Am. Rep. 475; Whitwell v. Wright, 136 App. Div. 246, 120 N. Y. Supp. 1065, 23 Am. Bankr. Rep. 747; Coleman v. Decatur Egg Case Co., 26 Am. Bankr. Rep. 248, 186 Fed. 136, 108 C. C. A. 248.

[4] Mere nonpayment of the debt on demand, or circumstances which create a mere suspicion or fear, are not enough. First National Bank of Philadelphia v. Abbott, 21 Am. Bankr. Rep. 436, 165 Fed. 853, 91 C. C. A. 538; Sparks v. Marsh et al. (D. C.) 24 Am. Bankr. Rep. 280, 177 Fed. 739; Powell v. Gate City Bank, 24 Am. Bankr. Rep. 316, 178 Fed. 609, 102 C. C. A. 55.

[5] The action taken by the board of directors on the eve of the filing of the petition in bankruptcy, and the receipt and retention of the check by the president immediately on its being made out and

signed, and at a time when the bankrupt, the secretary and treasurer of the company had his petition and schedules in bankruptcy all made out and ready for filing, with the information given by Harrington to Pendorf, the president, all together requires a finding in this case that Walter C. Harrington, the bankrupt, on the 21st day of December, 1911, transferred to his creditor the Rome Cement Stone Company, this defendant, in part payment of his indebtedness to that company, $352 of his property; that such transfer was made the day before Harrington filed his petition and schedules in voluntary bankruptcy and after they were executed; that the receipt and retention of such transfer of property by the Rome Cement Stone Company operated, and will operate, to enable the said company, one of the creditors of the bankrupt, to obtain a greater percentage of its debt than any other of such creditors of the same class; that at the time of such transfer said Walter C. Harrington was insolvent and unable to pay his debts in full, and well knew the fact; that the president of said company, who received the transfer of property from Harrington pursuant to a prior understanding with its board of directors, knew at the time that Harrington was insolvent and unable to pay his debts, and had reasonable cause to believe that the receipt and retention or enforcement of such transfer would effect and operate as a preference, that is, enable said company to obtain a greater percentage on its debt than any other of Harrington's creditors of the same class.

There will be a decree, or judgment, for the recovery of such preference, viz., $352, with interest thereon from the 21st day of December, 1911, with costs.

UNITED STATES v. PERE MARQUETTE R. CO.

(District Court, W. D. Michigan, S. D. September 5, 1913.)

1. RAILROADS (§ 229*)—INTERSTATE COMMERCE—SAFETY APPLIANCE ACT.
The use of a car, the coupling apparatus of which is inoperative on the tracks of a railroad company engaged in interstate commerce and in connection with such commerce either in a switch yard or in actual road service on the main line, is a violation of Safety Appliance Act March 2, 1893, c. 196, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174), as amended by Act March 2, 1903, c. 976, 32 Stat. 943 (U. S. Comp. St. Supp. 1911, p. 1314).

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

2. RAILROADS (§ 229*)—INTERSTATE COMMERCE—SAFETY APPLIANCE ACT.
Safety Appliance Act March 2, 1893, c. 196, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174), as amended by Act March 2, 1903, c. 976, 32 Stat. 943 (U. S. Comp. St. Supp. 1911, p. 1314), imposes positive and absolute duties on carriers engaged in interstate commerce, the nonperformance of which is not excused by the exercise of due care and reasonable diligence.

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

3. COMMERCE (§ 27*)—INTERSTATE COMMERCE—SAFETY APPLIANCE ACT—CARS SUBJECT TO RESTRICTION.
Safety Appliance Act March 2, 1893, c. 196, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174), as amended by Act March 2, 1903, c. 976, 32 Stat. 943

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

(U. S. Comp. St. Supp. 1911, p. 1314), requires every railroad company engaged in interstate commerce to equip with safety appliances all its cars and trains, regardless of the service in which they are employed.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 25; Dec. Dig. § 27.*]

4. COMMERCE (§ 27*)—SAFETY APPLIANCE ACT—EQUIPMENT OF CARS—TRAIN BRAKES—"TRAIN."

Safety Appliance Act March 2, 1893, c. 196, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174), as amended by Act March 2, 1903, c. 976, 32 Stat. 943 (U. S. Comp. St. Supp. 1911, p. 1314), provides that it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use any locomotive, in moving interstate traffic, not equipped with a power-driving wheel brake and appliances for operating the train brake system or to run any train in such traffic that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer can control its speed without requiring brakemen to use the common hand brake for that purpose. The act of 1903 declares that the original act shall apply to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce. *Held* that, where defendant railroad company engaged in interstate commerce transported 17 cars, at least one of which contained an interstate shipment, by switch engine over its main line tracks from one railroad yard to another, and the coupling apparatus of each of two of the cars was so out of repair as to be inoperative, and the air brakes were not coupled, so that they could be operated by the engineer, the cars and engine constituted a "train," within such act, and each of the cars so transported constituted a violation of the act.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 25; Dec. Dig. § 27.*

For other definitions, see Words and Phrases, vol. 8, pp. 7056, 7057, 7818.]

Action by the United States against the Pere Marquette Railroad Company. Judgment for the United States.

E. J. Bowman, U. S. Dist. Atty., of Greenville, Mich.
Bills, Parker & Shields, of Detroit, Mich., for defendant.

SESSIONS, District Judge. This is a suit to recover penalties for alleged violations of the Safety Appliance Acts. The declaration contains three counts, each setting up a distinct and separate cause of action, but all based upon a single movement of a train from Wyoming Yard to Freight House Yard, in the city of Grand Rapids, on the 5th day of March, 1912. The first count charges the hauling in such train of an Erie car with the coupling apparatus on one end so out of repair as to be inoperative. The second count contains a like charge with reference to a Pere Marquette car in the same train. The third count charges that this train, consisting of 17 cars and a locomotive, was so hauled and moved when less than 85 per cent. of the cars therein had their brakes used and operated, or so assembled and connected that they could be used and operated, by the engineer of the locomotive.

Wyoming Yard and Freight House Yard are both within the general yard limits of the city of Grand Rapids, but they are about two miles apart, and each has its own system of switching tracks. Trains passing from one yard to the other must run for the entire distance, upon defendant's main line, over which its regular passenger and

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freight trains as well as switching and transfer trains are operated. This part of the main line has some minor grades and curves and crosses at grade five city streets and a street car line.

All of defendant's freight trains entering Grand Rapids are taken directly to Wyoming Yard and are there broken up and the cars switched and classified; some being put into outgoing trains and forwarded to their destination, while others, containing local merchandise, are switched or transferred to the Freight House Yard or to some city side track to be unloaded and to have their cargoes rearranged. All outgoing freight trains are made up at and started from Wyoming Yard. Defendant's repair shops are located at this yard, which is also a flag station on the main line.

On March 5, 1912, 16 or 17 cars which had been brought into the Wyoming Yard in other trains were switched and formed into a train and then pushed by a switch engine from that yard over the main line of tracks to Freight House Yard to be unloaded or to have their cargoes rearranged. At least one of the cars contained an interstate shipment. Both before and at the time of the movement the couplings upon the two cars described in the declaration were so defective as to be inoperative. The air brakes of the cars of this train were not coupled up and connected so that they could be operated from the engine.

The sole question to be determined is whether or not the provisions of the Safety Appliance Acts apply to car and train movements like the one above described. It must be conceded that 16 cars and a locomotive coupled and moved together for two miles upon the main tracks of a railroad line through a large city and across several streets constitute a train within the purview of the statute. Plaintiff's witnesses have called the movement of this train a "transfer" movement, while defendant's witnesses insist that it was purely a "switching" movement. The name given to the movement is of no importance, and its character may not be controlling.

[1-3] That the use of a car, whose coupling apparatus is inoperative, upon the tracks of a railroad company engaged in interstate commerce and in connection with such commerce, either in a switch yard or in actual road service upon the main line, is a violation of the Safety Appliance Acts is no longer an open question. Delk v. St. Louis & San Francisco R. R. Co., 220 U. S. 580, 31 Sup. Ct. 617, 55 L. Ed. 590. It is also settled that these statutes impose positive and absolute duties, the nonperformance of which is not excused by the exercise of reasonable diligence and due care (Chicago, Burlington & Quincy R. R. Co. v. United States, 220 U. S. 559, 31 Sup. Ct. 612, 55 L. Ed. 582; St. Louis, Iron Mountain & Southern Ry. Co. v. Taylor, Administratrix, 210 U. S. 281, 28 Sup. Ct. 616, 52 L. Ed. 1061; Delk v. St. Louis & San Francisco R. R. Co., 220 U. S. 580, 31 Sup. Ct. 617, 55 L. Ed. 590), and that, in accordance with their provisions, every railroad company engaged in interstate commerce must equip with safety appliances all of its cars and all of its trains, regardless of the service in which they are employed (Southern Ry. Co. v. United States, 222 U.

S. 20, 32 Sup. Ct. 2, 56 L. Ed. 72; Wabash R. R. Co. v. United States, 168 Fed. 1, 93 C. C. A. 393).

[4] Should the statutory requirement concerning the use, connection, and operation of train brakes be given a different construction or interpretation from that which has been applied by the courts to the provisions relating to car coupling apparatus? Clearly not. The two sections of the statute are identical in the form of language employed, in legislative intent, in remedial purpose, and in the mandatory obedience thereto which is required; the only difference being that in the one the unit is a train or combination of cars, and in the other a single car. If section 1 of the original Safety Appliance Act stood alone, there would be at least room for argument that its provisions were intended by Congress to apply solely to trains made up for road service. But this section does not stand alone. It must be construed in connection with the other sections of the same statute, and particularly in connection with, and with reference to, the modifying and explanatory act of March 2, 1903. In and by the latter act Congress has removed whatever doubt, uncertainty, or ambiguity existed in the former one, and has said plainly and unequivocally that the provisions and requirements of the earlier act "shall be held to apply to all trains, locomotives, tenders, cars and similar vehicles used on any railroad engaged in interstate commerce." The legislative intent so plainly expressed must be respected. The beneficial and remedial purposes of these statutes must not be defeated by strained construction and must not be made subordinate to either convenience or economy of railroad operation. On the 5th day of March, 1912, the Pere Marquette Railroad was engaged in interstate commerce; the 17 cars and switch engine here in controversy constituted a train; at least one car of that train contained an interstate shipment; the train was run and operated upon defendant's main line of tracks; the coupling apparatus upon each of two cars was so out of repair as to be inoperative; and the air brakes were not coupled up and connected so that they could be operated by the engineer from the locomotive. There is therefore no escape from the conclusion that the law was violated in the manner set forth in each of the counts of plaintiff's declaration.

Counsel for defendant rely upon the case of Erie R. Co. v. United States, 197 Fed. 287, 116 C. C. A. 649, decided by the Circuit Court of Appeals of the Third Circuit. That case differs from the present one in some material respects, but in the main it supports defendant's contention. I have the profoundest respect for that court and its decisions, and it is with much diffidence and hesitation that I feel compelled to reach a different conclusion. In the Erie Case, however, the court seems to have entirely overlooked, ignored, and disregarded the controlling effect of the modifying and explanatory act of 1903. After careful and patient study, I am also convinced that the decision in the Erie Case is in conflict with both the spirit and the letter of the utterances of the Supreme Court.

Judgment will be entered in favor of plaintiff and against defendant for the statutory penalty of $100 upon each of the counts of the declaration and for costs of suit to be taxed.

DOUGHERTY v. THOMPSON-LOCKHART CO.

(District Court, E. D. Pennsylvania. February 26, 1914.)

No. 14 of 1913.

1. MASTER AND SERVANT (§ 279*)—INJURIES TO SEAMAN—EVIDENCE OF NEGLIGENCE.

On a claim against the owners of a tug and tow for injuries to a seaman in charge of the tow by getting his foot crushed in a line he was adjusting around a cleat on the scow, evidence *held* insufficient to show that the accident was caused by the negligence of the operators of the tug.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 973–975, 978–980; Dec. Dig. § 279.*]

2. MASTER AND SERVANT (§ 200*)—INJURIES—FELLOW SERVANTS.

Where a tug and tow belonged to the same person and were engaged in the same service, the master of the tug was a fellow servant of a seaman on the tow.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 492; Dec. Dig. § 200.*]

3. SEAMEN (§ 11*)—INJURIES TO SEAMAN—LOSS OF FOOT—MAINTENANCE AND CURE.

Where a seaman's foot was caught and crushed in a line from a tug which he was making fast on a scow, and he was in a hospital for three months, where he was maintained and cared for by the owner of the vessels free of charge but could not work for nine months longer, and had spent money for medicines, crutches, and an artificial foot which had been once renewed, and he still owed for board during the time he was under disability, an allowance of $500 would be made under the obligation of the owner to furnish maintenance, cure, and wages to a seaman who falls sick or is wounded in the service of the ship.

[Ed. Note.—For other cases, see Seamen, Cent. Dig. §§ 39–44, 187; Dec. Dig. § 11.*]

In Admiralty. Claim by William Dougherty against the Thompson-Lockhart Company for personal injuries to claimant as a seaman, and petition by respondent for a limitation of liability. Decree for plaintiff for $500.

James J. Breen and Willard M. Harris, both of Philadelphia, Pa., for claimant.

Howard M. Long and Charles S. Wesley, both of Philadelphia, Pa., for respondent.

J. B. McPHERSON, Circuit Judge. On November 21, 1910, the claimant, William Dougherty, was in the employ of the Thompson-Lockhart Company as the master of a barge or scow, and in the course of his service suffered an injury on that day. Asserting the negligence of the company, he brought suit in the common pleas of Philadelphia county, but proceedings for limitation of liability were afterwards begun in the district court, and the dispute was thereby transferred to the federal tribunal. No other claimant or creditor has appeared. Several preliminary steps have been taken, but they need not be referred to; it is enough to say now that the parties and their witnesses ap-

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

peared in court recently and were fully heard upon the merits, both sides submitting the whole controversy for final determination.

The first question in order of importance is whether the company is chargeable with negligence. The facts are as follows:

The Thompson-Lockhart Company is a Pennsylvania corporation, and none of its officers was directly connected with the claimant's injury. The tug "J. McAteer" and the scow were both owned by the company, and were engaged as a tow in carrying rubbish down the Schuylkill river for the city of Philadelphia. Both vessels were properly manned and equipped. Dougherty, who was the master of the scow and had been so employed for about three weeks, was the only person on board that vessel; no further help being usual or necessary. Toward noon on the morning in question the tug and the loaded scow were proceeding down the river bound for a point on the eastern shore near Penrose Ferry Bridge; the tide being ebb and the day fair. The scow was lashed to the port side of the tug in the usual manner, being held in place by lines at the bow and the stern, and moved by a running or towing line that was made fast more nearly amidships on both vessels. All the lines were provided with the usual eye or loop at one end. The eyes of the bow and the stern lines were laid around cleats on the deck of the scow, and the loose ends were made fast upon the deck of the tug. The eye of the running line was similarly adjusted, but upon the deck of the tug, and the loose end was fastened around a cleat on the deck of the scow. When the lines were not in use, the bow and the stern lines were hauled in upon the tug, and the running line was hauled in upon the scow.

[1] When the tow reached a point about two city squares above its destination, the tug was obliged to shift her place and to take the scow upon her starboard side in order to make the landing. In the proper execution of this maneuver, all the lines were cast off, the bow and the stern lines were hauled in upon the tug, and the running line was hauled in upon the scow. The scow moved along slowly by her own momentum aided somewhat by the tide, while the tug dropped astern and then came forward close to the port side of the scow. Her steam was shut off, but she also was moving slowly by momentum and the favoring tide. The next step was to fasten the lines again, and while this was going on the claimant suffered the injury complained of. Just how the unfortunate accident occurred, the testimony does not distinctly disclose; the claimant himself did not know, and the evidence leaves it in some uncertainty. But in my opinion the negligence of the company was not proved, while the negligence (or at least the misfortune) of the claimant seems to be the probable, and the sufficient, explanation. It is clear enough that the claimant brought a running line from the starboard side of the scow to the port side—either the running line that had already been used on the voyage, or perhaps a substitute, this fact being of little importance—and that one line at least (perhaps both) of these two was lying in disorder on the deck of the scow near the cleat to which the loose end was to be made fast. It is also clear that the eye of the bow line had been thrown over its proper cleat on the scow by a man on the tug, and that the claimant had hand-

ed the eye of the running line to another man on the tug by whom it had been made fast. After this had been done, it was still necessary to put the eye of the stern line over its appropriate cleat on the scow, and to make fast the loose end of the running line around the other cleat on the scow that was provided for this purpose. These were among the claimant's duties. He had partly discharged one of them—that is, he had taken a turn or two of the running line around its own cleat—when apparently he became confused or flustered in trying to put the eye of the stern line over the cleat a little further aft, and by some misadventure his right foot became entangled in a bight of the running line and was drawn against the cleat and badly crushed. If he had taken proper care of his steps, the injury would not have happened. He charges the master of the tug with negligence in starting prematurely, but the weight of the evidence is against him. His own bias was so marked as to impair his testimony, and if his account be disregarded there is practically nothing to support his theory. I am satisfied that the tug and the scow were not started prematurely, but were only moving slowly by their momentum and the tide; although the tug was not under steam, the weight of the vessels was enough to do the damage complained of. The pain naturally caused the claimant to cry out, and his plight was discovered immediately, whereupon the tug was at once backed in order to relieve the strain on the line, and two of the crew hastened to the claimant's aid. He was taken to the cabin of the scow and was given such care as could then be afforded; the tug went at full speed to her destination, calling through a megaphone for help and an ambulance. As speedily as possible a small boat came out to the scow, and the claimant was taken ashore and afterwards to a hospital, where the foot was taken off after an ineffectual effort to save it.

The claimant sought to establish the unrestricted liability of the company by attempting to prove that the master of the tug was a man of intemperate habits, and that the company continued to employ him with knowledge of such habits. Moreover, he charged and attempted to prove that the master and crew of the tug were under the influence of liquor on the morning in question, and this fact, of course, would have had much pertinence. In my opinion, however, neither attempt was successful. No doubt the master uses liquor occasionally—and so used it at that time—but the evidence did not establish either his intemperate habits in general or the use of liquor on November 21st, and nothing whatever was proved that would prevent the company from taking advantage of the acts of Congress limiting the liability of shipowners. But of course, if the claimant failed to establish the company's negligence—and in my opinion he did so fail—the question of limitation is no longer of importance.

[2] Moreover, under the decision in The Osceola, 189 U. S. 158, 23 Sup. Ct. 483, 47 L. Ed. 760, the question of limitation would not be important, even if the claimant had proved that his injury was due to the negligence of the tug's master. I lay aside the fact that the tug and the scow had a common owner, but the evidence seems to make it clear that they were not independent vessels engaged upon separate

voyages or prosecuting independent objects; in effect, they were one vessel engaged in the same enterprise and co-operating to produce the same result. The master of the tug was therefore the fellow servant of the claimant, and the fourth proposition laid down in The Osceola establishes the principle that in such case the common employer is not liable for the negligence of the master:

"4. That the seaman is not allowed to recover an indemnity for the negligence of the master, or any member of the crew, but is entitled to maintenance and cure, whether the injuries were received by negligence or accident."

[3] But the company concedes its liability under the fourth proposition just quoted, and also under the first:

"1. That the vessel and her owners are liable, in case a seaman falls sick or is wounded in the service of the ship, to the extent of his maintenance and cure, and to his wages, at least so long as the voyage is continued."

See, also, the recent case in this circuit of The Mars, 79 C. C. A. 435, 149 Fed. 729.

Under the evidence, I think an allowance of $500 and interest should be made. The claimant was in the hospital for three months, where he was maintained and cared for free of charge. But he could not work for about nine months longer, and he has spent money for medicine, crutches, and an artificial foot (once renewed), and still owes for boarding during the time he was under disability. A decree may therefore be entered for $500, with interest from November 21, 1911, and costs.

GERATY v. ATLANTIC COAST LINE R. CO. et al.

(District Court, E. D. South Carolina. February 11, 1914.)

1. CARRIERS (§ 200*) — COMMON CARRIER — EXCESSIVE CHARGES — FOREIGN TRANSPORTATION.

At common law no action lay against a common carrier for unreasonable and excessive charges on foreign transportation.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 901–905; Dec. Dig. § 200.*]

2. CARRIERS (§ 26*)—INTERSTATE COMMERCE—UNREASONABLE CHARGES—RIGHT TO RECOVER.

A shipper's right to recover for alleged unreasonable charges made by a carrier for the transportation of interstate commerce depends entirely on the rights conferred by the Interstate Commerce Act (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]), and hence to support such an action it must appear that the rates charged are in excess of the rates permitted as reasonable by the Interstate Commerce Commission.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 67–82; Dec. Dig. § 26.*]

3. CARRIERS (§ 26*)—INTERSTATE COMMERCE—RATES—LEGAL REGULATIONS.

Since, under the Interstate Commerce Act (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]), the Interstate Commerce Commission has the primary right to fix rates, the courts and a shipper as

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

well are bound to treat rates charged by carriers in interstate commerce as lawful so long as they are acquiesced in by the commission.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 67–82; Dec. Dig. § 26.*]

4. COMMERCE (§ 89*)—INTERSTATE COMMERCE—UNREASONABLE CHARGES—BURDEN OF PROOF.

Since, by the Interstate Commerce Act (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]), the Interstate Commerce Commission is charged with the duty of determining whether a carrier's charge for services rendered in interstate commerce is reasonable, a shipper seeking to recover for imposition of an alleged unreasonable charge must, as a condition to his right, allege and produce an order from the commission showing that the rate charged was unreasonable, and therefore illegal.

[Ed. Note.—For other cases, see Commerce, Dec. Dig. § 89.*]

5. CARRIERS (§ 26*)—INTERSTATE COMMERCE—ICING CHARGES—UNREASONABLENESS.

An icing charge made by a carrier in transporting interstate commerce is not prima facie unreasonable solely because it exceeds the actual cost of the ice alone; the carrier being entitled to charge a reasonable profit on the services.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 67–82; Dec. Dig. § 26.*]

At Law. Action by John W. Geraty against the Atlantic Coast Line Railroad Company and another. On demurrer to complaint. Sustained.

W. A. Holman, of Charleston, S. C., for plaintiff.
Mitchell & Smith, of Charleston, S. C., for defendants.

SMITH, District Judge. This cause came on to be heard upon a demurrer to the complaint on the ground that the complaint does not state facts sufficient to constitute a cause of action. The complaint is brought to recover for an alleged excess charge for icing upon interstate transportation. The plaintiff, a resident and citizen of the state of South Carolina, made a number of shipments of vegetables to points all outside of the state of South Carolina. The complaint alleges that the plaintiff is entitled to damages in a sum equal to the difference between the actual cost of the ice and the amount charged by the defendants and paid for by the plaintiff for the entire service of icing; the plaintiff taking the ground that any amount charged and paid for icing over and above the actual cost of the ice itself was excessive, unreasonable, and unjust. The cause was originally brought in the court of common pleas for Charleston county, and removed to this court as involving a question arising under the laws of the United States. Inasmuch as the action is brought to recover alleged unreasonable and excessive charges for interstate transportation, it would appear under the allegation of the complaint to be beyond question that the plaintiff's right, if it exists, must exist only under and by virtue of the Interstate Commerce Act.

[1] Under the rule at common law no action lay against a common carrier for unreasonable and excessive charges upon foreign transportation. The common law that a common carrier was entitled only

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

to make reasonable charges, and that any charge in excess of a reasonable charge could be recovered in an action at law, applied only to transportation charges within the jurisdiction. The carrier's charges upon foreign transportation such as transportation between England and France, or England and any foreign country, or the United States and any foreign country, were not within the purview and scope of the law. The reason is very evident; for, if it was a case of foreign transportation by perchance a foreign carrier, the question as to what was a reasonable charge might vary according to the statutes or legal rulings of the two different countries.

The foreign carrier, once he left the jurisdiction, was beyond the power of the court, and, as the charges upon shipments are paid as a rule by the consignee, manifestly it was beyond the power of an American court to enforce an American measure of a reasonable charge against an English carrier delivering cargo in England.

The rule that a carrier's charge must be reasonable was a rule of substantial law, not a rule of practice, and as such a law it could only apply to persons within the jurisdiction subject to that law, i. e., to carriers within the jurisdiction.

The adjudicated decisions do not hold that the rule that a common carrier would be limited to reasonable charges for transportation ever applied except to carriers between points within the jurisdiction. All of the states of the American Union being foreign to each other in matters of commerce and transportation, the same reason would apply. Under the rules of the common law, no action would lie against a common carrier for unreasonable charges for transportation between two different states without some express treaty or statutory recognition and creation of the right as binding on both states. It never has been contended that any court in the state of South Carolina could take jurisdiction against an English ship or the owners of an English ship to recover alleged unreasonable charges as prohibited by the domestic law of South Carolina on the transportation of cargo from South Carolina to England or to any other foreign country. Such being the case, no right of action existed on the part of any party claiming for unreasonable transportation charges upon interstate shipments until the passage by Congress of the Interstate Commerce Act, under the interstate commerce clause of the federal Constitution, and all rights to recover for such charges must rest upon the rights created by that statute and must be treated as actions to enforce rights given by that statute, and therefore arising under the laws of the United States.

[2] Inasmuch as the plaintiff's right to recover in this case must depend entirely upon the rights given by the terms of the Interstate Commerce Act, it should appear by the complaint that the plaintiff has brought himself within the terms of that act. To support an action brought to recover back unreasonable charges paid for interstate transportation, it must appear that such rates are in excess of the rates permitted as reasonable by the Interstate Commerce Commission. The presumption is that the defendant carrier has obeyed the law and filed and published its rates. Until otherwise held by

the Interstate Commerce Commission, such rates must be held prima facie reasonable, and so treated by the courts.

[3] Under the statute the carrier has the primary right to fix rates, and, so long as they are acquiesced in by the commission, the carrier and shipper are alike bound to treat them as lawful. Where the action is based upon unreasonable charges, there is no law fixing what is unreasonable, and the whole scope of the statute shows that it was intended that the commission and not the courts should pass upon that question.

[4] Since the commission is charged with the duty of determining whether the charge was unreasonable, the plaintiff must, as a condition to his right to recover, allege and produce an order from the commission that the rate charged was unreasonable and therefore illegal. Mitchell Coal Co. v. Penn. R. R. Co., 230 U. S. 247, 33 Sup. Ct. 916, 57 L. Ed. 1472.

[5] Furthermore, the complaint in this action is pitched upon the theory that the mere fact that the charge for icing was in excess of the cost alone of the ice makes the excess unreasonable and unlawful; and that any charge for services in the application and renewal of the ice or for a reasonable profit therefor is not permissible. The complaint alleges that the charge is unreasonable, but the facts alleged show that it is claimed to be unreasonable solely because it exceeds the actual cost of the ice alone. This is not sufficient to justify the inference of unreasonableness. Where the service is not strictly a part of the transportation, but is outside of and supplementary thereto as for icing in the present case, the carrier is not limited in its charge to the mere cost of such service, but may rightfully make a reasonable profit thereon. Southern Ry. Co. v. St. Louis Ry. Co., 214 U. S. 297, 29 Sup. Ct. 678, 53 L. Ed. 1004.

The complaint in the present case neither alleges that the rate complained of is in excess of the rate allowed by the Interstate Commerce Commission, nor does it allege any facts sufficient to justify the legal inference that the charge made, although in excess of the actual cost of the ice alone, was thereby unreasonable. The plaintiff has therefore failed to show that under the terms of the statute he has any right to recover.

Upon consideration of all whereof it is, accordingly, adjudged that the demurrer be sustained, and the complaint dismissed.

In re DRAPER.

(District Court, N. D. New York. February 27, 1914.)

BANKRUPTCY (§ 143*) — PROPERTY BELONGING TO ESTATE — LIFE INSURANCE POLICY—"CASH SURRENDER VALUE."

Bankr. Act July 1, 1898, c. 541, § 70a, 30 Stat. 565 (U. S. Comp. St. 1901, p. 3451), providing that life insurance policies belonging to a bankrupt, having a cash surrender value, shall belong to his estate in bankruptcy unless redeemed, is not confined to policies in which the cash sur-

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

render value is expressly stated, but includes those having a cash surrender value by the concession or practice of the company issuing them; and hence a policy on a bankrupt's life payable to his wife if she survived him, otherwise to his estate or any designated beneficiary, he having the absolute right to change the beneficiary at any time, and which, though having no cash surrender value, gave him the right, if he lived beyond a stated term, to receive the value of the policy in cash or paid-up insurance, was property which passed to the bankrupt's trustee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 194, 201, 202, 213–217, 223, 224; Dec. Dig. § 143.*]

In Bankruptcy. In the matter of bankruptcy proceedings of John N. Draper. Petition to review a referee's decision holding that a certain insurance policy on the bankrupt's life passed to the trustee as an asset of the estate. Affirmed.

Arthur T. Johnson, of Gouverneur, N. Y., for bankrupt.
D. M. Hazelton, of Gouverneur, N. Y., for trustee.

RAY, District Judge. February 8, 1899, John N. Draper, now bankrupt, insured his life in the New York Life Insurance Company in the sum of $2,500, under policy No. 922,206, and which policy states that:

"New York Life Insurance Company by this policy of insurance agrees to pay twenty-five hundred dollars to Nellie C., wife of the insured, or, in the event of her prior death to the insured's executors, administrators or assigns, or to such other beneficiary as may be designated by the insured as hereinafter provided, at the home office of the company, in the city of New York, immediately upon receipt and approval of proofs of the death of John N. Draper, of Gouverneur, in the county of St. Lawrence, state of New York (herein called the insured)."

By express provision it is incontestable after being in force one full year provided the premiums have been duly paid, and:

"The contract is made in consideration of the written application of the insured, which is a part of this contract, and in further consideration of the annual premium of fifty-seven dollars and thirty-eight cents to be paid in advance, and of the payment of a like sum on the 8th day of February in every year thereafter during the continuation of this policy."

It is a part of the policy that:

"The insured may at any time during the continuance of this policy, provided the policy is not then assigned, change the beneficiary or beneficiaries by written notice to the company, at its home office, accompanied by this policy; such change to take effect on the indorsement of same on the policy of the company."

The insured, John N. Draper, paid the premiums down to the time of his bankruptcy, and such policy had not been assigned. Neither had the beneficiary been changed. The contract also contains the following "special advantages":

"Guarantees at End of Accumulation Period.

"This policy participates in surplus as hereinafter provided, but no dividend shall be apportioned to it until the end of its accumulation period, which is twenty years, and ends on the eighth day of February in the year nineteen

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

hundred and nineteen. If the insured is then living, and if the premiums have been duly paid to that date, and not otherwise,

"The company will apportion a dividend to the insured, who shall have the option of continuing, or discontinuing, this policy under one of the following

"Eight Accumulation Benefits:

"(1) Receive the dividend, in cash, and continue this policy at the same premium rate; or

"(2) Receive the dividend, converted into an annual income for life, and continue this policy at the same premium rate; or

"(3) Receive the dividend, converted into additional paid-up insurance, subject to evidence of sound health satisfactory to the company, and continue this policy at the same premium rate; or

"(4) Receive the dividend, in cash, and receive paid-up insurance of twelve hundred and seven dollars, and discontinue this policy (evidence of sound health will not be required); or

"(5) Receive the dividend, in cash, and receive paid-up insurance of seven hundred and sixty-seven dollars, and receive an annual income for life of twenty-three and 1/100 dollars, and discontinue this policy (evidence of sound health will not be required); or

"(6) Receive the entire cash value, as stated below, in cash, and discontinue this policy; or

"(7) Receive the entire cash value, as stated below, converted into an annual income for life, and discontinue this policy; or

"(8) Receive the entire cash value, as stated below, converted into paid-up insurance, and discontinue this policy (evidence of sound health will not be required).

"The company guarantees that the entire cash value of this policy at the end of the accumulation period shall be seven hundred and sixty-seven dollars, and in addition thereto the cash dividend then apportioned by the company."

By other provisions the policy cannot be forfeited after having been in force full three years whether further premiums are paid or not.

It is evident that the beneficiary named, Nellie C., has no right or interest in the policy which cannot be terminated by the action of the insured. No present "cash surrender value" is provided for in the policy, and no proof was given that it has any at this time. It has such a value at the end of 20 years; that is, 5 years hence. It has considerable value, of course. If Nellie C. should die prior to the death of John N. Draper, then the policy is payable to his executors, etc. If she does not, then at the end of 20 years Draper may take certain benefits, etc., and he at any time may change the beneficiary.

Section 70a of the bankruptcy act relating to the "title to property" provides, amongst other things, as follows:

"Provided, that when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets."

In Hiscock, Trustee, etc., v. Mertens, 205 U. S. 202, 27 Sup. Ct. 488, 51 L. Ed. 771, it was held:

"The provisions in section 70a of the Bankruptcy Act of 1898 that a bankrupt, having policies of life insurance payable to himself and which have a cash surrender value, may pay the trustee such value and thereafter hold the

policies free from the claims of creditors, are not confined to policies in which the cash surrender value is expressly stated, but permit the redemption by the bankrupt of policies having a cash surrender value by the concession or practice of the company issuing the same."

In Matter of White, 23 Am. Bankr. Rep. 90, 174 Fed. 333, 98 C. C. A. 205, 26 L. R. A. (N. S.) 451, the policy of insurance was payable, as here, to the wife, if she survived him. If she did not, it was payable, as here, to his estate. Then if, after payment of two annual premiums, the policy lapsed for nonpayment of premiums, the company would, on the decease of the insured, issue a policy of paid-up insurance for a certain amount to the beneficiary. Here there is a similar "special advantage" not necessary to recite.

But the case now before this court is controlled by In re Hettling (C. C. A. 2d Circuit) 175 Fed. 65, 99 C. C. A. 87. The syllabus is as follows:

"A policy of insurance on the life of a bankrupt, payable to his wife if she survives him, otherwise to his estate or any designated beneficiary, and which, while having no cash surrender value, gives him the right to change the beneficiary at any time and the privilege of several options if he lives beyond a stated term, among which are to receive its then value in cash or paid-up insurance, is property of the bankrupt which passes to his trustee."

The court said:

"The policy has no cash surrender value, but the insured is given the power to change the beneficiary at any time. If he survive his wife the policy is payable, not to her, but to his estate; and, if he live beyond the term of 20 years, he is given several options, some of which are: To receive any accumulated dividends in cash or the entire cash value of the property, or to receive the entire cash value converted into an annual income for life. These are property rights, as pointed out in our decision in Re White (handed down herewith) 174 Fed. 333 (98 C. C. A. 205, 26 L. R. A. [N. S.] 451), that pass to the trustee under section 70a (5) of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451])."

This policy in its terms is the same as that in the Hettling Case, supra.

It follows that there will be an order affirming the order of the referee.

UNITED STATES v. MASON et al.

(District Court, S. D. Iowa, C. D. December 26, 1912.)

No. 67—(C. C.).

1. CLERKS OF COURTS (§ 75*)—BONDS—CONVERSION OF FUNDS.

Where the books of a clerk showed a receipt of certain costs, etc., and failed to show disbursement thereof, and, though there was evidence that the books were not accurately kept, the clerk admitted the conversion of "a few hundred dollars" subsequent to the giving of a bond to faithfully perform the duties of his office, the government, in the absence of proof of the actual amount converted, was entitled to recover $200 therefor, in addition to a surplus admitted to have been retained, above his authorized compensation, and unpaid costs collected, but not paid over.

[Ed. Note.—For other cases, see Clerks of Courts, Cent. Dig. §§ 135–142; Dec. Dig. § 75.*]

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

2. LIMITATION OF ACTIONS (§ 195*)—FUNDS—CONVERSION—LIMITATIONS—BURDEN OF PROOF.

Where, in a suit on a bond of the clerk of a federal court to recover money received and converted, it was contended that the action was barred by limitations, the burden was on the defendant to show the date of the conversion.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 711–716; Dec. Dig. § 195.*]

At Law. Action by the United States against Edward R. Mason and the United States Fidelity & Guaranty Company. Judgment for the United States.

Sylvester R. Rush, Sp. Asst. Atty. Gen., of Omaha, Neb., and Marcellus L. Temple, of Osceola, Iowa, for the United States.

Read & Read, of Des Moines, Iowa, and W. E. Mason, of Chicago, Ill., for defendants.

THOMAS C. MUNGER, District Judge. This is an action upon an official bond, given by Edward R. Mason, as clerk of the Circuit Court of the United States for the Southern District of Iowa, and dated January 2, 1899. Prior to that date Mr. Mason had served as clerk of the United States Court in Iowa. See In re Clerkship of Circuit Court in Eastern & Western Divisions of Southern District of Iowa (C. C.) 90 Fed. 248. The terms of the bond show that it was intended to act prospectively, and not retrospectively. The action is brought by the United States, as plaintiff (see United States v. Abeel, 174 Fed. 12, 98 C. C. A. 50), to recover (1) certain moneys formerly in the registry of the court and not accounted for; (2) certain fees and costs collected in cases, which belonged to attorneys and parties as advanced costs, balance of deposits for costs, etc.; (3) surplus of fees and emoluments retained by the clerk.

The evidence shows, and it is stipulated, that the clerk received, during the years 1908, 1909, and 1910, until the termination of his office, a surplus of $444.65 above the compensation that he was authorized to retain. The evidence further shows that he received, after the date of the bond on which this action is brought, certain costs, which were not disbursed to the parties entitled thereto, as follows:

Law	Case	3631,	Des Moines	Division	$ 5.70
Equity	"	699,	" "	"	29.00
"	"	786,	" "	"	11.24
"	"	2354,	" "	"	4.60
"	"	2357,	" "	"	17.95
"	"	2371,	" "	"	16.45
"	"	2409,	" "	"	1.03
"	"	1,	Creston	Division	7.38
"	"	10,	"	"	1.00
"	"	210,	Keokuk	"	4.75
"	"	261,	"	"	.30
"	"	2463,	Des Moines	Division	6.37
"	"	409,	Western	Division	.40
Law	"	572,	"	"	1.70
"	"	26,	Ottumwa	"	.10
Total					$107.97

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

[1] The government produced evidence to show that the clerk, prior to the giving of this bond, received a large amount of costs in various cases, and that the clerk's books disclose to whom these items of costs belonged, but do not disclose that they had ever been paid. It also produced evidence to show that there had been paid into the registry fund of the court certain amounts long prior to the execution of this bond, and that the clerk's records did not disclose that this had been drawn out by any checks authorized by orders of the court. The government did not offer the testimony of any of the parties to whom these items of money are said to have been due, to show their nonpayment. On behalf of the government it is claimed that, because the books do not record any payment of these items by the clerk, there arises a presumption that the clerk retained the items until after the execution of this bond, and it thereby became security for such payment. On behalf of the clerk it is contended that there is a presumption that the clerk did his duty, which was to pay these several items to the parties entitled thereto, even though the books do not record such payments.

The defendants offered evidence to show that the books were not accurately kept, and did not show all payments that were made, and also produced the testimony of many of the parties to show that they claimed nothing to be due from the clerk, even though items apparently due them were shown upon the clerk's books as unpaid. In addition, the defendant clerk testified, on behalf of the defense, that all money which he had received as clerk, prior to January 2, 1899 (the date of the giving of this bond), he had either deposited in the registry fund of the court, or had paid to the parties entitled thereto, or had converted to his own use. The conversion to his own use was described as having been made by deposits in bank in his own account and to his personal credit, intending to exercise dominion over such account as his own property, and that he had checked out to his personal use practically all of this account. The clerk qualified this statement by the admission that, of this money, he may have had, at the time he gave this bond, in the vaults of his office—

"a few hundred dollars; might have been more than that, but all that money in there I treated as my own and exercised dominion over it. I used it; at that time I used those things; any money I had in the vault at that time I used for my personal expenses, paid personal bills out of it, and treated it just as I did a personal account at the bank."

This use of the "few hundred dollars" in the vaults, which he says he may have had on hand on January 2, 1899, must have been subsequent to that date, and thus this bond became liable for the amount so used. The amount thus conceded by the witness as "a few" hundred dollars is quite uncertain, but it obviously refers to a sum of $200 or more. The government would therefore be entitled to recover, in addition to the surplus of emoluments, and the unpaid costs collected after January 2, 1899, this sum of $200.

[2] It is said that this amount cannot be recovered herein, because the action is barred by the statute of limitations. If it be conceded that the government, although the plaintiff, is not the real party in interest as to these items of costs, yet there is no evidence that shows at what

time, after January 2, 1899, the defendant converted the amount of costs that he thus admits having had on hand in the vaults at that date, or which he received after that date. It was incumbent upon the defendants to prove such dates, if they desired the benefit of the statute. This conclusion renders it unnecessary to discuss the proposition that the defendant concealed any conversion he may have made of these funds.

I think that the evidence of the nondisbursement of the remainder of the funds sued for, as shown by the absence of credit entries on the clerk's books, is fully met by the evidence of the clerk that he had no such money in his possession when this bond was given; that he had either paid it to the persons entitled thereto, or had converted it to his own use, before the giving of this bond.

From what has been said, it follows that the government will be entitled to a judgment against the defendants for the sum of $752.62, with interest from March 31, 1910. I am informed that since the submission of the case the clerk has paid into the court in this case the balance claimed by the government as due for surplus of emolument returns. In that case the judgment will be entered for the proper sum after allowing deduction therefor.

UNITED STATES ex rel. GEGIOW et al. v. UHL.

(District Court, S. D. New York. March 2, 1914.)

1. ALIENS (§ 49*)—RIGHT TO ENTER—PUBLIC CHARGE—DEPORTATION.
   In determining whether immigrants, who were unskilled laborers, seeking to enter the United States, were liable to become a charge on the public, the immigration authorities may consider the personal equation of each alien and the conditions which confront him.
   [Ed. Note.—For other cases, see Aliens, Cent. Dig. § 107; Dec. Dig. § 49.*]

2. ALIENS (§ 54*)—RIGHT TO ENTER—DETERMINATION.
   Whether an alien shall be admitted to the United States is a political question which Congress may dispose of as it chooses, and having provided by Act Feb. 20, 1907, c. 1134, § 25, 34 Stat. 906 (U. S. Comp. St. Supp. 1911, p. 515), that a decision of the proper immigration officers, if adverse to the admission of an alien, shall be final unless reversed on appeal to the Secretary of Labor, the decision cannot be reviewed by the courts when the prescribed procedure has been complied with.
   [Ed. Note.—For other cases, see Aliens, Cent. Dig. § 112; Dec. Dig. § 54.*]

This is a habeas corpus proceeding brought on behalf of several aliens who have been denied admission.

Barnett & Jablow, of New York City, for relator.

H. Snowden Marshall, U. S. Atty. for the Southern District of New York, and Harold A. Content, Asst. U. S. Atty., for respondent.

LACOMBE, Circuit Judge. [1] There is apparently no irregularity in the proceedings. The immigrants were examined, were brought before the board of Special Inquiry, and interrogated. After an ad-

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

verse decision, their appeals came duly before the Secretary of Labor, who affirmed the conclusion of the board that they were liable to become a public charge. The Acts of 1907, § 25, expressly provides that the decision of the proper immigration officers, if adverse to the admission of an alien, shall be final unless reversed on appeal to the Secretary of Labor. It is abundantly settled by decisions that it was the intent of Congress to leave the determination of the question to the board and the Secretary, not to the courts. These immigrants are apparently unskilled laborers, speaking no language except their own, unintelligible to other Russians, have very little money; there is no one in this country legally liable to support any of them. The board had opportunity on physical inspection to form conclusions as to their capacity to earn a living. Opinions might differ as to whether or not they were, at the time question arose as to their admission, liable to become a charge upon the public. The personal equation of each alien and the conditions which confront him are elements of the problem. Of section 8 of the Immigration Act of 1891 (26 Stat. 1085, c. 551 [U. S. Comp. St. 1901, p. 1298])—and the provisions of section 25 of the existing act are substantially the same, except that it substitutes a board of special inquiry for a single inspector—the Supreme Court has said:

"The statute does not require inspectors to take any testimony at all, and allows them to decide on their own inspection and examination the question of the right of any alien immigrant to land. The provision relied on merely empowers inspectors to administer oaths and to take and consider testimony, and requires only testimony so taken to be entered of record."

See Nishimura Ekiu v. U. S., 142 U. S. 651, 12 Sup. Ct. 336, 35 L. Ed. 1146, an authoritative decision expressed in unambigous language, which seems to be frequently overlooked.

[2] Whether an alien shall or shall not be admitted to this country is a political question which Congress may dispose of as it chooses. This statute confines the determination of that question, in the first instance, to administrative officers, who are not confined, as courts are, to a particular method of informing themselves as to the facts. To provide for the correction of any erroneous conclusions of these officers there may be a review in each case, on the request of the alien, by another officer holding a high political station, a cabinet officer. The act in no uncertain language provides that, when its procedure has been conformed to, his decision as to the fact shall be final and conclusive. To construe that language so as to destroy such finality would seem to be legislation rather than construction.

The writ is dismissed.

In re HAMMEL et al.

(District Court, S. D. New York. February 19, 1914.)

1. BANKRUPTCY (§ 482*)—COSTS AND FEES—ALLOWANCE TO BANKRUPT'S ATTORNEY.

Under Bankruptcy Act July 1, 1898, c. 541, § 64b, subsec. 3, 30 Stat. 563 (U. S. Comp. St. 1901, p. 3447), authorizing the allowance of a reasonable attorney's fee for professional services actually rendered to the bankrupt in involuntary cases while performing the duties therein prescribed, and section 7, subsec. 1, providing that the bankrupt shall attend the first meeting of his creditors, if directed by the court or judge to do so, and the hearing upon his application for a discharge, if filed, and subsection 9, providing that he shall, when present at the first meeting of his creditors and at such other times as the court shall order, submit to an examination concerning the conduct of his business, etc., an attorney's fee cannot, in ordinary cases, be allowed the bankrupt for attending the first meeting or the hearing on the application for the discharge, since his duty is only to answer truthfully, and he requires no attorney to protect him against abuse of the right of examination, as such right is abused only when it goes into such clearly irrelevant matters as needs no legal expert advice to distinguish, while the fact that the examination takes place before a commissioner or referee sufficiently protects him as to the manner and method of examination.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 874–876, 897; Dec. Dig. § 482.*]

2. BANKRUPTCY (§ 482*)—COSTS AND FEES—ALLOWANCE TO BANKRUPT'S ATTORNEY.

Within Bankruptcy Act July 1, 1898, c. 541, § 64b, subsec. 3, 30 Stat. 563 (U. S. Comp. St. 1901, p. 3447), authorizing the allowance of a reasonable attorney's fee for professional services to the bankrupt in involuntary cases while performing the duties therein prescribed, attending a sale of the assets is the bankrupt's privilege and not a duty.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 874–876, 897; Dec. Dig. § 482.*]

3. BANKRUPTCY (§ 482*)—COSTS AND FEES—ALLOWANCE TO BANKRUPT'S ATTORNEY.

Under such section, getting a discharge is not a duty imposed upon the bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 874–876, 897; Dec. Dig. § 482.*]

Proceeding in the matter of Leopold Hammel and another, individually and as copartners trading as L. Hammel & Co. On application for allowance as attorney for the bankrupt. Allowance by special master modified.

Application for allowance as attorney for the bankrupt in an involuntary case. The special master appointed to fix allowances has based an allowance of $125 upon the following services rendered the bankrupt: Preparing and filing schedules, attending sale of bankrupts' property, consenting to order of adjudication, being present with the bankrupt at the first meeting of creditors, and various adjournments, attending with the bankrupt at examinations of objecting creditors on discharge, consulting with objecting creditors regarding discharge.

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

Herman H. Oppenheimer, of New York City, for L. Hammel.
Cahn & Nordlinger, of New York City, for Bertha Hofman.
I. H. Kramer, of New York City, for Max Hofman.
Lawrence B. Cohen, of New York City, for receiver.

HAND, District Judge (after stating the facts as above). [1] Section 64b (3) controls in such a case, and limits the allowance to services rendered "to the bankrupt in involuntary cases while performing the duties herein prescribed." The duties of bankrupts are prescribed in section 7 of the act, of which only subdivisions 1, 8, and 9 are here pertinent. I cannot agree that a bankrupt in ordinary cases needs an attorney to attend at the hearing of his discharge or at the first meeting. In re Kross (D. C.) 96 Fed. 816. His duty is only to answer truthfully, and that needs no attorney. The theory is, I suppose, that the right of examination may be abused, and that he should be protected, but the abuse of examination can only be when it goes into such clearly irrelevant matters as need no expert legal advice to distinguish. The utmost latitude should be allowed. So far as manner and method of examination may be abused, as such examinations take place before a commissioner or referee, the bankrupt is protected from being misused without an attorney.

[2] Attending a sale of the bankrupt's assets is his privilege, not his duty.

[3] For preparing the schedules and attendance Judge Brown fixed the fee of $30 for usual cases, with $20 for the discharge. Re Kross, supra. I should prefer to say that, except in unusual cases, the bankrupt should have no lawyer at the hearings and examinations, unless he wishes himself to pay him. Nor can I see that getting a discharge is a duty imposed upon the bankrupt.

Allowance $50.

MOELLER v. SOUTHERN PAC. CO. et al.

(District Court, N. D. California, First Division. November 3, 1913.)

No. 15,703.

REMOVAL OF CAUSES (§ 39*)—DIVERSE CITIZENSHIP—DISMISSAL AS TO ONE OR MORE PARTIES.

Where, in an action in a state court by a citizen and resident of the state, a nonsuit was granted at the close of plaintiff's preliminary case as to the resident defendants without plaintiff's consent, though he refrained from opposing the motion for a nonsuit, the nonresident defendant could not remove the cause to the United States District Court on the ground of diversity of citizenship; the fact that plaintiff refrained from opposing the motion not being equivalent to a voluntary dismissal by him as to the resident defendants.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 73; Dec. Dig. § 39.*]

At Law. Action by Clarence Moeller, a minor, against the Southern Pacific Company and others. On motion to remand to the state court. Motion granted.

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

W. A. Anderson, of Woodland, Cal., Black & Clark, of San Francisco, Cal., and J. A. Elston, of Berkeley, Cal., for plaintiff.

A. C. Huston, of Woodland, Cal., and Foshay Walker and Frank McGowan, both of San Francisco, Cal., for defendant Southern Pacific Co.

VAN FLEET, District Judge. This action was commenced against the defendant Southern Pacific Company joined with two of its employés and two defendants sued by fictitious names. Before the trial, upon motion of the plaintiff, the action was dismissed as to the two fictitious defendants; and at the trial, upon plaintiff's resting its preliminary case, the court, upon motion of the defendants, granted a nonsuit as to the two defendant employés for want of evidence to go to the jury as to them; the plaintiff stating that, while he should not oppose the motion, he would not consent thereto. Thereupon the defendant company, being a Kentucky corporation, and the plaintiff a citizen and resident of the state of California, filed a petition and bond, upon due notice, for the removal of the cause to this court upon the ground of diversity of citizenship; and the cause was so removed. The plaintiff has now moved to remand the cause to the state court upon the ground that it does not present a case properly removable to this court upon the ground stated.

Upon the facts, the case is not to be distinguished from that of Whitcomb v. Smithson, 175 U. S. 635, 20 Sup. Ct. 248, 44 L. Ed. 303, held not to be a removable cause.

The facts do not bring the case within the principles of Powers v. Chesapeake & Ohio Ry. Co., 169 U. S. 92, 18 Sup. Ct. 264, 42 L. Ed. 673. They do not disclose, as in that case, a voluntary discontinuance by the plaintiff as to the resident defendants. The fact that plaintiff refrained from opposing the motion for nonsuit is not the equivalent of a voluntary dismissal by him as to the two defendants submitting the motion, since it may well be that previous rulings of the court during the trial had made it impossible for plaintiff to make out a case as against those defendants. As to this, of course, the record here is silent. But, however that may be, the record does disclose that plaintiff refused his consent that the two defendants be dismissed from the case, and, this being so, he cannot be regarded as voluntarily abandoning the right to have the case proceed upon the theory upon which it was begun. As said in Whitcomb v. Smithson with reference to the order granting the nonsuit in that case:

"This was a ruling on the merits, and not a ruling on the question of jurisdiction. It was adverse to plaintiff, and without his assent, and the trial court rightly held that it did not operate to make the cause then removable and thereby to enable the other defendants to prevent plaintiff from taking a verdict against them. The right to remove was not contingent on the aspect the case may have assumed on the facts developing on the merits of the issues tried."

The motion to remand must be granted, and it is so ordered.

HILLS & CO., Limited, v. HOOVER et al.

(Circuit Court of Appeals, Third Circuit. March 4, 1914.)

No. 1713.

LIMITATION OF ACTIONS (§ 127*)—AMENDMENT—NEW CAUSE OF ACTION.

Plaintiff sued defendant in replevin to recover 20,000 copies of engravings alleged to offend plaintiff's copyright, and under the writ the marshal seized 4,673 copies and the stones from which the engravings were made. Pending this suit and before trial, the Supreme Court having held that Rev. St. § 4965 (U. S. Comp. St. 1901, p. 3414), contemplated two remedies, one to recover the infringing copies and the other a penalty of a dollar per copy seized, and that both remedies were enforceable in the same suit, plaintiff amended its declaration by setting up an additional claim to recover the penalty. *Held*, that such amendment pleaded a new and different cause of action from that alleged in the original declaration, and, not having been added within two years after the cause of action accrued, was barred by limitations.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 543–547; Dec. Dig. § 127.*]

In Error to the District Court of the United States for the Eastern District of Pennsylvania; James B. Holland, Judge.

Action by Hills & Company, Limited, against Joseph Hoover and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Hector T. Fenton, of Philadelphia, Pa., for Hills & Co.

Wm. A. Carr and W. Horace Hepburn, both of Philadelphia, Pa., for Hoover and others.

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

BUFFINGTON, Circuit Judge. The present is one of a number of cases growing out of the alleged violation by Joseph Hoover et al., the defendants, of the copyright of Hills & Co., Limited, the plaintiff, to certain engravings. The original case in this circuit—for one phase of the controversy was involved in Hills v. Austrich (C. C.) 120 Fed. 862 (1903), a case in the Second circuit—was an action of replevin brought by the plaintiff against the defendant in the Circuit Court to recover 20,000 copies of the offending copyright engravings. The marshal found and seized 4,673 copies in defendants' possession and delivered them to the plaintiff and made return of his writ on January 2, 1903. No further steps were taken in said case until June 19, 1912. The pleadings were the usual ones under the Pennsylvania action of replevin, averred title to the engravings in the plaintiff, and invoked the aid of the court to recover them. Subsequently the plaintiff brought a bill in equity in the Circuit Court to enjoin the sale of unseized copies. This bill resulted in a decree for an injunction and an accounting and a final decree on such accounting for the profits of the defendants on the unseized copies. That proceeding—the record of which is in evidence in the present case—is described at length in Hills v. Hoover (C. C.) 142 Fed. 904. The opinion at 142 Fed. 904, and the one at 220

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

U. S. 329, 31 Sup. Ct. 402, 55 L. Ed. 485, Ann. Cas. 1912C, 562, were delivered in an action of assumpsit which the present plaintiffs in 1903 brought against the present defendants to recover the statutory penalty on the 4,763 sheets seized on the replevin by virtue of section 4965 (U. S. Comp. St. 1901, p. 3414), which provides that defendant shall "forfeit one dollar for every sheet of the same found in his possession." The Circuit Court having eventually held that the plaintiff could not, in accordance with the case of Falk v. Curtis Publishing Co., 107 Fed. 126, 46 C. C. A. 201, maintain such action of assumpsit, it having been brought at the same time the action of replevin was, its decision was brought to this court for review. Pending its disposition, the case of Werckmeister v. American Company, 207 U. S. 382, 28 Sup. Ct. 124, 52 L. Ed. 254, holding a party aggrieved by a violation of his copyright, was confined to a single action in the nature of replevin in which he could recover both the forfeited sheets and the forfeited penalty, was decided by the Supreme Court. Thereupon, in view of the well-understood limitations of the Pennsylvania action of replevin, this court certified the questions to the Supreme Court in reference to that action, which are recited in Hills v. Hoover, 220 U. S. 329, 31 Sup. Ct. 402, 55 L. Ed. 485, Ann. Cas. 1912C, 562. In that decision, as we interpret it, it is held that the federal court may devise a writ in the nature of replevin, by virtue of which the marshal can seize the offending prints and in which a recovery of the penalty can be effected. In that regard the court said:

"There is no difficulty in issuing a writ in the nature of a writ of replevin in an action such as is authorized by section 4965, requiring the marshal to seize the alleged forfeited plates and copies, and asking in the same suit to recover the penalties for those found in the defendant's possession. The alleged infringing matter will be brought into court to abide its order and judgment, and at the same time, in the same action, a recovery may be had for the penalty awarded."

The court further stated:

"Holding that the remedy under the copyright statute embraces but one action, as was held in the Werckmeister Case, and that the local statutes of the state as to replevin, or other remedies, will not prevent the federal court from framing its process and writs, so as to give full relief in one action, we answer both of the questions certified in the affirmative."

Subsequent thereto, on June 12, 1912, the plaintiff moved the court, in the original replevin case of 1902, to amend its statement of claim by adding thereto the statutory cause of action arising under the provision that the defendant "shall further forfeit one dollar for every sheet of the same found in his possession," viz., a "statutory pecuniary penalty of one dollar per copy for each of said 4,763 piratical copies, in the aggregate, so found in the possession of said defendants and seized as aforesaid." To such amendment the defendant objected on the ground that this claim was barred by R. S. § 4968 (U. S. Comp. St. 1901, p. 3416), which provides that:

"No action shall be maintained in any case of forfeiture or penalty under the copyright laws, unless the same is commenced within two years after the cause of action has arisen."

This objection the court, without deciding, overruled, and allowed the amendment, but "without prejudice to the right of the defendants to interpose at the trial any defense which they might have made upon this motion." On the trial, the defendant having raised the question of the right of the plaintiff to amend in view of the statute of limitations, the court instructed the jury to find for the plaintiff, reserving "the right, in addition to other questions, that may arise, to pass upon the right of the plaintiff at this time, to amend its action of replevin, by inserting his claim for the money penalty for the infringement." In pursuance of this reservation the court subsequently entered judgment for the defendant. Whereupon the plaintiff sued out this writ. The question involved is whether the proposed amendment introduced into the action of replevin a cause of action which was barred by the statute of limitations. The power to amend is limited to the extent that no new cause of action can be engrafted on the original declaration, or, as stated by Justice Sharswood in Wilhelm's Appeal, 79 Pa. 120:

"The true criterion is, as all the authorities show: Did the plaintiff so state his cause of action originally as to show that he had a legal right to recover what he subsequently claims?"

Turning, then, to the original statement or declaration in the replevin, we find plaintiff claimed to recover in the action 20,000 copies of a series of four copyrighted prints, and "also the cuts, plates and stones by means of which or from which the same are engraved, lithographed or printed, of the additional value of two hundred and fifty ($250) dollars, of which aforesaid infringing copies the United States marshal in and for the said Eastern district of Pennsylvania, seized and delivered to the plaintiff 4763, the said stones, numbering 16 in all, have been destroyed by the defendants after seizure by and while in possession of the said marshal." The claim was made under that clause of R. S. § 4965, which provides, "He shall forfeit to the proprietor all the plates on which the same shall be copied, and every sheet thereof either copied or printed," and averred a distinct legal claim of forfeiture of the stones and the copies. It will be thus apparent that the right of action laid in such declaration was the same as in the replevin in Bolles v. Outing Co., 77 Fed. 966, 23 C. C. A. 594, 46 L. R. A. 712, of which action the Supreme Court, in Werckmeister v. American Co., 207 U. S. 384, 28 Sup. Ct. 127, 52 L. Ed. 254, said:

"The plaintiff in error had exhausted his remedy in the judgment rendered in the first suit."

It will therefore appear that the cause of action as laid in the declaration embodied a distinct cause of action, to wit, the forfeiture of certain stones and sheets. This cause of action the plaintiff could elect, declare upon, and enforce, without coupling thereto any additional relief provided by the statute. This view is, we think, necessitated by Werckmeister v. American Co., supra, where the Supreme Court, after stating that "this action requires the construction of section 4965," quote, without adverse comment, the opinion in Bolles v. Outing Company, supra:

"The section contemplates two remedies, enforceable in a single suit, each of which depends upon the same state of facts. The aggrieved party may, at his election, pursue either or both remedies."

Now there is no doubt that the plaintiff in his replevin actually meant to pursue but one of his remedies, viz., the forfeiture of the stones and sheets, and that he elected and declared on that alone and in point of fact declared on no other until some years later. That action was not the action which the court in Hills v. Hoover, supra, suggest as possible in future copyright actions, viz.:

"There is no difficulty in issuing a writ of replevin in an action such as is authorized by section 4965. * * * The alleged infringing matter will be brought into court to abide its order," etc.

Indeed, the court called attention to the present action of replevin as not the form of action the court suggested, saying:

"It is stated in the certificate that the replevin suit originally begun is still pending. Such being the fact, we do not wish to intimate, by anything herein decided, that the authority to amend pleadings and process in the federal courts may not justify an amendment in that case so as to embrace the entire relief which could have been obtained in a single action under section 4965 of the Revised Statutes of the United States, as we have stated. That question will arise if an application shall be made to the Circuit Court of the United States in that view."

It follows, therefore, the plaintiff having two separate causes of action under the statute and having in his action of replevin declared on one, the statute of limitations was not tolled against the second cause of action by the pendency of a suit on the first. And inasmuch as in the declaration in the replevin suit, the plaintiff, to use the words of Wilhelm's Appeal, supra, "did not so state his cause of action" for the stones and the sheets originally as to show that he had a legal right to recover the money forfeiture he now claims, for surely he had no legal right in such action to recover that for which he did not sue or declare, we are of opinion the court below was justified in holding that the second claim which was interjected into the original cause several years after the case brought was barred by the statute. For us to say otherwise would be to arbitrarily overrule the rational principles on which the salutary practice of amendment is based and would be at variance with that wholesome principle "interest rei publicæ ut sit finis litium."

The judgment below is affirmed.

TRIUMPH ELECTRIC CO. v. PATTERSON (two cases).

In re W. O. CRAIG MFG. CO.

(Circuit Court of Appeals, Eighth Circuit. January 7, 1914.)

Nos. 3941, 3973.

1. BANKRUPTCY (§ 449*)—REVIEW—NATURE AND FORM OF REMEDY.

Where, in a bankruptcy proceeding before the adjudication, a real estate mortgagee claimed certain machinery, and a vendor of the machinery filed an intervening petition which the court, after a hearing, dismissed,

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

the proper mode of review was by appeal, and a writ of error will be dismissed.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 915; Dec. Dig. § 449.*

Appeal and review in bankruptcy cases, see note to In re Eggert, 43 C. C. A. 9.]

2. FIXTURES (§ 1*)—REQUISITES OF CONVERSION INTO REALTY.

Whether an article is a chattel or an irremovable fixture depends upon real or constructive annexation to the realty, appropriation or adaptation to the use or purpose of that part of the realty with which it is connected, and the intention of the party, making the annexation, to make it a permanent accession to the freehold which may be inferred from the nature of the article, his relation and situation, the policy of the law, the structure and mode of the annexation, and the purpose and use for which it is made.

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

3. FIXTURES (§ 5*)—MACHINERY IN MANUFACTURING PLANT.

Machinery for an ice manufacturing plant installed in a building especially built and adapted to receive it and intended exclusively for the manufacture of ice, on a piece of land put to no other purpose, which machinery was essential to the business of the plant and was installed for permanent use, was an irremovable fixture and not a chattel, under the Arkansas law.

[Ed. Note.—For other cases, see Fixtures, Cent. Dig. § 4; Dec. Dig. § 5.*]

4. COURTS (§ 363*)—APPLICATION OF LOCAL LAWS—PROPERTY RIGHTS—LAW GOVERNING.

Whether a reservation of title to machinery by a vendor preserved its character as personalty, as against a subsequent mortgagee of land to which it was attached, was to be determined by the law of the state in which the land was situated.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 939–949; Dec. Dig. § 363.*]

5. COURTS (§ 366*) — UNITED STATES COURTS — AUTHORITY OF DECISIONS OF STATE COURT.

The local law of a state is to be ascertained, if possible, from the decisions of its courts of last resort, but otherwise the United States courts will form an independent opinion and decision upon the principles and doctrines of general jurisprudence.

[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 of Memphis v. City of Memphis, 49 C. C. A. 468; Converse v. Stewart, 118 C. C. A. 215.]

6. SALES (§ 472*)—CONDITIONAL SALES—OPERATION AND EFFECT AS TO THIRD PERSONS.

Under the law of Arkansas, a vendor of property clearly personal may retain title until the purchase price is paid as against a subsequent purchaser or lienholder without regard to notice.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1366–1376; Dec. Dig. § 472.*]

7. BANKRUPTCY (§ 155*)—PROPERTY—CONTROVERSIES BETWEEN CLAIMANTS.

The amendment of June 25, 1910 (chapter 412, § 8, 36 Stat. 840 [U. S. Comp. St. Supp. 1911, p. 1500]) to the Bankruptcy Act of July 1, 1898, c. 541, § 47, 30 Stat. 557 (U. S. Comp. St. 1901, p. 3438), giving trustees

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

all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings, had no application to a controversy in a bankruptcy proceeding between a conditional vendor of machinery and a subsequent mortgagee of the land to which it was attached, and the trustee derived no rights, remedies, nor powers from any source which could add anything to the mortgagee's rights under the mortgage.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 155.*]

8. FIXTURES (§ 18*)—BETWEEN MORTGAGOR AND MORTGAGEE.

As a general rule, the lien of a mortgage of realty embraces everything so annexed to the land as to become, in contemplation of law, part and parcel thereof, including not only buildings and structures, but also machinery forming an integral part thereof and designed, adapted, and intended for permanent use therein, although susceptible of removal and installation elsewhere, and although other similar machinery might be substituted therefor.

[Ed. Note.—For other cases, see Fixtures, Cent. Dig. §§ 32–46; Dec. Dig. § 18.*]

9. FIXTURES (§ 27*)—AS BETWEEN MORTGAGEE OF LAND AND VENDOR OF CHATTELS.

Under the Arkansas law which is in harmony with that generally prevailing, a reservation of title in a contract of sale of machinery attached to realty with the knowledge and consent of the vendor, which contract was not required by statute to be, and was not, recorded, did not prevent such machinery passing as realty to a subsequent mortgagee without notice, especially as the rule that fixtures pass with the land and inure to the benefit of mortgagees against secret liens and reservations of title is more strictly adhered to in those states where, as in Arkansas, a mortgage passes the legal title.

[Ed. Note.—For other cases, see Fixtures, Cent. Dig. §§ 5, 22, 25, 44, 45, 54; Dec. Dig. § 27.*]

Appeal from and in Error to the District Court of the United States for the Western District of Arkansas; F. A. Youmans, Judge.

Bankruptcy proceeding against the W. O. Craig Manufacturing Company, in which J. O. Patterson claimed certain property, and the Triumph Electric Company filed its intervening petition, claiming the same property. From a decree (201 Fed. 548) dismissing the petition of intervener, it appeals and brings error. Writ of error dismissed, and decree affirmed on appeal.

John I. Worthington, of Harrison, Ark., and Joseph M. Hill, James Brizzolara, and Henry L. Fitzhugh, all of Ft. Smith, Ark., for appellant.

E. H. Gamble and James F. Read, both of Ft. Smith, Ark., for appellee.

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

VAN VALKENBURGH, District Judge. The W. O. Craig Manufacturing Company, a corporation, was adjudicated a bankrupt on the 27th of July, 1912. This concern was formerly the Siloam Springs Cold Storage & Ice Company, and under the latter name the bankrupt bought from the Triumph Electric Company certain machinery for an ice manufacturing plant at Siloam Springs, Ark. This machinery consisted in general of five sections of double-pipe ammonia condenser

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

complete, hand hoist and crane, with can filler and hose; also, a 28-ton ice tank 25 feet wide, 43 feet and 10 inches long, and 47 inches deep, made of ¼-inch steel; a 28-ton shell type brine cooler; 380 ice cans; 18-inch propellor; one 3½ horse power motor; a traveling crane with hand hoisting attachments of a substantial construction; one automatic ice can dump of 300 pounds capacity; and various other articles appurtenant to this machinery and necessary for its installation. The machinery was sold under two contracts, dated respectively January 28 and February 25, 1911. The aggregate purchase price was $4,312.80, for which notes were given. Of this the sum of $3,026.98 is alleged to be unpaid. The contract between the bankrupt and the vendor contained the following provisions:

"The title to all material furnished by the company shall remain in it until full purchase price has been paid in cash, with full right of repossession by the company upon purchaser's default of any act or payment due under this contract; and purchaser agrees that company shall have the right to retain all the moneys, that may have been paid by the purchaser, as liquidated damages for purchaser's default. Purchaser agrees to do all acts necessary to protect such retention of title in the company, and the taking of any security whatsoever shall not operate as a waiver nor as otherwise affecting this retention of title.

"The company, at its election, shall be entitled to a conveyance of said material by way of mortgage, in order to secure the payment of the purchase price.

"Should the purchaser become insolvent or default in the performance of or payment of any part of this contract, including any obligation given for any part of it or failure to execute notes as agreed upon, the whole purchase price shall forthwith become due."

This contract was one of conditional sale. Under the law of Arkansas it was not required to be recorded, and was not recorded. The machinery was installed not later than May, 1911, in a building constructed for that express purpose, on a piece of land adjacent to a railroad for convenience of shipping. This land was put to no other use. The building was especially built and adapted to receive the machinery; it was intended exclusively for the manufacture of ice; the apparatus purchased was essential to the business of the plant, and was installed for permanent use therein.

[1] June 3, 1911, to secure the repayment of a loan of $30,000, made on that date, the bankrupt executed to the Commerce Trust Company of Kansas City, Mo., a mortgage on its entire plant and all personal property used in connection therewith. This mortgage, and the notes secured thereby, were afterwards assigned to the objector Patterson. Before the adjudication in bankruptcy, Patterson, in the bankruptcy proceeding, claimed all the property described in the mortgage and sought to have the same sold and the proceeds applied to the payment of the mortgage debt. The Triumph Electric Company filed its intervening petition, claiming the machinery sold by it to the bankrupt by virtue of the retention of title in its contract of sale. To this petition Patterson filed answer asserting the superior lien of his mortgage. The property was by the referee ordered sold free from liens, and out of the proceeds of the sale an amount sufficient to pay the intervener's claim was retained by the trustee to await the decision on

the issues thus framed. Upon hearing the trial court found in favor of the objector and dismissed intervener's petition.

The case is here both upon writ of error and by appeal. Appeal being the appropriate remedy upon the record as presented, we take jurisdiction thus, and the writ of error is accordingly dismissed.

As stated by the trial judge, the real question in the case is whether the property in controversy became a part of the realty and passed under the mortgage, or remained personal property, subject to the terms of the contract between the bankrupt and the intervener. This question necessarily subdivides itself thus:

1. Is the property of such a character, and were the circumstances of its annexation such, that in the absence of the special reservation it would ordinarily become a part of the realty and pass under the mortgage?

2. If so, did that special reservation of title preserve its character as personal property, and withdraw it from the subsequent mortgage lien?

[2, 3] With respect to this first branch of the question involved, the court below, after considering the facts and rules laid down by the Supreme Court of Arkansas for determining whether a given article is a chattel or an irremovable fixture (Choate v. Kimball, 56 Ark. 55, 19 S. W. 108; Ozark v. Adams, 73 Ark. 232, 83 S. W. 920), found that this machinery was such a fixture and constituted an integral part of the realty. We agree with this conclusion. The rules referred to are the following:

"1. Real or constructive annexation of the article in question to the realty.

"2. Appropriation or adaptation to the use or purpose of that part of the realty with which it is connected.

"3. The intention of the party making the annexation to make the article a permanent accession to the freehold, this intention being inferred from the nature of the article affixed; the relation and situation of the party making the annexation, and the policy of the law in relation thereto; structure and mode of the annexation and the purpose and use for which the annexation has been made."

Mr. Ewell, in his treatise on the Law of Fixtures (chapter 9, p. 293), after reciting the three tests quoted, says:

"The general course of decision is in favor of viewing everything as a fixture and as passing by a conveyance of the land, which has been attached to the realty with a view to the purpose for which it is employed or held, however slight or temporary the connection between them, provided, of course, that such attachment be intended as a permanent or habitual one, which in the absence of evidence to the contrary will in this relation ordinarily be presumed."

Mr. Jones states the rule as follows:

"The intention with which an article of personal property is attached to the realty, whether for temporary use or for permanent improvement, has within certain limits quite as much to do with the determination of the question, whether it has thereby become a permanent fixture, as has the way and manner in which it is attached. In the modern cases the intention with which a chattel is attached to the realty has become more and more the decisive test whether or not the chattel has become a part of the realty. The mode of annexation is of consequence chiefly as bearing upon the intention.

"The intention which controls is, 'not the secret design which may dwell in a party's mind, and as to whose existence he alone can speak, but that "in-

tention" which was either expressly declared by the parties competent to make it the governing rule, or which flows, patent to all, from the nature and character of the act, the clear purpose to be served, the manifest relation which the articles bear to the realty, and the visible consequences of their severance upon the proper and obvious use of it.'" Jones on Law of Real Property, vol. 2, §§ 1668, 1669.

The principles announced have received general recognition (William Firth Co. et al. v. South Carolina Loan & Trust Co., 122 Fed. 569–578, 59 C. C. A. 73; Giddings et al. v. Freedley et al., 128 Fed. 355, 63 C. C. A. 85, 65 L. R. A. 327); and particularly in the decisions of this court (Hooven, Owens & Rentschler Co. v. John Featherstone's Sons et al., 111 Fed. 81–83, 49 C. C. A. 229; Armstrong Cork Co. v. Merchants' Refrigerating Co. et al., 184 Fed. 199–201, 107 C. C. A. 93, 95). In the latter case Judge Sanborn said:

"The true test of the character of an improvement is the intent of the owner of the real estate to incorporate, or not to incorporate, it permanently in his realty as a part thereof."

The machinery in controversy was installed in such manner and under such circumstances as to satisfy all the tests prescribed for the determination of an irremovable fixture to land.

[4-7] We have next to consider whether the reservation of title in the contract of sale operated to preserve to this property its original character as personalty to such extent as to render the vendor's title superior to the lien of appellee's mortgage.

This case must, of course, be determined in accordance with the law of the state of Arkansas, if that can be ascertained with sufficient clearness from the decisions of its courts of last resort; otherwise, it will be our duty to form our independent opinion and decision upon the principles and doctrines of general jurisprudence. In all cases between vendor and vendee, and, with respect to property clearly personal, against any subsequent purchaser or lienholder, without regard to notice, the title, under the laws of Arkansas, can be retained by the vendor until the purchase price is paid. Carroll v. Wiggins, 30 Ark. 402; Andrews v. Cox, 42 Ark. 473, 48 Am. Rep. 68; McIntosh & Beam v. Hill, 47 Ark. 363, 1 S. W. 680; McRea et al. v. Merrifield et al., 48 Ark. 160, 2 S. W. 780; Simpson v. Shackelford, 49 Ark. 63, 4 S. W. 165; Edgewood Distilling Co. v. Shannon, 60 Ark. 133, 29 S. W. 147; Triplett v. Mansur & Tebbetts Implement Co., 68 Ark. 230, 57 S. W. 261, 82 Am. St. Rep. 284; Cullin-McCurdy Const. Co. v. Vulcan Iron Works, 93 Ark. 342, 124 S. W. 1023; In re Lutz (D. C.) 197 Fed. 492. In that state it is not essential to the validity of such contracts of conditional sale that they be filed of record in any public registry; therefore all decisions which are founded upon the provisions of recording statutes are not pertinent here. As an incident to this consideration, the amendment to the Bankruptcy Act, approved June 25, 1910 (chapter 412, § 8, 36 Stat. 838 [U. S. Comp. St. Supp. 1911, p. 1500]), which clothes trustees with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings, has no application. The mortgagee here derives whatever rights he has from the instrument under which he claims. The contract of conditional sale is in-

herently valid unless the mortgage lien is superior to it. From no source has the trustee derived any rights, remedies, or powers which could add anything to what the mortgagee already enjoys and is asserting in his own right.

[8] The general rule is that the lien of a mortgage of realty embraces whatever is annexed to the land in such manner as to become, in contemplation of law, part and parcel thereof. This includes not alone buildings and structures, but likewise machinery which forms an integral part of the same, and is designed, adapted, and intended for permanent use therein, with a view to the purpose for which they are employed. This is true in the absence of special local custom to the contrary, although such machinery may be susceptible of removal and installation elsewhere, and although in the structure other similar machinery might be substituted for it. It would be impracticable, and perhaps unprofitable within the compass of this opinion to recite all the modifications of this rule that are recognized under varying conditions and in various jurisdictions. It will be sufficient to call attention to such as are deemed to be pertinent to this inquiry.

[9] Against a prior mortgage, an agreement between the owner of the land and his vendor that articles annexed to the freehold shall remain chattels until paid for has been upheld chiefly upon the ground that the mortgagee has parted with nothing upon the faith of the annexation, and that therefore the vendor has the stronger equity. This is true, generally, where the mortgagee has notice, actual or constructive, of the agreement, and where the chattels may be removed without injury to the freehold. In the case of a subsequent mortgage, for a present valuable consideration, the rule is otherwise. Such mortgagee parts with his property upon the faith of the apparent security. Generally, however, if he have notice, actual or constructive, of the reserved personal character of what otherwise would be a fixture passing with the land, he must be bound thereby, because he dealt with knowlege of the situation. The rule that fixtures pass with the land, and inure to the benefit of mortgagees against secret liens and title reservations, is more strictly adhered to in states where the legal title to land is vested in the mortgagee. Jones on Real Property, vol. 2, par. 1744. Such is the estate recognized in Arkansas. Whittington v. Flint, 43 Ark. 504–519, 51 Am. Rep. 572; Perry County Bank v. Rankin, 73 Ark. 589, 84 S. W. 725, 86 S. W. 279. The following are among the many authorities which announce in their various phases the foregoing principles: Jones on the Law of Real Property, vol. 2, pars. 1668, 1669, 1680–1733, 1734, 1744, 1748, 1755; Bronson on Fixtures (1904) pp. 75, 98, 99, 147, and 154 to 162; Wickes Bros. v. Hill, 115 Mich. 333, 73 N. W. 375–376; Watson et al. v. Alberts et al., 120 Mich. 508, 79 N. W. 1048; Campbell et al. v. Roddy et al., 44 N. J. Eq. 244, 14 Atl. 279–282, 6 Am. St. Rep. 889; Ridgeway Stove Co. v. Way, 141 Mass. 557–560;[1] William Firth Co. v. South Carolina Loan & Trust Co. (C. C. A.) 122 Fed. 569–578, 59 C. C. A. 73; Phœnix Iron-Works Co. v. N. Y. Security & Trust Co. (C. C. A.) 83 Fed. 757, 28 C. C. A. 76; Evans v. Kister (C. C. A.) 92 Fed. 836, 837, 35 C. C. A. 28; In re Sunflower State Refining Co. (C. C. A.) 195 Fed. 180, 115 C. C. A. 132.

[1] 6 N. E. 714.

The case last cited, which was decided by this court, arose in the state of Kansas, where it is provided that all instruments evidencing the conditional sale of personal property shall be void as against innocent purchasers or creditors of the vendee unless deposited in the office of the register of deeds, and entered as a chattel mortgage. In that case the real estate mortgage was taken prior to the conditional sale. It contained an after-acquired property clause, which, under the law of the state, was ineffective as a chattel mortgage upon after-acquired property. The conditional sale contract had been recorded, as required by law. Under such circumstances it was held that this positive provision of the law of Kansas recognized and preserved the property described in the conditional sale as personal property both before and after it was placed upon the real estate. The record operated as notice to all parties in interest. Besides the mortgage was prior in date; it contained no after-acquired property clause effective as a chattel mortgage; and the mortgagee had parted with nothing on the faith of the annexation. Therefore, in the interest of justice, the claimant's lien was held to be superior; but the opinion carefully confined its ruling to the situation then before the court. It said:

"An examination of the authorities satisfies us that no general rule can be cited which can be applied to the decision of all cases similar to the one now under consideration. The correct decision of each case as it shall arise must depend upon the particular facts existing therein. * * *

"We think it may not be doubted that, in the absence of any agreement as between the vendor in a conditional sale of personal property and the bondholders or mortgagees under a mortgage having an after-acquired property clause, the true test for determining whether or not the lien of the conditional sale of the vendor is inferior to the lien of the mortgagee is whether the personal property has been so attached to the real estate mortgaged as to become a part of the realty. Whether the machinery sold to the bankrupt by the Carbondale Machine Company became real estate by its being placed upon the real estate described in the trust deed must be determined by the local law of Kansas, if any such law can be found."

It is conceded that appellee had neither actual nor constructive notice of the secret title reserved to appellant. His mortgage was taken subsequently to the annexation, and to secure a contemporaneous loan. As found by the trial court:

"Any man contemplating the purchase or the taking of a mortgage on the ice plant would have been warranted in assuming that the machinery was a part of the realty."

Unless, then, it is made to appear from the local decisions that a different rule of property has been announced in the state of Arkansas, it would seem that the decree below should be affirmed.

The first case in Arkansas which deals with this problem is Hensley v. Brodie, 16 Ark. 511. There a man named Woodruff sold to one Brodie certain machinery attached to a mill and delivered possession. Brodie exercised ownership and control over the property after the sale and removed part of it. Subsequently Woodruff entered into a written contract for the sale of the lot and mill house to the firm of Hoyt and Johnson; the title, however, remained in Woodruff, and the sale agreement contained a forfeiture clause. Woodruff specially reserved by parol the machinery in controversy as Brodie's property, and

Hoyt and Johnson so distinctly understood. There was evidence that Hoyt and Johnson were to pay Brodie a certain rental for the use of the machinery, which was left in the building. Subsequently, Hensley acquired the interest of Hoyt and Johnson, and agreed to pay to Brodie the same rent that Hoyt and Johnson were to pay him. Later Brodie brought replevin against Hensley for the property in question. Hensley pleaded property in himself by reason of attachment to the realty, and also that the machinery, forming a part of the realty, was not subject to replevin. It was held that though—

"The engine and apparatus, fitted up for the purpose of driving the mill, might have passed, on a sale of the premises by Woodruff, without reservation, to his vendee as fixtures (Sparks v. State Bank, 7 Blackf. [Ind.] 469), yet the sale of them by Woodruff to Brodie, the delivery of possession and control to him, and the subsequent exercise of ownership over them by him, established by the evidence, amounted clearly to such a severance of them, in law, from the realty, as to make them his personal property, and entitle him to bring replevin for them, against the defendant, who had recognized his title to them and offered to pay him rent for them, but afterwards refused to surrender them upon demand."

The opinion contains the following statement:

"The proof does not show that Hensley was an innocent purchaser, without notice, and if it did, the property being personalty, the rule caveat emptor applies."

But this conclusion must be read in connection with the announcement that the delivery of possession and control to Brodie, and the exercise of ownership by him, amounted to a severance, in law, from the realty; that Hensley had notice of the condition, was therefore not an innocent purchaser, and had recognized Brodie's title by offering to pay rent for the use. The court makes this further significant statement:

"We are not prepared to say, upon examination of authorities, that if this were a case arising between a vendor and purchaser of the premises, or an heir and executor, the machinery being fitted up for the purpose of running a mill upon the premises, it would not have belonged to and followed the soil. But it is clear that if the case arose between landlord and tenant—if Brodie, for instance, had leased the lot and mill house from Woodruff, and being the owner of the machinery, had fitted it up in the house for the purposes of trade—he would have had the right to remove it as personalty at the end of the term, and a conveyance by Woodruff of the premises during the lease would not have vested a right to the machinery in the vendee. (Citing cases.)

"The case at bar is not one arising between a landlord and tenant of the premises, but it is upon principle more analogous to that class of cases, than to the other classes of cases, in which the law in relation to fixtures is more rigid."

It will thus be seen that the Supreme Court of Arkansas, in this case, recognizes to the fullest the general principles to which we have adverted.

Choate v. Kimball, 56 Ark. 55, 19 S. W. 108, bases the right of removal of fixtures by the mortgagor, against the lien of a prior mortgage, upon the doctrine of implied notice of intention conveyed by a custom of the country of which the mortgagor had knowledge. It was held that this amounted to an implied agreement as effective as one expressed.

In Bemis v. First National Bank, 63 Ark. 625–630, 40 S. W. 127, it is said that if in Choate v. Kimball, supra, there had been no proof of custom amounting to notice and agreement for removal, the decision in that case must have been reversed.

In Monticello Bank v. Sweet, 64 Ark. 502, 503, 43 S. W. 500, 501, the rule is thus announced:

"Fixtures attached to the realty after the execution of a mortgage of it become a part of the mortgage security, if they are attached for the permanent improvement of the estate, and not for a temporary purpose, or if they are such as are regarded as permanent in their nature. * * *

"The mortgage to the bank included the land and all permanent annexations thereto made either before or after its execution. Such being the effect of the mortgage contract between the bank and Courtney, no subsquent law could provide for the creation of a lien by the mortgagor to a third party that would defeat the lien of the mortgagee, without destroying vested rights and impairing the obligation of contracts."

The decision in Markle v. Stackhouse, 65 Ark. 23, 44 S. W. 808, is consistent with the doctrine, repeatedly announced in Arkansas, that permanent annexations become a part of the realty, and pass with the sale or mortgage of the soil. It says:

"A sawmill erected by a vendee on land subject to a vendor's lien becomes a fixture, and subject to such lien, where the manner of its annexation to the soil, and its adaptation to the use to which the soil is devoted, clearly establish that it was erected with the intention that it should be a permanent accession."

In Brannon v. Vaughan, 66 Ark. 87, 48 S. W. 909, it was held that the right to remove a building erected by a third person upon land conditionally sold, under an agreement with the vendee that the person erecting it should have the right to remove it, depends upon whether the vendor of the land had knowledge of such agreement and gave to it his express or implied assent. Such vendor manifestly stands in the same relation to the property as a prior mortgagee; and therefore with an equity inferior to that of a subsequent mortgagee who relied upon the fixture as forming part of the realty. In the former case, a condition to the right of removal is that no injury will result to the land therefrom; but, in the case of a subsequent mortgagee, any removal of that which formed an apparent part of the realty is a manifest impairment of the security upon which he relied. The same principles are recognized in Kansas City Southern Railway Co. v. Anderson, 88 Ark. 129, 113 S. W. 1030, 16 Ann. Cas. 784, and in Peck-Hammond Co. v. Walnut Ridge School District, 93 Ark. 77, 123 S. W. 771. In the latter case the appellant sold to the contractor heating apparatus, under contract reserving title until the purchase price was paid. The apparatus was installed in the schoolhouse; recovery against the school district was denied. The court held that since the school board had no knowledge of such condition, and the apparatus was installed in the building, and thus became a part of the structure, the reservation of title could not be enforced. The contract was not made with the owner of the land. But, as we have seen, a mortgagee, either prior or subsequent, is the owner of the land in this sense. Under the decisions of Arkansas the title to this heating apparatus never passed to the contractor. None could be transferred by him until condition performed.

The rule of caveat emptor applied. Nevertheless, when the chattel was annexed to the realty, this rule, peculiar to personal property, gave way to that governing its newly acquired character.

There is nothing in Ozark v. Adams, 73 Ark. 227, 83 S. W. 920, which conflicts with the views uniformly expressed in that state. It is there said:

"This intention of permanency in the installation of the machinery is what fixes its character as irremovable fixture."

In that case the relation of lessor and lessee, rather than of vendor and vendee or mortgagor and mortgagee, was presented. Nevertheless, because of the nature of the annexation, and the continuing obligation imposed upon the tenant, the right to remove the machinery was denied. We conclude that the rule in Arkansas, in cases like that at bar, is in harmony with that prevailing generally elsewhere.

It will be observed that the conclusion here reached does not contravene the policy adopted in Arkansas respecting conditional sale contracts affecting property whose status as personalty is unquestioned. It applies to that which has been transmuted into realty, with the knowledge and consent of the vendor, the law which governs its changed condition. As has been said:

"To hold otherwise would contravene the policy of the law requiring conveyances of interests in real estate to be recorded, seriously endanger the rights of purchasers, afford opportunities for fraud, and introduce uncertainty and confusion into land titles." Bronson on Fixtures (1904) § 29b, p. 155.

Appellant might have protected itself by taking security of record, which would have imparted notice to subsequent purchasers and mortgagees. Having elected to rely upon its secret reservation of title, it cannot complain if it finds its claim postponed to that of one superior in equity.

It follows that the decree below must be affirmed, and it is so ordered.

MEESE et al. v. NORTHERN PAC. RY. CO.

(Circuit Court of Appeals, Ninth Circuit. February 16, 1914.)

No. 2287.

1. MASTER AND SERVANT (§ 250¾, New, vol. 16 Key-No. Series)—STATUTES—IMPLIED REPEAL—WORKMEN'S COMPENSATION ACT—"PREMISES."

Washington Workmen's Compensation Act (Laws 1911, c. 74, § 1) declares the public policy of the act to provide for the relief of workmen, and that the state of Washington therefore exercises its police and sovereign power by declaring that all phases of the "premises" are withdrawn from private controversy so as to provide sure and certain relief for workmen injured in extrahazardous employment, etc. *Held*, that the word "premises," as so used, meant the matters stated in the context, to wit, the common-law system governing the remedy of workmen against employers for injuries received in hazardous employment, which withdrawal did not include the general liability for personal tort nor a right of action under a state statute for injuries resulting in the death of an employé caused by the wrongful act or neglect of another who was not the

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

decedent's employer, and hence such act neither expressly nor by implication repealed Rem. & Bal. Code, §§ 183, 194, creating an action for wrongful death in favor of decedent's wife and children.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 6, pp. 5509–5513; vol. 8, p. 7761.]

2. STATUTES (§ 211*)—CONSTRUCTION—TITLE.

A statute cannot be extended by construction beyond the scope of its title.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 288; Dec. Dig. § 211.*]

3. STATUTES (§ 158*)—EXPRESS REPEAL—IMPLICATION.

Where a statute expressly repeals specific other acts, there is a presumption that it is not intended to repeal others not specified.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 228; Dec. Dig. § 158.*]

In Error to the District Court of the United States for the Southern Division of the Western District of Washington; Edward E. Cushman, Judge.

Action by Mary A. Meese and others against the Northern Pacific Railway Company to recover for the alleged wrongful death of Benjamin Meese. From an order sustaining a demurrer to the complaint and dismissing the action (206 Fed. 222), plaintiffs bring error. Reversed, with directions.

The plaintiffs, the wife and children of Benjamin Meese, deceased, citizens of the state of Washington, filed their complaint in the court below against the defendant, Northern Pacific Railway Company, a corporation organized and existing under and by virtue of the laws of the state of Wisconsin, to recover from said defendant the sum of $25,715.53 as damages sustained by them by reason of the death of their said husband and father.

It appeared from the complaint that the defendant maintained a track or switch connecting with its main tracks, by means of which freight cars were furnished to the Seattle Brewing & Malting Company for the loading of the finished product of its plant situate in the city of Seattle, Wash.; that said switch ran alongside of and parallel with a house or building of the brewing company known as the wire house, in which was stored the finished product of the plant to be loaded into cars for shipment to various parts of the country; that the cars left on said track or switch by the defendant were loaded with the barrels containing the finished product of the brewing company by means of skids and other appliances extending from the wire house into the car, said barrels being rolled from said wire house along and over the skids into the car.

It further appeared from said complaint that on the 12th day of April, 1913, the decedent, Benjamin Meese, was in the employ of said brewing company at its said plant in the city of Seattle, Wash.; that his duties, among others, as such employé, consisted in placing government stamps upon the barrels containing the finished product of the brewing company, and also in assisting in loading said barrels from the wire house of the brewing company into the cars supplied by the defendant on its said track or switch, for that purpose; that, at the time the decedent received the injuries from which he afterwards died, he was engaged, pursuant to his duties as an employé of said brewing company, in placing government stamps upon the barrels containing the finished product of said brewing company, as they were being rolled along one of the skids above referred to from the wire house of the brewing company into the car of the defendant standing on said track or switch; that for this purpose he was standing on a platform which ran below said skid and along the side of and parallel with said wire house, and between said wire house

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

and the track or switch of the defendant, such position being the position from which said work and duty was usually carried on and performed by employés of the brewing company when engaged in placing government stamps upon its finished product; that, while the decedent was so employed, the defendant, by and through its agents and employés, carelessly and negligently, and without warning to the deceased, caused a number of cars to come down its siding or switch with tremendous force and momentum, striking the car then being loaded with the finished product of the brewing company, causing the skid then being used for that purpose to fly back against the decedent, whereby a large number of barrels containing said finished product, then being moved and rolled along said skid, fell upon said decedent, causing the injuries from which he afterwards died.

To the complaint the defendant interposed a demurrer on the ground that the same failed to state facts sufficient to constitute a cause of action against it; that there was no authority in law under which the plaintiffs' action could be maintained as against the defendant for the reason that it appeared from the complaint that Benjamin Meese, on account of whose wrongful death the action was brought, sustained the injuries of which complaint was made at the place of work and the plant of his employer, and that plaintiffs' claim came within the terms of chapter 74 of the Session Laws of the state of Washington for 1911, being an act relating to compensation to injured workmen, and for the further reason that the court had no jurisdiction of the subject-matter of the action, the injuries to plaintiffs' decedent having occurred while he was employed at the works and plant of his employer, and all rights of action by reason of the matters set forth in the plaintiffs' complaint having been withdrawn from the jurisdiction of the court by chapter 74 of the Session Laws of Washington for 1911, known as the Workmen's Compensation Act.

The demurrer was sustained by the court below, and, the plaintiffs electing to stand upon their complaint without amendment, it was ordered and decreed that the action be dismissed, from which order and decree the plaintiffs sued out a writ of error from this court.

Govnor Teats, Leo Teats, and Ralph Teats, all of Tacoma, Wash., for plaintiffs in error.

C. H. Winders, of Seattle, Wash., for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge (after stating the facts as above). 1. The question on this appeal arises out of an act of the Legislature of the state of Washington, approved March 14, 1911, known as and designated the "Workmen's Compensation Act" (chapter 74, Session Laws of the state of Washington, p. 345), relating to the compensation of workmen in extrahazardous employments in that state. The constitutionality of the act is not attacked by either party, and the fact that the death of the decedent was due to the wrongful act and negligence of the railway company is not denied by that company. But the position taken by the plaintiffs in error (the plaintiffs in the court below) and controverted by the defendant in error, the Northern Pacific Railway Company, is that the Workmen's Compensation Act of the state of Washington does not and never was intended to deny to or take from the heirs or personal representatives of a deceased person their right of action for damages against the person or corporation, not an employer, whose wrongful act caused the death of such deceased person. This contention of the plaintiffs in error is: That, the death of Benjamin Meese having been caused by the wrongful act and negligence of the Northern Pacific Railway Company, not his employer, his heirs, the

plaintiffs in error herein, are not barred by the provisions of the Workmen's Compensation Act from maintaining their statutory right of action against the railway company by reason of the fact that, at the time the decedent was killed, he was in the employ of the Seattle Brewing Company and acting in the discharge of his duties as an employé of that company.

The intent of the Legislature of the state of Washington with respect to the scope and purview of the Compensation Act must be ascertained by a construction of the act as a whole, keeping well in view the evils which, as declared by the act itself, it was intended to remedy.

The primary title of the act is as follows:

"Relating to compensation of injured workmen."

The secondary title is as follows:

"An act relating to the compensation of injured workmen in our industries, and the compensation to their dependents where such injuries result in death, creating an industrial insurance department, making an appropriation for its administration, providing for the creation and disbursement of funds for the compensation and care of workmen injured in hazardous employment, providing penalties for the nonobservance of regulations for the prevention of such injuries and for violation of its provisions, asserting and exercising the police power in such cases, and, except in certain specified cases, abolishing the doctrine of negligence as a ground for recovery of damages against employers, and depriving the courts of jurisdiction of such controversies, and repealing sections 6594, 6595 and 6596 of Remington and Ballinger's Annotated Codes and Statutes of Washington, relating to employés in factories, mills or workshops where machinery is used, actions for the recovery of damages and prescribing a punishment for the violation thereof."

The act contains its own declaration of legislative policy in the following specific terms:

"Section 1. The common-law system governing the remedy of workmen against employers for injuries received in hazardous work is inconsistent with modern industrial conditions. In practice it proves to be economically unwise and unfair. Its administration has produced the result that little of the cost of the employer has reached the workman and that little only at large expense to the public. The remedy of the workman has been uncertain, slow and inadequate. Injuries in such works, formerly occasional, have become frequent and inevitable. The welfare of the state depends upon its industries, and even more upon the welfare of its wage-worker. The state of Washington, therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for workmen, injured in extrahazardous work, and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as otherwise provided in this act; and to that end all civil actions and civil causes of actions for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished, except as in this act provided."

Section 2 contains an enumeration of the extrahazardous occupations or works to which the act is intended to apply.

Section 3 contains particular definitions of the terms employed in the act.

Sections 4 to 19, inclusive, set forth the schedules of contribution and compensation of the act, and provide for the giving of notice under the act, and the methods of enforcement of the act.

Section 20 provides that any employer, workman, beneficiary, or person feeling aggrieved at any decision of the department created by the act, affecting his interests under the act, may have the same reviewed by a proceeding for that purpose, in the nature of an appeal, initiated in the superior court of the county of his residence.

Sections 21 to 26, inclusive, create an industrial insurance department, and impose the administration of said act upon that department.

By sections 27 and 28 it is provided that, if any employer shall be adjudged to be outside the lawful scope of the act, the act shall not apply to him or his workmen, and that if the provisions of the act relative to compensation for injuries to or death of workmen become invalid because of any adjudication, or be repealed, such repeal or the rendition of the final adjudication of invalidity shall not be computed as a part of the time limited by law for the commencement of any action relating to such injury or death.

Section 29 appropriates the sum of $1,500,000, or so much thereof as shall be necessary, for the purposes of the act.

In section 30 it is provided that sections 8, 9, and 10 of the act approved March 6, 1905, entitled "An act providing for the protection and health of employés in factories, mills or workshops, where machinery is used, and providing for suits to recover damages sustained by the violation thereof, and prescribing a punishment for the violation thereof" (sections 6594, 6595, and 6596 of Remington & Ballinger's Annotated Codes and Statutes of Washington, referred to in the title of the act), "and repealing an act entitled 'An act providing for the protection of employés in factories, mills or workshops, where machinery is used, and providing for the punishment for the violation thereof, approved March 6, 1903,' and repealing all other acts and parts of acts in conflict therewith," shall be repealed, except as to any cause of action which shall have accrued thereunder prior to October 1, 1911.

Section 31 relates to the distribution of the funds in case of a repeal of the act.

Section 32 provides that the act shall not affect any action pending or cause of action existing on the 30th day of September, 1911.

With respect to the title of the act it is to be observed that it relates to the compensation of injured workmen in industries in the state of Washington, and the compensation to their dependents where such injuries result in death; but it does not, with a single exception to be noticed hereafter, purport to relate to the statutory right of action for damages given to heirs and personal representatives of a deceased person, when the death of such person is caused by the wrongful act or neglect of another, not an employer. Again the title recites that the act contains provisions abolishing the doctrine of negligence as a ground of recovery of damages against employers, but it does not recite that the act contains provisions abolishing the statutory right of action in favor of the heirs and personal representatives of a deceased person, where the death of such person is caused by the wrongful act or neglect of another, not an employer; and the act does not in fact abolish such right of action in express terms. The title recites that the act abolishes certain sections of Remington & Ballinger's

Annotated Codes and Statutes of Washington; but it does not recite that the act repeals sections 183 and 194 of that compilation of Codes and Statutes under which this action was brought, and the act does not in fact in express terms repeal either of those sections of the law. These two sections, so far as they relate to this case, provide as follows:

"Sec. 183. * * * When the death of a person is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death."

"Sec. 194. No action for a personal injury to any person occasioning his death shall abate, nor shall such right of action determine, by reason of such death, if he have a wife or child living; * * * but such action may be prosecuted, or commenced and prosecuted, in favor of such wife or in favor of the wife or children. * * *"

With respect to the declaration of policy contained in the first section of the act, it is to be noticed that it is specifically directed against "the common-law system governing the remedy of workmen against employers for injuries in hazardous work." The present action is not one arising under the common-law system, and it is not against the employer of the decedent. The plaintiffs in error, as the wife and children of the decedent, had no right of action against the defendant at common law, whether the defendant was an employer or a third person not an employer. Their right of action is purely statutory, and is based upon sections 183 and 194 of the above-mentioned Codes and Statutes of Washington.

The question to be determined is this: Did the Compensation Act repeal these sections of the prior statute law? It did not by any express provisions of the act. Did it do it by implication?

[1] The contention of the defendant in error is that these sections have been repealed, so far as plaintiffs' right of action against the defendant in error is concerned, and that the plaintiffs must recover, if at all, under the Compensation Act. This contention is based: First, upon the declaration contained in the first section of the Compensation Act concerning the exercise of the police power of the state. The declaration is:

"That all phases of the premises are withdrawn from private controversy, and sure and certain relief for workmen injured in extrahazardous work, and their families and dependents, is hereby provided, regardless of questions of fault, and to the exclusion of every other remedy, proceeding or compensation, except as otherwise provided in this act; and to that end all civil actions and civil causes of action for such personal injuries, and all jurisdiction of the courts of the state over such causes are hereby abolished, except as in this act provided."

The scope of this provision of the act is clearly limited primarily by the word "premises." All phases of the "premises" are withdrawn from private controversy. What are the "premises"? The "premises" are the matters stated in the context, namely, "the common-law system governing the remedy of workmen against employers for injuries received in hazardous work." This withdrawal does not include the general liability for a personal tort, nor does it include specifically a right of action under the state statute for injuries resulting in death caused by the wrongful act or neglect of another not an employer.

The maxim "Noscitur a sociis," applies here and determines the proper interpretation of the language. Kelley v. City of Madison, 43 Wis. 638, 28 Am. Rep. 576; McGaffin v. City of Cohoes, 74 N. Y. 387, 30 Am. Rep. 307.

The defendant claims further that its contention is supported by the proviso found in section 3 of the act, relating to the definition of words used in the act, "that if the injury to a workman occurring away from the plant of his employer is due to the negligence or wrong of another not in the same employ, the injured workman, or if death result from the injury, his widow, children or dependents, as the case may be, shall elect whether to take under this act or seek a remedy against such other, such election to be in advance of any suit under this section"; but this proviso is limited in express terms to "an injury to a workman occurring away from the plant of his employer." If the injury to a workman occurs at the plant of his employer, the proviso does not apply. In the present case the injury did not occur to the workman away from the plant of his employer. It occurred while he was in the employ of his employer and at the plant of his employer. The fact that the injury was due to the negligence and wrong of another not in the same employ is not sufficient under this section to bring the case within the provisions of the Compensation Act; but it is not necessary for us to decide that question. The question here is: Have the plaintiffs in error a remedy under the prior statute? They have if that statute has not been repealed by the Compensation Act. It is not claimed that it has been repealed by that act in express terms. Can it be said that it has been repealed by implication? It is plain that it has not, when we consider that by the Compensation Act it is provided that if a workman is injured away from the plant of his employer by the negligence or wrong of another not in the same employ, and the injury results in the death of the workman, his widow, children, or dependents may elect whether to take under the Compensation Act or seek a remedy against such other. What that remedy against the other is is clearly indicated by the remainder of the section pointing to a right of action under the prior statute. The remainder of the section is as follows:

"* * * If he take under this act, the cause of action against such other shall be assigned to the state for the benefit of the accident fund; if the other choice be made, the accident fund shall contribute only the deficiency, if any, between the amount of recovery against such third person actually collected, and the compensation provided or estimated by this act for such case. Any such cause of action assigned to the state may be prosecuted or compromised by the department, in its discretion. Any compromise by the workman of any such suit, which would leave a deficiency to be made good out of the accident fund, may be made only with the written approval of the department."

A cause of action "against such other" which "shall be assigned to the state for the benefit of the accident fund" must be based upon the prior statute. If based upon the prior statute, that statute was not repealed, but continued in force.

It is further contended by the defendant in error that the first clause of section 5 of the Compensation Act provides a sure and certain remedy to workmen in case of injury, or their dependents in case of death,

regardless of the right of action against any person whomsoever, and takes away such right of action. The clause is as follows:

"Each workman who shall be injured whether upon the premises or at the plant or, he being in the course of his employment, away from the plant of his employer, or his family or dependents in case of death of the workman, shall receive out of the accident fund compensation in accordance with the following schedule, and except as in this act otherwise provided, such payment shall be in lieu of any and all rights of action whatsoever against any person whomsoever."

The last words of this clause, taken alone, might be held to be sufficiently broad to justify the plaintiffs in error in claiming out of the accident fund the compensation provided in the act, and, if such claim were made and allowed, it would undoubtedly "be in lieu of any and all rights of action whatsoever, against any person whomsoever." But further than this we do not think the clause can be extended. The clause does not abolish or take away the right of action. It merely provides that an award under the act "shall be in lieu of any and all rights of action whatsoever against any person whomsoever."

The conclusion we have reached is that the repeal of sections 183 and 194 of Remington & Ballinger's Compilation of the Codes and Statutes of Washington is not within the title of the Compensation Act, that the repeal of these sections is not within the declared policy of the Compensation Act as applied to the facts charged in the complaint in this case, that these sections have not been repealed by the Compensation Act either expressly or by implication; but, on the contrary, the implication to be drawn from the provisions of the statute is that these sections have not been repealed. These conclusions are abundantly supported by the general rules governing the construction of statutes.

[2] 2. It is a fundamental rule in the construction of a statute that its purview can be no broader than its title, or as stated by Sutherland, in his work on Statutory Construction, the title of the act must agree with the act itself, by expressing its subject; the title will fix bounds to the purview, for the act cannot exceed the title subject nor be contrary to it.

"An act will not be so construed as to extend its operation beyond the purpose expressed in the title. It is not enough that the act embraces but a single subject or object, and that all its parts are germane; the title must express that subject, and comprehensively enough to include all the provisions in the body of the act. The unity and compass of the subject must therefore always be considered with reference to both title and purview. The unity must be sought, too, in the ultimate end which the act proposes to accomplish, rather than in the details leading to that end. * * * The title cannot be enlarged by construction when too narrow to cover all the provisions in the enacting part, nor can the purview be contracted by construction to fit the title." Lewis' Sutherland, Statutory Construction, § 120.

"The title of an act defines its scope; it can contain no valid provision beyond the range of the subject there stated." Id. § 145.

In the case of Diana Shooting Club v. Lamoreux, 114 Wis. 44, 89 N. W. 880, 91 Am. St. Rep. 898, the Supreme Court of Wisconsin, applying the above rule to the case then under consideration, said:

"When one, reading a bill with the full scope of the title thereto in mind, comes upon provisions which he could not reasonably have anticipated because of their being in no way suggested by the title in any reasonable view of it,

they are not constitutionally covered thereby. But, in applying that rule, this other rule, which has been universally adopted, must be kept in mind: The statement of a subject includes, by reasonable inference, all those things which will or may facilitate the accomplishment thereof."

We are not asked in the present case to give effect to some clause of the act not embraced in the title (for, as we have observed, the act contains no provisions respecting injuries received by an employé in the course of his employment and at the plant of his employer, occasioned by the wrongful act and negligence of another not in the same employ and not connected in any way with the employé or with the employer); but we are asked to read into the statute under consideration, by construction, a meaning and an extent not covered by or included within the title.

We are of opinion that there is nothing in the title of the act which by direct words, or by any fair and reasonable intendment or inference, can be construed to include within the scope of the act, and therefore to deny to the plaintiffs in error in this case, a right of action of the nature of that asserted by them, or which can be construed as depriving the courts of jurisdiction of a controversy in the nature of the one now before this court.

3. It will be noted further that there are expressly designated, in the title of the act under consideration, certain sections of Remington & Ballinger's Annotated Codes and Statutes of the state of Washington, to wit, sections 6594, 6595, and 6596 thereof, which are by said act expressly repealed. But the very obvious purpose of the act (if the interpretation insisted upon by the defendant in error be the correct one) would be to repeal, in addition to the sections expressly enumerated, sections 183 and 194, providing for a right of action and the survival of a right of action in favor of the personal representatives of a decedent.

[3] But the express repeal of certain acts implies an intent not to repeal other sections. As said by the Supreme Court of New York in the case of Bowen v. Lease, 5 Hill, 226:

"The invariable rule of construction in respect to the repealing of statutes by implication is that the earliest act remains in force, unless the two are manifestly inconsistent with and repugnant to each other, or unless, in the latest act, some express notice is taken of the former, plainly indicating an intention to abrogate it. As laws are presumed to be passed with deliberation and with full knowledge of all existing ones on the same subject, it is but reasonable to conclude that the Legislature, in passing a statute, did not intend to interfere with or abrogate any former law relating to the same matter, unless the repugnancy between the two is irreconcilable."

Furthermore, if it was the intent of the Legislature to repeal the former act, that intent should have been clearly expressed.

"There can be no intent of a statute not expressed in its words. While the object of all construction, and the purpose of all rules of interpretation, is to ascertain the legislative intent, and while, in construing a particular part of a statute, the whole act may be regarded, and all other acts bearing upon the subject, and all extraneous circumstances which the Legislature may be supposed to have had in mind, may be properly taken into consideration, yet the intent which is finally arrived at must be an intent consistent with, and fairly expressed by, the words of the statute themselves. * * * The intent to be ascertained and enforced is the intent expressed in the words of the stat-

ute, read in the light of the Constitution and the fundamental maxims of the common law, and not an intent based upon conjecture or derived from external considerations." Sutherland, Statutory Construction, § 388.

In section 499 of the work of the same learned author, it is said:

"It is presumed that the Legislature does not intend to make any change in the existing law beyond what is expressly declared."

4. The opinion of the Supreme Court of the state of Washington, dated November 28, 1913, in the case of Peet v. Mills, 136 Pac. 685, has been called to our attention by the defendant in error, in support of the position taken by it in the case at bar. We are unable to agree with counsel that the Supreme Court of the state of Washington in that case reached a conclusion different from that reached by us in the present case. In the Washington case the plaintiff, Peet, while in the employ of the Seattle, Renton & Southern Railway Company, as a motorman, was injured in a collision between two of the railway company's trains. The defendant, Mills, was then the president of the railway company, and the plaintiff in his suit sought to hold him personally responsible for the injuries because of the allegations that, when Mills assumed control and management of the railway company, it was equipped with a block signal system for use in foggy weather, which the defendant failed to operate; and that, when complaint was made by the train operators of the great danger of operating the trains without the aid of the block signals, a promise was made by the defendant, Mills, to have the block signals working during foggy weather, which promise the defendant failed to keep, and, as a consequence of his negligence in so failing, the plaintiff was injured. The trial court sustained a demurrer to the complaint, and, the plaintiff electing to stand upon his complaint, the action was dismissed and an appeal taken to the Supreme Court. The decision of the lower court was affirmed. In whatever light the Supreme Court of the state of Washington may have viewed the case, no portion of the language used by it in that case can be claimed to cover the facts of the case which we now have under consideration. In the Washington case the injury was alleged to have been caused by the negligence of the defendant, who was the president of the railway; that is, in the same employ with the plaintiff. In the case now at bar the death of the decedent is alleged to have been caused by the negligence of the Northern Pacific Railway Company, a party not in the same employ with the decedent, and in no manner connected with said employment. The Washington case, viewed from this standpoint, comes within the express words of the statute; the present case does not. Here we have an entirely different state of facts, calling for the application of entirely different principles of law; and, as we view it, the conclusions we have reached are in no sense conflicting or inconsistent with the opinion in the Washington case.

The decision of the lower court is reversed, with directions to overrule the demurrer.

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

(Circuit Court of Appeals, Fifth Circuit. December 8, 1913. Rehearing Denied March 31, 1914.)

No. 2,555.

1. MASTER AND SERVANT (§ 296*) — ACTION FOR INJURY TO SERVANT — NEGLIGENCE OF PLAINTIFF.

Plaintiff, who was a fireman on defendant's railroad, was injured by the explosion of the water gauge on his engine which he was attempting to fix to prevent leakage. He alleged and testified that the screen around the glass was improperly fastened with a nail and fell off when he removed the nail just prior to the explosion. The testimony showed without contradiction that, had the screen been in place, plaintiff would not have been injured; that the glasses break from unaccountable causes; that when a glass becomes leaky the proper way to repair it is to first turn off the steam and water cocks, and drain the glass before removing the screen; and that plaintiff knew such facts. *Held*, that the refusal of a properly requested instruction, submitting the issue of plaintiff's negligence and instructing the jury that if they found such negligence he could not recover, was error.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1180–1194; Dec. Dig. § 296.*]

(*Per Shelby, Circuit Judge, Dissenting.*)

2. JURISDICTION OF FEDERAL COURTS—ALLEGATION OF CITIZENSHIP.

A petition, which alleges merely the state of plaintiff's residence, is insufficient to show jurisdiction in a federal court on the ground of diversity of citizenship.

3. ACTION FOR INJURY TO SERVANT—EMPLOYERS' LIABILITY ACT.

In an action against a railroad company for injury to an employé while employed in interstate commerce, based on Employers' Liability Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp. 1911, p. 1322), section 3 of which expressly provides that contributory negligence shall not bar a recovery and that plaintiff shall not be held guilty of contributory negligence in case the violation by defendant of any statute enacted for the safety of employés contributed to the injury where the alleged negligence of defendant was in the use of a locomotive having on the boiler a defective and dangerous water glass, in violation of Act Feb. 17, 1911, c. 103, § 2, 36 Stat. 913 (U. S. Comp. St. Supp. 1911, p. 1333), the court could not properly instruct the jury to return a verdict for defendant in case they found that plaintiff was chargeable with contributory negligence.

4. ACTION FOR INJURY TO SERVANT—QUESTIONS FOR JURY.

In such case, the fact of the defective condition of the glass being clearly established, whether the negligence of defendant in permitting its use was the proximate cause of the injury was a question of fact for the jury.

5. SUFFICIENCY OF EXCEPTIONS TO REFUSAL OF INSTRUCTIONS.

A judgment cannot be reversed on a general exception to the refusal to give two requested instructions if either was properly refused.

In Error to the District Court of the United States for the Western District of Texas; Thomas S. Maxey, Judge.

Action at law by Harry K. Hines against the Atchinson, Topeka & Santa Fé Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

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

J. W. Terry and A. H. Culwell, both of Galveston, Tex., for plaintiff in error.

George E. Wallace, of El Paso, Tex., for defendant in error.

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

CALL, District Judge. This suit was filed in the District Court of the United States for the Western District of Texas, at El Paso, Tex., by Harry K. Hines, the defendant in error, against the Atchison, Topeka & Santa Fé Railway Company, the plaintiff in error, claiming damages growing out of personal injuries sustained by said Hines, who was employed as fireman by the said corporation.

It is alleged in his petition that the said corporation, the railroad company, had a line extending through the states of California, Arizona, and New Mexico, and into the state of Texas, and was engaged in such business as an interstate carrier of goods and passengers; that on or about November 7, 1911, he, as a locomotive fireman in the service of the said corporation running between Barstow, Cal., to Parker, Ariz., was called to take a train as fireman from Parker to Barstow, and that while preparing the engine for the trip the water glass suddenly broke, causing a piece of glass to strike him in the eye; that the engine prior to said time was being used by the defendant in interstate traffic, and that it was the duty of the railroad company to furnish him with an engine and water glass attached thereto that was in a reasonably safe condition; that it failed to do so; that the water glass on his engine, by reason of long use or manner of inspection and repair, had become out of order and dangerous; that it was improperly and unskillfully fastened and maintained by reason of old, defective, and worn joints, or, by reason of the unskillful manner in which it and its appliances were placed on the engine, it was caused to leak and air was permitted to enter the boiler through the same, and that by reason thereof it was caused to explode; that if said water glass had been in a reasonably safe condition and skillfully placed and maintained on the boiler, and the joints properly fastened, it would have been airtight, and would not have leaked either water or steam, and would have been reasonably safe; that the defendant and its authorized agents, prior to the happening of this accident, knew that this water glass was old and defective and was leaking both water and steam, or by the exercise of ordinary care could have known these facts; that, while he was preparing the engine for the trip, he discovered that the water glass was leaking water or steam, or both, and that it became his duty to repair the same, and while making the inspection discovered that a nail had been inserted in the screen, or through the screen, which he endeavored to pull out, whereupon the screen surrounding the water glass fell off, at which time the water glass exploded; that this screen is used to surround the water glass for the purpose of protecting employés on the engine, in the event it should explode; and that when properly fastened and maintained this screen is a protection from flying glass, and in not securely fastening the same with screws and lugs, instead of with a nail, that the corporation was guilty of negligence;

that at the time of the accident he was assisting in transporting interstate shipments of goods and passengers between California and Arizona, and by reason of the exploding of the glass was injured.

The defendant answered by a general denial, and pleaded specially that, if the plaintiff was injured at the time and place alleged, the same was brought about by his own contributory negligence, and that he was furnished with a water glass properly protected by a wire screen or shield; that it was not his business to fix or deal with the water glass without first reporting the matter to the engineer in charge; and that he was further guilty of contributory negligence in that the proper way to fix the water glass, if it was leaking, was to first cut off the steam and water in the pipes or valves leading to the water glass and drain the same so that there would be no pressure and no chance for it to explode; that he failed to take this precaution and negligently removed the screen or shield before turning off the water and steam; and further that by reason of these facts plaintiff assumed the risk of the dangers encountered from which the injuries were received.

The case on these issues proceeded to trial, and a verdict and judgment was rendered in favor of Hines against the corporation for the sum of $10,000.

The defendant corporation, after the testimony was in and argument made to the jury, at the proper time asked three special instructions. The first two special instructions were refused by the court, and the third given; the court giving also a general charge.

The testimony in this case shows without contradiction that had the screen remained upon the glass the explosion would not have damaged Hines, the plaintiff. He says himself that, had the glass exploded when the screen was around it, there would have been no chance for him to have been hurt. The uncontradicted evidence shows further that these glasses break from no accountable reason, and the plaintiff, Hines, was aware of this fact; that where a glass becomes leaky, either of water or steam, the proper way to repair the leak was to have first turned off the steam at the top and the water at the bottom and drained the glass, and then removed the screen and repaired the glass; and that the plaintiff, Hines, was aware of this; and that had he proceeded in this manner no injury would have occurred to him.

[1] Charge No. 2, which was refused in this case, reads as follows:

"You are instructed that if you believe from the evidence that the water shield incasing the water gauge was fastened with a nail, and you believe that that nail safely fastened it so long as it was left alone, then, if you believe from the evidence that the plaintiff was negligent in pulling out the nail without first turning off the steam valve and the water valve and opening the drain cock, you are instructed to find for the defendant."

It seems to us that this charge ought to have been given by the trial court. The issue was made that the nail did not properly fasten the shield. That was one of the issues made in the case by the pleadings, and it should have been submitted to the jury in such a way that the jury might determine that issue in arriving at what was the proximate cause of the injury.

It is true that the court gave special instruction No. 3, asked by the defendant, but that instruction went only to the extent of submitting

to them the question as to whether the nail safely fastened the shield. This instruction No. 2 goes further and submits to the jury that issue as well as the other issues contained therein, which directly challenged the question of whether the plaintiff was guilty of negligence in so pulling out the nail and dropping the screen and leaving the glass unprotected at the time he was hurt, and before taking the proper precautions to make the water glass harmless. For if this screen was securely fastened and held by the nail and no damage could have happened to Hines had he not first removed the screen by taking out the nail, before making the glass harmless, by turning off the steam and water and draining the glass, then his act in removing the nail before taking precautions, usual and necessary in such cases, which precautions were well known to him, was the direct and proximate cause of the injury sustained. And in this connection it must be borne in mind that the court charged the jury that if this nail securely fastened the screen the company had not violated the law by not having a screw or lug. The mere fact of a leaky water glass, under all the testimony, if properly screened, cannot, we think, be construed into a defective boiler or appliances. Such a state of affairs is to be looked for at any time, happening for no apparent reason, and one remedied in perfect safety by the fireman of the different engines daily.

It is impossible for this court to say whether, if that charge had been given, the jury would have found for the plaintiff. It is an issue at least that ought to have been submitted. The particular issues attempted to be submitted to the jury in this charge are not covered by the general charge of the court, nor by the special charge given at the instance and request of the defendant; and it was error in the trial court not to have given the charge asked.

For this reason the judgment of the lower court is reversed, and the cause remanded, with instructions to grant a new trial and proceed with said cause in pursuance to the views herein expressed.

SHELBY, Circuit Judge (dissenting). This action was brought in the court below by the defendant in error against the plaintiff in error. The former will be referred to as the "defendant," and the latter as the "plaintiff." The suit is under the Federal Employers' Liability Act (chapter 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1911, p. 1322]), for personal injuries alleged to have been received by the plaintiff by the negligence of the defendant. The injury caused the plaintiff's entire loss of sight in one of his eyes, and the sight of the other was greatly impaired. The averments of his petition are substantially stated in the majority opinion. The defense pleaded was a general denial, and that the plaintiff was guilty of contributory negligence. The facts alleged as such contributory negligence are substantially as stated in the majority opinion, being, in effect: (1) That he should have reported the condition of the water glass first before trying to fix it; and (2) in not pursuing the proper course in fixing the water glass. The issues were found in the plaintiff's favor by the jury, and, of course, the case stands here on the questions of law presented on the record.

[2] 1. The defendant, in this court, claims that the court below was

without jurisdiction, and the plaintiff seeks to maintain the jurisdiction on the ground of diversity of citizenship, and, also, on the ground that a federal question is involved, the suit being under a federal statute. There is an averment that the "plaintiff resides in El Paso county, Tex.," but that averment is wholly insufficient as an allegation of citizenship. To show the jurisdiction, as based on diversity of citizenship, the citizenship of the plaintiff should be alleged (not merely his residence) and that the defendant corporation was incorporated under the laws of a state (naming the state) other than that of which the plaintiff is a citizen. 4 Ency. U. S. Sup. Ct. Reps. 939; Knight v. Lutcher & Moore Lumber Co., 136 Fed. 404, 69 C. C. A. 248. For the petition to show jurisdiction under the Federal Employers' Liability Act, it should aver that the injuries to the employé were sustained while the company was engaged, and the employé was employed, in interstate commerce. St. L. & San Francisco Ry. v. Seale, 229 U. S. 156, 33 Sup. Ct. 651, 57 L. Ed. 1129.

It may be that other parts of the record than the petition show jurisdictional facts—a matter of no moment at present, as the majority have reversed the judgment, and the petition may be so amended below as to remove all doubt as to jurisdictional averments.

2. The evidence tended to show that the water glass, an appurtenance or appliance of the engine and boiler, was out of order and leaking, and that the screen that is placed around the water glass for the protection of the fireman, which is also an appurtenance, was not secured in the proper manner; that it should have been secured by set screws or lugs; that one of the lugs or screws had come out, and in its place a nail had been inserted; that the nail was not a secure fastening, but was loose, so that it could be pulled or pushed out by hand; and that the plaintiff was ignorant of the fact that the lug or screw had come out and the nail had been substituted; that there had not been such inspection by the defendant's agents as to discover and repair the defect. The plaintiff's own testimony showed what occurred at the instant of the explosion:

"When I saw the condition this glass was in, I thought I ought to fix it before we left, so I reached for the steam valve with one hand and started to turn it off. I was in the position I have indicated when I noticed a nail sticking through the screen around the water glass. I wondered what the nail was there for. It was a little in front of the glass. The screens are not attached to the water gauge permanently, but are attached so as to move back and forth. As I turned the valve with one hand and pulled the nail out with the other, the screen flew apart and the glass burst, causing the accident. The screen around the glass is intended for the purpose of protecting the engineer and fireman. The screen shown me is as near a reproduction of the screen on the engine at the time of the accident as I could get. I have placed the gauge at about the height and position it was on the engine and have indicated the manner in which the nail was sticking in the screen. The screen is fastened with lugs. It is placed around the glass and clamped together, and in order to take it off or put it on, one has to use both hands. The screen protects the fireman and engineer from flying glass when the water glass breaks. I could not see just exactly where the nail was, as it ran behind the glass. I did not know that the nail was used for holding the screen together at the time I took it out, as all I could see was the nail sticking through the screen in front of the glass. I could not say whether or not there was any danger in the nail being in the position I found it, though it possibly might have broken the glass; but it had no business where it was."

[3] The opinion of the majority holds that the trial court erred in refusing to give charge No. 2, which is as follows:

"You are instructed that if you believe from the evidence that the water shield incasing the water gauge was fastened with a nail, and you believe that the nail safely fastened it, so long as it was left alone, then, if you believe from the evidence that the plaintiff was negligent in pulling out the nail without first turning off the steam valve and the water valve and opening the drain cock, you are instructed to find for the defendant."

The charge, in substance, is that, if the plaintiff was guilty of contributory negligence by the act described in the charge, "you are instructed to find for the defendant." The effect of the charge was to instruct a verdict for the defendant if the plaintiff was guilty of contributory negligence. That the charge is so understood by this court is shown by its opinion that the charge "directly challenged the question of whether the plaintiff was guilty of negligence," etc.

In Winfree v. Nor. Pac. Ry. Co., 227 U. S. 296, 302, 33 Sup. Ct. 273, 274 (57 L. Ed. 518), the court said, in construing the act under which this suit is brought: "It introduced a new policy and quite radically changed the existing law." The most radical departure made by the statute from former rules is in the total abolition of the doctrines of contributory negligence and assumption of risk, as formerly enforced by the courts, in all cases embraced by the statute, where the violation of any federal statute enacted for the safety of employés contributed to the casualty upon which the suit is based. Sections 3 and 4 of the act are as follows:

"Sec. 3. That in all actions hereafter brought against any such common carrier, by railroad under or by virtue of any of the provisions of this act to recover damages for personal injuries to an employé, or where such injuries have resulted in his death, the fact that the employé may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employé: Provided, that no such employé who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employés contributed to the injury or death of such employé.

"Sec. 4. That in any action brought against any common carrier under or by virtue of any of the provisions of this act to recover damages for injuries to, or the death of, any of its employés, such employé shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employés contributed to the injury or death of such employé." 35 Stat. 65, 66.

These sections prevent the defense of contributory negligence from completely barring any action properly brought under the act. That defense can go no further than to diminish the damages in proportion to the amount of negligence attributable to the employé. But the effect of the proviso to section 3 is that, in cases where the violation by the carrier of any statute enacted for the safety of the employés contributed to the injury, the employé shall not be held to be guilty of contributory negligence so as to diminish the damages. That distinction, however, need not be emphasized, for the charge the trial judge refused was not that the employé's contributory negligence diminished the damages, but that it completely barred the action. The

instant suit, both by the petition and the proof, is shown to charge the violation of a statute enacted for the safety of employés. The statute violated is one "to promote the safety of employés," etc., and the second section provides:

"Sec. 2. That from and after the first day of July, nineteen hundred and eleven, it shall be unlawful for any common carrier, its officers or agents, subject to this act to use any locomotive engine propelled by steam power in moving interstate or foreign traffic unless the boiler of said locomotive and appurtenances thereof are in proper condition and safe to operate in the service to which the same is put, that the same may be employed in the active service of such carrier in moving traffic without unnecessary peril to life or limb, and all boilers shall be inspected from time to time in accordance with the provisions of this Act, and be able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for." Act Feb. 17, 1911, c. 103, 36 Stat. 913 (U. S. Comp. St. Supp. 1911, p. 1333).

It seems plain that if the trial judge had given the instruction asked —that the negligent act described in the charge, if found to have been committed, entitled the defendant to a verdict—he would have disregarded the statute under which the suit was brought, and which it was his duty to enforce.

[4] 3. There can be no doubt that the defective condition of the appliances—the leaking of the water glass and the substitution of a nail for a set screw or lug in the screen—was the proximate cause of the accident. As to whether the negligence of the defendant in permitting such defects in its engine was the proximate cause of the injury was a question of fact in this case, and it was found in the affirmative by the jury. The original wrong must be considered as reaching to the effect, and proximate to it. The original wrong was the furnishing to the plaintiff a defective and dangerous engine.

"The question is not what cause was nearest in time or place to the catastrophe. * * * The proximate cause is the efficient cause, the one that necessarily sets the other causes in operation." Insurance Co. v. Boon, 95 U. S. 117, 130 (24 L. Ed. 395).

Defective appliances would not often cause injury to the servant unless he tried to use them. If he is guilty of contributory negligence in the use of them, in the absence of statutes abolishing or limiting that defense, it might be a bar to the action; but that defense, as we have seen, is not permissible in this case.

[5] 4. But if the controlling statutes be disregarded, the judgment cannot be reversed on the exception as taken, without disregarding the rules of procedure heretofore considered controlling. The bill of exceptions shows that the court was requested to give "the three following special charges," copying them as numbered separately. The court gave the third charge, but refused to give those numbered 1 and 2. The charge numbered 1, so far as the majority opinion shows, was properly refused, for it is not decided that it should have been given. The exception was taken to the refusal to give the two charges, Nos. 1 and 2.

"And be it further remembered," the bill of exceptions reads, "that the court refused to give special charges Nos. 1 and 2 so requested; and defendant excepted to the ruling of the court in refusing said special charges."

Under the rule, unless both charges were such as should have been given, the judgment should not be reversed for refusing them.

"Where a general exception is taken to the refusal of a series of instructions, it will not be considered if any one of the propositions is unsound." Union Pacific Ry. Co. v. Callaghan, 161 U. S. 91, 95, 16 Sup. Ct. 493, 495 (40 L. Ed. 628); Newport News & Mississippi Valley Co. v. Pace, 158 U. S. 36, 15 Sup. Ct. 743, 39 L. Ed. 887; 2 Ency. U. S. Sup. Ct. Reps. p. 101 and notes.

It is only by disregarding this well-established rule that the judgment could be reversed.

STIX, BAER & FULLER DRY GOODS CO. et al. v. AMERICAN PIANO CO.†

(Circuit Court of Appeals, Eighth Circuit. November 28, 1913.)

No. 3953.

1. TRADE-MARKS AND TRADE-NAMES (§ 73*) — INDIVIDUAL NAMES — RIGHT TO USE.

Where two grandsons of the original piano manufacturer, "William Knabe," transferred their interests in the corporation manufacturing the original piano, and started a new corporation for the manufacture of pianos, they were entitled to use their own name in such business, under the rule that a family surname is incapable of exclusive appropriation in trade.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 84; Dec. Dig. § 73.*]

2. TRADE-MARKS AND TRADE-NAMES (§ 73*)—FAMILY NAME—USE IN TRADE.

Where a family name has become known in trade, the second user must not do anything to cause the public to believe that his article is that of the first manufacturer, or that he is the successor of the first manufacturer, but must exercise care to prevent the public from so believing.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 84; Dec. Dig. § 73.*]

3. TRADE-MARKS AND TRADE-NAMES (§ 73*)—FAMILY NAME—DUTY OF SECOND USER TO WARN.

The duty of the second user of a family name to warn the public that his goods are not those of the first maker must not be pressed so far as to make it impracticable for the second user to employ his name in trade. Otherwise, the right which is granted under the law of trade-mark is denied under the law of unfair competition.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 84; Dec. Dig. § 73.*]

4. TRADE-MARKS AND TRADE-NAMES (§ 73*) — NOT PATENT RIGHT — UNFAIR TRADE COMPETITION.

The second user of a family name in trade may make an article which possesses all the qualities of the first manufacture, and may freely so advertise. It would be a grievous perversion of the law of unfair trade competition to use its doctrines so as to convert a trade-name into a patent right.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 84; Dec. Dig. § 73.*]

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

† Rehearing denied May 4, 1914.

5. TRADE-MARKS AND TRADE-NAMES (§ 97*)—UNFAIR TRADE COMPETITION—INJUNCTION.

Injunctions restraining the use of a family name in trade should be specific, and not so general as to make the practical use of the name in trade impossible.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 110, 111; Dec. Dig. § 97.*]

6. TRADE-MARKS AND TRADE-NAMES (§ 68*)—UNLAWFUL COMPETITION—ELEMENTS.

The essence of the wrong in unfair competition consists in the sale of the goods of one manufacturer for those of another. It relates to the origin of manufacture, and not to the qualities of the goods.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 79; Dec. Dig. § 68.*]

7. TRADE-MARKS AND TRADE-NAMES (§ 97*)—UNLAWFUL COMPETITION—USE OF FAMILY NAME—INJUNCTION.

Grandsons of the original "Knabe," who founded the piano business of that name, having sold their interests in the corporation which succeeded to the original business, organized a new corporation under the name "Knabe Bros. Company," and continued manufacturing pianos. Injunctions were issued compelling them to state that their pianos were not "original Knabes," and forbidding them to make any oral or written statement "calculated to induce the public to believe that the pianos manufactured by them were Knabe pianos." *Held*, that the injunctions are too broad, because they deal, not with the origin of manufacture, but with the qualities of the instruments.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 110, 111; Dec. Dig. § 97.*]

Appeal from the District Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

Suit by the American Piano Company against the Stix, Baer & Fuller Dry Goods Company and others. From an order granting a preliminary injunction, defendants appeal. Modified and affirmed.

William Knabe began the manufacture of the piano which has since become famous as the "Knabe" in the city of Baltimore, in 1837. Soon after he took his two sons, Ernest and William II into partnership under the firm name of "Wm. Knabe & Co." The father died in 1864. The business was continued by members of his family under the same firm name; Ernest Knabe becoming the head of the firm. In 1889 the business was incorporated under the laws of Maryland, as "William Knabe & Company Manufacturing Company." In 1908 the property of this company, including trade-marks, trade-name, and good will, was transferred to the complainant, the American Piano Company, which was organized for the purpose of taking over the business of the Knabe Company, and also that of Chickering & Sons, of Boston, and the Foster, Armstrong Company of Rochester.

Ernest Knabe, Jr., and William Knabe III were the sons of Ernest Knabe above named, and grandsons of William Knabe, the founder of the business. These two men were taken into the factory in the late 80's, when they were 18 years of age, and trained by their father in the business of piano making, and the traditions of the family. Ernest Knabe died in 1894. Soon thereafter Ernest, Jr., and William III bought out the interest of the other members of the family in the corporation and became its sole owners and its executive officers, and so continued until the transfer to complainant in 1908. At that time they also became respectively president and vice president of complainant, and continued in that position until they retired from the company in 1911. They then went to Cincinnati, Ohio, organized a corporation under the laws of that state under the name of the Knabe Bros. Company, and engaged in the manufacture and sale of pianos.

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

Soon after the Knabe Bros. Company began business, the appellee filed its bill in the District Court for the Southern District of Ohio, against it and its officers, and prayed for a preliminary injunction restraining them from using the name "Knabe" either singly or in combination, upon pianos, in advertisements or otherwise, in the piano business. To this bill the defendant filed a cross-bill asking certain relief against the complainant. Upon the hearing the court issued an injunction restraining the Knabe Bros. Company from placing the words "Knabe Brothers" upon the fall-board or any conspicuous part of any piano manufactured or sold by them, but added the following language: "But this order shall not prevent Ernest J. Knabe, Jr., and William Knabe III from doing business under their own names or under the name of 'Knabe Bros. Company,' or from stating that the piano of their, or defendant's manufacture, is made by, or under the supervision of Ernest J. Knabe, Jr., and William Knabe III."

The court further enjoined the complainant in the case from displaying any sign or placard "containing the statement that the Knabes of the present generation are still making the William Knabe Company piano, or are connected with the American Piano Company, or making any statement from which the inference of such connection may be fairly drawn. Although it may be permitted to state, if it so desire, that a grandson of William Knabe is still connected with the making of the 'Knabe' piano." It further enjoined the complainant from "publishing that Ernest J. Knabe, Jr., or Wm. Knabe III have any connection with the American Piano Company."

Controversies arose as to the rights of the defendants under this injunction, and upon a subsequent application the court, for the guidance of the parties, made an order requiring defendant to place on the fall-boards of its pianos the following language:

"The Knabe Bros. Company.

"This piano is not an Original 'Knabe' but is made under the supervision of E. J. and Wm. Knabe III, grandsons of the original Wm. Knabe I."

No appeal has been taken from this order.

The appellant here, the defendant below, Stix, Baer & Fuller Dry Goods Company, conducts a large department store in the City of St. Louis. In 1912, it entered into contract with the Knabe Bros. Company, to sell their pianos, and to make them the leader in that line of trade. In promoting this business it advertised extensively in the papers of St. Louis, and some other trade journals. In December, 1912, the American Piano Company filed the present bill against the above-named appellant, and also against the Knabe Bros. Company and Ernest J. Knabe, Jr., and William Knabe III, setting forth the above facts and charging in particular that the advertisements were calculated to palm off defendant's pianos as complainant's, and also to cause the public to believe that defendants were the successors in business of the Baltimore concerns. Process was served upon the Stix, Baer & Fuller Co. alone, but the Knabe Bros. Company afterwards entered its appearance in the case and participated in its defense. The bill was supplemented by affidavits, and upon this showing complainant moved the trial court for a preliminary injunction. At the hearing counter affidavits were presented on behalf of the defendant. The trial court issued an injunction as prayed in the bill. It is general in its terms, enjoining the defendants "from making any oral representation or using or permitting to be used in connection with the sale of pianos, in any catalogue, placard, circular, advertisement, or otherwise, descriptive of pianos manufactured by the Knabe Bros. Company, any statement or representation calculated to induce the public to believe that the pianos manufactured by the said defendant, the Knabe Bros. Company, and sold or offered for sale by said the Knabe Bros. Company, or said defendants, Stix, Baer & Fuller Dry Goods Company, are Knabe Pianos." The court further found that the advertisements published by the Dry Goods Company were calculated to induce the forbidden belief on the part of the public and enjoined the defendants "from again or further making, using or issuing the said advertisements in the same or substantially the same form." The present appeal is brought to review that order.

Gilbert Bettman, of Cincinnati, Ohio, and William S. Bedal, of St. Louis, Mo. (Edward C. Eliot, of St. Louis, Mo., on the brief), for appellants.

Frederick N. Judson and J. Porter Henry, both of St. Louis, Mo. (John F. Green, of St. Louis, Mo., and Masten & Nichols, of New York City, on the brief), for appellee.

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

AMIDON, District Judge (after stating the facts as above). This case is closely parallel with the Hall Safe Cases, reported in 208 U. S. 267, 28 Sup. Ct. 288, 52 L. Ed. 481, and 208 U. S. 554, 28 Sup. Ct. 350, 52 L. Ed. 616. There is this distinction: The present case concerns pianos, an article used in the fine art of music, and hence the personal genius of the maker would be a larger element than manufacturing and business organization in producing trade reputation. In the safe business the latter elements would be controlling. Here, as in the Hall Cases, there is nothing in the connection of the individual defendants with the Wm. Knabe & Co. Manufacturing Company or its sale to complainant, which restricts or estops them from using their names in the piano business.

[1] Ernest J. Knabe, Jr., and William Knabe III have a peculiar right to use the name "Knabe" in their trade. They are not pirates. They have not come into the piano business from some other field for the purpose of stealing a good name. They were bred and trained to the business and have known no other calling throughout their lives. They are the only living descendants of the man who made the Knabe piano famous, who now bear the name Knabe. They were associated with those founders in the production of the piano, and acquired their skill and traditions. They have the right to use their name in trade and state these facts. So said the Supreme Court in the Hall Safe Cases:

"With such explanation the defendants may use the Hall's name, and, if it likes, may say that they are sons of the first Hall, and brought up in their business by him, and otherwise may state the facts."

[2, 3] It is now settled beyond controversy that a family surname is incapable of exclusive appropriation in trade. The right of every man to use his own name in his business was declared in the law before the modern doctrine of unfair trade competition had arisen. It is part of the law of trade-mark. The subject may therefore be properly approached from that side. If, however, the name has previously become well known in trade, the second comer uses it subject to three important restrictions: (1) He may not affirmatively do anything to cause the public to believe that his article is made by the first manufacturer. (2) He must exercise reasonable care to prevent the public from so believing. (3) He must exercise reasonable care to prevent the public from believing that he is the successor in business of the first manufacturer. This duty to warn, however, must not be pressed so far as to make it impracticable for the second comer to use his name in trade. Otherwise we destroy under the law of unfair trade

competition the very right which we have saved under the law of trade-mark.

[4, 6] As to marks upon individual instruments, the inscription prescribed by the court in Ohio granted complainant the full measure of relief to which it is entitled. In fact, the court went further than some courts have been willing to go. L. E. Waterman & Co. v. Modern Pen Co., 197 Fed. 534, 117 C. C. A. 30. This case decides that the word "original," in a similar inscription, tended "to characterize the defendant's product as inferior to that of the complainant, and is unduly prejudicial to it," and modified the decree of the trial court so as to correct this impression. If the word "original" in the sentence, "This piano is not an original Knabe," means that the instrument is not made by the American Piano Company, or any of its predecessors in business, it does not go beyond the protection to which complainant is entitled. But the word is susceptible of another interpretation. It may mean that defendants' piano does not employ the qualities of the piano which had become famous under the name "Knabe." Given that meaning it is highly prejudicial to the defendants' rights, for it must be borne in mind that no part of the Knabe piano is covered by a patent. The defendants have the right to make that instrument, and to endeavor to cause the public to believe that their pianos embody all the excellencies of the pianos made at Baltimore. They may not represent that their piano is made by the complainant, or its predecessor, or that they are the successors in business of complainant or its predecessors. Observing these restrictions, however, they may state that they have embodied in their instrument all the skill and genius of the original makers of Knabe pianos. It would be a grievous perversion of the law of unfair trade competition to use its doctrines so as to convert a trade-name into a patent right and thus give to it "a monopoly more effective than that of the obtainable patent in the ratio of eternity to 17 years." Pope Automatic Merchandising Co. v. McCrum-Howell Co., 191 Fed. 979, 982, 112 C. C. A. 391, 40 L. R. A. (N. S.) 463 (Baker, J.). Much of the argument in appellee's brief, and, indeed, some language of the courts, tend to this conclusion. It is said that there is and can be only one Knabe. Judge Hollister, in his opinion in the case in the Southern District of Ohio, speaking of the words "Knabe Bros., Cincinnati," at first used on the fall-board of defendant's pianos, said: "The name indicates that it is a Knabe piano. It is not a Knabe piano." If such expressions mean that there can be only one Knabe piano made by complainant or its predecessor in business, the statement is an obvious truism; but if they mean that no one else has the right to make and sell a piano which embodies every feature of the piano made by complainant and its predecessor in interest, and also induce the public to believe that the second piano embodies all the excellencies of the first, then the statement goes beyond the law as it is now established by the highest court. Complainant here is presented, to some extent, with the same difficulties as the plaintiff in White v. Trowbridge, 216 Pa. 11, 22, 64 Atl. 862, 866 (cited in the Hall Safe Case, 208 U. S. 559, 28 Sup. Ct. 350, 52 L. Ed. 616), where the court says:

"In fact, the real difficulty in this case is that the plaintiffs have reason to fear, not that the public will be deceived, but that if the fact becomes known

that the defendant is engaged in the same business the public will purposely purchase the goods made by him for the reason that he was and is the originator" of the article.

Against this difficulty however, complainant is entitled to no aid from the courts.

The bill sets up a right to the word "Knabe" as a registered trade-mark. But the word being incapable of use as a trade-mark, the claim seems to have been abandoned at the trial, and in this court. In the affidavits some attempt is made to show improper oral representations. This evidence, however, is so feeble and untrustworthy that it would not entitle the complainant to relief. The case must therefore stand here, as it stood in the trial court, upon the advertisements. The trial court was justified in holding that these violate the rights of complainant, and fall short in performing the duty of the defendant to warn. We are of the opinion, however, that the injunction is subject to two objections: (1) Its language is too general. (2) Its restraint is too broad.

[5] In the generality of the language the order falls under the same condemnation as the Supreme Court imposed upon similar decrees of the trial court in the Hall Cases. Business cannot be conducted under a suspended sword. The manufacturer must depend upon sales agencies in disposing of his product. In a field where competition is so fierce as in the piano business, no agent will undertake the sale of an instrument if he is likely to be haled into court and possibly subjected to punishment for contempt for violating an injunction whose language is so general as as leave the acts which will constitute its violation open to serious doubt. Neither ought a court of equity to clothe an angry litigant with a writ which will enable him to keep his competitor and the subagents of his competitor, in terror of a proceeding for contempt because of the indefiniteness of the injunction. Business cannot be carried on under such conditions. Courts of late have shown a keen appreciation of this hardship, and have formulated their injunctions in such cases in specific terms. L. E. Waterman & Co. v. Modern Pen Co., 197 Fed. 534, 117 C. C. A. 30; G. & C. Merriam & Co. v. Saalfield, 198 Fed. 369, 378, 117 C. C. A. 245; Dr. A. Reed Cushion Shoe Co. v. Frew, 162 Fed. 887, 89 C. C. A. 577; Herring-Hall Safe Co. v. Hall's Safe Co., 208 U. S. 554, 560, 28 Sup. Ct. 350, 52 L. Ed. 616.

In the advertisements we think defendant's zeal as an advertiser got the better of its duty as a warner. The facts which it was bound to point out are pointed out feebly and indirectly, and are involved in other language likely to cause the public to believe that its pianos were made by the complainant or its predecessors, or that defendant was the successor in business of complainant, or its predecessors. When it comes to performing its duty to warn, defendant should lay aside its character as an advertiser and direct its attention and the attention of the public unequivocally to the three facts specified above. It may be that in performing this duty defendant will be compelled to advertise complainant's business. That is because the difference between two things cannot be pointed out without bringing both things clearly before the mind. The difference between complainant's manufacture and

defendant's requires that both manufactures be presented clearly and explicitly. Defendants' duty to the public and to the complainant can be performed in no other way. It should assume this burden and not dodge it or equivocate. Its own trade welfare as well as justice to the complainant, demands the faithful performance of this duty.

Following the direction in the Hall Safe Case, 208 U. S. 560, 28 Sup. Ct. 350, 52 L. Ed. 616, we think the decree should have run substantially as follows:

"The defendants are restrained and enjoined from using the name 'Knabe' (either alone or in combination in corporate name), in circulars, catalogues or advertisements, unless accompanied by information that defendant is not the original William Knabe & Co., or William Knabe & Co. Manufacturing Company, or the successor to either, and that defendants' pianos are not the product of the last named concerns or their successor, the American Piano Company.

"It is further ordered and decreed that for the purpose of distinguishing defendants' manufacture from complainant's, the defendants shall insert in their circulars, catalogues and advertisements, a notice substantially as follows, and in form as conspicuous as the body of such circulars, catalogues or advertisements:

"Notice.

"The Knabe piano was made from 1837 to 1889, at Baltimore, by William Knabe & Co. In 1889 this firm was incorporated as William Knabe & Co. Manufacturing Company, and continued under that name until 1908, when it sold all its property, good will, and trade-name to the American Piano Company, which has since been, and now is, carrying on said business at Baltimore.

"Ernest J. Knabe, Jr., and William Knabe III learned the business from their father, Ernest Knabe, who had charge of it from 1864 to 1894. They were president and vice president of the above companies from 1898 to 1911. In the latter year they withdrew from the American Piano Company and organized the Knabe Bros. Company, and began making pianos in Cincinnati.

"The piano made at Baltimore has been, and now is, known to the trade as the 'Knabe' or 'William Knabe & Co.' piano. The piano of the Knabe Bros. Company is named 'The Knabe Bros.' piano. It is a new manufacture, and has no connection with the pianos made at Baltimore.

"The defendant shall also print the above notice on paper at least 18 inches by 2 feet in size, and frame the same, and place one such notice upon their pianos in all salesrooms in which the same are offered for sale."

Oral representations, while not required to be as explicit as those in writing, should be in harmony with the provisions of the above decree.

The notice, when formulated, should appear in identically the same language in all advertisements, catalogues, and circulars. In that way the public will be both warned and instructed.

In connection with the above notice, defendant should be at liberty to state fully the whole truth in regard to its manufacture and that of complainant. It may explain to the public that Ernest J. Knabe, Jr., and William Knabe III are the only descendants of the original founders of the Knabe piano business, bearing the name Knabe, now engaged in that trade. They may point out fully how the business was built up by their grandfather, father and themselves, and how they received their training and education under their father. They may likewise point out, if that is the fact, that many of the skilled mechanics who were engaged in the business at Baltimore, have joined them at Cin-

cinnati, and otherwise point out any fact which will be favorable to their instrument, and unfavorable to that of complainant. Such advertising does not tend to confuse the public mind as to the difference between defendants' manufacture and complainant's, but simply to give the impression that defendants' instrument is superior to the piano now made by the complainant. The defendants have the undoubted right as a part of the law of trade competition, to create that impression.

We come next to the second objection to the order of the trial court that its restraint is broader than complainant's right. It enjoins defendants from making "any statement or representation calculated to induce the public to believe that the pianos manufactured by the Knabe Bros. Company are Knabe pianos." The words "Knabe pianos" as here used, have the same duplicity as the term "original" above discussed. They may mean pianos manufactured by complainant and its predecessors at Baltimore. With that significance the injunction does not extend beyond complainant's rights. But these words have another meaning. According to that they point to a piano having certain qualities—a peculiar scale, sounding board, lyre and acoustic properties—the elements which gave the Knabe piano its individuality among pianos. To the public the words "Knabe piano" meant chiefly an instrument possessing these qualities. Until defendants began business there had been only one maker of these pianos, and it is probable that the public knew little if anything of complainant or its predecessors. It was the kind of instrument, and not the maker, to which public notice had thus far been directed. Defendants have the same right as complainant to embody in their instrument these distinctive features of the Knabe piano, and to advertise to the public that they have done so. Note the things which Mr. Justice Holmes, speaking for the court in the Hall Safe Cases, said defendants here might say in connection with their piano trade. They may say that they are the sons and grandsons of the founders of the Knabe piano. But this statement, when made in defendants' piano business, is clearly "calculated to induce the public to believe" that defendants' instruments are "Knabe pianos" in the sense that they embody their excellent qualities. Defendants may show that they were trained by their father in the art of making the Knabe, and that they themselves had charge of the business for years. Hardly anything, however, could be better "calculated to induce the public to believe" that the pianos which they are now making, embody the distinctive features of the Knabe. The vice of the injunction is that it is not leveled directly at forbidding the defendants from representing the pianos manufactured by them, to have been manufactured by complainant or its predecessors. It is only necessary to compare the order appealed from with the order of the Supreme Court in the Hall Safe Case, to see how far the former departs from correct principle. The Halls were restrained from using their name in the safe business unless accompanied by information: (1) *That defendant is not the original Hall's Safe & Lock Company, or its successors;* or, (2) *That its safe is not the product of the last-named company or its successor.* It is palming off the article made by defendant as having been made by

complainant which constitutes the wrong of unfair competition. Such has been the uniform holding of the Supreme Court.

"Relief in such cases is granted only where the defendant * * * represents to the public that the goods sold by him are those manufactured or produced by the plaintiff, thus palming off his goods for those of a different manufacture."

This language from the earliest case (Goodyear Co. v. Goodyear Rubber Co., 128 U. S. 598, 604, 9 Sup. Ct. 166, 32 L. Ed. 535) is substantially the same as that found in the latest:

"The essence of the wrong in unfair competition consists in the sale of the goods of one manufacture or vendor for those of another." House Scale Co. v. Wyckoff, Seamans & Benedict, 198 U. S. 118, 140, 25 Sup. Ct. 609, 614 (49 L. Ed. 972).

The wrong consisting of misrepresentation as to the origin of manufacture, the injunction should be leveled directly at that wrong, and not be expressed in equivocal language so as to enable complainant to say that defendants may not make any statement calculated to induce the public to believe that their instruments embody the merits of the Knabe pianos.

[7] In the trade conflict between these parties complainant has powerful advantages. It has succeeded to the manufacturing plant, the skilled workmen, and the long-established business connections which have created the Knabe piano, given it its good name, and placed it in every community where such instruments are used. It also has exclusive right to use the name Knabe in trade, without qualification or explanation. These are advantages which will be potent in convincing the public that the pianos made by complainant are superior to the instruments of any other maker who attempts to build a piano possessing the qualities of a Knabe. On the other hand, notwithstanding the teaching of some scientists that acquired talents do not pass by heredity, most of mankind probably still believe that they do; and defendants have the right to appeal to that belief and urge that they have inherited the genius of their father and grandfather. They may claim that these talents have passed to them not only by blood, but by the years of training which they received under their father's tuition. They may also relate that they had exclusive charge of the business of making the Knabe piano for thirteen years, and maintained its excellence and enhanced its good name. In the trade conflict, based upon these opposing arguments, the courts ought to hold an even hand, and not formulate their writs in such language that either party can make a wrongful use of them as a part of the weapons of trade.

It seems scarcely necessary to say that nothing done in this suit can in any way affect any decree entered in the suit in the Southern district of Ohio.

The trial court is directed to modify its order so as to conform to the views here expressed. Neither party shall recover costs in this court.

COPPER RIVER & N. W. RY. CO. et al. v. REEDER.

(Circuit Court of Appeals, Ninth Circuit. February 2, 1914.)

No. 2299.

1. APPEAL AND ERROR (§ 522*)—RECORD—FORM.

Where the record contained so-called minutes of the trial, including motions for a nonsuit and for a directed verdict, followed by a so-called transcript of the testimony, commencing with the usual form of introduction to a bill of exceptions, and followed by a certificate, settling, allowing, and certifying it as a bill of exceptions, and a certificate to the bill of exceptions, the motions for a nonsuit and for a directed verdict were not a part of the bill of exceptions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2367–2371; Dec. Dig. § 522.*]

2. EXCEPTIONS, BILL OF (§ 56*)—RECORD—AUTHENTICATION.

Where, though motions for a nonsuit and a directed verdict were apparently filed with the proceedings during the course of the trial, the validity of the court's rulings thereon and the allowance of exceptions thereto were not authenticated by the trial judge, they could not be treated as a bill of exceptions, especially where no testimony accompanied them.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. §§ 94–96; Dec. Dig. § 56.*]

3. EXCEPTIONS, BILL OF (§ 20*)—FORM OF BILL.

Under Code Civ. Proc. Alaska, § 220, defining an exception as an objection taken at the trial to a decision upon a matter of law, section 221, providing that the point of the exception shall be particularly stated, and may be delivered in writing to the judge or entered in his minutes, and section 223, providing that the statement of the exception when settled and allowed shall be signed by the judge, filed with the clerk, and taken to be a part of the record, such a statement constitutes a "bill of exceptions."

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. §§ 21–28; Dec. Dig. § 20.*

For other definitions, see Words and Phrases, vol. 1, pp. 783, 784.]

4. EXCEPTIONS, BILL OF (§ 56*)—AUTHENTICATION—NECESSITY OF SEAL.

Under such sections a bill of exceptions is sufficiently authenticated by the trial judge's signature without the seal of the court or judge.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. §§ 94–96; Dec. Dig. § 56.*]

5. EXCEPTIONS, BILL OF (§ 24*)—SCOPE AND CONTENTS.

A bill of exceptions may be perfected, settled, and allowed, involving but a single point, or more than one bill may be allowed in a single case, or all the points relied upon may be incorporated in a single bill.

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

6. APPEAL AND ERROR (§ 181*)—RESERVATION OF GROUNDS OF REVIEW—OBJECTIONS AND EXCEPTIONS.

In order that a party may avail himself of an alleged error committed at the trial of an action at law in an appellate tribunal, the objection must be made, the ruling of the court had, and the exception saved at the time of the trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1141–1151, 1157, 1158, 1160; Dec. Dig. § 181.*]

7. EXCEPTIONS, BILL OF (§ 56*)—RECORD—AUTHENTICATION.

Where the record contained a bill of exceptions followed by a certificate settling, allowing, and certifying it, and a certificate to the bill of excep-

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

tions, following which were requested instructions, exceptions to the instructions, the verdict, motions for a new trial, the order denying such motions, the judgment, the orders allowing a writ of error, including the assignments of error and citation following which the certificates and allowance of the bill of exceptions were again printed, they added nothing to the authentication of the matters following the bill of exceptions.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. §§ 94–96; Dec. Dig. § 56.*]

8. APPEAL AND ERROR (§ 272*)—RESERVATION OF GROUNDS OF REVIEW—OBJECTIONS AND EXCEPTIONS.

Where the record showed the allowance, on May 5th, of exceptions to the instructions in a case, the trial of which ended on April 26th, and did not show that the exceptions were saved prior to May 5th, or that they were saved at the trial, they could not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1611–1619; Dec. Dig. § 272.*]

9. APPEAL AND ERROR (§ 701*)—CONTENTS—INCORPORATION OF EVIDENCE.

A bill of exceptions, complaining of instructions, could not be considered, where it contained no evidence from which it could be determined whether they were proper or improper.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2933–2935; Dec. Dig. § 701.*]

10. APPEAL AND ERROR (§ 671*)—CONTENTS—INCORPORATION OF EVIDENCE.

Where separate bills of exceptions are settled and allowed in the same case, each must be complete in itself, and the evidence contained in one bill cannot be considered in reviewing the matters complained of in another bill.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2867–2872; Dec. Dig. § 671.*]

11. NEW TRIAL (§§ 68, 76*)—DISCRETION OF COURT.

A motion for a new trial for insufficiency of the evidence or excessiveness of the damages is addressed to the sound discretion of the trial court.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 135–140, 153–156; Dec. Dig. §§ 68, 76.*]

12. APPEAL AND ERROR (§ 938*)—ALLOWANCE AND SETTLEMENT.

Where the record did not show why a bill of exceptions was settled, allowed, and certified by a judge other than the trial judge, it would be assumed that a sufficient reason existed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3795–3803; Dec. Dig. § 938.*]

13. APPEAL AND ERROR (§ 694*)—RECITALS THAT ALL EVIDENCE IS INCLUDED.

A denial of motions for a nonsuit and a directed verdict could not be reviewed, where the certificate of the judge settling and certifying the bill of exceptions contained no statement that the bill contained all the testimony given at the trial or bearing upon such motions, though the bill contained a statement by the stenographer that it was a full and correct transcript of the shorthand notes taken at the trial, since the verity of the extended transcript must be authenticated by the trial judge under his own hand, especially as the bill might contain a full and correct transcript of the shorthand notes, and yet not comprise all the testimony in the case.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2910, 2915; Dec. Dig. § 694.*]

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

14. EVIDENCE (§ 353*)—ACTIONS FOR INJURIES.

Where, in an employé's action for injuries defendant denied the allegation of the complaint that it was a common carrier, bills of lading having some tendency, though slight, to establish this fact were properly admitted.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1404–1428, 1430, 1431; Dec. Dig. § 353.*]

In Error to District Court of the United States for the Third Division of the Territory of Alaska; Peter D. Overfield, Judge.

Action by Daniel S. Reeder against the Copper River & Northwestern Railway Company and another. Judgment for plaintiff, and defendants bring error. Affirmed.

W. H. Bogle, Carroll B. Graves, F. T. Merritt, and Laurence Bogle, all of Seattle, Wash., for plaintiffs in error.

J. H. Cobb, of Juneau, Alaska, for defendant in error.

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

WOLVERTON, District Judge. The plaintiffs in error were defendants below. A judgment was rendered against them, and in favor of the defendant in error, from which this writ is prosecuted. The action was for damages on account of personal injuries sustained by plaintiff, occasioned by the breaking down of the roof of the tunnel in which he was at work, thus permitting the timbers and earth and gravel to be precipitated upon him.

The complaint alleges that the defendants were doing business as common carriers; that plaintiff was in their employ at the time, namely, August 7, 1911, and was at work upon the line of railway extending from Cordova up the Copper river into the interior of Alaska. It is then further alleged that the accident by which plaintiff was injured as aforesaid was caused by the negligent failure of the defendants to furnish the plaintiff with a reasonably safe place to work; that said place was unsafe and dangerous by reason of the negligent failure of the defendants to suitably timber said tunnel and protect the workmen employed therein from the danger of cave-ins, and the falling of material constituting the roof of the bore thereof, all of which was known to the defendants, or by the use of reasonable diligence could have been so known, but was unknown to the plaintiff.

Defendants answered separately. The Copper River & Northwestern Railway Company admits that at the time it was doing business as a common carrier, but denies that the plaintiff was in its employ. The Katalla Company denies that it was doing business at the time as a common carrier, but admits that plaintiff was in its employ. Both deny the allegations of negligence. Both interpose two separate defenses: First, that the plaintiff assumed the risk; and, second, that the injury was caused by the negligence of a fellow servant.

The record as it comes here contains what are denominated "Minutes of Trial." Under this head are found minutes of the impaneling of the jury, of the swearing of certain witnesses, naming them, of the introduction of certain exhibits, of the filing of a motion for nonsuit

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

at the close of plaintiff's case on the part of the Katalla Company, and also on the part of the Copper River & Northwestern Railway Company, and at the close of all the testimony a motion on the part of each for a directed verdict, of the denial of each of these motions and allowance of exceptions to the ruling of the court. These motions are then set out in full, and all appear to have been filed April 25, 1913. Under the same title, "Minutes of Trial," it appears that on April 26th arguments of counsel were had, and the jury, having retired for deliberation, in due time returned a verdict, which verdict is set out in the record.

Thereafter the record contains what is styled "Transcript of Testimony," etc. After entitling the cause, the record recites:

"Be it remembered that the above-entitled cause came on duly and regularly to be heard * * * on Thursday, the 24th day of April, 1913, at 10 o'clock a. m., before the Honorable Peter D. Overfield, Judge of said court and a jury"

—in the usual form of introduction to a bill of exceptions. Thereafter the record contains the examination of some of the jurors and the ruling of the court touching their competency to sit, some exceptions being reserved. Then follows what appears to be the testimony of the witnesses. At the close of plaintiff's testimony, and when the plaintiff had rested his case, the record shows that the defendants each filed a separate motion for a nonsuit, which motions were argued, and nonsuit refused by the court, and exceptions were allowed. Thereafter follows the testimony of the defendants. At the close of the case the record shows that the defendants filed separate motions for a directed verdict. These motions, after argument, were denied, and exceptions allowed. Then follow the instructions of the court, and thereafter are appended, as appears from the record, two certificates of Fred M. Brown, Judge, one settling, allowing, and certifying the bill of exceptions, and the other entitled "Certificate to Bill of Exceptions." Thereafter the transcript of record contains plaintiff's requests for instructions in two items of the same designation, instructions requested by Copper River & Northwestern Railway Company, instructions requested by Katalla Company, and defendants' exceptions to the court's instructions to the jury. Under this head there appear 21 exceptions, and at the foot thereof this recital:

"Exceptions allowed this the 5th day of May, A. D. 1913. Peter D. Overfield, Judge."

Following this are the verdict and motions for a new trial on the part of each of the defendants, order denying motions for new trial, and the judgment. Then follow the usual orders attending the allowance of a writ of error, including the assignments of error and citation. To all this are again appended the two orders, one allowing, settling and certifying bill of exceptions, and the other entitled "Certificate to Bill of Exceptions." Thereafter appear transcripts of exhibits, supposedly such as were introduced in evidence.

The defendant in error has filed a motion here to strike from the transcript the motions of the Katalla Company and the Copper River

& Northwestern Railway Company for nonsuit and directed verdict, for the reason that they are not embodied in the bill of exceptions, and, further, for the same reason, to strike from such transcript plaintiff's requests for instructions, instructions requested by both the Copper River & Northwestern Railway Company and the Katalla Company, and their exceptions to the court's instructions, also the motion for a new trial made on behalf of each of said companies. The defendant in error also moves the court to strike from the transcript the document or paper entitled "Transcript of Testimony," etc., for the reason that said transcript, although intended as a bill of exceptions, is not signed by the judge of the court below, or otherwise properly authenticated so as to become a part of the record on writ of error.

[1, 2] The first questions to be disposed of arise upon the motion to strike parts of the transcript of record because not incorporated in the bill of exceptions. The motions for a nonsuit and for a directed verdict are clearly not so incorporated. While they appear to have been filed with the proceedings during the course of the trial, the verity of the court's rulings respecting them, and the allowance of the exceptions, is not authenticated by the judge, and they cannot within themselves be termed a bill of exceptions, or treated as such. Furthermore, standing by themselves, they are wholly futile in bringing error to this court because no testimony accompanies them, and, without the testimony, no error can be made to appear touching the ruling of the court concerning them. The motion to strike as to these motions must be allowed.

Neither is any part of the record following the first two certificates of the judge, settling, allowing, identifying, and certifying the purported bill of exceptions, the first contained in the record, a part of such bill. We say "purported" to distinguish this from the supposed bill of exceptions contained further on in the record, now to be noted.

[3, 4] It seems to be the contention of counsel for plaintiff in error that the requested instructions of the two defendant companies, together with the 21 exceptions noted thereto, and the allowance of such exceptions by the judge, constitute within themselves a bill of exceptions, and should be so treated. This contention is based upon the provisions of the Alaska Code, citing sections 1053 and 1055 of the Compiled Laws of the territory of Alaska. These statutes are sections 221 and 223 of the Civil Code of Procedure adopted by Congress. 1 Federal Statutes Annotated, page 92. Section 221 provides that:

"The point of the exception shall be particularly stated, and may be delivered, in writing, to the judge or entered in his minutes, and at the time or afterwards be corrected until made conformable to the truth."

And section 223 that:

"The statement of the exception, when settled and allowed, shall be signed by the judge and filed with the clerk, and thereafter it shall be deemed and taken to be a part of the record of the cause."

In this relation it should be noted that "an exception" is defined by section 220 as:

"An objection taken at the trial to a decision upon a matter of law, whether such trial be by jury or court, and whether the decision be made during the formation of a jury, or in the admission of evidence, or in the charge to the jury, or at any other time from the calling of the action for trial to the rendering of the verdict or decision."

These sections are taken bodily from the Oregon Code, and contemplate that the exceptions shall be taken at the trial and may be delivered in writing to the judge or entered in his minutes. Such a statement and exception, when settled and allowed by the judge and signed by him and filed with the clerk, shall be deemed and taken to be a part of the record. Such a statement, made in conformity with the Code, would by statutory intendment constitute a bill of exceptions. Under this Code, as under the Revised Statutes of the United States, a bill of exceptions is to be deemed sufficiently authenticated if signed by the judge of the court in which the cause was tried. Section 1932, Rose's Code of Federal Procedure. The seal of the court or judge is therefore no longer necessary for proper authentication, as it seemed to be formerly. Pomeroy's Lessee v. Bank of Indiana, 1 Wall. 592, 17 L. Ed. 638.

[5, 6] A bill of exceptions may be perfected, settled, and allowed involving but a single point in the controversy, or more than one bill of exceptions may be allowed in a single case, or, as is usually the case, all the points relied upon as error may be incorporated in a single bill of exceptions. Pomeroy's Lessee v. Bank of Indiana, supra. Lees v. United States, 150 U. S. 476, 14 Sup. Ct. 163, 37 L. Ed. 1150. In order, however, that a party may avail himself of an alleged error committed at the trial of an action at law in an appellate tribunal, it is essential that the objection be made, the ruling of the court be had, and the exception saved, all at the time of the trial. Such is the holding of the Supreme Court of Oregon.

"If a party desires to raise a question in this court," says the court [State v. Foot You, 24 Or. 61, 67, 32 Pac. 1031, 1033], "as to the competency of evidence offered in the trial court, or of any other supposed irregularity of that court, either of omission or commission, he must, at the time, make his objection, and thereby obtain a ruling of the court, and, if adverse, he must save an exception, and bring it here by a proper bill of exceptions."

Such is also the practice in the federal courts. Bates on Federal Practice, § 1140; Michigan Ins. Bank v. Eldred, 143 U. S. 293, 298, 12 Sup. Ct. 450, 36 L. Ed. 162.

[7-10] Now, turning to this supposed bill of exceptions. The authentication in the form "Exceptions allowed this the 5th day of May, A. D. 1913," and signed by the judge, may be sufficient, but this we need not determine now. The printing of the court's certificates and allowance of the purported bill of exceptions again in the record subsequent to this supposed bill of exceptions adds nothing to its authentication. Such certificates found in such a place in the record are worthless for any purpose. The trial of the case was had extending from April 24, to 26, 1913, inclusive, and defendants' exceptions to the instructions of the court were not allowed, and presumably not saved, until May 5th. They were not filed until that date, and

there is no statement in the record whatever indicating when such exceptions were saved—manifestly not at the time of the trial. It is also a rule of practice in the federal courts that objections and exceptions to the instructions given a jury, or requested and refused, must be made and reserved before the jury retires. Bates, Federal Procedure, § 1144. For the reason, therefore, that it does not appear that the objections and exceptions to the instructions of the court were made and saved at the time of the trial and prior to the retirement of the jury, this supposed bill of exceptions is wholly nugatory. Another vital objection to such supposed bill of exceptions is that it contains no evidence taken at the trial from which the court may determine whether the instructions given or refused were proper or improper, and hence it presents no alleged errors for this court to consider. Manifestly this separate bill of exceptions cannot be considered in connection with that which precedes it in the record for the purpose of aiding its statement. Each bill of exceptions must stand upon its own statement, and will not be aided by another separate bill of exceptions, although both are settled and allowed in the same case. The motion, therefore, as it relates to the items designated "Plaintiff's request for instructions," "Instructions requested" by each of the defendants, and "Exceptions to court's instructions," must also be allowed.

[11] As it pertains to the motions for a new trial, they are addressed to the sound discretion of the trial court, and no question of the court's abuse of that discretion is presented here for our determination. The Code of Alaska relative to the subject, being section 1058 of the Compiled Laws, and section 226 of the Code of Civil Procedure as adopted by Congress, is taken again from the Oregon Code, and under the decisions of the state court a motion for a new trial, based upon insufficiency of the evidence or excessive damages, is addressed to the sound discretion of the trial court, and its decisions respecting the same are not reviewable except for a manifest abuse of such discretion. State v. Foot You, supra; State v. Gardner, 33 Or. 149, 152, 54 Pac. 809; Coos Bay Navigation Co. v. Endicott, 34 Or. 573, 578, 57 Pac. 61. And it is the doctrine of the Supreme Court of the United States that the refusal of the trial court to grant a new trial cannot be assigned for error in that court. Addington v. United States, 165 U. S. 184, 17 Sup. Ct. 288, 41 L. Ed. 679; Erie Railroad Co. v. Winter, 143 U. S. 60, 75, 12 Sup. Ct. 356, 36 L. Ed. 71.

[12] The paper entitled, "Transcript of Testimony," etc., should not be stricken. This document is sufficiently certified by the judge to entitle it to the dignity of a bill of exceptions. True, the bill of exceptions was settled, allowed, and certified by a judge other than the person who presided at the trial, but we will assume that there existed sufficient reason for that. The record does not show what the reason was.

This disposes of the last 26 of the 35 assignments of error, being all of such assignments which have relation to alleged errors of the trial court in giving and refusing instructions to the jury and in denying the motions for a new trial.

[13] It is strenuously urged, notwithstanding the motions for nonsuit and directed verdicts in the transcript of record may not be considered to be incorporated in the bill of exceptions, yet that the bill of exceptions contains a sufficient statement concerning them to bring up the questions relating thereto for consideration by this court. The bill of exceptions shows that at the close of plaintiff's testimony, and when he had rested his case, the defendants each moved the court for a nonsuit, which motions were overruled and exceptions allowed. The motions themselves are not set out. The same thing is shown with reference to the motions for a directed verdict, which were interposed at the close of the entire testimony. The insuperable objection to our considering these motions in any event is that the certificate of the judge in settling the bill of exceptions and certifying the same contains no statement that such bill of exceptions contains all the testimony given at the trial, or bearing upon the question of nonsuit or directed verdict. Such is the rule both in the Oregon state court and the federal courts. Keady v. United Railways Co., 57 Or. 325, 333, 100 Pac. 658, 108 Pac. 197; Sternenberg et al. v. Mailhos, 99 Fed. 43, 39 C. C. A. 408. There is found in the bill of exceptions a statement by the stenographer, occurring at the close of the testimony, to the effect that the above is a full and correct transcript of the shorthand notes taken by him at the trial. This statement may be all true, and yet the shorthand notes taken by him at the trial may not comprise all the testimony in the case. At any rate, the certificate of the stenographer to the verity of the extended transcript is not enough. The trial judge must indicate his approval of its correctness by due authentication under his own hand. 3 Encyc. Pld. & Prac. 437.

We come the more readily to this conclusion having carefully read and digested the entire evidence contained in the record, and finding that the questions predicated upon the motions for nonsuit and directed verdict are without merit. This disposes of assignments of error Nos. 8 and 9.

[14] Assignments of error 1 to 4, inclusive, are not insisted upon here. Assignments 5 to 7, inclusive, relate to the admission in evidence, over objections, of certain bills of lading introduced for the purpose of showing that the Katalla Company was a common carrier by railway in Alaska. They have a tendency in some measure, though slight it may be, to establish that alleged fact, and were therefore pertinent.

The judgment of the trial court will be affirmed.

TAGGART v. GREAT NORTHERN RY. CO.

(Circuit Court of Appeals, Ninth Circuit. February 2, 1914.)

No. 2304.

1. PUBLIC LANDS (§ 92*)—GRANT OF RAILROAD RIGHT OF WAY—DATE OF ACQUISITION OF RIGHTS.

Under Act March 3, 1875, c. 152, § 1, 18 Stat. 482 (U. S. Comp. St. 1901, p. 1568), granting a right of way through the public lands to any duly organized railroad company which shall file with the Secretary of the Interior a copy of its articles of incorporation and due proofs of its organization, and section 4 providing that any company desiring the benefits of that act shall within 12 months after the location of any section of 20 miles of its road, or if upon unsurveyed lands within 12 months after the survey by the United States, file with the Register of the Land Office a profile of its road, and that, upon approval thereof by the Secretary of the Interior, it shall be noted upon the plats in his office, and that thereafter all such lands over which such right of way shall pass shall be disposed of subject thereto, where, though the maps showing the definite location of a line of railroad had not been approved when a homestead entry was made, they had been filed and proceedings for final approval were pending, the final approval subsequently made related back to the filing, and the lands acquired under the homestead entry were subject to such right of way.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 276–282; Dec. Dig. § 92.*]

2. PUBLIC LANDS (§ 92*)—GRANT OF RAILROAD RIGHT OF WAY—FILING MAPS —"PROFILE."

Under such sections, the maps filed by a railway company and approved were not insufficient, though they did not show the elevations, depressions, and grades of the line where the regulations of the General Land Office expressly declared that "profile," as used in such act, was understood to intend a map of alignment or definite location.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 276–282; Dec. Dig. § 92.*]

3. PUBLIC LANDS (§ 92*)—GRANT OF RAILROAD RIGHT OF WAY—ABANDONMENT.

Where the successor of a railroad company, whose maps of its right of way across public lands had been filed and approved, revised the survey and location of the road and filed maps of such revision and amended definite location, showing a right of way, the center line of which, in crossing a particular lot, did not vary to exceed 20 feet from that of the old right of way, and was required by the Commissioner of the General Land Office to file a relinquishment under seal of all rights under the original approval of the maps filed by its predecessor, whereupon it filed a relinquishment of all its right to the right of way pertaining to the line of railway shown upon such maps, excepting and excluding, however, all of such right of way as was or might be situated within the limits of the right of way pertaining to the revised and relocated line of railway, after which the new maps were approved, the company did not abandon its rights acquired by the filing of the original maps to so much of the right of way shown thereon as was within the right of way shown on the new maps.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 276–282; Dec. Dig. § 92.*]

Appeal from the District Court of the United States for the Northern Division of the Western District of Washington; Frank H. Rudkin, Judge.

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

Suit by George M. Taggart against the Great Northern Railway Company. Judgment for defendant (208 Fed. 455), and complainant appeals. Affirmed.

C. J. France and Frank P. Helsell, both of Seattle, Wash., for appellant.

F. V. Brown, of Seattle, Wash., and Charles S. Albert and Thomas Balmer, both of Spokane, Wash., for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. The question in this case is whether the appellant, who was complainant in the court below, took the title to the tract of land conveyed to him by the patent of the government issued pursuant to his entry thereof under the homestead laws, subject to a right of way over it claimed to have been acquired by the appellee railway company under and by virtue of the provisions of the act of Congress of March 3, 1875 (18 St. at Lg. 482), the first and fourth sections of which provide as follows:

"Section 1. That the right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any state or territory, except the District of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road; also the right to take, from the public lands adjacent to the line of said road, material, earth, stone, and timber necessary for the construction of said railroad; also ground adjacent to such right of way for station buildings, depots, machine shops, side-tracks, turn-outs, and water-stations, not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road."

"Sec. 4. That any railroad company desiring to secure the benefits of this act, shall, within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and, if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a profile of its road; and upon approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office; and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way: Provided, that if any section of said road shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any such uncompleted section of said road."

The stipulation upon which the cause was tried shows these, among other, facts: During the year 1906 the Washington & Great Northern Railway Company, a corporation of the state of Washington, and by its laws authorized to locate and construct lines of railroad within the state, surveyed and located a line of railway from Wenatchee northerly along the west bank of the Columbia river to the mouth of the Okanogan river and northerly therefrom to the international boundary line between the United States and the Dominion of Canada. The line of road so surveyed and located crossed lot 4, section 13, township 28 north of range 23 east, W. M., in a northerly and southerly direction. That is the lot over which the present controversy arose, and was at that time vacant and unoccupied public land of the United

States. The line of road so surveyed and located by the Washington & Great Northern Railway Company was duly adopted by resolution of its board of directors as the definite location of its line of railway, and the company, having filed with the Secretary of the Interior of the United States a copy of its articles of incorporation and due proof of its organization under the same, filed, January 2, 1907, in the United States Land Office at Waterville, in the state of Washington, maps showing the definite location of its line of railway as so surveyed and located. The maps so filed were duly approved by the Secretary of the Interior March 23, 1908, and were returned to the local land office at Waterville, where the proper notations were made by its officers upon the plats, showing the located line across the public land of the United States. In July, 1907, the Washington & Great Northern Railway Company conveyed to the Great Northern Railway Company, the appellee herein, all its right, title, and interest in and to the right of way thus located and acquired, which grantee company then became and has ever since been the owner thereof. The Great Northern Railway Company filed with the Secretary of the Interior a copy of its articles of incorporation and due proof of its organization thereunder, and during the years 1908 and 1909 revised the survey and location of the road as theretofore made by its predecessor in interest, and on July 31, 1909, filed, with the Register and Receiver of the United States Land Office at Waterville, maps of such revision and amended definite location. The difference between the central line of the road as shown on the original maps and the central line of the road as shown on the amended maps does not exceed 20 feet at any point where the lines cross lot 4, but at other places the variation is as much as 200 feet. On the 12th of January, 1912, the local land office at Waterville, by direction of the Commissioner of the General Land Office, called the attention of the Great Northern Railway Company to the fact that the amended map of definite location was not accompanied by a relinquishment under seal of all rights under the original approval of the maps filed by the Washington & Great Northern Railway Company, as to the portions thereof amended by the map filed by the Great Northern Railway Company, as required by section 19 of the Circular of the General Land Office issued May 21, 1909, which reads as follows:

"When the railroad is constructed, an affidavit of the engineer and certificate of the president must be filed in the local office, in duplicate, for transmission to the General Land Office. No new map will be required except in case of deviations from the right of way previously approved, whether before or after construction, when there must be filed new maps and field notes in full, as herein provided, bearing proper forms, changed to agree with the facts in the case. The map must show clearly the portions amended, or bear a statement describing them, and the location must be described in the forms as the amended survey and amended definite location. In such cases the company must file a relinquishment, under seal, of all rights under the former approval as to the portions amended, said relinquishment to take effect when the map of amended definite location is approved by the Secretary of the Interior."

February 6, 1912, the Great Northern Railway Company released and relinquished to the United States all its right, title, and interest in and to the right of way pertaining to the line of railway as shown upon

the maps filed by its predecessor and approved by the Secretary of the Interior, "excepting and excluding, however, any and all of such right of way that is or may be situated within the limits of the right of way pertaining to the revised and relocated line of said company's railway shown upon the maps thereof filed in the United States District Land Office at Waterville, Wash., on the 31st day of July, 1909."

The relinquishment expressly provided that it should not take effect until the revised and amended map of definite location was approved by the Secretary of the Interior. The amended map thus filed was formally approved by the Secretary of the Interior July 13, 1912. Neither the Great Northern Railway nor its predecessor in interest filed a profile showing the elevations and grades of the proposed roads across the public lands of the United States, and was never requested so to do until November 17, 1910, on which day the register and receiver of the land office at Waterville, by direction of the Secretary of the Interior, notified the appellee that since the line of its railway, as described in the map of amended definite location, crossed certain lands suitable for power sites, which had been temporarily withdrawn from entry and sale, the company would be required to file a profile showing the elevations and depressions at which the line of railway crossed such lands, and pursuant to that request the company did, on the 4th day of May, 1911, file a profile in the land office at Waterville, showing the elevations and depressions of its entire line, from the crossing of the Okanogan river to the junction with the main line near Wenatchee. At all times since November 4, 1898, the regulations promulgated by the General Land Office and approved by the Secretary of the Interior, under the act of Congress of March 3, 1875, contained, among other things, the following:

"The word 'profile' as used in this act is understood to intend a map of alignment. All such maps and plats of station houses are required by the act to be filed with the register of the land office for the district where the land is located. If located in more than one district, duplicate maps and field notes need be filed in but one district, and single sets in the others. The maps must be drawn on tracing linen, in duplicate, and must be strictly conformable to the field notes of the survey of the line of route or of station grounds."

It further appears from the agreed statement of facts:

"That the only land in said lot 4 which said defendant proposes to occupy in the construction, maintenance, or operation of its railroad across said lot 4 is a strip of land about 180 feet in width, being all that part of a strip of land 100 feet wide on each side of the center line shown in the map of definite location filed January 2, 1907, located and remaining within the lines of a strip 100 feet wide on each side of the center line shown on the map of amended definite location filed July 31, 1909. That said defendant will, unless restrained by the order of this court, proceed to enter upon said strip, and to construct, maintain, and operate its line of railway thereon."

It thus appears that the land patented to the appellant pursuant to his homestead entry thereof was vacant and unoccupied public land at the time of the definite location of the railroad in question by the appellee's predecessor in interest, and at the time, to wit, January 2, 1907, it filed in the land office of the district in which the land is situated its maps showing such definite location, that company having

previously filed with the Secretary of the Interior a copy of its articles of incorporation and due proof of its organization thereunder as required by the right of way act, which maps of definite location were on the 23d day of March, 1908, duly approved by the Secretary of the Interior and by him returned to the local land office, upon the receipt of which the register and receiver noted upon the plats in that office, "The said located line of railway of said Washington & Great Northern Railway Company."

[1] Although the maps showing the definite location of that line had not been finally approved at the time the homestead entry was made upon which the appellant's patent is based, those maps had been previously filed in the local land office, proceedings for the final approval of which were pending in the Land Department at the time of the homestead entry, which final approval, made March 23, 1908, related back to the filing of the maps in the land office, which latter date was prior to the initiation of the appellant's rights, thereby subjecting the land acquired by him to the right of way conferred on the appellee's predecessor in interest by the act of Congress of March 3, 1875. Stalker v. Oregon Short Line, 225 U. S. 142, 32 Sup. Ct. 636, 56 L. Ed. 1027.

[2] The objection urged on behalf of the appellant that the maps so filed by the railway company and so approved were not the "profile" maps required by the act of March 3, 1875, in that they did not show the elevations, depressions, and grades of the line, is, we think, untenable. As has been seen, in and by the regulations promulgated by the General Land Office, it is expressly declared that the word "profile," as used in the act of March 3, 1875, "is understood to intend a map of alignment," or definite location, and such seems always to have been the construction of the Land Department. Circular of January 13, 1888, 12 Land Dec. Dept. Int. 423; Circular of November 4, 1898, 27 Land Dec. Dept. Int. 663.

In the case of Stalker v. Oregon Short Line, supra, the question was whether a pre-emptor, whose claim was initiated while the Secretary of the Interior had under consideration the approval of a map for station grounds claimed by the railroad company under the act of March 3, 1875, thereby obtained a right to be preferred. In holding against the pre-emptor the court, in the course of its opinion, said, among other things:

"Prior to the initiation of any right here involved, the Land Department put in force certain regulations to be followed by railroad companies desiring to secure the benefits of a grant in advance of actual construction, as provided by the fourth section of the act. One of these required that upon the location of any section, not exceeding twenty miles in length, the company should file with the register of the land district in which the land lay 'a map for the approval of the Secretary of the Interior, showing the termini of such portion and its route over the public lands,' etc. Another of these departmental regulations provided that 'if the company desires to avail itself of the provisions of the law which grants the use of ground adjacent to the right of way for station buildings * * * it must file for approval, in each separate instance, a plat showing, in connection with the public surveys, the surveyed limits and area of the grounds desired.' These regulations require that 'a copy' of the approved map of 'definite location,' and of the

'approved plat of grounds selected by a company, under the act in question, for station purposes,' shall be transmitted to the register of the land office where the land lies. Upon the receipt of the map of alignment, the land office is required 'to mark upon the township plats the line of the route of the road as laid down on the map,' and to note in pencil on the tract books, opposite the tract of public land cut by said lines of railroad, 'that the same is disposed of subject to the right of way,' etc., and to write upon the face of any certificate disposing of said lands, after the filing of such approved map of location, 'that it is allowed subject to the right of way.' A like duty is put upon the register when an approved station ground plat is received.

"The plat of the station grounds selected by the railroad company in this case was filed in the local land office on September 12, 1888, and reached the Secretary of the Interior on September 20, 1888. Both dates are antecedent to the filing of the pre-emption claim. But the selection pended in the office of the Secretary of the Interior until December 15, 1888, on which date it was approved. While thus pending, the pre-emption right of Reed was initiated.

"There can be no doubt that the provisions of the fourth section, for securing in advance of construction the benefits of the act, have application to the station grounds, as well as to the right of way proper. The 'benefits' to be secured cover one as well as the other. The prerequisites for securing either right, in advance, is the filing of a map of location, whether it be for a right of way or for station grounds. But until approved the appropriation stands suspended. * * *

"But it is said that the doctrine of relation does not apply to the benefits to be acquired under the fourth section of the act of March 3, 1875, because a railroad desiring a right of way in advance of construction must do three specific things: First, make a definite location of its route; second, file a profile map of its line with the register of the land office for the district; and, third, obtain the approval of that map by the Secretary of the Interior—and that the act makes each of these things a prerequisite to the acquirement of any right, by expressly declaring that 'thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way.'"

And, after referring to two of its former decisions, the court further said:

"Any construction of the fourth section of the act of 1875 which would permit rights initiated while the Secretary of the Interior was considering the approval of a map of location of a right of way over public lands, or a plat of survey of depot grounds, to prevail over rights resulting from the prior commencement of proceedings for the acquisition of title, would be in conflict with the settled practice of the Land Department and the repeated rulings of this court under other acts. Shepley v. Cowan, 91 U. S. 330 [23 L. Ed. 424]; Weyerhaeuser v. Hoyt, 219 U. S. 380 [31 Sup. Ct. 300, 55 L. Ed. 258]."

[3] In the present case the further point is made that, if the appellee did acquire a right of way over the land in question by the map of definite location filed by its predecessor in interest, it abandoned such right by the filing of the map of amended definite location.

In view of the admitted facts, we see no merit in the contention. The relinquishment to the United States made by the appellee pursuant to the requirement of the Land Department by reason of the amendment was of all of its interest in and to the right of way pertaining to the line of railway as shown by the maps filed by its predecessor and approved by the Secretary of the Interior, "excepting and excluding, however, any and all of such right of way pertaining to the revised and relocated line of said company's railway shown upon the maps thereof filed in the United States District Land Office at Waterville, Wash., on the 31st day of July, 1909."

The agreed statement of facts shows:

"That the center line shown on said map of definite location, filed by the Washington & Great Northern Railway Company, is located easterly of the center line shown on said map of amended definite location filed by said Great Northern Railway Company across said lot 4. The maximum distance between said center lines is 13.2 feet, according to measurements from the northeast corner of lot 1, section 13, township 28 north, range 23 east, W. M., and 23.7 feet according to measurements from the southwest corner of said section 13, said points being the nearest, northerly and southerly, respectively, from said lot 4, to which said center lines are tied on said maps."

And:

"That the only land in said lot 4 which said defendant proposes to occupy in the construction, maintenance, or operation of its railroad across said lot 4 is a strip of land about 180 feet in width, being all that part of a strip of land 100 feet wide on each side of the center line shown in the map of definite location filed January 2, 1907, located and remaining within the lines of a strip 100 feet wide on each side of the center line shown on the map of definite location filed July 31, 1909. That said defendant will, unless restrained by the order of this court, proceed to enter upon said strip and to construct, maintain, and operate its line of railway thereon."

It thus appears that the only portion of appellant's land over which the railway company claims a right of way is within the original right of way and was expressly excepted from the relinquishment.

The judgment is affirmed.

COMPAGNIE GENERALE TRANSATLANTIQUE v. RIVERS.

(Circuit Court of Appeals, Second Circuit. January 13, 1914.)

No. 40.

1. STATUTES (§ 281*)—FRENCH LAW—NECESSITY OF PLEADING.

Where the stateroom of a passenger on a French vessel on the high seas was broken into and she was assaulted by a watchman, it was not necessary that she should plead and prove that the French Law authorized a recovery under such facts; the wrongful entry into her stateroom having been rendered easy of accomplishment through the carrier's negligence, the burden being on the carrier to show any peculiarity of the French law relieving it from liability, if it existed.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 380, 381; Dec. Dig. § 281.*]

2. SHIPPING (§ 166*) — INJURIES TO PASSENGERS — CARE REQUIRED — INSTRUCTIONS.

In an action against the owners of a steamship for an assault on a passenger by a watchman, the court having charged that defendant was not an absolute insurer against assaults of such character, and having pointed out the difference between an assault by an employé when carrying out the orders of his master and a wanton one committed by the employé when off duty, a further instruction that defendant was bound to exercise the very highest degree of care to protect its passengers was not error.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 538–552; Dec. Dig. § 166.*]

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

3. SHIPPING (§ 166*)—INJURIES TO PASSENGERS—ASSAULT BY WATCHMAN—EVIDENCE.

Where a watchman on a steamship entered a female passenger's stateroom in the nighttime and assaulted her, and the entry was rendered easy because of the loss of a key to the door connecting plaintiff's stateroom with the adjoining one, which was vacant, and defendant's failure to change the lock so that it could not be controlled by the lost key if found and retained by an unauthorized person, and also because of the failure of the night watchman on duty to attend to his duties, the evidence was sufficient to sustain a finding of actionable negligence.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 538–552; Dec. Dig. § 166.*]

4. SHIPPING (§ 166*) — INJURIES TO PASSENGERS — ASSAULT — CONTRIBUTORY NEGLIGENCE.

Where plaintiff, a female passenger, on entering her stateroom on a steamship inquired for the key connecting her stateroom with the adjoining one, which was vacant, and was informed by the stewardess that no keys were issued to passengers, but that she should bolt the door on her side when occupying the room, and might leave it open when she was away from it, plaintiff, having once bolted the connecting door, was not negligent in failing to see that it was bolted every time she entered the room, so as to preclude her from recovering for the injuries sustained by being assaulted by a watchman, who entered the room in the nighttime through such door after he had unbolted it.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 538–552; Dec. Dig. § 166.*]

5. APPEAL AND ERROR (§ 1039*)—REVIEW—PREJUDICE.

Where, in an action for injuries to a steamship passenger by an assault by a watchman, the complaint charged permanent nervous injuries, defendant was not prejudiced by the admission of evidence of injury to plaintiff's heart, which was not allowed as an independent ground for recovery.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4075–4088; Dec. Dig. § 1039.*]

6. TRIAL (§ 83*)—HYPOTHETICAL QUESTIONS—OBJECTIONS.

An objection that a hypothetical question "does not contain all the facts," without any statement as to the respect in which it is deficient, is unavailable.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 193–210; Dec. Dig. § 83.*]

7. DAMAGES (§ 168*)—PERSONAL INJURIES—EVIDENCE OF MENTAL CONDITION.

In an action for injuries to a steamship passenger by being assaulted in the nighttime by a watchman, evidence as to mental pain suffered by the plaintiff, and that for a long time after the assault she feared to be alone and was distrustful of everything and every one, was admissible, since the plaintiff's description of her condition after the assault necessarily involved a recital of her mental condition.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 480, 482–486; Dec. Dig. § 168.*]

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

This cause comes here upon writ of error to review a judgment of the District Court, Southern District of New York, entered on a verdict of $12,500 in favor of defendant in error, who was plaintiff below.

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

Nolan Bros., of New York City (Joseph P. Nolan and John M. Nolan, both of New York City, of counsel), for plaintiff in error.

Davies, Auerbach & Cornell, of New York City (Charles H. Tuttle and Bertram Winthrop, both of New York City, of counsel), for defendant in error.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge. Plaintiff, a widow traveling alone, sailed from New York October 6, 1910, on defendant's steamship La Provence, for a tour in Europe. She occupied, with no roommate, one of the so-called "demi-luxe" cabins No. 653 on the promenade deck. The adjoining cabin No. 651 was not occupied during the voyage. Both cabins had doors opening into the corridor and were also connected by a door through the partition. The door opening into the corridor had a lock and bolt on the inside; the partition door had a lock and a bolt on each side. No stateroom keys were issued to passengers or to any one else; the staterooms were divided into groups of contiguous rooms, for each one of these groups one of the stewards had exclusive charge of a pass-key which controlled the locks of all the doors in the group, corridor, and partition. About three weeks before, on a prior voyage the under-steward, who carried the pass-key to the group of which plaintiff's cabin formed one, lost the key. The loss was reported to his superior; the lost key was never returned. A new pass-key exactly like the lost one was issued to the under-steward, but nothing was done to the locks of this group, no rearrangement made of their interior mechanism, so that they remained controllable not only by the new key, but also by the lost one.

The connecting door was covered on plaintiff's side by a hanging curtain. When she first entered the cabin, on coming aboard, she felt of this door behind the curtain and found it was bolted and apparently locked. The testimony warrants the conclusion that it was then locked and bolted. She asked for a key and the stewardess told her that passengers did not have keys; that when out of the stateroom she should leave her door open, and when in she could keep it closed and bolted. This she did.

In the corridor on which her stateroom opened there were electric lights near the ceiling which burned day and night continuously. At night, when all light in the stateroom was extinguished, enough came through the ventilator from these corridor lights for one to see objects in the stateroom. Close to the berth in every passenger stateroom, where they could be easily reached without rising, were two push-buttons; one of them turned on the electric light in the stateroom, the other communicated with a so-called bell-board at the forward end of the corridor, on which plaintiff's stateroom was located. The bell-board was about the width of three staterooms away and served for the group of demi-luxe staterooms. It bore the numbers of each stateroom; when a button was pushed, an electric alarm or "buzzer" sounded, and the number of the stateroom in which the button had been pushed was illuminated. The regulations of the ship called for a man to be stationed continuously day and night immediately opposite the

bell-board, in order to hear and respond promptly to any call. His station was such that he commanded a view of the corridor which has been referred to; if he were conscious and his eyes were open the lights in the corridor could not be turned out at night without his perceiving it. These lights could be turned out by switches at the top of the wall. Among those who, in successive reliefs, were assigned to this post were Lamure, a day watchman, referred to in the testimony as a bell-boy, and Fructus, a night watchman.

The plaintiff suffered from seasickness and passed most of her time in the stateroom. On the afternoon of the last day, however, she was out of it for two or three hours, passing Lamure on her way to the deck. She returned to her stateroom about 6 p. m., ate something, and lay in her berth reading until about 9 p. m., when, wanting some one to come, she pushed the bell-board button. She did this repeatedly from 9 to 11 p. m., but no one came until the last named hour. Then her room steward, Coret, came. Asked if he had not heard the bell, he said he had had to wait in the dining room, had had extra things to do. After he left plaintiff rose and bolted her door, put out the stateroom light, and fell asleep. Shortly thereafter she awoke, thinking she heard some one at the window; she got up, satisfied herself that the shutter was bolted, returned to her berth, and again fell asleep. The testimony of others indicates that when she next awoke it was 2:30 a. m. The first thing she was conscious of was that it was pitch dark (the corridor lights had been turned out); this terrified her, thinking there had been some accident to the machinery. She listened intently for quite a while, hearing the throbbing of the engine, until she heard "a little noise somewhere around the door to No. 651." She at once pressed both buttons. As the stateroom light shone out, the curtains to her berth were pulled apart, and she saw a figure in black standing there. This was Lamure. From the evidence it is manifest that he had found the lost pass-key, had slipped into No. 653 while plaintiff was out of it on the afternoon of the last day, and slipped back the bolt of the connecting door behind the curtain, had made his way in the dead of night up three decks (his sleeping quarters, where he was required to be at that hour, were below) and along the whole length of the ship unobserved. That he had entered No. 651 using the pass-key. Once there he had taken off his uniform, collar, necktie, and false shirt front and put on a bag of black lustrine as a mask, with places cut for eyes and mouth. In his pocket he had a length of rope about the thickness of one's finger. Either before or after this change of costume, he had put out the lights in the corridor. He next unlocked the connecting door with the same pass-key (it was found in the lock the next morning), and went to plaintiff's berth.

As the curtains were drawn apart, he struck the plaintiff. This was the beginning of a desperate struggle; plaintiff says it seemed like a lifetime, but probably lasted about ten minutes. Possibly that estimate is too large, but the occurrences which took place certainly indicate that it lasted some time. Plaintiff struggled up and out of the berth three times, and three times beating her on the head clutching her by the throat, and thrusting his knee against her chest, Lamure hurled

her back across the berth, stooping as he got a chance to get hold of the rope. The physical marks left on her head, face, eyes, throat, etc., clearly supported her narrative of the transaction. At last the night watchman, Fructus, arrived and grappled with Lamure, whom he recognized at once; the mask had come off in the struggle. Lamure got away but was subsequently arrested. Fructus did not arrive earlier because he heard no buzzer; what "waked him up was the plaintiff's screams"; he did not know until then that the corridor lights had been put out; manifestly he was asleep on his post. Had he been awake, when the lights were turned out, before Lamure entered either stateroom, he would have known at once that something was wrong and would have interfered, if not with the initiation of the assault, at least with its continuance.

The first point in controversy is whether the complaint sets out a cause of action on contract or in tort. It is unnecessary to decide which is the correct construction of the pleading, because the trial judge interpreted it most favorably to defendant, treating the action as one sounding in tort, and charging that plaintiff could recover only upon proof of some specific negligence on the part of the defendant.

[1] Defendant next contends that, since La Provence was a French vessel, plaintiff could not recover without pleading and proving that under the law of France there could be recovery against the defendant upon the facts proved. It would seem to be almost an insult to any self-respecting civilized country to assume that under its law a common carrier of sleeping passengers would not be responsible for assaults of this sort by its own employés, even though the assault were a wanton one, when such assault was made easy through negligence of the carrier in taking proper precautions to assure the safety of its passengers. We find sufficient authority for this proposition in Cuba Railway v. Crosby, 222 U. S. 473, 32 Sup. Ct. 132, 56 L. Ed. 274, 38 L. R. A. (N. S.) 40; Barrow S. S. Co. v. Kane, 170 U. S. 100, 18 Sup. Ct. 526, 42 L. Ed. 964; Whitford v. Panama R. R., 23 N. Y. 465. If the law of France is peculiarly tender towards common carriers of passengers, it was for defendant to show it.

[2] It is assigned as error that the court charged the jury that defendant was bound to an obligation "of the very highest degree of care to protect its passengers." This phrase is found in the opinion of the Supreme Court in Penn. R. R. v. Roy, 102 U. S. 451, 26 L. Ed. 141. Standing alone, it might possibly lead a jury to believe that the defendant was to be treated as an insurer of the safety of its passengers. But it did not stand alone. The judge charged expressly, more than once, that defendant was not an absolute insurer against assaults of this sort. He pointed out the difference between an assault by an employé when carrying out the orders of his employer and a wanton one, committed when off duty. In this particular he instructed more favorably to defendant than some of the authorities indicate. The Minnetonka, 146 Fed. 509, 77 C. C. A. 217; N. O. & N. E. R. R. v. Jopes, 142 U. S. 18, 12 Sup. Ct. 109, 35 L. Ed. 919; Clancy v. Barker, 131 Fed. 161, 66 C. C. A. 469, 69 L. R. A. 653. He required the plaintiff to satisfy the jury of the existence of specific acts of negligence. He went further

and rehearsed at some length the precautions which the defendant had undertaken, referring to La Provence as a "well-ordered, well-equipped, and well-conducted ship," telling the jury that they were justified in finding that, "like any other steamer in the business, it was in a general sense properly conducted." In his latest reference to the degree of care, after he had called attention to the difference between assaults when obeying orders and purely wanton ones, he described it as "the highest degree of care which (defendant) can reasonably be required to exercise for the safety and protection of (passengers) against such an assault as this."

From a careful study of the whole charge (there are several exceptions to isolated parts of it), we have reached the conclusion that Judge Holt was apprehensive that the distressing circumstances attending the assault might prejudice the jury. Therefore he was most careful, even at the risk of giving some sound exceptions to plaintiff, to impress upon the jury that there could be no recovery unless the proofs showed some specific neglect in exercising that degree of care which reasonable prudence would require of a carrier obligated to be watchful and vigilant to protect its sleeping passengers.

The charge was favorable to defendant, and we are satisfied that the verdict was not induced by any undue conception of the carrier's duty in that regard; it finds abundant support in the undisputed facts. It may be assumed that it was a prudent regulation, which forbade the distribution of stateroom keys among hundreds of passengers, about the antecedents of many of whom the carrier had no information and which left the single key which controlled the connecting doors of a group of staterooms in the hands of one trusted employé. But when that key was lost on board ship, with the possibility that it might be found by some one, and when it was not returned, a circumstance tending to indicate that the finder (if there were one) was keeping it for ulterior purposes, it would not be surprising if the jury reached the conclusion that a man of reasonable prudence would overhaul the locks so that they would be controllable by the new pass-key but not by the lost one.

[3] So, too, the precautions taken for policing this group of staterooms were no doubt all that could be required, if they were carried out. Instant communication from stateroom to buzzer and bell-board, ceaseless watch, by successive reliefs, all through the night, of the bell-board signals, and of the two intersecting corridors on which these staterooms opened; the watchman being so stationed that both were at all times open to his view. If a trusted watchman were there all the time, as the rule required, discharging the duties intrusted to him, it is difficult to see how this assault could possibly have been accomplished. He could not have failed to detect Lamure walking through the corridor and, knowing that his place was then in his sleeping quarters two decks below, would have been put on guard. He would have been at once conscious of the disappearance of the lights in the cross corridor, directly in front of him, and would have investigated the cause. These lights were obviously switched off by Lamure before he finally entered the adjoining stateroom; he had to be in the corridor to reach

the switches. The policing precautions were admirable, on paper; but if the trusted watchman deserted his post of duty or slept on it the precautions were, for the time, withdrawn. Desertion of such a post of vigilance or sleeping on it is certainly negligence, on the part of the watchman, and, for his negligence in failing to execute his employer's orders, the employer is responsible, if such neglect be a cause of injury to a passenger. That the assault on plaintiff occurred because, for the time being, the precautions devised to prevent such an occurrence were not carried out there can be no doubt upon the proof.

[4] It is next contended that a verdict should have been directed for defendant upon the ground of plaintiff's contributory negligence in not examining the bolt on her side of the connecting door when she last entered her stateroom. That question was one for the jury to pass upon. Among defendant's written requests was one that "if plaintiff's negligence contributed to her injuries she could not recover." After the charge, in which many of defendant's requests had been substantially incorporated, defendant asked for an exception to each of the requests not charged. The court declined to allow such a general exception and told counsel that, if there was any request not passed upon, it should be called to his attention and he would pass upon it. Several of the requests were then called to his attention, but not this one. Irrespective of this technicality, however, we find no merit in the proposition that when a passenger has ascertained upon reaching her stateroom that the connecting door is locked, and is further informed that no keys are issued to passengers, she is under an obligation carefully to inspect the fastening of the connecting door every time she returns to her stateroom after a temporary absence.

[5] Error is assigned to the admission of testimony as to the condition of plaintiff's heart. Evidence about her heart by another physician had already been admitted. Injury to the heart was not allowed as an independent ground for recovery and might well be included in the general language as to damages. Permanent nervous injuries were charged in the complaint; the testimony as to the heart was merely incidental.

[6] Exception was reserved to two hypothetical questions. To the first of these the only objection was that it "does not contain all the facts," but no statement was made as to the respect in which it was deficient. When such long hypothetical questions are under consideration, it is unfair to the trial judge to except in such general terms, without indicating in what respects the question contains too little or too much. The second question was badly expressed, but it did not, as defendant contends, require the witness to weigh the evidence of the other doctor and to say whether the witness agreed with him.

We find no merit to the contention that the court erred in admitting evidence of some items of disbursement for care and attendance; we think they were sufficiently pleaded; the complaint enumerates some expenditures which, "among others," she was compelled to make; these trifling little items are some of the "other disbursements"; it would be a waste of time to discuss these trivial items of disbursement.

[7] It is assigned as error that testimony was admitted as to men-

tal pain; that for a long time plaintiff feared to be alone after the assault; that she was distrustful of everything and everybody, etc. Some of this testimony came in on cross-examination. Mind and body are closely connected. The network of nerves which is spread over our bodies, connecting with the brain, are susceptible of traumatic injury which, long after the cause has ceased, may leave serious effects behind them, which might not be there if the mere appearance of a threatening figure with mask and rope had not been accompanied with a brutal mishandling of the nerves themselves. A fair description of the plaintiff's condition after the assault necessarily involved the recital of her mental condition. Defendant, however, was abundantly protected by the charge of the court who instructed the jury that:

"The fact that the remembrance of this occurrence causes her emotion is not alone anything for which you can give money compensation. But, if it affected her nervous condition as a matter of health, then that is what you may consider."

Plaintiff testified as to the sort of trip she expected to take in Europe, a trip which this assault brought to an end, but defendant itself brought the testimony out on cross-examination.

We find nothing to call for consideration in the remaining assignments of error.

Judgment affirmed.

AMERICAN CAR & FOUNDRY CO. v. ANDERSON.

(Circuit Court of Appeals, Eighth Circuit. January 24, 1914.)

No. 3927.

1. EXECUTORS AND ADMINISTRATORS (§ 11*)—PROBATE COURT—ADMINISTRATION OF ESTATE.

Under Rev. St. 1909, Mo. §§ 9, 56, 112, providing for the appointment of administrators, the probate court of St. Louis, though a court of limited jurisdiction, had jurisdiction to grant letters of administration and to settle the estate of a decedent killed by an accident in that city, whose entire estate consisted of a claim for wrongful death against his employer.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 25; Dec. Dig. § 11.*]

2. EXECUTORS AND ADMINISTRATORS (§ 24*)—APPOINTMENT—PUBLIC ADMINISTRATOR—"WITHOUT KNOWN HEIRS."

Rev. St. 1909, Mo. § 302, declares that it shall be the duty of the public administrator to take charge of the estates of all deceased persons in his county when such persons die intestate, without any known heirs, and when money, property, papers, or other estate are left in a situation exposed to loss or damage, and no other person administers the same, and when any estate of any person who dies intestate in the county or elsewhere is left in the county liable to be injured, wasted, or lost, and when the intestate does not leave a known husband, widow, or heirs in the state. *Held*, that the words "without any known heirs" mean without any heirs known to the public, the probate court, or the public administrator; and hence, where a decedent was killed, leaving a mother, brothers, and a sister, who, however, were not known to the public administrator, and a claim for wrongful death against defendant, and more than a fourth of the time limited for the enforcement of such claim expired

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

without any effort being made to collect the same when the public administrator took charge of the estate, and substantially half of the time had expired when the claim was settled by him, sufficient facts existed to entitle him to take charge of the estate.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 132–140; Dec. Dig. § 24.*]

3. EXECUTORS AND ADMINISTRATORS (§ 29*) — COLLATERAL ATTACK — ADMINISTRATOR—APPOINTMENT.

Where a public administrator was appointed to take charge of a decedent's estate, and the court had authority to grant the petition, a subsequent application by decedent's next of kin, to revoke the public administrator's authority prospectively, and without any application to revoke the administrator's authority to settle a claim for decedent's wrongful death, or to revoke the settlement made under such authority, the application was a collateral attack on the probate court's order of appointment, and, conferring authority to settle the claim, was therefore unsustainable.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 177–182, 1411; Dec. Dig. § 29.*]

4. EXECUTORS AND ADMINISTRATORS (§ 271*)—WRONGFUL DEATH—CLAIM FOR DAMAGES—ASSETS OF ESTATE.

A claim for damages for wrongful killing of decedent is not an asset of his estate, subject to the payment of debts.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1044–1051; Dec. Dig. § 271.*]

5. EXECUTORS AND ADMINISTRATORS (§ 87*)—RIGHT TO SUE—COMPROMISE.

An administrator or other person authorized to sue for damages for the death of another may, in general, compromise the claim without complying with statutes similar to Rev. St. 1909, Mo. § 242, providing that administrators, with the approval of the probate court, when unable to collect claims, may compromise the same, since such provisions are construed to refer to claims belonging to the estate proper, and not to the widow, heirs, etc., which claims may be compromised, not only without the consent of the beneficiaries, but against their affirmative protest.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 323, 384–392; Dec. Dig. § 87.*]

In Error to the District Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

Action by Albert R. Anderson, as administrators of Jacob Joseph Baudendistel, deceased, against the American Car & Foundry Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

William R. Gentry, of St. Louis, Mo. (M. F. Watts and Edwin W. Lee, both of St. Louis, Mo., on the brief), for plaintiff in error.

Henry B. Davis, of St. Louis, Mo. (John A. Harrison and Charles Erd, both of St. Louis, Mo., on the brief) for defendant in error.

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

SMITH, Circuit Judge. The American Car & Foundry Company, hereafter called the defendant, has for some years been conducting a manufacturing plant at St. Louis, Mo. On or about December 22, 1910, Jacob Joseph Baudendistel was killed by an accident at the defendant's works. At the time of the accident he was employed by Wil-

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

liam Eiler who had a contract with the defendant to put brake connections upon cars at a fixed rate per car. At the time of the accident the defendant carried a liability policy with the Travelers' Insurance Company by which it was agreed that the insurance company would assume the defense and make payment of claims against the defendant on account of the personal injury or death of employés while engaged in the service of that company. On December 24, 1909, a coroner's inquest was held upon the body of Mr. Baudendistel. There was introduced before it the report of the police department, from which it appeared that the deceased resided with his mother, Mary Baudendistel, at 3213 South Seventh street. At the same inquest Frank Biederman testified that he was the uncle of the deceased, and that the deceased lived at 3213 South Seventh street. The deceased was unmarried, but left his mother, Mary Baudendistel, a widow, and four brothers and one sister, namely, August Baudendistel, Julius Baudendistel, John Baudendistel, Frank Baudendistel, and Elizabeth Baudendistel. All of his brothers and sister were minors at the time of the death of Jacob Joseph Baudendistel, but August Baudendistel became of age March 28, 1910, and Julius Baudendistel, John Baudendistel, and perhaps Elizabeth Baudendistel are now of age. On April 16, 1910, Harry Troll, public administrator for the city of St. Louis, filed with the judge of the probate court of the city of St. Louis notice that he had taken charge of the estate of Jacob Joseph Baudendistel. The clerk of the probate court attached to a copy of this notice a certificate that the same was such copy, and that Harry Troll, public administrator, was duly authorized and empowered to secure and dispose of the property of the said deceased according to law, collect all moneys due said deceased, and in general to do and perform all other acts and things which are or hereafter may be required of him by law. This certificate was under the seal of the probate court. Troll published a notice of his, having taken charge of the estate in the St. Louis Times on April 29 and on May 6, 13, and 20, 1910. On April 18, 1910, said public administrator filed in the probate court his inventory, in which he reported the only estate of the deceased consisted of a claim against the defendant for the killing of the deceased. June 6, 1910, he filed in the probate court an application in which it was alleged a copy of the testimony taken at the coroner's inquest was attached, and asked leave to compromise the claim against the defendant for $1,000, and on the same day the court ordered that he be so authorized. Thereupon the sum of $1,000 was paid, and the public administrator gave to the defendant a full release of this claim. The negotiations prior to the settlement were largely carried on by the Travelers' Insurance Company under its policy of indemnity.

On cross-examination, as a witness in this case, Harry Troll testified:

"Q. Did you interview Baudendistel's mother? A. Her existence was not known to the administrator until December, 1910. Q. Had you interviewed these brothers and sister that sit here in court? A. We had no information regarding them."

This evidence is in no wise controverted, except as the report of the police department, above referred to, contained the information that

the deceased resided with his mother, Mary Baudendistel, at 3213 South Seventh street, and Troll further testified upon this trial:

"Q. Had you seen the Coroner's inquest? A. Not personally—not myself, no."

About December 10, 1910, Mary Baudendistel, the mother, and August Baudendistel, the oldest brother of the deceased, who had become of age, filed in the probate court an application in which it was alleged that no administration had ever been regularly taken out upon the estate of the deceased; that notwithstanding that fact Harry Troll, public administrator, had unlawfully and wrongfully, and without notice to the applicants or either of them, and without any order of the probate court, taken charge of and begun the administration of the estate; that he had no authority of law whatsoever for so doing, and his acts and doings in the premises were and are wholly wrongful and unlawful, and that he had no authority in law whatsoever for entering upon said estate, none of the facts or circumstances existing authorizing him to take charge thereof, and asking that all authority, if any in him, to administer upon or enter into possession of the said estate be set aside and revoked. Thereupon the court revoked the authority of the public administrator, and appointed Albert R. Anderson administrator de bonis non. After said order of revocation the judge of the probate court approved a settlement with the public administrator, allowed him $25 for his services, and directed him to pay over $608.60 to Albert R. Anderson, administrator de bonis non and successor to public administrator.

Anderson brought this suit in the state court, as administrator of the deceased, to recover damages for the killing of his intestate. Anderson, as administrator, will hereafter be called the plaintiff. The case was removed from the state to the United States District Court, and resulted in a verdict for the plaintiff for the sum of $5,000, and the American Car & Foundry Company sued out this writ of error.

Upon the trial the defendant relied exclusively upon the accord and satisfaction heretofore referred to, and substantially the sole question raised upon this hearing was as to the validity of the release given by Harry Troll as public administrator.

The following, quoted from the Revised Statutes of Missouri of 1909, although published after, are the same as were in force at the time of the accident:

"Sec. 5425. * * * If there be no husband, wife, minor child or minor children, natural born or adopted as hereinbefore indicated, * * * then in such case suit may be instituted and recovery had by the administrator or executor of the deceased and the amount recovered shall be distributed according to the laws of descent, and such corporation, individual or individuals may show as a defense that such death was caused by the negligence of the deceased.

"Sec. 5426. When Representative may Sue.—Whenever the death of a person shall be caused by a wrongful act, neglect or default of another, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who or the corporation which would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured.

"Sec. 5427. Damages, by Whom Recovered—Measure of.—Damages accruing under the last preceding section shall be sued for and recovered by the same parties and in the same manner as provided in section 5425; and in every such action the jury may give such damages, not exceeding ten thousand dollars, as they may deem fair and just, with reference to the necessary injury resulting from such death, to the surviving parties who may be entitled to sue, and also having regard to the mitigating and aggravating circumstances attending such wrongful act, neglect or default."

"Sec. 9. Letters, by Whom Granted.—The probate court, or the judge or clerks thereof in vacation, subject to the confirmation or rejection of the court, shall grant letters testamentary and of administration."

"Sec. 56. Proceedings to Compel Accounting in Cases of Resignation or Removal.—If the executor or administrator resign or his letters be revoked, it shall be the duty of his successor, or of the remaining executor or administrator, to move the court to compel the executor or administrator removed, or having resigned, to make final settlement; and on such motion, after due notice to such executor or administrator, the court having jurisdiction shall ascertain the amount of money, the quality and kind of real and personal property, and all the rights, deeds, evidences of debt and paper of every kind of the testator or intestate in the hands of such executor or administrator, or that came into his hands and remain unaccounted for at the time of his resignation or removal from office or revocation of his letters, and to enforce such order and judgment against such administrator or executor, and his sureties if they had due notice of the proceedings, or against either of them—first, for the amount of money specified in the judgment, by execution in the ordinary form; second, for all other estates, effects and papers described in the judgment or order, by attachment against the person or property of executor or administrator."

"Sec. 112. General Power of Court over Estate.—The court may, at any time, make such orders as the interest of the estate may require for the speedy collection of debts or the sale and distribution of personal property."

"Sec. 299. To be Elected, When—Oath and Bond—Ex Officio Public Guardian.—Every county in this state, and the city of St. Louis, shall elect a public administrator at the general election in the year 1880, and every four years thereafter, who shall be ex officio public guardian and curator in and for his county."

"Sec. 302. Duty of Public Administrator to Take Charge of Estates, When.—It shall be the duty of the public administrator to take into his charge and custody the estates of all deceased persons, and the person and estates of all minors, and the estates or person and estate of all insane persons in his county, in the following cases: * * * Second, when persons die intestate without any known heirs; * * * fourth, when money, property, papers or other estate are left in a situation exposed to loss or damage, and no other person administers on the same; fifth, when any estate of any person who dies intestate therein, or elsewhere, is left in the county liable to be injured, wasted or lost, when said intestate does not leave a known husband, widow or heirs in this state."

"Sec. 5429. Limitation of Action—Effect of Nonsuit.—Every action instituted by virtue of the preceding sections of this article shall be commenced within one year after the cause of action shall accrue."

"Sec. 303. Additional Powers, Duties and Remedies.—In addition to the provisions of this article, he and his securities shall have the same powers as are conferred upon, and be subject to the same duties, penalties, provisions and proceedings as are enjoined upon or authorized against executors and administrators, guardians and curators by articles 1 to 13, inclusive, of this chapter, so far as the same may be applicable. He shall have power to administer oaths and affirmations in all matters relating or belonging to the exercise of his office."

Articles 1 to 13 thus referred to define in large measure the duty of private as distinguished from public administrators and include the two following sections:

"Sec. 101. Administrator to Collect Debts, Prosecute and Defend Suits, etc.—Executors and administrators shall collect all money and debts of every kind due to the deceased, and give receipts and discharges therefor, and shall commence and prosecute all actions which may be maintained and are necessary in the course of his administration, and defend all such as are brought against him."

"Sec. 242. Administrator with Approval of Court may Compound with Debtor.—Executors or administrators, with the approval of the probate court, may in all cases where they are unable to collect by law compromise any claim against any debtor of the decedent."

"Sec. 305. Notice, How and When Given—Penalty for Failure.—It shall be the duty of every public administrator immediately upon taking charge of any estate, except those of which he shall have taken charge under the order of the probate court for the purpose of administering the same, to file a notice of the fact in the office of the clerk of the probate court. If any public administrator shall fail to file the notice provided for in this section, he shall forfeit and pay to the persons entitled to the estate a sum not exceeding two hundred dollars, to be recovered before said court, on motion, and after reasonable notice thereof to said public administrator; and said court may, in its discretion, remove such public administrator from office."

"Sec. 308. Court may Order Him to Account to Successor, When—The probate court may at any time, for good cause shown, order the public administrator to account for and deliver all money, property or papers belonging to any estate in his hands to his successor in office, or to the heirs of said estate, or to any executor or administrator regularly appointed, as provided by law."

It is contended by plaintiff: First, that the public administrator had no authority to take charge of the estate under section 302 of the Missouri Statutes; second, that there was no power in the public administrator to compromise the claim, and especially without the consent of the beneficiaries.

[1] While the probate court of the city of St. Louis is, so far as appears, a court of limited jurisdiction, there can be no doubt that it had jurisdiction of the granting of administration upon and the settlement of the estate of Jacob Joseph Baudendistel. Whatever question may be raised as to the jurisdiction of the public administrator, none can be suggested as to the jurisdiction of the probate court.

[2] The power of the public administrator to take charge of the estate probably existed under the second, fourth, and fifth grounds specified in section 302 of the Revised Statutes of Missouri of 1909. What is meant by "when persons die intestate without any known heirs"? If the person left heirs, they must be known by some one, although they may not be known to be heirs of the deceased. In other words, the existence of any human being unknown to everybody is not conceivable. Manifestly "without any known heirs" means without any heirs known to the public, the probate court, or the public administrator. While the administrator cannot willfully blind himself to the existence of heirs, if he in fact knows of none, he can take charge of the estate. He was equally entitled to take charge of the estate under the fourth ground that the estate was "left in a situation exposed to loss or damage, and no other person" administered on the same. There was a short statute of limitations in Missouri, one year (section 5429). More than one-fourth of this time had elapsed when the public administrator took charge, and substantially half of it had expired before the settlement. The first effort made by the heirs to re-

move the public administrator was about December 10th, within about 12 days of the claim being wholly lost by the statute of limitations. Surely by this neglect, for whatever cause, of the heirs at law the claim was "exposed to loss."

For the same reason the public administrator had authority, under the fifth ground specified under section 302, but entirely aside from this question the contention here made is in a collateral proceeding.

[3] While the application to the probate court was to set aside and revoke the authority of the public administrator, the whole record shows that it was revoked prospectively and not retrospectively. No application was ever made to the probate court to revoke the authority to the public administrator to settle the claim or to revoke the settlement made under such authority. It is the settled law of Missouri that the authority of a public administrator to take charge of an estate cannot be assailed collaterally. Dunn v. German American Bank, 109 Mo. 90, 18 S. W. 1139; Leeper v. Taylor, 111 Mo. 312, 19 S. W. 955; Wetzell v. Waters, 18 Mo. 396; Richardson v. Busch, 198 Mo. 184, 95 S. W. 894, 115 Am. St. Rep. 472; Vermillion v. Le Clare, 89 Mo. App. 55.

In Dunn v. German American Bank, supra, the court said:

"Nor is there any doubt that the public administrator had authority under the statute to take charge of the estate of the decedent, and, besides his right to thus take charge of an estate cannot be questioned collaterally. Wetzell v. Waters, 18 Mo. 396; 1 Woerner, Adm'n, 397."

And in Leeper v. Taylor, supra, the court said:

"Even if the facts did not exist to justify him in taking charge of the estate, he would be the administrator until superseded by a duly appointed private administrator."

The public administrator probably had authority to take charge of the estate, and whether he had or not, he became administrator until superseded or otherwise removed. See Simmons v. Saul, 138 U. S. 439, 11 Sup. Ct. 369, 34 L. Ed. 1054, and the cases there referred to, namely, Comstock v. Crawford, 3 Wall. 396, 18 L. Ed. 34, and McNitt v. Turner, 16 Wall. 352, 21 L. Ed. 341; Garrett v. Boeing et al., 15 C. C. A. 209, 68 Fed. 51. It is claimed that if it be conceded that Troll was the de facto administrator of this estate, he had no power to compromise this claim, even with the approval of the probate court.

[4] First it is urged that the claim for damages was not a general asset of the estate subject to the payment of debts, and this is true.

The case of Pisano v. Shanley Co., 66 N. J. Law, 1, 48 Atl. 618, is cited. It is there said:

"There are decisions of our sister states holding that the administrator in actions of this sort is so purely a formal party that his release or discharge of the cause of action, without the consent of the beneficiaries, will not be permitted. It is not necessary to review the decisions on this subject."

The question was not expressly passed upon in that case. There is no explanation of what is meant by "will not be permitted." Not be permitted by whom? Did the court mean not permitted by the probate court having jurisdiction of the estate, or did it mean such a settlement might be collaterally assailed? The court wholly failed to cite any of

the alleged decisions of sister states so holding. None of them have been cited by the plaintiff, and we have not been able to identify them. If the New Jersey court meant such settlement would not be permitted by the probate court, the answer here is at once that the probate court did permit this settlement.

In Jeffries v. Mutual Life Insurance Company of New York, 110 U. S. 305, 4 Sup. Ct. 8, 28 L. Ed. 156, the court said:

"To commence and prosecute actions fairly includes the power to make such reasonable contracts in regard to compensation and the compromising of actions on doubtful claims as the circumstances of particular cases may justify. The fact of the enactment in Missouri of a statute, which went into effect November 1, 1879, Rev. Stat. of Missouri 1879, vol. 1, p. 37, § 242, giving power to an administrator to compound with a debtor, with the approbation of the judge of probate, does not imply that the power did not exist before without such approbation. This transaction occurred before such enactment. An administrator has general power, to dispose of the personal effects of his intestate, 2 Williams on Ex'rs (6th Am. Ed.) p. 998, and to compound a debt, if it is for the benefit of the trust estate. 3 Williams on Ex'rs, p. 1900, and note g2. And, even when statutes exist providing for compromises with debtors with the approval of a probate court, it is held that the right to compromise, which before existed, is not taken away, but may be exercised subject to the burden of showing that the compromise was beneficial to the estate. Wyman's Appeal, 13 N. H. 18; Chouteau v. Suydam, 21 N. Y. 179; Chadbourn v. Chadbourn, 9 Allen [Mass.] 173."

[5] It is quite uniformly held that the administrator or other person authorized to bring suit for damages for the death of another may compromise the claim without complying with such statutes as section 242 of the Revised Statutes of Missouri because such statutes have reference to the compromise of claims which belong to the estate proper, and not to the widow, heirs at law, and the like, and that such compromises may be made, not only where the beneficiaries do not consent, but where they affirmatively object. Hartigan v. Southern Pac. R. Co., 86 Cal. 142, 24 Pac. 851; Henchey v. City, 41 Ill. 136; Washington v. L. & N. Ry. Co., 136 Ill. 49, 26 N. E. 653; Washington v. L. & N. Ry. Co., 34 Ill. App. 658; Brinks Ex. Co. v. O'Donnell, 88 Ill. App. 459; Pittsburg, C., C. & St. L. Ry. Co. v. Gipe, 160 Ind. 360, 65 N. E. 1034; Greenlee v. Railroad Co., 73 Tenn. (5 Lea) 418; Stephens v. R. R. Co., 78 Tenn. (10 Lea) 448; Holder v. Nashville, C. & St. L. R. Co., 92 Tenn. 141, 20 S. W. 537, 36 Am. St. Rep. 77; Cotton Mills Co. v. Mullins, 67 Miss. 672, 7 South. 542; Cogswell v. Concord & M. Railroad Co., 68 N. H. 192, 44 Atl. 293; Parker v. Providence & S. Steamship Co., 17 R. I. 376, 22 Atl. 284, 23 Atl. 102, 14 L. R. A. 414, 33 Am. St. Rep. 869; Foot v. Ry. Co., 81 Minn. 493, 84 N. W. 342, 52 L. R. A. 354, 83 Am. St. Rep. 395; Flynn v. Chicago Great Western Railroad Co. (Iowa) 141 N. W. 401, 45 L. R. A. (N. S.) 1098.

Lewis v. McCabe, 76 Mo. 307, is relied on by plaintiff. That case must be considered in connection with McCabe v. Lewis, 76 Mo. 296. These cases were decided by a divided court. The majority held in effect that the public administrator was only authorized to take charge of property in his county at the time of the death of his intestate, and that the law did not contemplate that the public administrator should take charge of property as administrator de bonis non, which property had

already been administered. There is nothing in either of these cases which seems pertinent here.

Plaintiff also cites Voris v. C., M. & St. P. 172 Mo. App. 125, 157 S. W. 835, but it does not seem to have any bearing upon the question deemed of controlling character in this case.

The matters that have been referred to were properly pleaded and proven by the defendant, and at the close of all the evidence it moved for a directed verdict, which was overruled, but which in the view taken should have been sustained.

The case is therefore reversed and remanded, with directions to the District Court to set aside the verdict and grant a new trial.

GREAT NORTHERN RY. CO. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. February 24, 1914.)

No. 2310.

1. MASTER AND SERVANT (§ 13*)—OPERATION OF RAILROADS—HOURS OF SERVICE LAW—MOVEMENT OF TRAINS—"MOVEMENT"—"EMPLOYÉ."

Hours of Service Law (Act Cong. March 4, 1907, c. 2939, 34 Stat. 1415 [U. S. Comp. St. Supp. 1911, p. 1321]), prohibiting the employment of railroad employés longer than 16 hours without relief, defines the term "employé" to mean a person actually engaged in or connected with the movement of any train. *Held*, that the word "movement," as so used, is not restricted to the actual revolution of the wheels of a train or locomotive engaged in interstate commerce, and that a railroad fireman, acting as a locomotive watchman, while his train was tied up on a siding, was engaged in the movement of a train within the statute.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 14; Dec. Dig. § 13.*

For other definitions, see Words and Phrases, vol. 5, p. 4615; vol. 3, pp. 2369-2377; vol. 8, p. 7649.]

2. MASTER AND SERVANT (§ 13*)—OPERATION OF RAILROADS—EMPLOYÉS—HOURS OF SERVICE LAW—CHARACTER OF DUTY.

Hours of Service Law (Act Cong. March 4, 1907, c. 2939, 34 Stat. 1415 [U. S. Comp. St. Supp. 1911, p. 1321]) makes it unlawful for any carrier to require or permit any employé to remain on duty for a longer period than 16 consecutive hours, etc. *Held* that, where, after a railroad fireman had been working for 16 hours as such, his train was tied up on a siding and he was compelled for 8 additional hours to remain on duty as watchman of his engine, during which time his duties were not essentially different in kind from those required of him in the operation of the engine, though lighter in degree, such change from fireman to watchman did not prevent his continued employment from constituting a violation of the statute.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 14; Dec. Dig. § 13.*]

In Error to the District Court of the United States for the Northern Division of the District of Idaho; Frank S. Dietrich, Judge.

Action by the United States against the Great Northern Railway Company to recover a penalty for violation of the Hours of Service

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

Law (Act Cong. March 4, 1907, c. 2939, 34 Stat. 1415 [U. S. Comp. St. Supp. 1911, p. 1321]). Judgment for the United States (206 Fed. 838), and defendant brings error. Affirmed.

The plaintiff in error, a corporation organized and doing business under the laws of the state of Minnesota, and acting as a common carrier engaged in interstate commerce by railroad in the state of Idaho, was charged in the complaint filed by the United States Attorney in the court below with having violated an act of Congress approved March 4, 1907, entitled "An act to promote the safety of employés and travelers upon railroads by limiting the hours of service of employés thereon" (34 Stat. 1415), by requiring and permitting its certain employé and fireman, Ed. Bergen, to be and remain on duty as such employé and fireman upon its line of railroad at and between the stations of Hillyard, in the state of Washington, and Laclede, in the state of Idaho, for a longer period than 16 hours, to wit, from the hour of 6 o'clock a. m. on July 10, 1912, to the hour of 6 o'clock a. m. on July 11, 1912.

The case was tried in the court below upon an agreed statement of facts, from which it appeared that Ed. Bergen, the employé and fireman named in the complaint, had entered upon his duties as such fireman upon one of the locomotives of the railroad company, at Hillyard, Wash., on July 10, 1912, at the hour of 6 o'clock a. m.; that said locomotive, after being attached to a freight train of the railroad company engaged in the movement of interstate commerce, left Hillyard, Wash., at said hour, and proceeded eastward over the Spokane division of the railroad company, and arrived at Laclede, Idaho, at 9:59 p. m. on that date; that throughout the movement and operation of the locomotive and freight train from Hillyard, Wash., to Laclede, Idaho, and during the whole of that time, the fireman, Ed. Bergen, was engaged in firing the locomotive, without interruption or rest, and without being off duty as such employé and fireman.

It further appeared from the agreed statement of facts that upon arriving at Laclede, Idaho, at 9:59 p. m. on July 10, 1912, the locomotive and freight train were run onto a siding leading out of and into the main line of the railroad company, the whole of the freight train and locomotive occupying the siding, leaving the main line of the railroad free and clear for the unobstructed movement of trains passing along the main line; that the switches at each end of the siding were then locked and thereafter remained locked in such position that the freight train and locomotive could not leave such position, and no train could proceed from the main line to or upon the siding; that the brakes on the locomotive and freight train were set so that the same could not be moved unless the brakes should be released; that thereupon the crew of the locomotive and freight train, other than the employé and fireman, Ed. Bergen, retired to rest upon the freight train, and the orders of the freight train and locomotive, constituting the orders under which they had a right to proceed or move, were annulled.

The stipulated facts also showed that after the locomotive and freight train were placed on the siding and tied up as above set forth, and up to and until 6 o'clock a. m. on July 11, 1912, the fireman and employé, Ed. Burgen, remained on the locomotive continuously, during which time he was on duty as an engine watchman, and was charged with performing and did perform no other duties or work other than the duties and work of an engine watchman.

The court below found for the plaintiff and against the railroad company, and assessed the fine of the latter at $100. A judgment was thereafter entered against the railroad company for that amount.

F. V. Brown, of Seattle, Wash., E. C. Lindley, of St. Paul, Minn., and Charles S. Albert and Thomas Balmer both of Spokane, Wash., for plaintiff in error.

C. H. Lingenfelter, U. S. Atty., of Boise, Idaho.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge (after stating the facts as above). The act of Congress of March 4, 1907, so far as it is applicable to this case, provides as follows:

"* * * The provisions of this act shall apply to any common carrier or carriers, their officers, agents and employés, engaged in the transportation of passengers or property by railroad in the District of Columbia or any territory of the United States, or from one state or territory of the United States or the District of Columbia to any other state or territory of the United States or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States. The term 'railroad' as used in this act shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease; and the term 'employés' as used in this act shall be held to mean persons actually engaged in or connected with the movement of any train.

"Sec. 2. That it shall be unlawful for any common carrier, its officers or agents, subject to this act to require or permit any employé subject to this act to be and remain on duty for a longer period than sixteen consecutive hours, and whenever any such employé of such common carrier shall have been continuously on duty for sixteen hours he shall be relieved and not required or permitted again to go on duty until he has had at least ten consecutive hours off duty; and no such employé who has been on duty sixteen hours in the aggregate in any twenty-four hour period shall be required or permitted to continue or again go on duty without having had at least eight consecutive hours off duty."

Upon the arrival of the freight train and locomotive of the plaintiff in error, upon which its employé, Bergen, was engaged as a fireman, at Laclede, Idaho, at 9:59 p. m. on July 10, 1912, he had been on duty as such fireman continuously, without interruption, and without any opportunity for rest, from 6 o'clock on the morning of that date, a period of 16 consecutive hours. Upon arriving at Laclede, Idaho, the locomotive and freight train were tied up on one of the sidings of the plaintiff in error located at that point, and all of the crew of the locomotive and freight train (with the exception of the fireman, Bergen) were released from any and every duty in connection with the movement of the same, and retired to rest upon the train. The fireman, Bergen, remained on the locomotive in the capacity of engine watchman, from the time of the tying up and side-tracking of the locomotive and freight train at 9:59 p. m. up to and until 6 o'clock a. m. on the following morning, a period of 8 hours, making in all 24 consecutive hours during which he was on duty as fireman and as engine watchman.

The plaintiff in error contends that while their fireman was acting as engine watchman on the locomotive, for the period during which their freight train and locomotive were tied up on the siding, the employé was not a person "actually engaged in or connected with the movement of any train," within the meaning of those words as used in the act of Congress; and further that the final eight hours during which their employé was engaged as and performing the duties of engine watchman on their locomotive, and while it was tied up and side-tracked on their siding as aforesaid, constituted no portion of the period of duty covered by the act of Congress, and that, so far as the final period of eight hours is concerned, the act does not apply.

[1] With respect to the first of these contentions, we do not think that the narrow interpretation insisted upon by the plaintiff in error can be applied to the language of the act above quoted. We cannot believe that it was the intention of Congress that the word "movement" should be restricted to the actual revolution of the wheels of a train or locomotive engaged in interstate commerce, for, if that interpretation were the correct one, obviously the very object of the act, the promotion of the safety of employés and travelers upon railroads, would be frustrated. The sidings of a railroad are a part of its system and are indispensable to the proper operation and movement of its trains. Tying up on a siding for any purpose, whether to await orders, or for the passing of other trains, or for any other purpose connected with the transportation of freight or passengers, is as much a part of the general movement of a train as the actual running thereof on the main line and at scheduled periods. The fact that, as in this case, the delay was for a period of eight consecutive hours does not operate to make it any the less a delay occurring in the ordinary course of the general movement of the trains of the plaintiff in error. Such delays are a part of the general operations whereby traffic over railroads is conducted. Following this contention of the plaintiff in error to its logical conclusion, the result would be that the freight train and locomotive in this case could have been side-tracked and tied up for an hour at a time, at intervals of an hour, and its employé required to remain on duty as fireman and as engine watchman alternately for an indefinite period, yet it would not have been guilty of a violation of the act under consideration.

[2] It is next contended by the plaintiff in error that the final eight hours during which their employé was engaged in performing the duties of engine watchman on their locomotive, while it was tied up and side-tracked on their siding, constituted no portion of the period of duty covered by the act. The duties of an engine watchman, as appears from the agreed statement of facts in this case, consisted in watching the quantity of water in the boiler of the engine which he was employed to watch, and in replenishing the same so that the engine could always have an adequate supply of water whereby steam could be adequately and efficiently and promptly generated, so that, when the engine was again to be moved, it could move under its own steam without delay incident to waiting until the engine could have again developed sufficient steam, and likewise to watch the fire in the fire box of the engine, and to replenish the same with fuel, so that the fire would be kept up to such an extent that steam would be generated, so that, when it was next desired to move the engine, the same could move without delay by means of the steam so generated by means of the fire. But wherein did these duties of the employé as engine watchman differ from his duties as fireman? In no essential particular, as we view it. It is true that, when a locomotive is actually running, the duties of a fireman, with respect to keeping a proper amount of water in the boiler, and a proper amount of fire in the fire box, may be more strenuous and occupy his time to a greater extent than when the locomotive is side-tracked and tied up on a siding; but that would be merely a ques-

tion of degree and would not affect the general nature of the duties of his occupation. The all-important fact not to be lost sight of in this case is that the employé was required and permitted to continue to apply himself to and perform, for a period of eight consecutive hours (after 16 consecutive hours of labor), duties very similar to those which he had been performing for the 16 hours immediately before, without being granted any period during which he might have an opportunity for rest. The argument of the plaintiff in error, in connection with the contention now under consideration, is that the safety of its employés and of the travelers upon its railroad was not imperiled by the employé remaining on duty the additional period of eight hours as engine watchman. Conceding that this might be true as to the employés and travelers upon other trains, the fact would still remain that had the fireman, Bergen, during this additional period while he was acting as engine watchman, through fatigue and general debility due to excessive hours of labor, permitted the water in his locomotive to become so low that an explosion would have been caused thereby, his own safety, and perhaps the safety of the other members of the crew of the train, who had during that period retired to rest upon the train, would have been imperiled.

There is another and a much stronger argument which we think fully supports the views which we have stated. The act prohibits any common carrier from requiring or permitting any "employé" to be and remain on duty for a longer period than 16 consecutive hours. There is no distinction made in the act as to any particular duty or duties which an employé may be performing during the whole time, or any portion of the time, he is on duty. In this case, when Bergen's duties were changed from those of fireman to those of engine watchman, he continued to be no less an employé of the railroad company. In other words, had he been employed as an engine watchman during the entire period of 24 consecutive hours, there could be no question but that such employment would have constituted a violation of the act. The fact that during the 24-hour period he was employed for 16 hours as fireman and for 8 hours as engine watchman does not lessen the offense.

The judgment of the court below is affirmed.

ALWART BROS. COAL CO. v. ROYAL COLLIERY CO. (two cases).

(Circuit Court of Appeals, Seventh Circuit. January 6, 1914.)

Nos. 1999, 2022.

1. SALES (§ 62*)—CONTRACT—CONSTRUCTION:

A contract for the purchase and sale of coal provided that defendant coal company purchased from plaintiff colliery company approximately 20,000 tons at $1.07 per ton to be shipped in approximately equal monthly quantities between July 25, 1911, and March 31, 1912, as ordered by the buyer. The colliery company agreed to sell the coal from its mine, and the coal company as the purchaser agreed to buy the coal as provided;

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

the contract also providing the method of payment and certain excuses for nonperformance and for the purchase of coal in the open market in case of a failure of the seller to perform. *Held*, that the contract contemplated that the buyer was to have and should take approximately 2,500 tons of coal in each of the eight calendar months embraced in the contract, unless excuse arose as specified, thus making each monthly requirement severable for performance.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 171–179; Dec. Dig. § 62.*]

2. APPEAL AND ERROR (§ 977*)—NEW TRIAL—DENIAL.

Error cannot be assigned in the Circuit Court of Appeals on the overruling of a motion for a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860–3865; Dec. Dig. § 977.*]

3. APPEAL AND ERROR (§§ 259, 263*)—INSTRUCTIONS—REMARKS TO JUDGE—NECESSITY OF EXCEPTIONS.

Assignments of error directed to various portions of the instructions and to remarks of the judge in the presence of the jury cannot be reviewed where no adequate exceptions are preserved thereto.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1498–1502, 1516–1523, 1525–1532; Dec. Dig. §§ 259, 263.*]

4. EVIDENCE (§ 129*)—MATERIALITY—ISSUES.

In an action for the purchase price of coal delivered under a contract, evidence of sales of coal, made by the plaintiff to the buyer during the period covered by the contract which were not within it, was properly admitted to prove that a credit claimed by the coal company was not applicable to the contract in suit, but to such other sales.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 388–393, 395–398; Dec. Dig. § 129.*]

5. APPEAL AND ERROR (§ 1052*)—REVIEW—RECEPTION OF EVIDENCE—PREJUDICE.

Where the verdict is in accord with the undisputed evidence, error, if any, in the reception of evidence, will not be deemed prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4171–4177; Dec. Dig. § 1052.*]

6. SALES (§ 371*)—CONTRACT—MONTHLY DELIVERIES—NECESSITY OF TENDER.

Where a contract for the sale of coal required the seller to deliver, and the purchaser to take, approximately 2,500 tons during each of the calendar months as specified in the contracts as ordered by the buyer, the seller was not required to tender such amounts during particular months included within the contract period in order to entitle it to recover for the buyer's failure to order the amount specified per month.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1086–1088; Dec. Dig. § 371.*]

7. TRIAL (§ 252*)—REQUESTS TO CHARGE—APPLICABILITY TO EVIDENCE.

A request to charge not supported by the evidence nor in accord with the undisputed facts was properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 596–612; Dec. Dig. § 252.*]

8. SALES (§ 421*)—BREACH OF CONTRACT—INSTRUCTIONS.

Where a contract for the sale of coal required the purchaser to accept approximately 2,500 tons during each month of the contract period unless excused by specified conditions making the contract as to each monthly quantity severable for performance, an instruction that the seller's consent to delay shipments amounted to a waiver of its right to insist on the buyer's acceptance of the regular monthly amount during the months prior to January 1, 1912, and, if such waiver appeared, it was the seller's duty to

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

deliver after that date such amount as with the amount shipped thereto would make up the full contract quantity, was properly refused.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1203; Dec. Dig. § 421.*]

9. SALES (§ 416*)—CONTRACT—BREACH—EVIDENCE.

Where a contract for the sale of coal required the seller to deliver, and the buyer to accept, approximately 2,500 tons per month from July 25, 1911, to March 31, 1912, and in an action for the seller's breach of the contract it appeared that the contract quantity had not been furnished as ordered between January 1 and February 20, 1912, and there was no proof that any of the reasons provided in the contract which would relieve the seller of liability had occurred, the seller's liability for damages was for the jury, notwithstanding the buyer placed orders in excess of the monthly contract quantity during such period and there was a disagreement as to the contract requirements, and hence the exclusion of evidence to prove the fact and amount of the buyer's damage was error.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1171, 1172; Dec. Dig. § 416.*]

In Error to the District Court of the United States for the Eastern Division of the Northern District of Illinois; Francis M. Wright, Judge.

Actions by the Royal Colliery Company against the Alwart Brothers Coal Company. Judgment for plaintiff in each case, and defendant brings error. Judgment in first case affirmed, and judgment in the second case reversed, and case remanded, with directions to grant a new trial.

In both of these suits at law Royal Colliery Company (hereinafter referred to as "Colliery Company") recovered judgment against Alwart Bros. Coal Company (hereinafter referred to as "Coal Company"), and the Coal Company, as plaintiff in error, seeks reversal of each judgment under writs of error respectively, Nos. 1999 and 2022.

Both suits are founded on alleged breach of a contract in writing between the parties, made July 25, 1911, for purchase and sale of coal, for "approximately 20,000 tons," as four-sevenths of "the requirements of school districts" of Chicago mentioned, at $1.07 "per ton of 2,000 pounds," to be shipped "in approximately equal monthly quantities between July 25, 1911, and March 31, 1912, as ordered by the purchaser." The Colliery Company is designated as the "seller" and agrees to sell the coal from its mine at Virden, Ill., and the Coal Company, "as the purchaser, agrees to buy coal" as provided. Other terms of the contract relating to the controversy read as follows:

"Payments.—Settlements shall be made by purchaser in cash at office of seller at Virden, Ill., on or before the 20th day of each calendar month for fifty per cent. of the value of all coal shipped during the previous month. The remaining fifty per cent. will be paid on the 10th day of the second month following the month in which shipments are made. Upon failure of purchaser to pay for any fuel within the time stipulated, the seller may at its option, to be exercised any time prior to payments therefor in full, on five days written notice, suspend further shipments until such payment is made, or treat the contract for any or all unshipped fuel as broken by purchaser. * * *

"This contract is subject to cancellation should the works of either of the parties hereto be destroyed by fire or other accident, and to interruption in delivery should they be closed or partially closed temporarily for repairs, strikes, lockouts, deficient car supply, or other unavoidable reasons. In the event of such interruption to the works of the shipper it may prorate shipments on all existing contracts during such interruption.

"In the event the seller herein shall at any time fail to comply with any

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

of the terms and conditions contained in the preceding paragraph of this contract, the seller in such case and only in such case agrees to protect, indemnify and hold blameless the purchaser under clauses L and N of the purchaser's general contract with the Board of Education of the City of Chicago, which clauses read as follows:

"'(L) Purchase of Fuel on Open Market.

"'Should the contractor, from any cause or at any time, fail, in the judgment of the business manager, to promptly deliver fuel, or, as shown by the reports of the engineering firm which does the testing for the board of education, fail to deliver fuel of the kind or quality theretofore ordered to be delivered to any of the public school buildings, said business manager shall have the right, either personally or through others whom he may designate, to purchase fuel to supply the want of any school building or buildings which the contractor has failed to supply in accordance with the order of said business manager. Said fuel so purchased by said business manager to be of any grade or quality which can be obtained, and shall be purchased at the expense of the contractor so defaulting. The said business manager shall deduct the difference in cost, if any, between the price thus paid and the contract price, from any moneys due or accruing to the contractor from the board under the terms of the contract.'"

Clause N is inapplicable to the controversies.

(1) In No. 1999, the suit was brought by the Colliery Company (as a foreign corporation) in the federal court, to recover: (a) For coal delivered in January and February, 1912, under the contract, and (b) for damages for alleged failure of the purchaser to take the agreed amount of coal during the prior months of 1911. On submission of the issues therein to a jury, the Colliery Company recovered a verdict against the Coal Company embracing both of the above claims.

(2) In No. 2022, the suit was instituted by the Coal Company against the Colliery Company, in the municipal court of Chicago, for recovery of damages for alleged failure of deliveries of coal in the months of January, February, and March, 1912; was removed to the District Court and issue joined therein. It "was consolidated for the purpose of trial" with the other cause (No. 1999), but treated as independent thereof for separate verdict upon such issue, which was neither pleaded nor treated by way of set-off in No. 1999. On conclusion of the evidence thus taken jointly, the trial court directed a verdict in favor of the Colliery Company (defendant) in No. 2022.

The material facts in reference to performance and the questions of law presented in each case are stated in the opinion.

John A. McKeown and Defrees, Buckingham, Ritter & Eaton, all of Chicago, Ill., for plaintiff in error.

Frank Crozier, of Chicago, Ill., for defendant in error.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

SEAMAN, Circuit Judge (after stating the facts as above). [1] The main controversy between the parties, in both of these suits upon the contract of purchase and sale of coal, rests on an interpretation of the contract terms, with the facts in reference to performance and nonperformance respectively undisputed. Upon that inquiry we believe the contract to be plain in its provisions that the purchaser was to have and take approximately 2,500 tons of coal in each month of the eight calendar months embraced in the contract—unless excuse arose as specified—thus making each monthly requirement severable for performance, as construed by the trial court in the submission of the issues in the original suit, No. 1999. This interpretation of the contract is applicable as well for determination of the issues in the other suit.

[2, 3] 1. No. 1999 is the suit of the Colliery Company, as seller,

upon the alleged causes of action: (a) For the purchase price of coal delivered in January and February, 1912, and (b) for damages for failure of the purchaser to take the agreed amounts of coal in each of the prior months embraced in the contract. The verdict awarding recovery upon both of these grounds is supported by facts in evidence, and we believe the assignments of error present no cause for reversal, under the contract obligations as above interpreted. Error is variously assigned for overruling motions for a new trial, although it is well settled that error is not assignable thereupon. Several assignments are directed to various portions of the instructions given to the jury and for remarks of the trial judge "in the presence of the jury," but each is without force for the reason that no adequate exceptions are preserved for review thereof, and were it assumed (without so intimating) that any of such rulings were objectionable, no review is authorized. The only assignments of error entitled to consideration, therefore, are those designated as third, eleventh, and twelfth, in the transcript of record.

[4, 5] (1) The third assignment relates to the admission of evidence of sales of coal made by the Colliery Company to the Coal Company, during the period covered by the contract, which were not within the contract sales in suit, and other items of evidence, all alleged to be "not material to any issue before the jury" and tending "to confuse the jury" and induce an "excessive verdict." It is contended on behalf of the defendant in error that the items of evidence referred to were admissible to disprove a credit claimed by the Coal Company in the case at bar for a payment of $1,100, which was not applicable to the contract in suit, but to these other sales; and the record appears to support its reception on that ground. If immaterial in any measure, however, we understand the verdict to be in accord with undisputed facts in evidence, so that error in such reception cannot be deemed prejudicial, and in either view the assignment must be overruled.

[6, 7] (2) The eleventh assignment is for denial of instructions requested, in substance: (a) That no breach of the contract was committed by the Coal Company in its failure to order "approximately 2,500 tons of coal per month" unless tenders of such amounts were made by the Colliery Company "during the months previous to January 1, 1912"; and (b) that the Colliery Company "consented to and acquiesced in the manner of performance" on the part of the Coal Company "and thereby waived its right to insist on the defendant taking the regular monthly amount of coal under the contract." We understand the first-mentioned proposition of law to be untenable, and that the last-mentioned request was neither supported by evidence nor in accord with the undisputed facts.

[8] (3) In the twelfth assignment error is predicated on denial of an instruction as requested, in substance, that consent on the part of the Colliery Company to delay in shipments amounted to a waiver of its right to insist on the taking by the purchaser of "the regular monthly amount of approximately 2,500 tons during the months up to January 1, 1912," and that, if such waiver appeared, it became the duty of the Colliery Company to deliver "after January 1, 1912, such amount of coal as, with the amount shipped previous to that date, would make

up the full amount of approximately 20,000 tons." Neither this assignment nor the request referred to is discussed or mentioned in the brief for plaintiff in error, and we are not advised of its assumed bearing upon the issues in No. 1999, nor whether it is relied upon for reversal; but, whatever may have been contemplated as making the requested instruction applicable, we believe no error was committed in its rejection, as it was, on any theory, inconsistent with the foregoing interpretation of the contract.

All of the assignments of error are therefore overruled, and various other propositions which are set forth in the argument of counsel, not embraced in these assignments, are not involved for consideration. It may justly be remarked, however, that the verdict appears to be supported by the evidence, under the pleadings.

[9] 2. In No. 2022, removed from the municipal court of Chicago, the issue involved was a claim of the Coal Company for damages against the Colliery Company, for alleged failure to make complete deliveries of coal, as provided by the contract, in January, February, and March, 1912. While a large portion of this claim was disproved by the evidence under the foregoing interpretation of the contract, it nevertheless appears in evidence that orders placed by the Coal Company between January 1st and February 20th were not supplied at the rate and extent of 2,500 tons per month as required by the contract, and that the shortage therein presented an issue of default on the part of the seller. If not excused by inability to obtain cars for shipment or other cause within the contract terms, the Colliery Company became liable for damages for such nondeliveries up to February 20th, as above mentioned, and the issue thereupon was for determination by the jury. Evidence was offered by the plaintiff in error and excluded by the court tending to prove the fact and amount of damages thus caused, and we believe error to be well assigned, both upon such exclusion of evidence and upon the final direction of a verdict therein in favor of the defendant below. Neither the fact that the plaintiff below placed orders in excess of 2,500 tons per month during such period, nor the subsequent disagreement of the parties as to the contract requirements, can serve to defeat such right to have the above-mentioned issue of fact submitted to the jury.

In conformity with the foregoing opinion, the first-mentioned judgment, in No. 1999, is affirmed; and the judgment in No. 2022 is reversed, and the cause so designated is remanded to the District Court, with direction to grant a new trial.

LACKAWANNA LEATHER CO. et al. v. LA PORTE CARRIAGE CO.

(Circuit Court of Appeals, Seventh Circuit. January 6, 1914.)

No. 1,998.

1. PLEADING (§ 127*)—ANSWER—DENIAL—DOUBLE NEGATIVE.

An alleged bankrupt filed an answer, denying that it had committed the acts of bankruptcy alleged in the petition, or that it was insolvent, or at the time of filing such involuntary petition in bankruptcy was insolvent, and "that it should not be declared a bankrupt for any cause in said pe-

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

tition alleged." *Held*, that the second negative was intended from the context as an additional independent denial, and hence the answer could not be construed as a confession that respondent should be declared a bankrupt.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 264–268; Dec. Dig. § 127.*]

2. BANKRUPTCY (§ 89*)—INVOLUNTARY PETITION—ANSWER—VERIFICATION.
Where an involuntary bankruptcy petition is verified on information and belief, the petitioners are not entitled to have a better verification of the answer.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 120–122; Dec. Dig. § 89.*]

3. BANKRUPTCY (§ 82*)—ANSWER—VERIFICATION—DEFECTS—WAIVER.
Where an involuntary bankruptcy petition is heard on the merits without objection to the pleadings, the fact that one or more of them is verified on information and belief only is immaterial.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 123; Dec. Dig. § 82.*]

4. BANKRUPTCY (§ 95*)—INVOLUNTARY PETITION—ADJUDICATION—REFERENCE TO MASTER.
Where in involuntary bankruptcy proceedings, the alleged bankrupt and a creditor filed separate answers, both denying the material allegations of the petition, only one issue was thereby presented, and hence the petitioning creditors were not relieved from the duty to appear before the special master and try such issue, because the order of reference only submitted the issue formed by the petition and the "answer" thereto, instead of referring the issue presented by the petition and both answers.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 132, 140, 145; Dec. Dig. § 95.*]

5. BANKRUPTCY (§ 95*)—ISSUE—SUBMISSION TO MASTER—REPORT—SUMMARY OF EVIDENCE.
Under Gen. Bankr. Order 27 (89 Fed. xi, 32 C. C. A. xi), providing for a certification of the summary of the evidence, report of a special master, setting forth the substance of the testimony, was not objectionable, in the absence of any request made at the time that the testimony be returned verbatim.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 132, 140, 145; Dec. Dig. § 95.*]

6. BANKRUPTCY (§ 61*)—ACT OF BANKRUPTCY—ADMISSION—EVIDENCE.
A letter, written by the president of an alleged bankrupt corporation, asking for a conference with creditors, and stating that the corporation was unable to meet its obligations promptly and continue the business, having been handicapped by having too much invested in the plant and too little working capital, though it appeared that it could procure sufficient business if it could put itself in shape to take care of it, did not constitute a confession of bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 61.*]

7. BANKRUPTCY (§ 91*)—ASSETS—TRUE CASH VALUE—FAIR VALUATION.
On an issue of insolvency in an involuntary bankruptcy proceeding, an objection to proof of the "true cash value" of the alleged bankrupt's property, in that "fair valuation" was the test required by the Bankruptcy Act, was unsustainable, since the burden assumed by the alleged bankrupt was at least as heavy as that prescribed by the statute.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 137–139; Dec. Dig. § 91.*]

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

8. BANKRUPTCY (§ 100*)—ACT OF BANKRUPTCY—DENIAL—REHEARING.
Where an alleged bankrupt was found not to have committed an act of bankruptcy, a motion by the petitioning creditors for rehearing, which merely repeated such creditor's original charge on information and belief that the alleged bankrupt was insolvent, but contained no statement of procurable evidence with which to combat the evidence of solvency previously offered, was properly denied.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 60, 131, 141–144; Dec. Dig. § 100.*]

9. BANKRUPTCY (§ 100*)—INVOLUNTARY PROCEEDING—DISMISSAL—STATUTES.
Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 561 [U. S. Comp. St. 1901, p. 3444]), § 58a, providing that creditors shall have at least 10 days' notice of the proposed dismissal of the proceedings, contemplates notice to other creditors when the petition is about to be dismissed for want or prosecution or consent of the parties already in court, and does not apply to dismissal of an involuntary petition on the merits after hearing.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 60, 131, 141–144; Dec. Dig. § 100.*]

Appeal from the District Court of the United States for the District of Indiana; Albert B. Anderson, Judge.

In the matter of bankruptcy proceedings of the La Porte Carriage Company. From an order adjudging that the respondent was not a bankrupt and dismissing the petition, the Lackawanna Leather Company and others, petitioning creditors, appeal. Affirmed.

Appellants on November 12, 1912, filed their petition against the appellee, a corporation, alleging that appellee was insolvent and had on November 7, 1912, while insolvent, transferred a portion of its goods to one of its creditors with intent to prefer such creditor. On the same day appellants also filed a petition asking the court to appoint a receiver, and the court at once made such an appointment.

On December 2, 1913, appellee filed its answer, in which it "denies that it has committed any of the acts of bankruptcy set forth in said petition, or that it is insolvent, or at the time of filing such involuntary petition in bankruptcy was insolvent, and that it should not be declared bankrupt for any cause in said petition alleged." At the same time the Cudahy Packing Company, a creditor, filed an answer denying the allegations of the petition.

Upon December 4, 1912, the judge referred the petition of appellants and the "answer" (not answers) to a special master with instructions "to set a day for hearing, and notify the parties, and to take the testimony in said matter and report the same to this court, together with his findings of fact and conclusions of law."

On January 11, 1913, the special master filed his report, in which he showed that on December 26, 1912, he set the cause for hearing at the court house in La Porte, Ind., on January 9, 1913, and notified the parties in interest and also their attorneys of record, and that at the time and place set for hearing the cause came on for hearing, and that appellants and their counsel failed to appear. The master further reported that appellee by counsel and the Cudahy Packing Company by counsel were present, and called one Parkhurst, president of appellee, as a witness, and that the witness was sworn and examined. The master then certified that said witness "testified in substance as follows," setting out in narrative form Parkhurst's statements that the real estate, plant and machinery of appellee on November 7, 1912, were of the cash value of $240,000, against which there was a bonded indebtedness of $64,500, and that the merchandise then on hand was worth in cash $61,000, and that there were accounts receivable worth $7,500 net, and that all of appellee's indebtedness in excess of said bonded indebtedness was $60,000.

In appellants' petition for the appointment of a receiver is set out a letter

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

which the president of appellee had sent on November 8, 1912, asking for a conference with its creditors. In this letter, after a statement of the floating debt, the following statement appears: "While this amount is not large, we are unable to meet these claims promptly and continue our business. We hope to have a full representation and have you examine our plant and equipment for doing business. We have been handicapped by having too much invested in our plant and too little working capital. It looks as though we could procure business enough if we could put ourselves in shape to take care of it.".

On February 10, 1913, appellants filed certain exceptions to the report of the special master. These exceptions are noticed in the opinion. And at the same time appellants filed a motion that they be granted leave to dismiss, and that 10 days' notice be given to all creditors of the contemplated dismissal, or that the original petition for adjudication be again referred to a special master. This petition alleged that appellants believed that appellee "is hopelessly insolvent," but failed to tender or refer to any evidence, newly discovered or otherwise, in support of the alleged belief. And on February 13, 1913, the court overruled said exceptions and motion and entered the decree appealed from, adjudging that appellee was not and is not a bankrupt, and that the petition be dismissed with costs.

Israel Cowen, of Chicago, Ill., for appellants.

Ellsworth E. Weir, of La Porte, Ind., and Eugene H. Garnett, of Chicago, Ill., for appellee.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

BAKER, Circuit Judge (after stating the facts as above). [1] Counsel for appellants urges with evident good faith that the decree must be reversed on account of appellee's confession in its answer that it should be declared a bankrupt. This confession is said to be brought about by the wording of the answer to the effect that appellee denied that it should not be declared a bankrupt. But the argument overlooks the phrases that immediately follow the word "denies," and couples the second negative with the original denial, while the second negative was evidently intended, from the context, to be an additional independent denial. At all events, after a hearing upon the petition and the answer without objection, there is no merit in the assignment.

[2, 3] Counsel challenges the sufficiency of the verification of appellee's answer. But on examination of the record it appears that it is the appellants' own petition, and not appellee's answer, that is verified on information and belief. But if appellee's answer had been only verified in the same way, appellants could not well call for a better verification than they gave. This matter, also, became utterly immaterial when the case was heard on these pleadings without objection.

[4] An insistence is made that the order of reference is insufficient to support any decree based upon a report under the reference, on the ground that the matter submitted to the special master was the issue formed by the petition and "the answer thereto." The point is that since the appellee and a creditor had each filed an answer, appellants could not be required to pay any attention to this ambiguous order of reference. But as both answers were denials of the material allegations of the petition, only one issue was in fact presented, and a trial upon the petition and either answer would determine that issue.

[5] Objection is made to the master's report because it does not set out the evidence in obedience to the order of reference, but only

states that the witness "testified, in substance, as follows." No request was made at any time that the testimony be returned verbatim. General Order 27 (89 Fed. xi, 32 C. C. A. xi) provides for the certification of "a summary of the evidence."

[6] Against the testimony of the president of appellee given before the master it is claimed that the facts stated in the letter of the president should prevail. But this letter was never introduced before the master, and it only appeared in the ex parte application of appellants for the appointment of a receiver. There is, however, no contradiction between the testimony of Mr. Parkhurst and the statements in the letter. This letter is far from admitting any cause for an adjudication of bankruptcy. It merely admits that appellee's floating indebtedness cannot be met promptly. The view presented is that too much capital is invested in plant in proportion to the working capital.

Counsel also insists that under section 3 of the Bankruptcy Act, relating to the burden of proof, appellee had the burden of establishing that no cause existed for an adjudication of bankruptcy. We shall not stop to analyze the various provisions of this section, because if the burden was upon the appellee, that burden was fully met.

[7] Objection is also made to the proof of the "true cash value" of the property, when "fair valuation" is the test required by the statute. We are of the opinion that appellee assumed at least as heavy a burden as the statute required in this respect.

It is also claimed that the proof is insufficient because the date with respect to solvency was given as November 7th instead of November 12th, when the petition was filed. But November 7th was the date of the alleged preference, and to constitute a preference it was necessary that appellee while insolvent should have made a transfer. So that, even if the presumption of a continuation of solvency from November 7th to November 12th could not be indulged, yet an adjudication of bankruptcy could not be rendered in the face of the proof that appellee had committed no act of bankruptcy.

[8] Appellants' motion to have the matter resubmitted was without merit. It simply repeated the appellants' original charge on information and belief that appellee was insolvent, but contained no statement of any procurable evidence with which to combat that which had been offered by the appellee.

[9] The alternative of the motion, namely, that appellants be permitted to dismiss the petition after 10 days' notice to all creditors, was likewise without merit. Section 58a contemplates notice to other creditors when the petition is about to be dismissed for want of prosecution or by consent of the parties already in court, and has no application to a dismissal of the petition on the merits after a hearing. Neustadter v. Chicago Dry Goods Co. (D. C.) 96 Fed. 830, 3 Am. Bankr. Rep. 96; Cummins Grocer Co. et al. v. Talley, 187 Fed. 507, 109 C. C. A. 273, 26 Am. Bankr. Rep. 484.

The decree is affirmed.

ALBEMARLE SOAPSTONE CO. v. SKIPWITH.

(Circuit Court of Appeals, Fourth Circuit. November 4, 1913.)

No. 1163.

1. WATERS AND WATER COURSES (§ 49*)—FLOODING LAND—PERMANENCY OF INJURY.

Where, in trespass to recover damages to plaintiff's land and crops by defendant's deposit of soapstone dust into waters of a creek which by floods and freshets subsequently was carried down and deposited on plaintiff's land, there was no proof of a permanent injury, the rule of damages applicable to a nuisance resulting from a permanent structure or establishment which at once exerts a malefic effect was inapplicable.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 39, 40; Dec. Dig. § 49.*]

2. WATERS AND WATER COURSES (§ 49*)—INJURIES TO LAND—RIGHT TO SUE.

In an action for injuries to plaintiff's land and crops by the pollution of the waters of a stream with soapstone dust by defendant, which was later thrown on plaintiff's land by floods and freshets, plaintiff's right to recover was limited to the damages for injuries sustained after the time he acquired title to the land.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 39, 40; Dec. Dig. § 49.*]

3. WATERS AND WATER COURSES (§ 49*) — INJURIES TO LAND — MEASURE OF DAMAGES.

In an action for injuries to plaintiff's land and crops by defendant's pollution of a stream by soapstone dust, which was later thrown onto the land by floods and freshets, the court properly charged that plaintiff's measure of damages for injury to the land was the difference between its rental value freed from and subject to or incumbered with the dust so deposited and for the injury to any given crop the difference in value of the crop free from and burdened with such deposit.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 39, 40; Dec. Dig. § 49.*]

4. DAMAGES (§ 217*)—INSTRUCTIONS—DAMAGES.

Where, in an action for injuries to plaintiff's land and crops by deposit of soapstone dust in the waters of a stream which was thereafter carried onto the land by freshets and overflows, the evidence showed that one portion of plaintiff's land was more subject to overflow and consequent deposit of soapstone dust than the remainder, and that the damage to crops was confined to the upper bottom, while the damage by loss of the use of the land for purposes other than grazing the wild grass was confined to the lower bottom, an instruction that an upper riparian proprietor had no right to so use the stream as to materially injure the land or crops of the lower owner of the same stream, and if the jury believed from the evidence that defendant had so used the stream in question as to materially injure the land or crops, or both, of plaintiff, the jury should find for him, and assess his damages at such sum as would compensate him for the injury so done, the measure of damages for injury to the land being the difference between the fair rental value thereof, free from and subject to the alleged deposit during the period specified, and the measure of damages for injury, if any, to crops being the difference in the value of the crops free from and subject to the deposit, was not objectionable as authorizing double damages.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 556–559; Dec Dig. § 217.*]

In Error to District Court of the United States for the Western District of Virginia, at Charlottesville; Henry Clay McDowell, Judge.

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

Action by L. Skipwith against the Albemarle Soapstone Company. Judgment for plaintiff, and defendant brings error. Affirmed.

J. T. Coleman, of Lynchburg, Va. (Coleman, Easley & Coleman, of Lynchburg, Va., on the brief), for plaintiff in error.

H. W. Walsh and R. T. W. Duke, Jr., both of Charlottesville, Va., for defendant in error.

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

KELLER, District Judge. This was an action in trespass on the case brought by L. Skipwith against the Albemarle Soapstone Company, a corporation organized under the laws of the state of New York, alleging damages to Skipwith's land occasioned by the depositing by the defendant of soapstone dust in the waters of Eppes creek, which dust was by floods and freshets subsequently carried down and deposited upon the lands of plaintiff below, rendering said lands sterile and infertile, etc.

[1] Upon a former trial of this case a verdict and judgment was rendered in favor of the defendant, which was reversed upon writ of error. See Skipwith v. Albemarle Soapstone Co., 185 Fed. 15, 107 C. C. A. 119. In view of the opinion of this court in that case it will be unnecessary to consider all of the assignments of error embraced in the record as it is evident that many of them are founded upon the theory that the doctrine applicable to the case is that the damage complained of is attributable solely to the erection and operation of permanent structures or establishments which at once exert their malefic effect. That such is *not* the case here was plainly pointed out in the opinion of Judge Boyd in the case upon the former writ of error; and to the views therein expressed we adhere. The claim here is for damage to the land, and this did not arise until soapstone dust and débris became deposited on the plaintiff's land.

[2] The defendant was properly permitted to file its plea of the statute of limitations of five years, and the learned trial judge in instruction D further limited the time within which the injury must have happened to the period between April 7, 1903, and May 27, 1907; it appearing that plaintiff's record title did not accrue until April 7, 1903. This instruction D given by the court below, and made the subject of an exception, is as follows:

"The upper riparian owner has no right to so use a stream of water as to materially injure the land or crops of a lower riparian owner on the same stream. If the jury believe from the preponderance of the evidence that the defendant has, between April 7, 1903, and May 27, 1907, so used the stream in question here as to materially injure the land or crops, or both, of the plaintiff, the jury should find for the plaintiff, and assess his damages at such sum as will compensate him for the injury so done. The measure of damages for the injury to the land, if any, is the difference between the fair rental value of the land free from and subject to the alleged deposit of soapstone dust during the period aforesaid. The measure of damages for injury, if any, to plaintiff's crops during the aforesaid period is the difference in the value between such crops free from and subject to the alleged deposit of soapstone dust thereon. In no event will the jury assess any damages for mere loss of the use of the water."

[3] This instruction told the jury that they could give no damages on account of the only feature wherein the declaration counted, on what may be termed a "permanent" injury, namely, the pollution of the water, and confined the recovery to injury occurring to the plaintiff's lands and crops within the period from April 7, 1903 (when plaintiff took title), to May 27, 1907. The court properly instructed the jury that the measure of damages to the lands was the difference between their rental value free from and subject to or incumbered with the soapstone dust deposited on them; that as to any given crop as to which evidence of injury by deposit of such soapstone dust appeared, the measure of damages would be the difference in value between the crop free from and burdened with such deposit. We think, in view of the evidence given, that this instruction was not only without fault, but that it was eminently proper.

[4] The evidence disclosed that one portion of plaintiff's lands was more subject to overflow and consequent deposit of soapstone dust than the remainder. As pointed out by the learned trial judge in his opinion entering judgment on the verdict of the jury, "the evidence of damage to crops was confined to the *upper bottom,* while evidence of damage by loss of the use of the land for purposes other than grazing the wild grass was confined to the *lower bottom,*" and we fully agree with his conclusion that, read in the light of the evidence, the instruction D, given by the court could not have been misunderstood by the jury, or have been regarded by that body as authorizing *double damages* upon any feature arising in the case. We therefore hold that the third and fourth exceptions of the defendant, covering assignments Nos. 3, 4, 5, and 6 are without merit.

Assignments Nos. 1, 2, and 7 are more general in their nature, the first two being based on the refusal of the court to direct a verdict for the defendant, and the last on the refusal to set aside the verdict and grant the defendant a new trial, and embrace the doctrine, disapproved by this court, that the occasion of the injury to the plaintiff was one to which the pleas of prescription and of the five year statute of limitation applied, as being the immediate and inevitable result of a permanent structure. See the very instructive case of Mast v. Sapp, 140 N. C. 537, 53 S. E. 350, 5 L. R. A. (N. S.) 379, 111 Am. St. Rep. 864, 6 Ann. Cas. 384. And see, also, the very full discussion of the whole subject in Sutherland on Damages (3d Ed.) § 1037 et seq., where the doctrine in relation to the class of cases in which injuries are regarded as permanent, and may or must be sued for once for all and the class in which no suit can be brought until the actual injury to complainant arises is fully set out and illustrated by cases from many jurisdictions.

We are fully persuaded that the former decision of this court in this case was correct, and that the District Court for the Western District of Virginia in retrying the case committed no error.

It results that the judgment is in all respects affirmed.

Affirmed.

MUSICA et al. v. PRENTICE et al.

(Circuit Court of Appeals, Fifth Circuit. February 10, 1914.)

No. 2541.

1. BANKRUPTCY (§ 136*)—COURTS OF DIFFERENT DISTRICTS—ANCILLARY JURISDICTION.

Where bankruptcy proceedings were instituted in New York, from which state the bankrupts fled and were arrested in New Orleans, where large sums of money, belonging to the bankrupts' estate were found in their possession, the federal court of Louisiana sitting in bankruptcy had jurisdiction to aid the receiver, appointed by the court of original jurisdiction, to recover the money as provided by Bankruptcy Act July 1, 1898, c. 541, 30 Stat. 546 (U. S. Comp. St. 1901, p. 3421) § 2 [20] added by Act Cong. June 25, 1910, c. 412, § 2, 36 Stat. 839 (U. S. Comp. St. Supp. 1911, p. 1492), declaring that courts of bankruptcy shall exercise ancillary jurisdiction over property or persons within their respective territorial limits, etc.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 233, 235; Dec. Dig. § 136.*]

2. BANKRUPTCY (§ 115*)—ADMINISTRATION OF ESTATE—RECOVERY OF FUNDS—ADVERSE CLAIM.

Where, in proceedings by bankrupts' receiver to recover funds alleged to belong to the estate, it appeared that defendants had no just adverse claim to the money, the bankruptcy court had jurisdiction to order its surrender in summary proceedings.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 165; Dec. Dig. § 115.*]

3. BANKRUPTCY (§ 188*)—ATTORNEY'S FEES—ASSETS.

Attorneys for bankrupts were not entitled to a lien for fees for services rendered to the bankrupts subsequent to the institution of the proceedings in an ancillary suit by the receiver to recover moneys belonging to the estate.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 270, 286–289, 291–295; Dec. Dig. § 188.*]

4. BANKRUPTCY (§ 219*)—ATTORNEY FOR BANKRUPT—CLAIM FOR FEES—DETERMINATION.

A claim for attorney's fees for services rendered to the bankrupt after the institution of the bankruptcy proceedings must be made and determined by the court having jurisdiction of the administration of the bankrupts' estate, and cannot be determined by a bankruptcy court exercising ancillary jurisdiction.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 356; Dec. Dig. § 219.*]

Appeal from the District Court of the United States for the Eastern District of Louisiana; Rufus E. Foster, Judge.

In the matter of bankruptcy proceedings of Antonio Musica & Son. Ancillary proceedings by Ezra P. Prentice, as receiver, and others, to recover money and property belonging to the bankrupts' estate. From decree granting the relief prayed (205 Fed. 413), Antonio Musica and others appeal. Affirmed.

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

Henry L. Lazarus, Eldon S. Lazarus, and David Sessler, all of New Orleans, La. (Herman Michel, of New Orleans, La., on the brief), for appellants.

William C. Dufour, H. Generes Dufour, and Gustave Lemle, all of New Orleans, La. (George Janvier, of New Orleans, La., on the brief), for appellees.

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

SHELBY, Circuit Judge. This litigation involves four separate proceedings by petition in the bankruptcy court and two interventions by claimants of a fund in court. The subject of the controversy is a large sum of money—about $75,000—and some notes, mortgages and insurance policies amounting in value to probably $50,000. The money and securities were found by search in the possession of Antonio, Philip, Arthur, and Lucy Grace Musica. The first three were arrested in New Orleans as fugitives from justice, and the last named was arrested and held as a material witness. The property was first delivered by the city police to the judge of the First City Criminal Court, in which the proceedings were pending, and, by direction of that court, were placed in a bank in New Orleans. Subsequently the City Criminal Court directed that the property be held subject to the order of the bankruptcy court. So there is no question of conflict of jurisdiction in the case before us.

Much has been said in argument about the alleged illegal arrest and search of the Musicas and the alleged illegal seizure of the property, but no questions involving such allegations are material, or necessary to be considered, in the decision of the case presented to us by the record.

Antonio Musica and Philip Musica were partners in trade, under the firm name of A. Musica & Son. All of the property in question, with the exception of about $2,500, was the property of A. Musica & Son. No objection is made as to the disposition by the court below of the part of the fund not belonging to the bankrupt firm. On the same day of the arrest of the Musicas in New Orleans—March 19, 1913—a petition in involuntary bankruptcy was filed in the District Court of the United States for the Southern District of New York against the firm of A. Musica & Son and the individual members of the firm, and on the next day Ezra P. Prentice was, by that court, appointed receiver of the bankrupt partnership, which partnership and the members thereof were duly adjudicated bankrupts. Prentice, as such receiver, appeared by counsel in the court below and prayed to be confirmed as receiver, and, later, filed the four petitions, one against each of the Musicas, to which petitions the custodians of the property were also made parties, seeking in this summary way to recover possession of the money and securities.

[1] The court below had ancillary jurisdiction of the proceedings,

if not under the bankruptcy law as originally enacted, certainly by virtue of the amendment of June 25, 1910, which authorizes courts of bankruptcy to—

"exercise ancillary jurisdiction over persons or property within their respective territorial limits in aid of a receiver or trustee appointed in any bankruptcy proceedings pending in any other court of bankruptcy." 36 Stat. 838.

[2] The sworn admissions of Lucy Grace Musica and Arthur Musica, and the other evidence, left no doubt that the property in question was the property of the bankrupt estate. The parties defendant to these petitions had and asserted no just adverse claim to the fund that would entitle them to test their rights in a plenary suit against them. In such cases the jurisdiction of the bankruptcy court may be exercised against persons so holding assets of the bankrupt estate in a summary way by petition and without plenary suit. Mueller v. Nugent, 184 U. S. 1, 18, 22 Sup. Ct. 269, 46 L. Ed. 405.

An intervening petition of Adams & Generelly was disposed of by the court below in a manner that seems satisfactory to all parties, and it requires no further notice.

[3, 4] On April 28, 1913, the law firm of Lazarus, Michel & Lazarus filed in the court below an intervening petition, claiming $15,000 attorney's fees for services for representing the Musicas in their defense against the proceedings against them in the city of New Orleans and in the courts of Louisiana to protect their property rights and possession, and for representing them against proceedings in New York if their services were there required. The evidence shows the rendition of valuable legal services by the interveners to the Musicas. It contains written contracts and assignments, showing that the compensation was agreed on by the Musicas as alleged by the interveners. All of these agreements were made and the professional services rendered after the petition in bankruptcy had been filed against the firm of A. Musica & Son. It seems clear that, as the money and securities are the property of the bankrupts, the other members of the Musica family could create no charge on the property in favor of the interveners. It is equally clear that A. Musica & Son and the members of that firm, after the beginning of the proceedings in bankruptcy, could, neither directly nor indirectly, create any charge on their assets in favor of the interveners for services to be rendered them in the city and state courts. Provision is made by the Bankruptcy Act, § 64b 3, for one reasonable attorney's fee for services rendered the bankrupt in involuntary cases "while performing the duties herein prescribed." We do not understand the intervening petition as asserting a claim under the provisions of the bankruptcy law; and, besides, if such claim is asserted, it must be decided by the New York bankruptcy court having jurisdiction of the administration of the bankrupt's estate. In re Wood and Henderson, 210 U. S. 246, 28 Sup. Ct. 621, 52 L. Ed. 1046.

The court below sustained the right of the receiver to recover the money and securities which were proved to belong to the bankrupts, and dismissed the intervening petition of Lazarus, Michel & Lazarus,

reserving to them the right to assert whatever claim they have as counsel fees in the bankruptcy court of primary jurisdiction.

The decrees of the court below and the opinion of the District Judge —205 Fed. 413—conform to the views we have expressed.

Affirmed.

FILASTO et al. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. January 19, 1914.)

No. 103.

WITNESSES (§ 405*)—CROSS-EXAMINATION—IMPEACHMENT—IMMATERIAL MATTER.

Where, in a prosecution for violating the White Slave Traffic Act (Act June 25, 1910, c. 395, 36 Stat. 825 [U. S. Comp. St. Supp. 1911, p. 1343]), the woman admitted that she had been a prostitute, but on cross-examination denied that she had been so at B. while living there with another than her husband, her conduct at B. was an immaterial matter, and defendants were not entitled to contradict her by proving that during her residence there she had been a prostitute, and that her paramour had had a difficulty with her husband and had cut him with a razor.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 879–884; Dec. Dig. § 405.*]

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

Frank Filasto and Joseph Ribuffo were convicted of violating the White Slave Traffic Act, and they bring error. Affirmed.

The following is the opinion of Hand, District Judge, denying defendant's motion for a new trial, referred to in the opinion:

The motion for a new trial in this case is made upon the exceptions of the defendants to the ruling out of certain testimony upon the trial. The prosecution was for enticing one Candida Cavallucci, alias Annie Græco, to go from New York to Paterson for the purpose of prostitution some time during the second week of January, 1912. The government rested its case upon the testimony of Annie, and of a prostitute named Maria Maura, who both swore that on the 1st of January, 1912, the defendant Filasto had urged upon Annie Græco to go and live in a house of his in Paterson and engage in prostitution, and that on the same evening the other defendant had repeated the request. About 10 days afterwards Annie did go to Paterson for that purpose, and lived there for nearly a year. At the time in question Annie Græco lived in illicit relations with Tony Maura, the brother of Maria Maura. Annie Græco had been married some three years previously, but she swore that her husband had beaten her, and she had complained against him, and then he ran away to Italy. Annie Græco conceded that she had been a prostitute from the time she went to Paterson until about some time toward the end of December, 1912, but denied that she had ever engaged in the practice before, especially in Bridgeport, about three years before, while living with Tony Maura. She conceded that she had lived in Bridgeport with Tony for a month while they ran a restaurant together. Upon Mr. Barra's opening he stated that he would prove to the jury that Annie Græco's husband had gone to Italy because he had been threatened and assaulted with a razor by Tony Maura. I then stated that this was a collateral matter to the main issue, and that he

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

was bound by the cross-examination of the woman. Counsel thereupon stated that he wished to prove that when Annie Græco went to Bridgeport, about two or three years ago, she had lived there as a prostitute, which I also declined to allow him to prove. After the opening the defendant put in some testimony, and then the record shows that the following events took place, which are relied upon for a reversal:

"Mr. Barra: I call for the witness Musulla.

"The Court: That is the husband?

"Mr. Barra: Yes. I wish to prove he did not beat her and run away.

"The Court: It is not material here.

"Mr. Barra: Exception.

"Mr. Barra: May I prove that Maura assaulted this man with a razor?

"The Court: No.

"Nannine De Marco, a witness called on behalf of the defendant, being first duly sworn, testified as follows (through an interpreter):

"Mr. Barra: This witness is called for the purpose of proving that the witness, Annie Græco, was a prostitute in the city of Bridgeport, Conn.

"The Court: No.

"Mr. Barra: The court rules out the testimony, and the defendants duly except."

The exception to my direction on the opening and to the exclusion of this testimony is what the defendant complains of. It was undoubtedly a part of the defendants' defense that it was Tony who had induced the woman to go to Paterson to ply her trade. Undoubtedly she had practiced prostitution in a house of which the defendant Filasto was the owner, and from which the defendant Ribuffo collected rent, and it was amply proved, although it was denied, that both defendants knew what she was doing in the house. Not only that house, but three or more other houses, of the defendants were regularly used by prostitutes. It was also proved that about the 1st of February Annie Græco and Tony and his sister lived together while she was plying her trade, though, as I understand it, they lived in a different house. It would have been relevant proof in the case to show that two or three years before Tony had put this woman into a house in Bridgeport, and lived from her earnings as a prostitute. This would have lent probability to the story that it was he and not the defendants who in January induced her to go to Paterson, which was the issue of the case. Possibly it might have been relevant also to prove that Tony had seduced her from her husband and assaulted him, so as to show the origin of Tony's domination over her. If it had been urged upon the trial that Tony drove off the husband by violence, and so acquired domination over the witness, and that he had put her into a brothel in Bridgeport while he lived with her, I think I should have allowed the proof. However, nothing of the sort was suggested at the time. What the defendants offered to show was, first, that the woman had been a prostitute in Bridgeport, which she had denied upon her cross-examination. As to that I held, correctly as I think, that it only contradicted her on a collateral matter. It is true that one may impeach a witness by showing she is a prostitute, but she had already conceded that she was a prostitute, and it clearly added nothing to that impeachment to show that, not only was she a prostitute for the year preceding the trial, but that she had already been so three years before that. As to the testimony of the husband that Tony had assaulted him with a razor, it was only offered to contradict the witness' story. It was not suggested that Tony had taken the woman from him by violence. The defendants did not therefore offer any proof, as they now suggest that Tony before January, 1912, had taken charge of this woman, and had induced or persuaded or coerced her in any way to live in a brothel, and had lived on her earnings. The proffer of proof went no further than to show that during the time that Tony had lived with her she had been a prostitute in Bridgeport, and that he had had a fight with her husband and had cut him with a razor. The testimony therefore seems to me to have been irrelevant, and I see no reason for granting another trial because of the exceptions.

The motion is denied.

Caesar B. F. Barra and Henry W. Unger, both of New York City (C. B. F. Barra, of New York City, of counsel), for plaintiffs in error.

H. Snowden Marshall, U. S. Atty., of New York City (John E. Walker, Asst. U. S. Atty., of New York City, of counsel), for the United States.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

PER CURIAM. The record is a short one, involving only questions of fact on which the evidence was conflicting; the witnesses flatly contradicting each other. Their credibility of course was for the jury to pass upon.

The jury were instructed fully, carefully, and fairly—no objection or exception was taken to anything in the charge, nor was there any request submitted for further instructions; both sides evidently were satisfied that the charge was sufficient and unobjectionable. If the jury believed the testimony of the government's witnesses (as their verdict shows they did), the offense was proved. There is nothing in the exception to the refusal to direct acquittal.

The technical points as to admission and exclusion of testimony are sufficiently disposed of in the opinion filed by the trial judge, on denying motion for a new trial.

The judgment is affirmed.

NEW YORK, N. H. & H. R. CO. v. PONTILLO.

(Circuit Court of Appeals, Second Circuit. January 13, 1914.)

No. 111.

MASTER AND SERVANT (§ 137*)—NEGLIGENCE.

Where decedent, a track walker in defendant's employ, was walking between defendant's main track and a siding, in the clear, as defendant's train approached him from the rear on the main track, and there was nothing to indicate to the fireman, who observed him for a quarter of a mile, that he intended to step on the track in front of the engine, as he did just prior to his being struck and killed, the fireman was not negligent in failing to signal the engineer to blow the whistle to attract decedent's attention to the approaching train.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 269, 270, 273, 274, 277, 278; Dec. Dig. § 137.*]

In Error to the District Court of the United States for the District of Connecticut; James L. Martin, Judge.

Action by Rosie Pontillo, as administratrix of Angelo Pontillo, deceased, against the New York, New Haven & Hartford Railroad Company. The action was brought under the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1911, p. 1322]) to recover for defendant's alleged negligence in causing the death of plaintiff's intestate, who, at the time he was killed, was a track walker on defendant's road at Hartford, Conn. A verdict for $4,000 was rendered in favor of plaintiff, and defendant brings error. Reversed.

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

Joseph F. Berry and William C. Mitchell, both of New Haven, Conn., for plaintiff in error.

Clement Scott and Ralph O. Wells, both of Hartford, Conn., for defendant in error.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

COXE, Circuit Judge. Angelo Pontillo, the plaintiff's intestate, had been a track walker for about 12 years. On the day of the accident he was walking in the middle of the space between the main track, on which the engine which killed him was approaching, and a siding. His back was towards the engine and at no time did he look behind him. The space between the two tracks was between 7 and 8 feet. The engine which struck him was drawing the regular train from Danbury to Hartford. The train was running on time and at the usual speed of about 15 miles an hour. As the track curved, the engineer, on the right side of the engine, was unable at any time to see Pontillo. The fireman saw him, but at all times, until just prior to the accident, he was walking between the two tracks and was in a place of safety. The engine bell was ringing at the time of the accident, and had been ringing for a long distance prior thereto. When the engine was about 10 feet from him, Pontillo shifted his position, stepped directly in front of the engine and was killed.

The trial judge tersely states the question as follows:

"Plaintiff places her right of action upon the failure of the fireman to ask the engineer to sound the whistle."

The court charged the jury, inter alia, as follows:

"The fireman was ringing the bell, the train was on time; the other train that was spoken of was on time going out. The fireman sees a man walking the track in a place where, if he had kept his position, he was perfectly safe. Now, was it negligence on his part in not guessing that that man would step out of a safe place on to the track that that train was running on, due that very minute? Not, was it an error of judgment. He may not judge right as to what a man will do, but was it negligence? If it was only an error of judgment, why, even if the master was there, that would not of itself be negligence. Was it negligence on his part if he did not say to the engineer, 'There is a man on ahead here, although walking where he is safe now, he may step off the track, and you better sound the whistle.' It comes right down to that. So, if you say that was negligence, why, then you may find a verdict for the plaintiff."

Assuming that the defendant would be liable for the negligence of the fireman, we are unable to find any negligence on his part. The train was on time, running at its usual rate of speed.

The engineer and the fireman were in their proper places; both were looking ahead and the latter was ringing the engine bell. The fireman saw a long distance ahead, between the main track and a side track, a man walking in the same direction that the engine was going. It is true that he testifies that at the time he did not know that this man was a track walker. It may be assumed that he was clad in laborers' garments and was carrying the hammer and wrench used in track repairing. However this may be, he was in a position where an ordinary citizen had no right to be and the fireman was, at least, justi-

fied in assuming that the man he saw walking ahead was familiar with the general situation. The natural inference for the fireman to draw was that, being in a safe place, he would stay there. If the fireman were required to go further in his precautions, he would naturally assume that if the man stepped upon either track it would be on the siding and not the main track. The contingency that he would step out on the main track directly in front of a passenger train at the precise moment that it was due at that point without turning his head, seems too remote to be seriously considered. But assume that the fireman should have considered it, what could he have done? When the engine was a quarter of a mile distant there was no occasion for apprehension; as they approached nearer there was nothing to indicate that Pontillo intended to step on the track in front of the engine and the fireman had no reason to suppose that he would do so. The only suggestion is that he might have signaled the engineer to blow the whistle, but he might well have hesitated before giving such a signal. Had he done so, and Pontillo, alarmed by the sudden shriek directly behind him, had jumped to the right and had been killed, it is probable that the sounding of the whistle would have been urged as an act of the grossest negligence. In other words, we think negligence cannot be predicated of the fireman's failure to signal the engineer to give a signal which might have converted a condition of safety into one of great peril. We cannot believe that a railroad company is required to take such extraordinary and speculative precautions as are here suggested.

The judgment is reversed.

In re SOLOWAY & KATZ et al.

(Circuit Court of Appeals, Second Circuit. January 13, 1914.)

No. 83.

1. BANKRUPTCY (§ 384*)—CLAIMS—REVIEW OF REFEREE'S PROCEEDINGS—DISCRETION.

Where a claimant in bankruptcy was denied a hearing before the referee, as special master, because the specifications of his claim were not filed with the referee within 10 days after January 2d, though they were left with a clerk in the referee's office other than the clerk designated as the person upon whom service could be made on Saturday, January 11th, and were received by the referee on the Monday following, and because they were not served on the attorney for the bankrupts within 10 days after the return day, as required by a rule of the District Court, though served 3 days later, it was within the discretion of the District Court to refuse to confirm the referee's recommendation that a composition offered be accepted, and to remand the matter to the referee, in order that such claimant might have its day in court.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 590–592; Dec. Dig. § 384.*

Appeal and review in bankruptcy cases, see note to In re Eggert, 43 C. C. A. 9.]

2. BANKRUPTCY (§ 342½*)—CLAIMS—SPECIFICATIONS—AMENDMENT.

It was within the discretion of the District Judge to permit a claimant in bankruptcy to amend the specifications of its claim, after a recom-

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

mendation by the referee that a composition be accepted, where the referee disallowed such amendments because of a doubt as to his power.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 530; Dec. Dig. § 342½.*]

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

Proceedings in the matter of Soloway & Katz and others, bankrupts. From an order refusing to confirm the recommendation of the referee, as special master, that a composition offered by the bankrupts be accepted, and directing that the matter be remanded to the referee, for the purpose of permitting the Bay State Milling Company, one of the objecting creditors, to amend its proof of claim, and permitting the Star & Crescent Milling Company, another objecting creditor, to amend its specification, the bankrupts appeal. Affirmed.

See, also, 195 Fed. 100.

De Forest & Klein, of Bridgeport, Conn., for appellants.

Benedict M. Holden, of New York City, for appellee Bay State Milling Company.

Harry M. Burke, of Hartford, Conn., for appellee Star & Crescent Milling Company.

Before LACOMBE, COXE, and WARD, Circuit Judges.

COXE, Circuit Judge. [1, 2] The two objecting creditors have never had their day in court. The specifications of the Bay State Milling Company were not considered by the referee because he did not regard the filing and service thereof as regular. The amendments proposed by the Star and Crescent Company were disallowed for the reason as stated by the referee:

"That a very large majority of the claims were opposed to allowing an amendment, and I consider it as very questionable whether I have any right to allow an amendment, either as referee or as special master."

It is entirely possible that the proposed composition is for the best interests of the creditors and that the opposition of the two creditors named is captious and, perhaps, vexatious. Nevertheless, we think they are entitled to be heard. The objection that the specifications of the Bay State Company were not filed with the referee within ten days after January 2d, because they were left with a clerk in his office on January 11th, after the referee had gone out, the said clerk not being the clerk designated by the referee as the person upon whom service could be made, seems to us unnecessarily harsh, especially so as the 12th of January was Sunday and the referee received the specifications on the Monday following. Furthermore the specifications were not served upon the attorney for the bankrupts within ten days after the return day, as required by rule 9 of the District Court of Connecticut, but three days later. It was, however, within the discretion of the District Court to relieve the creditor from the requirements of its own rule.

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

The action of the District Judge was intended to give the objecting creditors an opportunity to be heard on the merits. It was surely within his discretion to do this. He has made no definitive decision as to the legality or propriety of the composition, but has simply rendered it possible for the objecting creditors to state their case upon the merits to the referee and, if his decision be adverse, to review it upon a record which fully states the facts.

The order is affirmed.

DRENNEN v. HEARD et al.

HEARD et al. v. DRENNEN.

(Circuit Court of Appeals, Fifth Circuit. February 10, 1914.)

No. 2557.

1. EQUITY (§ 65*)—OBTAINING ADVANTAGE FROM OWN WRONG.
Where, under a will, a certain legatee forfeited her interest as legatee by taking legal steps to set the will aside, one who encouraged and approved such legatee's contest of the will, if she did not directly advise it, would not be given relief in equity based entirely on such legatee's forfeiture of her interest.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 185–187; Dec. Dig. § 65.*]

2. EVIDENCE (§ 589*)—CONSTRUCTION OF TESTIMONY OF PARTY.
The testimony of plaintiff as a witness in her own behalf should be construed most strongly against her.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2438; Dec. Dig. § 589.*]

Appeal and Cross-Appeal from the District Court of the United States for the Northern District of Georgia; Wm. T. Newman, Judge.

Suit by Miriam Drennen against Frank A. Heard and another, executors of W. L. Tillman, deceased. From the decree (198 Fed. 414), plaintiff appeals, and defendants file cross-appeal. Affirmed.

William A. Wimbish, of Atlanta, Ga., and T. T. Miller, of Columbus, Ga. (Wimbish & Ellis, of Atlanta, Ga., on the brief), for appellant and cross-appellee.

A. W. Cozart, T. Leslie Bowden, and H. C. McCutchen, all of Columbus, Ga., and Spencer R. Atkinson, of Atlanta, Ga., for appellees and cross-appellants.

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

SHELBY, Circuit Judge. We have concluded that the decree in this case is right, and that it should be affirmed, both on the appeal and the cross-appeal.

[1] The only claim made by the bill which we deem it necessary to notice is that Mrs. Hattie Tillman lost her interest under her husband's will by taking unsuccessful steps to set the will aside.

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

Conceding, but not deciding, that appellant's contention is well founded, that the caveat filed by Mrs. Hattie Tillman against the admission to record of the will, although it was withdrawn by consent; constituted "legal steps to set aside" the will, within the meaning of the fourteenth item, we are of the opinion that there are facts in the record which would sustain the decree notwithstanding such concession.

[2] It appears to us that the appellant—the plaintiff below—advised and encouraged Mrs. Hattie Tillman to contest the will. Construing the plaintiff's evidence, as given as a witness for herself, most strongly against her, as it should be construed (Clark Thread Co. v. Willimantic Linen Co., 140 U. S. 481, 488, 11 Sup. Ct. 846, 35 L. Ed. 521), it seems that she admitted, rather than denied, that the contest had her sanction and approval, if not her active encouragement. While she denies that she ever "directly advised" Mrs. Tillman to contest the will, we cannot avoid the conclusion, from her deposition, that the contest was encouraged and approved by her. The testimony of Mrs. W. B. Butt, R. E. Clements, and Mrs. Hattie Tillman, while in some parts denying the fact, tends, we think, strongly to show that the plaintiff encouraged and approved the contest. Having instigated and encouraged the contest—a step that, according to her contention, revokes the bequests to Mrs. Hattie Tillman—she cannot come into court and reap benefits from the fact of such contest. If she advised or encouraged Mrs. Hattie Tillman to take steps in the unsuccessful contest of the will that would cause the revocation of bequests to Mrs. Tillman, she should not be permitted in equity to profit by her advice. In this aspect of the case, the right of the plaintiff to relief is based entirely on the averment that Mrs. Tillman forfeited her interest as legatee by an alleged wrongful violation of the terms of the will in taking steps to set it aside. We are of the opinion that the plaintiff cannot be permitted in equity to profit by such contest, when it appears that she sanctioned, approved or advised it. 1 Pomeroy's Eq. Jur. (3d Ed.) §§ 397–404.

So we conclude that, if appellant's chief contention is well founded—that there was such a contest as constituted "legal steps" and a forfeiture under the will—the plaintiff cannot reap any benefit from it.

Decree affirmed.

LOWER COAST TRANSP. CO. v. GULF REFINING CO. OF LOUISIANA.†

(Circuit Court of Appeals, Fifth Circuit. February 3, 1914.)

No. 2471.

MARITIME LIENS (§ 25*)—LIEN FOR SUPPLIES FURNISHED.

Under Act June 23, 1910, c. 373, 36 Stat. 604 (U. S. Comp. St. Supp. 1911, p. 1192), one furnishing fuel to a vessel in a foreign port, under contract with a corporation operating the vessel on joint account of itself and the owner, is entitled to a maritime lien therefor, and it is immaterial that the bills were not made out to the vessel.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. §§ 20, 31–36; Dec. Dig. § 25.*]

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

† Rehearing denied March 3, 1914.

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

Intervening libel by the Gulf Refining Company of Louisiana against the Lower Coast Transportation Company, as owner of the vessel Grover Cleveland. Decree for intervener, and respondent appeals. Affirmed.

John D. Grace, of New Orleans, La., for appellant.

J. L. Warren Woodville and John A. Woodville, both of New Orleans, La., for appellee.

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

PER CURIAM. The case shows that the Grover Cleveland was owned by the Lower Coast Transportation Company, a corporation created under the laws of Mississippi and domiciled at Bay St. Louis in that state, and that that corporation entered into a combination or partnership with the owners of the El Rito, by which the two vessels, the Grover Cleveland and El Rito, were to be operated by a corporation known as the Lower Coast Merchants' & Growers' Transportation Company, the earnings to be divided between the three corporations; and under this arrangement the Grover Cleveland was turned over to and was operated by the Lower Coast Merchants' & Growers' Transportation Company, which company contracted with the Gulf Refining Company of Louisiana for necessary fuel oil to operate the Grover Cleveland, and the oil furnished under this contract is the basis of the intervening libel of the Gulf Refining Company.

The District Court found that the Gulf Refining Company had a lien on the Grover Cleveland for the fuel thus furnished; and in this we concur. The fact that bills were made out to other parties connected with the management of the boat does not destroy the maritime lien for supplies furnished in a foreign port. And see chapter 373, 36 Stat. 604. Affirmed.

COMMERCIAL NAT. BANK OF NEW ORLEANS v. HILLER.

SAME v. CANAL-LOUISIANA BANK & TRUST CO. et al.

In re DREUIL & CO.

(Circuit Court of Appeals, Fifth Circuit. February 23, 1914.)

Nos. 2517 and 2525.

BANKRUPTCY (§ 155*)—PROPERTY—RIGHTS OF THIRD PERSONS.

It was the duty of the bankruptcy court to turn over property in the possession of the bankrupt to a lawful pledgee thereof.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 155.*]

Appeal from and Petition to Revise Proceedings of the District Court of the United States for the Eastern District of Louisiana, Rufus E. Foster, Judge.

Bankruptcy proceeding against Dreuil & Co. On a petition by the Canal-Louisiana Bank & Trust Company, judgment was rendered in

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

its favor (205 Fed. 568), and the Commercial National Bank of New Orleans appeals and petitions for a revision. Decree affirmed, and petition to revise denied.

Edwin T. Merrick, Walter S. Lewis, Philip Gensler, Jr., and Ralph J. Schwarz, all of New Orleans, La., for petitioner and appellant.

Henry Mooney, John Janvier, J. Blanc Monroe, and Monte M. Lemann, all of New Orleans, La., for respondents and appellees.

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

PER CURIAM. In these cases we find no error in the rulings and opinion of the District Court. The fact that the cotton in dispute was found in the possession of the bankrupts is controlling. On the claims made therefor the duty of the bankruptcy court was to turn it over to the rightful possessor, the Canal-Louisiana Bank & Trust Company the only lawful pledgee of the same. If the cotton or the warehouse receipts even had been retained by the Commercial National Bank, a different case might have been presented.

The petition to revise is denied. The decree appealed from is affirmed.

BRONK v. CHARLES H. SCOTT CO.

(Circuit Court of Appeals, Seventh Circuit. January 6, 1914.)

No. 2026.

1. PATENTS (§ 310*)—INFRINGEMENT—MOTION FOR DECREE ON FACTS.

Where complainant, by answer to interrogatories in a suit for a patent infringement, admitted in effect that the infringement complained of consisted solely in defendant's manufacture and sale of certain protectors which were identified and described in the interrogatories, a motion by defendant for a decree on the facts should be determined by the principles applicable to a demurrer to the bill.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 507–540; Dec. Dig. § 310.*]

2. EQUITY (§ 363*)—BILL—DISMISSAL—JUDICIAL KNOWLEDGE.

Where a bill by its own averment states a prima facie case, it cannot be dismissed by the chancellor on the ground that he judicially knows of facts that would support an answer, unless his judicial knowledge is so broad that he can properly hold that no facts exist that would tend to controvert the supposed answer and support a replication and the bill.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 762–766, 768; Dec. Dig. § 363.*]

3. PATENTS (§ 328*)—INFRINGEMENT—SANITARY PROTECTOR.

Patent No. 899,196, granted September 2, 1908, for a sanitary protector, includes as an indispensable characteristic a spheroidal form of the yoke portion, and hence was not infringed by the manufacture and sale of protectors in which all the parts had plane surfaces.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois; George A. Carpenter, Judge.

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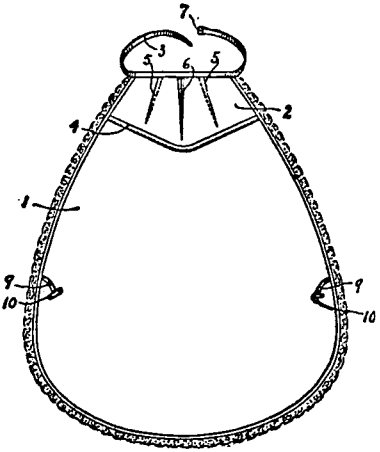
*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Action by Alice M. Aiken Bronk against the Charles H. Scott Company. Judgment for defendant, and complainant appeals. Affirmed.

This is an appeal from a decree dismissing for want of equity appellant's bill charging appellee with having infringed patent No. 899,196, September 2, 1908, issued to appellant for a sanitary protector.

Figure 3 of the drawings is as follows:



In the specification the construction of the patented article is described in these words: "In order to give the protector the proper shape or configuration to conform to the general contour of the body of the wearer as shown most clearly in figure 3, and also provide for a circulation of air below the waist line (the shield being of impermeable material) the shield portion is cut away at its top to provide for the yoke portion 2, of suitable permeable material, and secured thereto by means of the horizontally-extending seam 4; and the yoke portion 2 is given the proper form or contour by having its upper portion contracted and folded into downwardly and laterally-extending tapering plaits or folds 5, on each side of a median seam 6, the folds being on the inner or under side of the yoke portion, as shown most clearly in figure 3 of the drawings."

The only claim of the patent is as follows:

"A protector, comprising a permeable yoke portion provided with a median seam and having its upper portion contracted and folded into downwardly and laterally-extending tapering plaits or folds on each side of said median line, and an impermeable portion comprising a single ply of material depending from said yoke portion, said yoke portion being provided about its upper edges with a waistband and said shield portion being provided with attaching-tabs near the depending end thereof."

Appellee in its answer charged that appellant during the prosecution of her application had sought to obviate objections by making amendments which limited the claim of the patent to the exact details described and shown, and that in view of the state of the prior art, as disclosed by numerous patents which were named, no invention was required to devise the article patented. The answer then proceeded to say that appellee had done nothing which could be claimed to be an infringement of the patent except to manufacture and sell certain protectors, specimens of which were filed with and made a part of the answer. Thereupon appellee, under equity rule 58, filed interrogatories to be answered by appellant, inquiring whether appellant's charge of infringement was based on any other or different acts of appellee than the manufacture and sale of the protectors described and exhibited in the answer. And appellant answered the interrogatories by saying that she had no other basis for her charge of infringement.

The permeable yoke portion of appellee's protectors is cut from a flat piece of material and has no plaits or folds whatever by which the yoke portion is made to depart from a plane surface and to conform to the contour of the wearer's body.

Appellee moved that the bill be dismissed on the ground that appellant's answers to the interrogatories disclosed that there was no infringement of the patent, and on the additional ground that in view of the file wrapper and prior patents, certified copies of which were filed with the motion, the patent was void for lack of invention. This motion was sustained and the bill was dismissed for want of equity.

Appellee has tendered to this court a certified copy of the file-wrapper and contents, and has attached to its brief copies of numerous patents of the prior art which were named in its answer.

Minor G. Norton, of Cleveland, Ohio, and N. J. Shupe, of Chicago, Ill., for appellant.

Philip C. Dyrenforth and Russell Wiles, both of Chicago, Ill., for appellee.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

BAKER, Circuit Judge (after stating the facts as above). If the decree cannot be sustained by an application of the law to the facts admitted by appellant in her bill and in her answers to appellee's interrogatories, the cause must be remanded for trial in due course. Undoubtedly the purpose of authorizing interrogatories was to enable the court to make a summary disposition of a cause by applying the law to an admitted state of facts; but, when the facts are not admitted, neither that rule nor any other warrants a summary disposition on affidavits or other untested showings by the party moving for the summary disposition, in lieu of proofs duly taken with proper opportunity for the adversary to cross-examine. We therefore disregard the file-wrapper and the patents tendered by appellee, and consider only those facts which stood admitted by appellant upon the record prior to appellee's motion for a decree of dismissal.

[1, 2] While this motion for a decree upon the facts, as admitted by appellant upon the record, is not a demurrer to the bill, yet the principles that are applicable to a demurrer should be applied, for the reason that appellant's answers to the interrogatories are the same in effect as if she had charged in her bill that appellee's infringement consisted solely in the manufacture and sale of the protectors which were identified and described in the interrogatories. And the rule with respect to a demurrer to a bill for infringement of letters patent is well settled. Lange v. McGuin, 177 Fed. 219, 101 C. C. A. 389; Krell Auto Grand Piano Company v. Story & Clark Company (C. C. A.) 207 Fed. 946. If a bill, in and by its own averments, states a prima facie case, that case cannot properly be overthrown by the chancellor merely on the ground that he judicially knows of facts that would support an answer. His judicial knowledge must go farther and be so broad and all-embracing that he can properly hold that no facts exist that would tend to controvert the supposed answer and support a replication and the bill. This is so because, if such facts exist, the complainant is entitled to a hearing where he can present and argue the facts, and such a hearing cannot be had on a demurrer to the bill.

[3] Applying this rule to the admitted facts, we have no difficulty in sustaining the decree. The description of the yoke portion of appellant's patented article shows tapering plaits which have the effect of giving the surface of the yoke a spheroidal form. And the claim makes this an indispensable characteristic of the yoke portion. So it is immaterial what, if any, disclaimers appellant was compelled to make during the prosecution of her application through the patent office, or what were the teachings and disclosures of the prior art. If it were

admitted that appellant was the absolute pioneer in protectors of this character, and was in fact the first inventor of plane as well as spheroidal shapes, still it is the province of courts only to construe claims, not to reconstruct them. And it would require an entire reconstruction of the claim to eliminate what appellant has made an essential element, namely, the spheroidal form of the yoke portion; and inasmuch as appellant admits that appellee has never made or sold protectors except those in which all of the parts have plane surfaces, no testimony with respect to the utility, novelty and commercial success of appellant's article, and no exposition of the prior art by experts, could alter the result, which is noninfringement.

The decree is:

Affirmed.

In re D. C. CLARK SHOE CO.

(District Court, D. Massachusetts. December 24, 1913.)

No. 16,484.

1. BANKRUPTCY (§ 316*)—CLAIMS PROVABLE—FIXED LIABILITY.

An owner of shoe manufacturing machinery leased it to a manufacturer for a term of 17 years unless sooner terminated, the lessee agreeing to pay a specified sum for each pair of boots manufactured and certain annual payments. The lease was terminable at the option of the lessor upon the bankruptcy of the lessee, or at any time upon 30 days' notice in writing, and upon such termination the lessee agreed to pay specified sums as to each machine. If the lease continued for the full term, such payment was not to be exacted, nor was it to be required if the lessor terminated the lease in respect to only such machines as it considered unnecessary in the lessee's business. *Held*, that where the lessee became bankrupt and the lessor terminated the lease, the agreement to make such payments upon termination of the lease became a fixed liability for an ascertained amount presently payable, and the claim thereon was provable in bankruptcy under Bankruptcy Act July 1, 1898, c. 541, § 63a, subsec. 1, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3447), providing that debts may be proved and allowed which are a fixed liability, as evidenced by an instrument in writing absolutely owing at the time of the filing of the petition, the liability being no less a fixed one because the lessor might have terminated the lease upon grounds which would have relieved the lessee from making such payments.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 474–477; Dec. Dig. § 316.*]

2. BANKRUPTCY (§ 318*)—CLAIMS PROVABLE—FIXED LIABILITY.

Under Bankruptcy Act July 1, 1898, c. 541, § 63a, subsec. 1, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3447) providing that debts may be proved which are a fixed liability evidenced by an instrument in writing absolutely owing at the time of the filing of the petition whether then payable or not, and subsection 4 providing that debts founded on express contracts are provable, there is impliedly incorporated in subsection 4 the provision of subsection 1 as to a fixed liability absolutely owing.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 481, 482; Dec. Dig. § 318.*]

Proceeding in the matter of the D. C. Clark Shoe Company, bankrupt. On petition to review an order of the referee allowing the claim of the United Shoe Machinery Company. Order affirmed.

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

William R. Buckminster, of Boston, Mass., for trustee.
Walter B. Farr, of Boston, Mass., for creditor.

MORTON, District Judge. This is a petition to review an order of the referee allowing the the claim of the United Shoe Machinery Company for $2,731.57. The matter was heard upon agreed facts, which are, in substance, as follows:

[1] The bankrupt manufactured shoes. It obtained from the United Shoe Machinery Company a considerable amount of shoe machinery upon leases. Broadly speaking, these leases provided for the payment of a certain sum yearly upon each machine, further sums for each pair of shoes manufactured with the machine, and still further sums for return charges which became due under the conditions stated in the leases. It is for these return charges that the present claim, so far as now material, was made and was, as the trustee contends, erroneously allowed.

Eight different leases are involved, varying somewhat in their terms. The provisions of those most favorable to the trustee are, so far as material to this case, in substance as follows: The lessor leases to the lessee certain machines which remain its property; the term of the lease is 17 years from its date unless sooner terminated by the lessor as therein provided; the lease is terminable at the option of the lessor upon the bankruptcy of the lessee, and at any time upon 30 days' notice in writing by the lessor to the lessee; the lessee agrees to pay a certain stated sum in respect to each pair of boots manufactured with the machine, and also certain specified annual payments mentioned in the lease, and also "upon expiration or termination of this agreement, or any extension thereof," amounts equal to two-thirds of the sums set opposite the name of each machine in a schedule contained in the lease; provided, however, that in case the lease shall continue throughout the full term of 17 years without any default, then this payment shall not be exacted. It is to be noted that this payment, which is the "return charge" forming the basis of controversy in this case, becomes due and payable, although the lease be terminated by the lessor on account of the lessee's bankruptcy, or simply because the lessor elects to terminate and gives notice of the termination in writing. The lease further provides that if the lessee shall, at any time, have in his factory more machines than in the opinion of the lessor are sufficient for performing the work there, the lessor may, upon 30 days' notice in writing, terminate the lease in respect to such machines as are considered unnecessary, and, in this event, no return charge is to be made in respect to such machines.

[2] By section 63 (a) 1 of the Bankruptcy Act debts of the bankrupt may be proved which are a fixed liability, evidenced by an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not. By subsection (a) 4 debts founded on express contracts are provable; but into this subsection is impliedly incorporated the provision contained in subsection (a) 1 as to fixed liability absolutely owing.

At the time of the filing of this petition the bankrupt had absolutely

agreed to pay the return charges at the expiration of the leases (unless it carried them through without default), and to pay such charges sooner upon any termination of the leases by the lessor. As soon as the lessor terminated the leases, the return charges became immediately payable. It is true that the lessor might do this the day after the machines were installed, and that the leases are extremely onerous and one-sided. No question is made, however, but what the bankrupt took them in good faith; and the mere unfairness of a contract is not ground for rejecting the proof under it.

The lessor has terminated the leases on December 10, 1911, within the time for proving claims. Its action in so doing created a fixed liability of ascertained amount presently payable, for which, it seems to me, it was entitled to prove. Lowell on Bankruptcy, p. 128.

The trustee urges that the leases referred to might have been terminated upon grounds which would have relieved the bankrupt from paying return charges; but it does not seem to me that this possibility prevents the bankrupt's agreement to pay on expiration, or on termination by notice, as in this case, from being a fixed liability. The liability is in fact a fixed one, though it might, had the lessor elected, have been discharged by the lessor's withdrawal of the machinery. The only contingency was therefore as to the possible release or nonrelease of this liability, not as to its existence.

The order of the referee allowing the sum of $2,626.30 on account of return charges, which, with the further sum of $105.27 for guaranteed royalties, constitutes the total allowance of the claim of the United Shoe Machinery Company in the sum of $2,731.57, is affirmed.

STEWART v. CYBUR LUMBER CO.

(District Court, S. D. Alabama. February 10, 1914.)

1. REMOVAL OF CAUSES (§ 12*)—RIGHT TO REMOVE—RESIDENCE OF PARTIES.
   Under the rule that where federal jurisdiction is founded on diversity of citizenship a suit must be brought in the district of the residence of either plaintiff or defendant, a suit commenced in a state court in a federal district, in which neither the plaintiff nor the defendant resides, cannot be removed to the district court of such district by the nonresident defendant on the ground of diverse citizenship.
   [Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 32, 33; Dec. Dig. § 12.*]

2. REMOVAL OF CAUSES (§ 12*)—"PROPER DISTRICT."
   Where a suit is commenced in a state court in a federal district in which neither the plaintiff nor the defendant resides, the "proper district" to which defendant is entitled to remove the cause for diversity of citizenship is the district in which he resides, and in which the federal court would have had jurisdiction had the suit been originally brought there.
   [Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 32, 33; Dec. Dig. § 12.*]

At Law. Action by A. W. Stewart against the Cybur Lumber Company. On motion to dismiss for want of prosecution. Motion granted.

Stevens, McCorvey & Dean, of Mobile, Ala., for defendant.

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

TOULMIN, District Judge. Motion by defendant to dismiss the case for want of prosecution.

[1] This case is here by removal proceedings from the circuit court of Pearl River county of the state of Mississippi. The removal is founded on the fact that the action is between citizens of different states. Where the jurisdiction of the federal court is founded on the fact of diverse citizenship, suit shall be brought only in the district of the residence of either the plaintiff or the defendant. The plaintiff failed to do either, but brought his suit against the defendant in a state and district of which both were nonresidents.

A suit commenced in a state court in a federal district, in which neither the plaintiff nor the defendant resides, cannot be removed to the District Court of such district by the nonresident defendant on the ground of diverse citizenship, as such court would have had no jurisdiction of the same as an original suit. Gruetter v. Cumberland Telephone & Telegraph Co. (C. C.) 181 Fed. 249; Smellie v. Southern Pac. Co. (D. C.) 197 Fed. 641.

"No cause can be removed" into a federal court "unless it is one which could have been originally brought in that court." Younts v. Southwestern Telegraph & Telephone Co. (C. C.) 192 Fed. 200; Waterman v. Chesapeake & O. Ry. Co. (D. C.) 199 Fed. 667.

"A plaintiff instituting a suit in the federal court of a district other than that of the residence of either of the parties, waives thereby the wrong venue, and the provision authorizing venue in the district of his (plaintiff's) residence." Decker, Jr., & Co. v. Southern Ry. Co. (C. C.) 189 Fed. 224.

[2] The defendant had a right to remove the suit to a federal court. The right of removal given by the statute is to the "proper district," and this right of removal cannot be defeated by the act of the plaintiff in bringing his suit in the state court of Mississippi in which neither party resided. Mattison v. Boston & M. R. R. (D. C.) 205 Fed. 821.

For the defendant to remove the suit to the "proper district" is to remove it to the district court where he resides, and which is one that has original jurisdiction of the suit, and in which it could have been brought.

The case of Mattison v. Boston & M. R. R., supra, was, where a citizen of Vermont brought suit against a citizen of Massachusetts in a state court of New York. The defendant removed the case to the district court of the United States for the Northern District of New York, in which district the action was brought. The plaintiff moved to remand the cause on the ground that said District Court of the United States had no jurisdiction, and that the cause could not be removed to that court, inasmuch as neither the plaintiff nor the defendant was a citizen or resident of the state of New York. The court granted the motion to remand the cause to the state court of New York. In its opinion the court said:

"As the * * * plaintiff may bring his action against the defendant in the District Court of the district where the defendant resides, it seems plain that the defendant here might have removed this case to the District Court of Massachusetts, * * * not to the United States District Court of the Northern District of New York, where neither the plaintiff nor the defendant resides, as that is not the proper district."

It is very plain that if the action is brought in the state court it may be removed, but it can only be removed to the "proper district," which is the district where the action might have been brought by the plaintiff. The right of removal given by the statute is not to be defeated by the act of the plaintiff in bringing the action in the state of New York. Mattison v. Boston & M. R. R., supra.

I fully concur in the reasoning and conclusion of the learned judge in his opinion in the case above cited.

When the petition and bond are filed in the state court the jurisdiction of that court ceases, and that of the court to which the cause has been removed attaches. State ex rel. v. Coosaw Min. Co. (C. C.) 45 Fed. 804; Kinney v. Columbia Savings, etc., Ass'n, 191 U. S. 82, 24 Sup. Ct. 30, 48 L. Ed. 103.

My opinion is that the defendant had the right to remove this cause, and that the removal to this district and court was a proper removal.

This cause is before the court on a motion to dismiss it for want of prosecution. At the time the motion was submitted and set down for hearing due notice of the same was ordered to be given the attorneys for the plaintiff. When the motion came on to be heard it appeared to the court that such notice had been received by said attorneys, and on their failure to appear at the hearing, thus indicating that they did not desire to contest said motion to dismiss, the same was duly granted.

DAVEY v. YOLO WATER & POWER CO. et al.

(District Court, N. D. California, Second Division. December 18, 1913.)

1. REMOVAL OF CAUSES (§ 61*)—SEPARABLE CONTROVERSY—DETERMINATION.
Where an action is brought in the state court against several defendants, one of whom is of diverse citizenship, whether the suit involves a separable controversy as to such defendants so as to be removable to the federal court must be determined from the state of the pleadings and record at the time of the application for removal, and cannot be affected by facts otherwise disclosed.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 115; Dec. Dig. § 61.*]

2. REMOVAL OF CAUSES (§ 52*)—SEPARABLE CONTROVERSY—CAUSE OF ACTION.
Plaintiff brought suit against several defendants jointly to quiet plaintiff's title to the waters of a natural stream, alleging that plaintiff was rightfully in possession and entitled to the use for irrigation of a certain quantity of water constituting the flow of certain water courses, etc., and that defendants claim an estate or interest in the waters and in the use thereof, without right, etc., praying that the rights of the parties be settled by decree. *Held*, that under the theory of the complaint, plaintiff was entitled to join the several defendants as provided by Code Civ. Proc. Cal. § 379, and, having done so, one of the defendants of diverse citizenship was not entitled to remove the cause to the federal court on the ground that the suit, as to it, involved a separable controversy, in that such defendant's interest was in fact separate and distinct from those of its codefendants.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 102, 103, 105; Dec. Dig. § 52.*]

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

In Equity. Suit by H. C. Davey against the Yolo Water & Power Company and others. On plaintiff's motion to remand. Granted.

William Clark Crittenden, of San Francisco, Cal., for plaintiff.

Charles S. Wheeler and John F. Bowie, both of San Francisco, Cal., for defendant Power & Irrigation Co., of Clear Lake.

VAN FLEET, District Judge. This is a motion to remand the cause to the state court. The action is against several defendants, sued jointly to quiet plaintiff's title to the waters of a natural stream, it being alleged that plaintiff is rightfully in possession and entitled to the use for the purposes of irrigation of a certain quantity of water, "constituting the natural flow and flood waters of Kelsey creek, in the county of Lake, state of California, and of any waters flowing or lying beneath the surface of the gravel or in the ground in the bed of said creek," etc., and that "the said defendants claim, and each of them claims, an estate or interest in said waters and water right and in the use of said waters, adverse to the said plaintiff and his said use thereof," without right, etc., with a prayer that the rights of the parties be settled by the decree. The plaintiff and all of the defendants but one are residents and citizens of this state. The nonresident defendant, the Power & Irrigation Company of Clear Lake, is an Arizona corporation, and has removed the cause here solely upon the ground that there exists, as between it and the plaintiff, a separable controversy.

[1, 2] I am disinclined to hold with plaintiff's first contention that the case is not one falling within the grant of original jurisdiction to this court, and hence not subject to removal; but it is not necessary to determine that question, since I am of opinion that the case is improperly here under the further objection urged that no separable controversy is disclosed by the record. This latter question must be determined from the state of the pleadings and record at the time of the application for removal, and cannot be affected by facts disclosed otherwise. C., B. & Q. Ry. Co. v. Willard, 220 U. S. 413, 426, 31 Sup. Ct. 460, 55 L. Ed. 521. In this respect it is to be observed that the claim of the plaintiff extends to the waters of the stream as an entirety, and the averment is that each and all of the defendants claim an interest adverse to that right; and the prayer is that the rights of plaintiff and the adverse claims of all the defendants be declared and determined by the decree. Upon the cause of action thus stated, no separable controversy arises as between the plaintiff and any one of the defendants, but the controversy is common to all. Moon on Removal, par. 144.

And it can make no difference for present purposes that the facts may not turn out as laid, and that plaintiff may not be able to maintain his cause of action as stated. Upon the theory on which the plaintiff proceeds, it was his right to join the several defendants. C. C. P. § 379. And, having chosen to do so, he has a right to have the action proceed to trial upon that theory. As said in Powers v. Chesapeake & Ohio R. R. Co., 169 U. S. 92, 18 Sup. Ct. 264, 42 L. Ed. 673:

"A defendant has no right to say that an action shall be several which the plaintiff seeks to make joint. A separate defense may defeat a joint recov-

ery, but it cannot deprive plaintiff of his right to prosecute his suit to final decision in his own way. The cause of action is the subject-matter of the controversy, and that is, for all the purposes of the suit, whatever the plaintiff declares it to be in his pleadings."

It is immaterial, therefore, if it be true, as alleged in the petition, that the interest of the removing defendant be in fact separate and distinct from that of its codefendants. As said in Wilson v. Oswego Township, 151 U. S. 56, 14 Sup. Ct. 259, 38 L. Ed. 70:

"It has been too frequently decided to be now questioned that the plaintiff may elect his own method of attack, and the case which he makes in his declaration, bill, or complaint, that being the only pleading in the case, is to determine the separable character of the controversy for the purpose of deciding the right of removal."

The case is in no wise to be distinguished in principle from that of West Side Railroad Co. v. California-Pacific Railroad Co. (D. C.) 202 Fed. 331, recently decided in this court.

The motion to remand must be granted; and it is so ordered.

In re BAUSCH PICTURE FRAME & MOULDING CO.

(District Court, E. D. New York. February 16, 1914.)

1. RECEIVERS (§ 204*)—DISCHARGE—OBJECTIONS.
   Where the receiver of a corporation was appointed trustee in bankruptcy, and individual creditors of the incorporator, president, and principal stockholder claimed the corporate assets and objected to the trustee's sale, because they were not given notice, such objection furnished no reason for not permitting the receiver to account and be discharged and paid the proper allowance of commissions, as such accounting would not prevent relief against the trustee if the sale should be set aside or the proceeds held inadequate, and surcharged.
   [Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 319, 407, 408; Dec. Dig. § 204.*]

2. RECEIVERS (§ 198*)—COMMISSIONS—AMOUNT.
   A receiver of a corporation is entitled to only such compensation as the court may allow, not exceeding the maximum fixed by law.
   [Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 392–396; Dec. Dig. § 198.*]

3. RECEIVERS (§ 198*)—COMMISSIONS.
   Where the same person is receiver of a corporation and trustee in bankruptcy, he should not be paid double commissions as receiver on the value of real estate turned over to the trustee in kind and double commissions on the value of the same property as trustee, unless his services were worth as much or more than all possible allowances.
   [Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 392–396; Dec. Dig. § 198.*]

In Bankruptcy. Proceeding against the Bausch Picture Frame & Moulding Company. On application by receiver of bankrupt for discharge and allowance of commissions. Application granted.

James Gray, Receiver, in pro. per.
Raymond C. Haff, of Farmingdale, N. Y., for creditor.

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

CHATFIELD, District Judge. [1] "Individual" creditors object to the account of the receiver of the corporate assets which are claimed by the creditors of the individual, who was the incorporator, president, and principal stockholder of the corporation. The creditors of the individual bankrupt were not given formal notice of sale, which was sent only to creditors of the corporation. They therefore object also to any act which apparently recognizes the validity of the sale. This objection cannot be sustained. The sale may be attacked, and in the meantime the proceeds should be held so that the creditors of the individual may be protected if they have any further rights, but there is no reason why the receiver should not account and be discharged as to the assets which he had in his hands as receiver. He may also be paid a proper allowance. Such accounting would not prevent relief against the trustee if the sale should in any way be set aside or the proceeds held inadequate and any amount be surcharged.

[2] As to commissions, the receiver can ask double commissions upon the property actually passing through his hands and used in conducting the business. He can receive only what the court "allows," as the law fixes a maximum up to which the court may grant the proper "compensation."

[3] The property in this case included the real estate, and the price realized was in effect for the equity therein. The receiver has not asked commissions upon the value of the real estate covered by the mortgages, etc., but has asked for double commissions upon the receipts from the business and upon the equity from the sale of the property turned over to the trustee "in kind."

As receiver and trustee, the same individual should not be paid double commissions on the value of the real estate as receiver and double commissions on the value of the same property as trustee, unless the services were worth as much or more than all possible "allowances." Here the receiver would seem to be entitled to double commissions on $3,948.25, and a single commission on the equity of $5,000, amounting to $337.94, and also one-half of the double commission on the $5,000 equity at 2 per cent., or $50 more. The remaining $50 should be allowed to the trustee as a part of his double commission for running the business after his qualification as trustee.

The allowance to the receiver will not be computed upon the property covered by liens.

GLOUCESTER WATER SUPPLY CO. v. FREEMAN.

(District Court, D. Massachusetts. February 20, 1914.)

No. 112.

1. EMINENT DOMAIN (§ 230*)—PROCEEDINGS TO ASSESS COMPENSATION—COSTS AND FEES—CONTRACTS.

The parties to a proceeding to assess the compensation to be made for property taken by a city, commenced while the law required payment for the commissioners' services to be made by the parties, could contract with the commissioners for the payment of reasonable compensation.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 584; Dec. Dig. § 230.*]

2. EMINENT DOMAIN (§ 230*)—PROCEEDINGS TO ASSESS COMPENSATION—COSTS AND FEES—CONTRACTS.

Assumed that, under a contract by the parties to a proceeding to assess compensation for property taken by a city to pay the commissioners reasonable compensation for their services, where it was the established custom that such compensation should be paid in the first instance by the prevailing party and apportioned between the parties as might be eventually determined, the prevailing party who paid such compensation had a right to reimbursement from the other party to the extent of its share.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 584; Dec. Dig. § 230.*]

3. EMINENT DOMAIN (§ 243*)—RES JUDICATA—MATTERS CONCLUDED.

A proceeding to assess the compensation for property taken by a city was sent back by the Massachusetts full court for hearing on the amount to which the petitioner was entitled by its payment of the costs charged by the commissioners and came on for hearing before a single justice. Pending the proceeding the compensation of commissioners in such cases was by statute made chargeable to the county, and at the hearing the counsel for the parties agreed that if $8,750 could be allowed the commissioners from the county treasury as compensation the parties would adjust the rest of the commissioners' bill between themselves, and the court decreed payment of such amount by the county. The city repudiated the agreement of its counsel, and a decree was made vacating the first decree and recommitting the report to the commissioners to report the amount of their compensation to be paid by the parties, which decree, on an appeal by the city from the decree "ordering that the report * * * be recommitted," was reversed on the ground that in the absence of a contract, as to which no evidence was taken, though the parties had contracted to pay the commissioners reasonable compensation, the compensation was to be fixed by the court and paid by the county. *Held*, that the decree ordering payment of $8,750 by the county was not conclusive that such amount was reasonable compensation under the contract.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 551, 627–629, 700; Dec. Dig. § 243.*]

4. EMINENT DOMAIN (§ 263*)—APPEAL—REVERSAL—EFFECT.

The reversal of such second decree affected only the part appealed from, and the part of such decree vacating the prior decree was not reversed.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 687; Dec. Dig. § 263.*]

5. JUDGMENT (§ 956*)—CONCLUSIVENESS—MATTERS CONCLUDED—EVIDENCE.

The opinion accompanying the reversal of a decree may be looked at to determine on what grounds the reversal was made and to what extent the decree below was affected.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1822–1825; Dec. Dig. § 956.*]

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

6. EMINENT DOMAIN (§ 230*)—PROCEEDINGS TO ASSESS COMPENSATION—FEES—PAYMENT UNDER DURESS.

In a proceeding to assess compensation for property taken by a city, the payment of the commissioners' fees by the prevailing party, before the report was filed, was not made under duress, since the court could have made enforceable orders directing the commissioners to submit or file their report and settling their compensation, and such party was therefore not compelled to pay such fees to obtain the filing of the report.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 584; Dec. Dig. § 230.*]

7. PAYMENT (§ 85*)—RECOVERY BACK—PAYMENT UNDER MISTAKE.

Where by statute the fees of the commissioners in a proceeding to assess compensation for property taken by a city were chargeable to the county, a belief by the prevailing party and the commissioners, at the time of the payment thereof by such party, that it was bound to pay them and that it would be reimbursed for a part thereof by the other party, was not such a mistake of fact as entitled such party to recover back the fee so paid, where the commissioners could not then have recovered the fees from the county or the other party.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 272–281; Dec. Dig. § 85.*]

At Law. Action by the Gloucester Water Supply Company against John R. Freeman. Judgment for defendant.

Storey, Thorndike, Palmer & Dodge, of Boston, Mass., for complainant.

Samuel J. Elder, of Boston, Mass., for defendant.

MORTON, District Judge. [1] At the time when the commissioners accepted the appointment and did much of the work, the law was that payment for their services should be made by the parties to the litigation; and the parties and the commissioners so understood it. They also understood that the charges of the commissioners were to be reasonable considering the character and amount of work which should be done, the standing and experience of the commissioners, and the charges made by commissioners in other similar cases. On this understanding, which was never put into explicit language either oral or written, the parties to the original suit and the commissioners proceeded. The plaintiff here contends that upon the agreed facts no actual contract of any kind existed in reference to the payment of the commissioners, that the parties and commissioners acquired merely the rights and obligations which by law arose out of the situation, and that these rights and obligations might and did vary subsequently with changes in the law applicable thereto. The defendant contends that there was an actual contract whereby the parties agreed to pay the commissioners reasonable compensation. The right of the parties to make such a contract clearly existed.

"If the parties choose to make special contracts with commissioners in regard to their compensation, these contracts are enforceable." Knowlton, C. J., Gloucester Water Supply Co. v. Gloucester, 185 Mass. at page 537, 70 N. E. 1015.

By the act of 1899 (which was passed while the matter was pending before the commissioners), it was provided that the compensation of

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

commissioners like these should be paid out of the county treasury at a rate not exceeding $15 per day. The correspondence and briefs of the parties after this act was passed (St. 1899, c. 458), and before the $25,000 payment, show clearly that they understood that the commissioners were not limited to the maximum compensation fixed thereby, and that the parties were to pay such further sums as would be required to make up reasonable compensation. This position seems inconsistent with the idea that the rights of the commissioners to compensation rested solely upon the legal implications arising out of the situation. The question whether or not there was a contract between the parties and the commissioners for the payment of reasonable compensation was never heard and determined in the Massachusetts court. No evidence was ever taken on that issue. The statement in the opinion of the Supreme Judicial Court that, "Presumably it (the payment of $25,000) was made provisionally subject to the action of the court upon the validity and legal effect of this part of the award," is not a finding of fact.

[2] It seems to me that upon the agreed facts there was, at the time when the commissioners accepted their appointments, more than a mere duty implied by law requiring the parties to pay to them such compensation as the court might subsequently order. I find and rule that there was an actual, tacit contract between the plaintiff, the city of Gloucester, and the commissioners, obligating the first two parties to pay the commissioners reasonable compensation for their services, which incorporated the established custom that such compensation should be paid in the first instance by the prevailing party and apportioned between them as might be eventually determined. See memorandum of Mr. Justice Loring, Exhibit A, p. 1. Under this contract the payment of $25,000 was made by the plaintiff, on its own account and upon the account of the city of Gloucester, and carried with it the right to reimbursement from the city to the extent of the city's share. This right of the plaintiff to reimbursement was explicitly recognized by the Supreme Judicial Court; for, in sending back the case for further hearing after the first appeal, the court in banc said:

"The case is to stand for hearing on the amount to which the petitioner is entitled by its payment of the costs charged by the commissioners." 179 Mass. 384, 60 N. E. 982.

Their bill having been paid, the commissioners were not concerned in the matter of apportionment. The payment of $25,000 is said by the plaintiff to have been treated by the commissioners, "not as a final payment from a debtor, but as an advance." (Sup. Brief for Plaintiff, p. 8.) I do not so regard it, except perhaps to the extent to which the amount charged might thereafter be held excessive. The suggestion in the opinion of the Supreme Judicial Court (185 Mass. 537, 70 N. E. 1015) does not seem to me to preclude the view which I have taken. It is also said for the plaintiff that:

"The commissioners could elect whether to treat the county or the parties as their debtor, and if they wished to hold the parties they must discharge the county by repaying what it had paid." (Sup. Brief for Plaintiff, p. 11.)

The facts do not, in my opinion, warrant a finding that the commissioners at any time elected to hold the county, rather than the parties, responsible for their fees. Their attitude throughout seems to have been that they were looking to the parties for their compensation, and were not interested as to the proportions in which it was divided between the parties.

As to the reasonableness of the amount charged, namely, $27,000: At the incomplete hearing before Mr. Justice Loring evidence was submitted that such amount was reasonable. Evidence to the same effect is offered in the agreed facts; and I admit it. No witness ever testified that the sum charged by the commissioners was unreasonably high; and no such evidence is now offered. The absence of it is significant. While the amount charged seems large, an examination of the commissioners' bills contained in Exhibit A shows that a great deal of work was done. Upon the record, and in the absence of evidence to the contrary, said amount appears to have been reasonable; and I so find.

[3, 4] The plaintiff contends, however, that there has been a judicial determination by the Supreme Judicial Court that reasonable compensation for the commissioners was $8,750, and no more. The essential facts on which this contention is based are as follows: The original suit (Gloucester Water Co. v. Gloucester), having been sent back by the court in banc, after the first appeal, "for hearing on the amount to which the petitioner is entitled by its payment of the costs charged by the commissioners" (Gloucester Water Supply Co. v. Gloucester, 179 Mass. at page 384, 60 N. E. 982), came on for hearing in the Supreme Judicial Court before Mr. Justice Loring. At that time, by reason of the act of 1901 (St. 1901, c. 366), the entire compensation of the commissioners had become chargeable on the county. After some testimony had been offered as to the amount of work done by the commissioners and the reasonableness of their charges, counsel for the water company and the city represented to the court that, if $8,750 could be allowed from the county treasury as compensation to the commissioners, the parties would adjust the rest of the commissioners' bill between themselves. The court thereupon expressed its willingness to pass a decree ordering payment to that amount to be made by the county. That was done; and the hearing was concluded, without the merits having been fully heard, on the understanding by all parties present that the $8,750 would be turned over to the plaintiff, that the parties would agree as to the apportionment of the balance of the bill, viz., $18,250, and that the matter was satisfactorily settled. Subsequently the city denied the authority of its counsel to make such an agreement. This repudiation was represented to Mr. Justice Loring; and he thereupon made a further decree vacating his previous one, on account of the mistake on which it had been based, and providing that if this plaintiff (the water company) should repay to the county the $8,750, which it had meanwhile received, the report should be recommitted to the commissioners to report the amount of their compensation to be paid by the parties; but that, if the plaintiff did not repay such sum, it should have no further right to reimbursement from the city in respect to the sums paid by it to the commissioners. The plaintiff

did not refund the money. The court in banc reversed this second decree upon the ground that, in the absence of an actual contract relating to it—upon which point, as has been said, no evidence was taken—the compensation of the commissioners was to be fixed by the court, not by the commissioners, and to be paid by the county, not by the parties.

The plaintiff now contends that because the second decree was reversed by the court in banc, though upon another point in it, that part of it which set aside the first decree failed, that the first decree has therefore not been legally revoked, is now in full force, and conclusively adjudicates, as between this plaintiff and this defendant, that the total sum which he was entitled to receive for his services as commissioner was $2,625, instead of $8,500, which he has in fact received.

The plaintiff's case upon this important point seems to me to be technical and unmeritorious. In fact, Mr. Justice Loring never did determine the amount of reasonable compensation. He has said so himself.

"I allowed compensation to the commissioners to be paid by the county of Essex on the statement which was made to me that if that allowance was made the whole matter would be taken care of by the parties to the suit. I am now informed that the statement was not authorized by the defendant.

"This allowance, having been made by me under a misapprehension, may be set aside if the plaintiff elects to refund to the county treasury the money received by it." (Exhibit A, page 2.)

[5] The plaintiff endeavors to give the proceedings before Mr. Justice Loring an effect which neither he nor any party at that time supposed that such proceedings had. The defendant has in fact received no more than he was justly entitled to. I do not think that the record in the Supreme Judicial Court requires me to assume otherwise. It is true that the second decree (entered April 13, 1903) was appealed from, and that the subsequent record shows only, "Decree reversed." But a decree in equity is not a single indivisible thing like the ordinary judgment at law. It frequently incorporates several distinct matters. An appeal may be upon one or more points only, or against the whole decree. The city's appeal was from the decree "ordering that the report of the commissioners be recommitted to the commissioners to report to the court the amount of their compensation to be paid by the parties to this proceeding." 185 Mass. 536, 70 N. E. 1015. On this appeal only the part of the decree appealed from was affected or could be attacked by the appellant. 2 Daniell's Chancery Practice, p. 1490. The order, "Decree reversed," related only to the part of the decree appealed from. The rest of the decree remained in force. Moreover, if necessary, the opinion accompanying the reversal may be looked at to determine on what grounds it was made and to what extent the decree below was affected thereby. Coyle v. Taunton Safe Deposit & Trust Co., Banker & Tradesman (Mass.) 103 N. E. 288, December 27, 1913. Neither in fact nor in law has the defendant been overpaid.

[6] The plaintiff further contends that the overpayment of fees was exacted by what amounted in law to duress or coercion, on the part of a public officer. As I have found and ruled that the fees paid were no more than the commissioners were legally entitled to receive, the

principal support of this contention fails. Even assuming, however, that the fees charged were excessive, it does not seem to me that they were exacted by duress or coercion. There is, I think, a clear distinction in this respect between arbitrators agreed upon by the parties when no proceeding in court is pending, and commissioners appointed in a pending cause by a court which has jurisdiction of the parties and control over its appointees. In the former case, the prevailing party is practically obliged to pay the fees charged in order to obtain the decision. In the latter case, there is no such necessity; it being already before the court, enforceable orders can be obtained against the commissioners in respect to their report and their compensation.

"These commissioners were officers of the court appointed under a special statute, and they were not, by virtue of their appointment, in contractual relations with either of the parties. The most that they could ultimately expect under the existing practice was that the court, by proper orders if necessary, would make provisions for their reasonable compensation. If no statute were passed, they might expect that this compensation would come from the parties under an order of the court." Knowlton, C. J., Gloucester Water Supply Co. v. Gloucester, supra.

There was no necessity for the plaintiff to pay the $25,000 when it did so; it then raised no objection to the amount of the fees and made the payment voluntarily; that amount was within the control of the court appointing the commissioners; had the plaintiff desired, it could have applied to the court for orders, directing the commissioners to submit or to file their report, and settling their compensation. Mr. Norman, acting for the plaintiff, undoubtedly supposed, at the time when the payment was made, that the practice in the Newburyport case was to be followed. He assumed that the commissioners had power to fix their fees, was very keen to see the report, and made the payment out of impulsive curiosity, and, as his counsel put it to him, on his own responsibility for the consequences, rather than under any duress or coercion.

[7] The plaintiff finally contends that, even if the fees paid were reasonable and were not exacted by duress or coercion, they were nevertheless paid and received under such a mistake of fact as gives the plaintiff a right to recover in this action. Mr. Norman, at the time when he made the payment, supposed that there was an actual agreement between the parties, under which the plaintiff would be reimbursed for the payment of so much of the fees as might be put upon the city, and that an obligation to do so was imposed upon the city by law. The evidence offered on page 4 of the agreed statement of facts is admitted. The commissioners held the same views and supposed that the plaintiff was obligated to pay their fees in the first instance and would be repaid by the city such part thereof as should eventually be charged against the city. The commissioners and Mr. Norman were mistaken, if at all, not as to the amount or validity of their claim, but as to the plaintiff's duty to pay and right to reimbursement.

Assuming that there was a mistake of fact, it is not of such character as to give the plaintiff the right to recover in this action. To allow such recovery would deprive the defendant of about two-thirds of his just pay for work done by him; for he now has no means of re-

covering from the city or the county any portion of what he may be compelled to return to the plaintiff. The situation is such that either he or the plaintiff must lose the amount in controversy; and there seems to be no sufficient reason for putting the loss upon him.

As the broad grounds above stated are sufficient to dispose of the matter, there is no necessity for me to pass on the questions of estoppel, nor to decide whether the plaintiff's conduct in not refunding the money received from the county, nor prosecuting the suit against the city, precludes it from maintaining this action.

In accordance with the views above stated, I understand that I have dealt with the requests of the parties for rulings, which may be referred to in connection herewith, as follows:

Of the plaintiff's requests I have refused the first eight, the thirteenth, the fourteenth, and the "request for finding of fact," which I have numbered 15. I regard it as unnecessary to pass upon the ninth, tenth, eleventh, and twelfth of the plaintiff's requests.

Of the defendant's requests I have refused the first, because I do not think it states the actual contract exactly as I have found it to be. The second and third are given, and the fourth is given as modified by adding "and which would entitle the plaintiff to recover herein." Of the further findings of facts requested by the defendant in its briefs in reply, I give 3 and 13. The fourteenth I regard as immaterial. Of the rulings of law requested by the defendant I give 1, substituting for the word "implied" the word "actual" or "tacit." I give 2, 3, and 7. The others I regard it as unnecessary to pass upon.

Judgment for defendant.

THE NOREUGA.

THE GLENLUI.

(District Court, E. D. Virginia. January 20, 1914.)

1. COLLISION (§ 49*)—PRECAUTIONS—LIGHTS.

In a libel for collision, evidence *held* to require a finding that the lights of the sailing vessel with which the steamship collided were properly set and burning at the time of the collision.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 55; Dec. Dig. § 49.*]

2. COLLISION (§ 43*)—STEAMSHIP AND SAILING VESSEL—DUTY TO GIVE WAY.

Where a steamship and sailing vessel are approaching each other on converging courses, it is the duty of the steamship to give way and the sailing vessel to hold her course, and the steamship, having attempted to cross the bow of the sailing vessel, resulting in collision when there was ample sea room, was at fault, rendering her liable for the damages sustained.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 43–47; Dec. Dig. § 43.*]

3. COLLISION (§ 45*)—NAVIGATION—ACTS IN EXTREMIS.

Where a steamer was approaching a sailing vessel on converging courses, and the navigator of the steamship, on a collision appearing imminent, starboarded the helm, throwing the steamship across the bow of

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

the sailing vessel, and did not stop or reverse the engines until it was too late to prevent a collision, such maneuver could only be excused as an error in extremis and was unavailable where the steamship's officers were negligent in failing to observe the sailing vessel earlier and so to navigate the steamship as to avoid a collision.

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

4. SALVAGE (§ 21*)—RIGHT TO SALVAGE—CAUSE OF DISASTER.

Where the negligent operation of a steamship was the cause of a collision resulting in injury to a sailing vessel and a cargo, neither the steamship nor her owners could recover for salvage services rendered in saving the same.

[Ed. Note.—For other cases, see Salvage, Cent. Dig. §§ 48–51; Dec. Dig. § 21.*]

In Admiralty. Libels in admiralty by Willig & Ebert and others, as owners and in behalf of others having an interest in the cargo of the Norwegian ship Glenlui, against the Norwegian steamship Noreuga, and by the Actreselskabet Norge Mexico Gulf Linjen, a Norway corporation owning such steamship, on behalf of the officers and crew thereof, against the Glenlui and her cargo. Decree for libelant in first suit; other libel dismissed.

Lewis, Adler & Laws, of Philadelphia, Pa., and John W. Oast, Jr., of Norfolk, Va. (Frances L. Laws, of Philadelphia, Pa., of counsel), for the Glenlui and her owners.

Floyd Hughes, of Norfolk, Va., for the Noreuga and her owner.

WADDILL, District Judge. On the morning of November 1, 1912, about 4:45 o'clock, at a point some 90 miles south of Cape Hatteras, on the Atlantic Ocean, a collision occurred between the Norwegian sailing ship Glenlui and the Norwegian steamship Noreuga.

The Glenlui was a large and powerful vessel, built of iron, 1,806 tons net register, 265′1″ long, 42′1″ beam, depth of hold 23′9″; and the Noreuga was a large and valuable steel vessel of 2,689 tons register, 333′9″ long, 46′11″ beam, and depth 23′. At the time of the collision, the Glenlui was laden with a cargo of 1,219,033 feet of pitch pine lumber under deck, and 62,291 on deck, bound on a voyage from Pensacola, Fla., for Montevideo, South America; and the Noreuga was laden with a general cargo of merchandise, en route from the port of Norfolk, Va., to the port of New Orleans, La. On the morning in question, while the Glenlui was proceeding close hauled on the starboard tack, the Noreuga collided with and struck the Glenlui in the forward part on the port side, tearing away her bow, foremast, forerigging, and doing other serious damage; the steamer also receiving serious damage by having a large hole made in her starboard side. The wind at the time was fresh from the southeastward, the night clear, but dark, good weather, and each vessel making about ten knots an hour. The Noreuga stood by the Glenlui and transferred the latter's crew to the Noreuga, and on the next day towed the Glenlui some 130 miles en route to the Capes of Virginia, when a gale was encountered, and the Noreuga's hawser parted.

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

The United States Battleship Minnesota thereupon went to the Glenlui's assistance and towed her further on her way to the Capes, until she was met by the Merritt & Chapman Wrecking Company's tugs Rescue and Merritt, and taken by them to Newport News, Va. At Newport News, the Glenlui discharged her cargo of lumber and was subsequently sold in her damaged condition.

The libel in the first case was filed on behalf of the owners of the cargo of lumber to recover the loss sustained by reason of the collision, and in the last case by the owners of the Noreuga to recover for alleged salvage services, rendered in connection with the rescue of the Glenlui and her crew, and towing the vessel as aforesaid for the Capes of Virginia. The two cases were by stipulation heard together, and will be disposed of in the order mentioned.

First. The libel in the first suit, while filed solely on behalf of the owners of the cargo of lumber on the Glenlui, and not for damage to that ship, nevertheless involves the collision between the Glenlui and the Noreuga, and presents the usual questions arising in collision cases, and is determinable by the law and rules of navigation properly applicable thereto. The libelants, the cargo owners, charge that the collision resulted from the negligence, carelessness, mismanagement, and inattention of those navigating the Noreuga in (a) not having a lookout properly stationed; (b) in not taking precautions to avoid the sailing vessel; (c) in not keeping out of the way of the sailing vessel; (d) in endeavoring to cross the bow of the sailing vessel; (e) in being so negligently and carelessly manned and maneuvered as to bring about the collision; and (f) in failing to have proper lights set and brightly burning.

The Noreuga denies generally the allegations of fault made by the libelant, and insists that the collision was brought about by reason of the failure of the Glenlui to have in command a competent master and crew, a vigilant lookout on her forecastle, and particularly that the Glenlui's lights were defective in that they were not set and burning as required by law so as to be visible a distance of two miles in the situation in which the two vessels were approaching each other prior to the collision, and that the collision was thus brought about by reason of the insufficiency of the lights as aforesaid.

Considerable testimony was taken, and in the view taken by the court, while there is much evidence to sustain the contention of the libelant, the owners of the cargo on the Glenlui, that the Noreuga was not manned and controlled at the time of the accident by competent navigators, particularly as respects her lookout and wheelsman, the former being a young man 17½ years of age, rated as a "boy about the deck," and the latter a common seaman, only 21 years of age, still the case really turns upon whether or not the Glenlui, at the time of the collision, was equipped with proper lights duly set and burning, and whether the Noreuga was being so navigated as to keep out of the way of and avoid collision with the sailing vessel, and also whether she was not in fault for attempting to cross the bow of the Glenlui.

[1] The court is convinced, upon a careful consideration of the testimony, that the Glenlui was equipped with regular lights, properly set

and burning at the time of the collision. Witnesses on behalf of the Glenlui, consisting of her master, mate, lookout, wheelsman, steward, and two watchmen, clearly established the fact that her lights then in use were usual and proper ones, and were burning brightly before and at the time of the accident; that they were regularly lighted and placed, examined from time to time, and observed immediately before and shortly after the impact, and were still burning brightly after the collision and the injury to the light box; and that the port light was seen and observed by the crew while they were being taken off the vessel and en route to the Noreuga, a distance of as much as a mile away, and after daylight of the same morning, upon returning to the Glenlui as late as 10 or 11 o'clock, the lights were still brightly burning. These witnesses from the ship were examined by the libelants; and the second mate of the Glenlui, whose watch ended at 4 o'clock in the morning, was called by the Noreuga as a witness, and, while he makes some criticism of the port light on his vessel, he admits that the same was of proper size, was put up as usual, and when he turned in that it was all right and properly set and burning. This positive testimony of the officers and crew of the ship ought not to be lightly disregarded, especially when assailed only by persons of doubtful competency, themselves apparently negligent, merely because they claim not to have seen the light. On the contrary, their testimony should be viewed favorably, as it is improbable that seamen would themselves consent to the navigation of a ship upon the high seas without lights. The Richmond (D. C.) 114 Fed. 208, 212; The Dorchester (D. C.) 163 Fed. 779, 782. Nor can the court lose sight of the fact of the Noreuga's failure to mention in her log book so important an event as that of the defective lights of the Glenlui, now made the real basis of its explanation of the collision. The Richmond (D. C.) supra, 114 Fed. 208, and cases cited; The Winooski (D. C.) 162 Fed. 64. Against this positive testimony as to the existence of the light, we have the evidence of those navigating the Noreuga that they failed, as aforesaid, to observe the same until the vessels were only a short distance apart, and too late to avoid collision, and also that of Commander Harold Lundh, director of the Nautical College of Christiania, and of the Public Control Office for Ships Instruments of Norway, a most accomplished representative of his government, and a high authority on the subject under consideration, who testified as to having examined a tower and lamp purporting to have been taken from the Glenlui, and forwarded to Norway at the instance of the ship's representative; that he insisted and endeavored to demonstrate that the light was not the regulation light and could not, on account of its condition and that of the tower, as he described it, have been seen and observed the prescribed distance. Assuming that the tower and lamp forwarded to Norway and examined by the expert were those of the Glenlui, and when inspected by him were in the same condition as on the night of the occurrence, still it is hard for the court to adopt expert opinion, procured without notice to adverse parties, long after the accident, and thousands of miles away, in place of the evidence of witnesses who were present at the scene of the collision. However

intelligent and conscientious such a witness may be, the testimony is but an effort generally to substitute theory for fact, and can rarely be depended on, as it is impossible, as in this case, to prevent uncertain and unreliable conclusions being reached in connection with the same, arising from the difficulty of having the subject under investigation placed in the precise relation to the occurrences as they existed at the time of the happening of the accident. The tower and lamp examined by Commander Lundh may or may not have been the actual ones on the vessel at the time of the collision, and more difficult still is it to determine as to their condition on the two occasions. Respecting this matter, it must be admitted that the element of uncertainty enters, and it is impossible for the court to decide, with that degree of definiteness and certainty that ought to prevail in the ascertainment of a given fact, either that they were the same or in like condition at the different times.

[2] Assuming the existence of proper lights on the Glenlui, the responsibility for the accident is easy of determination. She was a sailing vessel, required to keep her course and speed; and upon the steamship was imposed the burden of avoiding collision, or the risk thereof with her, and not to cross her bow; and for a collision occurring between a sailing vessel and steamship under the conditions existing here, with ample sea room, all the presumptions are favorable to the sailing vessel. The New York, 175 U. S. 187, 204, 20 Sup. Ct. 67, 44 L. Ed. 126; The Pavonia (C. C.) 26 Fed. 106; The Richmond (D. C.) supra, 114 Fed. 208, 212; The Delmar (D. C.) 125 Fed. 130; The Job H. Jackson (D. C.) 144 Fed. 896. Members of the crew of the sailing vessel testified to having seen the steamship several miles away; that the Glenlui did not change her course and speed, nor did the steamship in time to avoid the collision; that, upon the steamship approaching the Glenlui so close, they sounded the fog signal, and rang a bell to attract the Noreuga's attention, and finally, seeing the accident was inevitable, put her wheel hard aport, with a view of lightening the lick of the collision as far as possible; and that the steamship heedlessly ran upon them, and, when only some two ship's lengths away, changed her course by starboarding and going to port across her bow, when too late to avoid the collision.

The Glenlui cannot be said to have been guilty of fault in what she did, whereas the Noreuga was clearly so in her failure sooner to observe the Glenlui and to so navigate as to avoid collision with her. It is apparent from this testimony that the Glenlui's lights could have been seen by those navigating the Noreuga, had they been discharging their duty, in ample time to have avoided the collision, or the risk thereof, and that the actual collision could and would have been avoided. Moreover, had they been in the exercise of due care, there was no reason why a sailing vessel the size of the Glenlui, with her sails set, and giving the signals that she gave, should not have been seen, observed, or heard in time to have avoided running into her; and it is likewise quite clear that had those in charge of the Noreuga properly directed her navigation upon observing the Glenlui, namely, by reversing her engines and putting her wheel hard aport, with a view

of passing under the stern instead of across the bow of the Glenlui, there would have been no collision.

[3] Instead of making this maneuver, the young man in charge of her navigation, the second mate, upon observing the presence of the Glenlui, took the directly opposite course and starboarded, throwing his steamship across the Glenlui's bow, and not until after the steamer's master, who had retired, was called on deck were the engines either slackened, stopped or reversed, and put astern. This maneuver in navigation can only be excused, if at all, as an error in extremis, which the court thinks should not avail here, and in any event that the Noreuga is clearly liable by reason of her negligence in failing to see and observe the Glenlui earlier, and so navigating as to avoid collision, or the risk thereof, with her.

[4] Second. Considering the second libel, brought by the owners of the Noreuga against the Glenlui and her cargo, to recover damages for salvage services in connection with saving the latter ship and cargo, the same having been rendered in an effort to save them because of injuries in a collision brought about by the negligence of the Noreuga, no recovery can be had therefor.

It follows from what has been said that the libelant in the first suit is entitled to recover against the Noreuga, and that the libel in the latter case should be dismissed, and a decree will be so entered on presentation.

UNITED STATES v. 150 CASES OF FRUIT PUDDINE.

(District Court, D. Massachusetts. January 17, 1914.)

No. 523.

1. FOOD (§ 15*)—MISBRANDING—CONSTRUCTION OF WORDS.

In a proceeding for the misbranding of food in violation of the Pure Food and Drugs Act (Act June 30, 1906, c. 3915, 34 Stat. 768 [U. S. Comp. St. Supp. 1911, p. 1354]), the words of the offending label are to be construed in their ordinary or customary meaning so far as they have one.

[Ed. Note.—For other cases, see Food, Cent. Dig. § 14; Dec. Dig. § 15.*]

2. FOOD (§ 15*)—PURE FOOD AND DRUGS ACT—MISBRANDING.

Pure Food and Drugs Act (Act June 30, 1906, c. 3915, 34 Stat. 771) § 8 (U. S. Comp. St. Supp. 1911, p. 1357), provides that the term "misbranding" shall apply to all articles of food, the package or label of which shall bear any statement regarding the article or its ingredients which shall be false or misleading in any particular, and that an article shall be deemed misbranded (subd. 4) if the package containing it or its label bear any statement, design, or device regarding the ingredients which shall be false or misleading in any particular, provided that any article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed adulterated or misbranded (1) in the case of mixtures or compounds known as articles of food under their own distinctive names, and not an imitation of, or offered for sale under the distinctive name of, another article, if the name be accompanied on the same label or brand with a statement of the place where the article is manufactured or produced, etc. *Held*, that such proviso was limited to the distinctive name under which a proprietary food was sold, and as so limited the proviso applied to the first paragraph of section 8, and protected distinctive names

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

from constituting misbranding; and hence, where a food was sold in cartons bearing the words "fruit flavored," when in fact the article was not fruit flavored, it was misbranded and subject to forfeiture.

[Ed. Note.—For other cases, see Food, Cent. Dig. § 14; Dec. Dig. § 15.*]

3. FOOD (§ 15*)—MISBRANDING—DISTINCTIVE NAME.

Pure Food and Drugs Act (Act June 30, 1906, c. 3915, 34 Stat. 771) § 8, subd. 4 (U. S. Comp. St. Supp. 1911, p. 1358), provides that for the purposes of the act an article shall be deemed misbranded if the package containing it or its label shall bear any statement, design, or device regarding the ingredients which shall be false or misleading in any particular, provided that an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed adulterated or misbranded (1) in the case of mixtures or compounds known as articles of food under their own distinctive names, etc. Claimant manufactured a proprietary food made largely of cornstarch, called "Puddine," and to designate the different colors used the words "cream vanilla" and "rose vanilla" as a trade-mark, the product being flavored with vanillin or synthetic vanilla obtained from oil of cloves. *Held*, that such words did not indicate that the food labeled "cream vanilla" was flavored with the highest quality of vegetable extract of the vanilla bean, and the "rose vanilla" with the highest quality of a compound of vegetable flavors of rose and vanilla, but that they were distinctive names, the use of which was protected by such provision, and their use did not constitute misbranding.

[Ed. Note.—For other cases, see Food, Cent. Dig. § 14; Dec. Dig. § 15.*]

Information by the United States against One Hundred and Fifty Cases of Fruit Puddine. Decree for plaintiff.

James S. Allen, Jr., Asst. U. S. Atty., of Boston, Mass.
Ropes, Gray & Gorham, of Boston, Mass., for claimant.

MORTON, District Judge. This is a proceeding, under the Food and Drugs Act, by information (or libel) against 150 cases of a food product called "Puddine" or "Fruit Puddine." A jury having been waived by both parties, the case was tried before me upon fact and law. I find the material facts, in addition to those alleged in the information and admitted in the answer, to be as follows:

"Puddine" or "Fruit Puddine" is the distinctive name, adopted and used as early as 1889, of a proprietary food product consisting largely of cornstarch. It is manufactured by the claimant and is put up in packages or cartons of different flavors, adapted to the retail trade. It does not contain any deleterious or poisonous ingredient. It is not an imitation of, or offered for sale under the distinctive name of, any other article; and the name "Puddine" or "Fruit Puddine" is accompanied, on the same label or carton, with a true statement of the place where it has been manufactured.

The alleged misbrandings lie in the words "Cream Vanilla," "Rose Vanilla," and "Fruit Flavored," which appear upon the cartons. "Cream Vanilla" and "Rose Vanilla" are two of the many flavors in which Puddine is manufactured. All the cartons in question appear to have been marked "Fruit Flavored Puddine," to which is added on some cartons "Cream Vanilla," and on others "Rose Vanilla," according to the flavor of the Puddine therein.

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

The plaintiff contends that branding any article of food with the word "Vanilla," alone or in combination with other words, is a representation that it is flavored with vegetable extract of vanilla made from the vanilla bean; that the word "Cream" prefixed to the word "Vanilla" means the best or highest grade of vanilla; that the words "Cream Vanilla" on the claimant's cartons mean "flavored with the highest grade of vegetable extract of vanilla"; that the word "Rose" prefixed to the word "Vanilla" means a combination of the vegetable flavors of rose and vanilla; that the words "Rose Vanilla" on the claimant's cartons mean "flavored with the vegetable extracts of rose and of vanilla"; and that the words "Fruit Flavored" mean flavored with fruits (commonly so-called), capable of being used as flavoring substances.

The contention of the claimants, who are the manufacturers of the product, is that "Puddine" and "Fruit Puddine" are artificial words, adopted as the name of their product, and constitute a distinctive name for the article within section 8, subsec. 4 (1), of the act in question; that "Cream Vanilla" and "Rose Vanilla" are also artificial words, adopted by them to indicate the taste and appearance of their product, and import nothing as to the origin of the taste; that they are not false or misleading; and that the term "Fruit" or "Fruit Flavored," while adopted as an arbitrary or artificial part of the name, is in fact true, because the grain out of which the product is manufactured is, botanically speaking, a fruit.

[1] The words in question are to be construed in their ordinary or customary meaning so far as they have one. U. S. v. Seventy-Five Boxes of Pepper (D. C.) 198 Fed. 934; U. S. v. Thirty Cases of Grenadine (D. C.) 199 Fed. 932; Brina v. U. S., 105 C. C. A. 558, 179 Fed. 373.

[2] The distinctive or trade name of the product is "Puddine," or "Fruit Puddine," always accompanied on the cartons by words indicating the flavor. "Puddine" and "Fruit Puddine" are frequently used without the adjective "Fruit Flavored," which is not part of the name. It seems clear that "Fruit Flavored" does signify, as the plaintiff contends, that the article is flavored with "fruit" in the common, not the botanical, meaning of the word. As no such fruit is used in "Puddine," the words "Fruit Flavored" are untrue and misleading as applied to it; and the misleading effect of them is heightened by the picture of a dish of fruit which appears on some of the cartons. If Puddine were not an article of food known under its own distinctive name, it would clearly be "misbranded" within the act, by reason of the words "Fruit Flavored" upon the cartons.

The claimant contends, however, that articles of food which come within the terms of the proviso to the fourth subsection of section 8 are exempt from the operation of the Food and Drugs Act, and are not to be deemed misbranded, no matter what misstatements are made upon the cartons. The plaintiff contends: (1) That the first paragraph of section 8 prohibits all misbranding as therein defined, and is not limited by the proviso in question; and (2) that, even if the proviso does apply, it is not the intent of it to except from the operation of the act anything except the distinctive name itself; that even if, as to articles

of food which come within the proviso, misstatements which form part of the name itself are not forbidden, it is nevertheless true that any other false or misleading statements regarding the ingredients or substances contained in such articles constitute misbranding.

It has been said that the sole purpose of this statute "was: (1) To protect purchasers from injurious deceits by the sale of inferior for superior articles; and (2) to protect the health of the people by preventing the sale of normally wholesome articles to which have been added substances poisonous or detrimental to health." Sanborn, J., Hall-Baker Co. v. U. S., 198 Fed. 614, 616, 117 C. C. A. 318 (C. C. A. 8th Circuit). In other words, deception and unwholesomeness are the evils which the act is designed to prevent. The last part of section 8, providing that "manufacturers of proprietary foods which contain no unwholesome added ingredients" shall not be required "to disclose their trade formulas, except in so far as the provisions of this act may require to secure freedom from adulteration or misbranding," plainly implies that a proprietary product may be misbranded. The report of the Committee (House of Representatives, 59th Congress, First Session, Report No. 2118, March 7, 1906), and the debates, so far as they refer to the proviso in question, indicate that the attention of Congress was directed to protecting thereby established distinctive or trade names from being outlawed by the act.[1]

In U. S. v. Forty Barrels of Coca Cola (D. C.) 191 Fed. 431, 440, it was held that the proviso in question "was only intended to protect an article sold under its distinctive name from the charge of misbranding in so far as any statement or suggestion contained in the name it-

[1] The legislative history of this act is as follows: The bill which, after amendment, became the Food and Drugs Act of June 30, 1906, was Senate Bill No. 88, 59th Congress, First Session. It is printed in full in the Congressional Record for that session at page 897. It was reported favorably to the Senate December 14, 1905 (Senate Reports, vol. 1, No. 8, 59th Congress, First Session), passed by the Senate February 21, 1906 (Cong. Rec., 59th Congress, First Session, p. 2773), and was introduced in the House of Representatives the next day (page 2853), and there referred to the Committee on Interstate and Foreign Commerce. The Committee's report is found in House Reports, 59th Congress, First Session, vol. 1, Report No. 2118. The Committee of the House recommended amendment to the Senate bill by substituting for it the Hepburn Pure Food Bill (H. R. 4527, reported to the House January 18, 1904, and passed by the House) as amended by the Committee. The bill was passed by the House with amendments June 23, 1906 (Rec. pp. 9076, 9353), and sent back to the Senate, which refused to concur. Conference Committees filed identical reports June 27, 1906, setting out in full the bill as agreed upon and recommending that it pass (House Reports, vol. 3, No. 5056; Senate Docs. vol. 8, Doc. 521; Cong. Rec. pp. 9353, 9379, 9381). The second conference report making certain minor improvements in sections 1 and 2 of the bill, was filed June 29, 1906, giving the bill as finally enacted (House Reports, vol. 3, No. 5096). The bill was then passed and signed June 30, 1906.

As to the distinctive name proviso:

The subject-matter of this proviso appeared in the original Senate bill; and the proviso as finally passed first appears in substance in the bill as amended by the House Committee, where it is numbered paragraph 4 of section 7. There appears to have been no discussion at all of the "Distinctive Name" proviso in the debates in the Senate; and the only allusion to it in the debates in the House is found under date of June 23, 1906 (Cong. Rec., 59th Congress, First Session, p. 9068).

self is concerned." See, too, U. S. v. American Chicle Co., U. S. Dist. Court, District of Oregon (no opinion filed).

It is undoubtedly true that persons purchasing a proprietary article of food, like Puddine, get what they go for, whether all the statements on the carton are correct or not. But it is also true that the purchase of a proprietary article may well be induced by false statements concerning it upon the cartons; and it is not difficult to imagine cases in which reliance on such misstatements would work real injury to the purchaser. For example, if such an article were branded, "Contains no sugar," when in fact it did, the misbranding might induce the purchase by persons whose diet demanded absence of sugar. Such articles are within the purview of the statute. It does not seem to me that the proviso in question was intended to except them absolutely from the provisions of the act, and to leave the manufacturers free to make misrepresentations concerning them. Such a construction is out of harmony with all the rest of the statute, and disregards one of the principal purposes of it. It seems to me that the protection afforded by the proviso is limited to the distinctive name; and, as so limited, I have no doubt that the proviso applies to the first paragraph of section 8, and fully protects distinctive names from being misbranding.

I therefore find and rule that the words "Fruit Flavored" upon the cartons containing Puddine were a statement regarding such article, or the ingredients or substances contained therein, which was false or misleading and constituted misbranding within the statute.

The conclusion above reached makes it unnecessary to consider whether the use of the words "Cream Vanilla" and "Rose Vanilla" constitutes misbranding; but I infer from what was said at the argument that this is a point upon which a decision is particularly desired by the parties. I therefore proceed to find the facts and state my conclusions in reference thereto.

[3] No such extract, flavoring matter, or combination as "Rose Vanilla" is known to the trade, or to the public, except in connection with the defendant's product; nor any such extract or flavoring matter as "Cream Vanilla," except perhaps to a limited extent in the bottling trade, in which it is sometimes used to signify a high-grade vanilla extract; but such use is not known to the public generally, and is wholly unrelated to the use by the claimant. "Cream Vanilla," as applied to the claimant's product, is certainly not understood by the public as meaning "flavored with a high-grade vanilla extract." The word "Rose," followed by "Vanilla," was registered by the claimant in the United States Patent Office as a trade-mark applicable to "Puddine" on the 21st of May, 1889. Both "Rose Vanilla" and "Cream Vanilla" were in use by the claimant on Puddine before the Food and Drugs Act went into effect.

Puddine is not flavored with the vegetable extract of vanilla, but with vanillin, or synthetic vanilla, which is obtained from oil of cloves. Natural vanillin is found in the vanilla bean and forms the characteristic and most important element in the vegetable extract of vanilla. It is what gives to vanilla extract its characteristic taste. Synthetic vanillin is one of the comparatively recent discoveries in organic chem-

istry, of which indigo and madder are other examples. It is exactly the same as the natural vanillin. The flavor produced by synthetic vanillin is as wholesome as that produced by the vegetable extract of vanilla, and is substantially identical with it in taste; the difference, if any, being due to accidental substances in the natural extract. As used by the claimant, "Cream Vanilla" is applied to cream-colored Puddine flavored with vanillin, and "Rose Vanilla" to exactly the same thing colored pink with a harmless dye; the difference being in color only.

When a proprietary product is sold in different flavors, I see no reason why there may not be a distinctive name of a particular flavor, nor any reason for denying to such a name the protection of the proviso. The very purpose of the proviso, as I construe it, was to save distinctive names, which might be of great value, and the use of which might otherwise have been forbidden. "The purpose of the law is the ever insistent consideration in its interpretation." McKenna, J., U. S. v. Antikamnia Chem. Co. (January 5, 1914) 231 U. S. 654, 34 Sup. Ct. 222, 58 L. Ed. ——. I find and rule that "Cream Vanilla" and Rose Vanilla," as used with "Puddine," are artificial and distinctive names adopted by the claimant, the use of which is not misbranding. It is unnecessary to decide whether the word "Vanilla" applied to food amounts, as the plaintiff contends, to a representation that the taste thereof has been produced by the vegetable extract, and not by the synthetic product.

Decree for plaintiff.

In re SHEA.

(District Court, W. D. Kentucky. February 19, 1914.)

1. BANKRUPTCY (§ 288*)—RECOVERY OF PROPERTY—ADVERSE CLAIMS—SUMMARY PROCEEDINGS.

Whether a bankrupt's trustee may maintain summary proceedings against the bankrupt and his wife to recover money and property, claimed by her, as a part of the bankrupt's estate, over her protest that she is entitled to be proceeded against in a plenary action, depends on whether she has a bona fide claim of ownership or whether it clearly appears that she is holding the money as a mere agent of the bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 447; Dec. Dig. § 288.*]

2. BANKRUPTCY (§ 288*)—PROPERTY OF BANKRUPT—RECOVERY—ADVERSE CLAIM.

Between April 21, 1913, and the following November the bankrupt gave to his wife $3,970.38, which she deposited to her own credit. By November 10th she had checked against the account so that only $684.47 remained. A bankruptcy adjudication was passed on November 11th, after which the wife further withdrew $449.93, but on December 2d added to her credit $284.64. It also appeared that, shortly after the marriage of the parties in 1906, the bankrupt delivered most of his earnings to his wife with the understanding that she should pay the family expenses, and that any money she saved out of it should be her own property, and that from such savings she bought certain building association stock, which had always been in her name. *Held*, that the wife, as to the stock and the money deposited in the bank, except the balance of $284.64 remaining, had a bona fide adverse claim which she was entitled to have tried in a

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

plenary suit as against the husband's trustee in bankruptcy, notwithstanding Ky. St. § 1907, providing that every gift made by a debtor without a valuable consideration shall be void as to all his then existing creditors, etc.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 447; Dec. Dig. § 288.*]

In Bankruptcy. In the matter of bankruptcy proceedings of John H. Shea. An order having been entered by the referee requiring the bankrupt and his wife to deliver certain moneys and securities to the trustee as belonging to the bankrupt's estate, the wife filed a petition for review. Reversed in part, and affirmed in part.

Burwell K. Marshall, of Louisville, Ky., for trustee.
John B. Baskin, of Louisville, Ky., for respondents.

EVANS, District Judge. On his own petition John H. Shea was on November 11, 1913, adjudicated a bankrupt. R. H. Courtney was qualified as trustee, and on January 2, 1914, filed a petition before the referee which contained the following averments, to wit:

"Your petitioner, R. H. Courtney, respectfully shows: That he is trustee in bankruptcy herein, duly qualified and acting. That the said John H. Shea, bankrupt, has been examined in this proceeding and denied that there was any sum of money belonging to the said bankrupt or any property due him, but your petitioner states that said bankrupt has in the possession of his wife, Irene Shea, $684.47 on deposit in the First National Bank, which belonged to the estate of the said John H. Shea, bankrupt, at the time of the adjudication of bankruptcy herein, and has $837 in shares of stock in the Avery Building Association standing in the name of Irene Shea or Mrs. J. H. Shea which belonged to the said John H. Shea, bankrupt, at the time of the adjudication of bankruptcy herein, and has $1,958 in shares of stock in the Portland Building & Loan Association standing in the name of said Irene Shea or Mrs. J. H. Shea which belonged to said John H. Shea, bankrupt, at the time of the adjudication of bankruptcy herein, but that said Irene Shea claims to be the owner of said money and said certificates of stock, and that same do not belong to the estate of said John H. Shea, bankrupt. That W. F. Woodruff, for the use and benefit of Jefferson county, the only creditor herein, has requested that your petitioner, as trustee, bring an action against Irene Shea for the recovery of the said money and stock claimed to be due the estate of John H. Shea, bankrupt, and your petitioner has been advised by his counsel, Burwell K. Marshall, that he has a good and valid cause of action against Irene Shea and John H. Shea for the said stock and money. Wherefore your petitioner, R. H. Courtney, trustee in bankruptcy of John H. Shea, prays for a rule against Irene Shea and John H. Shea, bankrupt, requiring them to pay to your petitioner the said money and turn over to him the said shares of stock in said building and loan associations."

Upon reading this petition the referee, on the day last named, instead of directing a suit to be brought on the cause of action the trustee was advised he had, ruled the bankrupt and his wife, Irene Shea, the latter not otherwise a party to the proceeding, to show cause on January 16th why they should not be required to turn over to the trustee the money and stock described in the petition we have copied. To this rule a written response was made, and the referee having, on January 30th, upon grounds stated in writing, held it to be insufficient, made the rule absolute, and the bankrupt and Mrs. Shea have filed a

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

petition for a review by the court of the referee's order. Treating the response of the bankrupt and his wife as that of the latter alone (the bankrupt having little or no legal interest in the question between his wife and his trustee), we must determine whether Mrs. Shea has shown a claim adverse to that of the trustee, either to the stock described in the petition or to the money in bank, or both, such as would entitle her to have the questions between her and the trustee determined in a plenary action where the claims of both could be adequately investigated and determined, or whether their respective claims should be adjudicated in a summary proceeding like this.

[1] We shall assume, if the property be that of the bankrupt, that so far as he is concerned he might, if the property is in his possession, be subjected to a rule to show cause. In reaching a conclusion, however, between the trustee and the outside adverse claimant, we must find an answer, not to the question of what may ultimately be held to be the exact rights of the parties, but whether Mrs. Shea in fact has an adverse claim which is not merely colorable but which might, in whole or in part, be sustained in a plenary action. The court has the right (Louisville Trust Co. v. Comingor, 184 U. S. 25, 22 Sup. Ct. 293, 46 L. Ed. 413) to pass upon the case to that extent when a summary proceeding is resorted to. Where, as in Mueller v. Nugent, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405, the person ruled showed that he held money as a mere agent of the bankrupt and not as an adverse claimant of title thereto, there was no reason why he should not be required to deliver to the trustee what he held as agent for the bankrupt; that is to say, if he had in his possession property belonging to the bankrupt and which he held as the bankrupt's agent, manifestly he had no adverse claim to it and could be compelled to turn it over to the trustee. Following that case is that of In re Eddleman (D. C.) 154 Fed. 160, which, in one of its aspects, was like the Nugent Case. The rulings in those cases apply to this one to the extent that if Mrs. Shea holds the money or the stock or any part of it as the mere agent of the bankrupt, and not under a bona fide claim of ownership, she may be coerced by rule to turn it over to the trustee, but, if she has possession and is a bona fide claimant of ownership, she cannot be dispossessed nor her claim of title adjudicated except in a plenary action. First National Bank v. Chicago, etc., Co., 198 U. S. 280, 25 Sup. Ct. 693, 49 L. Ed. 1051.

Remembering, first, that we are not to determine, in this proceeding, the merits of her claim to ownership, except to the extent that on her own showing it is not maintainable, and, second, that otherwise we are only to decide as to the good faith of her adverse claim and not upon the merits of a controversy in respect thereto to be determined in a plenary suit, we come to the consideration of the response and the testimony thereon, testimony which seems to have been considered by the referee as bearing on the merits of the controversy rather than on the question of the adverse character of the claim of Mrs. Shea. The latter, however, is the dominant consideration applicable to the very narrow question now involved, but to which we find it somewhat difficult to get the referees to limit themselves. The inquiry now is not

whether the trustee should or should not succeed in a plenary suit but whether that is the only proper way to litigate a controversy fairly entitled to be regarded as one involving adverse claims to certain property. A plenary suit, speaking generally, presents no obstacle to a trustee in the assertion of his rights to property claimed to be that of the bankrupt but in fact held by another, and such a suit is the only way by which an adverse claimant who is in possession can be reached. In re Mimms & Parham (D. C.) 193 Fed. 276–278.

[2] 1. As to the $684.47, the response shows that the bankrupt gave to his wife, Irene Shea, between April 21, 1913, and November 3, 1913, both dates inclusive, the sum of $3,970.38, which she deposited in the First National Bank to her credit, and that between April 28, 1913, and November 10, 1913, both dates inclusive, she checked thereon to the extent of $3,285.91, leaving at the last-named date the balance of $684.47, and that after November 10, 1913, and before respondents knew that any part of said balance would be claimed by the bankrupt's trustee, Mrs. Shea, on her own checks, withdrew $449.93 of the $684.47 and left thereof only a balance of $234.54. On December 2, 1913, she added to her credit in the bank $284.64. When she got the latter sum is not anywhere disclosed by the record, but, before the trustee can be entitled to it at all, he must show that it was earned or acquired by the bankrupt before his adjudication as such on November 11, 1913, after which event what he might earn would be his own and not his trustee's; the rights of the latter not extending to anything earned or acquired by the bankrupt after the adjudication. As to questions respecting the $449.93, withdrawn after the adjudication and not now in the possession of respondents, and those respecting the $284.64 deposited on December 2, 1913, it seems to be clear that there exists such a situation as demands a plenary action for the settlement of such questions as may arise. But as to the $234.93 it seems to be manifest that it belonged to the bankrupt at the time of his adjudication, and was held by his wife as his agent to be paid out by her for certain purposes, such as family expenses, etc. No part of this balance appears to be the wife's property or to be claimed by her under the hereinafter stated agreement between her and the bankrupt. As to this last-named sum we think the referee was right in making the rule absolute and requiring its payment to the trustee.

2. As to the various interests in the stocks of the two building and loan associations, it may suffice to say that the response shows that the stock was all purchased by Mrs. Shea at various times more or less distant from the adjudication, but all previous to that event; that the books representing the stock in the manner peculiar to such associations were issued in her name, were all delivered to her, and were in her possession exclusively, both before and at the time of the adjudication, and have been so ever since. In whatever way Mrs. Shea may have obtained the money to pay for it, in fact none of the stock mentioned in the trustee's petition was ever bought or owned by the bankrupt. It was never put in his name, and was never in his possession.

It seems not to be disputed, and we therefore find it to be true, that, shortly after the marriage of the respondents early in 1906, the bank-

rupt arranged with his wife to put most of his earnings in her hands, she to pay all bills, expenses, etc., of the family, and if she, by judicious and economical management, saved anything out of the money, the amount thus saved was to become her property. In this way, out of the bankrupt's earnings she saved the money which, regarding it as her own, she invested in the stock of the associations referred to, such investments being made in her name, and which stocks she claims in the response are her own property and in her own possession. This was all done, as we have said, before the adjudication; most of the stock having been obtained by Mrs. Shea more than a year before that event. Having long had possession of the stock, and having purchased and held it in her own name and with money which she regarded as her own, can she fairly be said to be a bona fide claimant thereof adversely to the trustee? Upon the authority of the decision of the Supreme Court in Louisville Trust Co. v. Comingor, 184 U. S. 18, 25, 22 Sup. Ct. 293, 46 L. Ed. 413, and upon that of the Circuit Court of Appeals of the Eighth Circuit in Re Rathman, 183 Fed. 913, 106 C. C. A. 253, we think the question must be answered in the affirmative. See, also, 2 Loveland on Bankruptcy (4th Ed.) § 540, and Collier on Bankruptcy (9th Ed.) pp. 476, 477, 478, and 479.

True, section 1907 of the Kentucky Statutes provides as follows:

"Every gift, conveyance, assignment, transfer or charge made by a debtor, of or upon any of his estate, without valuable consideration therefor, shall be void as to all his then existing liabilities, but shall not, on that account alone, be void as to creditors whose debts or demands are thereafter contracted; nor as to purchasers with notice of the voluntary alienation or charge; and though it be adjudged to be void as to a prior creditor, it shall not therefore be deemed to be void as to such subsequent creditors or purchasers."

But while those provisions may or may not make the title of Mrs. Shea to the stock more difficult to maintain, even in a plenary action, nevertheless it is possible for her to show that she paid a valuable consideration for the money she saved out of her husband's earnings, and certainly it may be possible for her to show that some part of the money saved under this arrangement was obtained by her before the creation of some part of the bankrupt's indebtedness, either of which contingencies would at least to some extent bring her case within section 1907. These matters cannot be determined in a summary proceeding but should be settled in a plenary action.

The only trace found in the testimony as to who were creditors of the bankrupt indicates that they were Jefferson county and possibly John H. Whallen and James P. Whallen, the latter of whom testified. The manner in which the debt due Jefferson county arose was, to say the least, unusual. Among the offices the bankrupt held in 1910 and subsequently were two connected with the fiscal court of Jefferson county, namely, he was its clerk and also its auditor; the two places together yielding quite a good salary, which the fiscal court fixed and caused to be paid in monthly installments by Jefferson county. The claim was urged that those payments were made without authority of law, but Jefferson county would not repudiate what had been done nor sue Shea to recover the money he had thus obtained. Thereupon a

taxpayer, one W. F. Woodruff, on August 13, 1912, commenced an action to recover the money for the use and benefit of Jefferson county. The court of original jurisdiction dismissed the action, but on appeal the Court of Appeals reversed that ruling, and directed a judgment to be entered for the amount sued for. Accordingly, on June 25, 1913, a judgment was entered against the bankrupt for $11,025, with interest thereon from August 13, 1912, until paid, and costs. This indebtedness is the only one proved or allowed against the bankrupt's estate. The accrual from time to time of the various items of this indebtedness extended over a period of several years, during most of which time Mrs. Shea might well be supposed to know nothing of the unauthorized character of the acts of the fiscal court. And the amounts the bankrupt gave or paid to her in the meantime for her economical management of her household and other affairs under the agreement we have referred to extended over the same period. As we have intimated, these facts rather emphasize the necessity for a plenary action so that the questions may all be investigated in detail in order to ascertain how far, if at all, section 1907 of the Kentucky Statutes may be applicable.

After very careful consideration we have reached the conclusion that the claim of Mrs. Shea to all of the stock in the building and loan associations in her possession, and which stand in her name, is such as to make a summary proceeding improper, as well as outside of the jurisdiction of the referee, and to require for its recovery a plenary action by the trustee. First National Bank v. Chicago, etc., Co., 198 U. S. 280, 25 Sup. Ct. 693, 49 L. Ed. 1051. In saying this of course we express no opinion upon the merits of either side of any controversy between them respecting this property.

The order of the referee complained of in the petition for a review, so far as it relates to the stock in the building and loan associations, and so far as it relates to the money in bank, except the $234.54, must be reversed, and except to that extent the response is held to be sufficient, and the rule is discharged. Orders accordingly may be prepared.

Ex parte YOUNG et al.

(District Court, W. D. Washington, N. D. February 19, 1914.)

No. 2628.

1. ALIENS (§ 54*)—DEPORTATION—WARRANT—REQUISITES.

Where, in proceedings to deport petitioners as aliens unlawfully within the United States, it appeared from their testimony on the deportation hearing that they knew with what they were charged, it was immaterial that the warrant of arrest was defective in not alleging the time and place of the alleged offense and the prostitute alleged to have been assisted and protected or promised protection from arrest, which constituted the offense.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 112; Dec. Dig. § 54.*]

2. ALIENS (§ 46*)—DEPORTATION—GROUNDS—STATUTES—CONSTRUCTION.

Immigration Act Feb. 20, 1907, c. 1134, 34 Stat. 898, as amended by Act March 26, 1910, c. 128, 36 Stat. 263 (U. S. Comp. St. Supp. 1911, p. 501),

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

providing for the deportation of any alien who in any way assists, protects, or promises to protect any prostitute from arrest, is not limited to assisting such persons to escape from arrest, as by furnishing money to escape to one threatened with arrest, etc., but contemplates only assistance furnished to such a person to enable her to continue the practice of prostitution.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 105; Dec. Dig. § 46.*]

3. ALIENS (§ 54*)—DEPORTATION—PROCEEDINGS—DEFENSES.

In proceedings to deport certain aliens for assisting, protecting, or promising to protect a prostitute from arrest, it was no defense that such aliens had been acquitted by juries on charges involving the same transaction.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 112; Dec. Dig. § 54.*]

Habeas corpus, on petition of Albert H. Young and another, to secure their discharge from arrest under deportation warrant. Petition denied, and rule discharged.

R. W. McClelland, H. A. P. Myers, and Walter L. Johnstone, all of Seattle, Wash., for petitioners.

Clay Allen, U. S. Atty., of Seattle, Wash., and G. P. Fishburne, Asst. U. S. Atty., of Tacoma, Wash.

CUSHMAN, District Judge. The above petitioners, for discharge upon habeas corpus, have been ordered deported; the warrant of deportation reading:

"Whereas, from proofs submitted to me, after due hearing before Immigrant Inspector B. A. Hunter, held at Seattle, Wash., I have become satisfied that the aliens Albert H. Young and Kamasaburo Sugiura, alias B. K. Sugiura, who landed at some unknown port, have been found in the United States in violation of the act of Congress approved February 20, 1907, amended by the act approved March 26, 1910, to wit: That the said aliens are unlawfully within the United States in that they have been found assisting a prostitute and protecting, or promising to protect from arrest, a prostitute, and may be deported in accordance therewith: I, J. B. Densmore, Acting Secretary of Labor, by virtue of the power and authority vested in me by the laws of the United States, do hereby command you to return the said aliens to Japan, the country from whence they came. * * *"

The warrant for their arrest recited:

"That the said aliens are unlawfully within the United States in that they have been found assisting, protecting, or promising to protect from arrest a prostitute or prostitutes."

The act under which they were ordered deported provides:

"That any alien * * * who in any way assists, protects, or promises to protect from arrest any prostitute, shall be deemed to be unlawfully within the United States and shall be deported in the manner provided by sections twenty and twenty-one of this act." Section 3 of the Immigration Act of 1907, as amended March 26, 1910, 36 Stat. at L., p. 264.

Petitioners rely upon the following authorities: United States v. Sibray (C. C.) 178 Fed. 148, 149; 36 Cyc. p. 1118; People v. Chicago. 152 Ill. 546–552, 38 N. E. 746; U. S. v. Williams, 200 Fed. 541, 542, 118 C. C. A. 632; Id. (C. C.) 189 Fed. 917; Frick v. Lewis, 195 Fed. 696, 115 C. C. A. 493; U. S. v. Martin (D. C.) 193 Fed. 797, 798; Ex

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

parte Saraceno (C. C.) 182 Fed. 957; Ex parte Petterson (D. C.) 166 Fed. 539; Chin Yow v. U. S., 208 U. S. 11, 28 Sup. Ct. 201, 52 L. Ed. 369; Ex parte Long Lock (D. C.) 173 Fed. 208; Yamataya v. Fisher, 189 U. S. 86, 23 Sup. Ct. 611, 47 L. Ed. 721.

Respondent relies upon the following authorities: In re Unlawful Detention of Moola Singh and Seventy-Two other Hindoo Aliens (Case No. 2532) 207 Fed. (D. C.) 780; Ekiu v. United States, 142 U. S. 651, 12 Sup. Ct. 336, 35 L. Ed. 1146; United States v. Ju Toy, 198 U. S. 253, 25 Sup. Ct. 644, 49 L. Ed. 1040; Lem Moon Sing v. United States, 158 U. S. 538, 15 Sup. Ct. 967, 39 L. Ed. 1092; Du Bruler v. Gallo, 184 Fed. 566, at 569, 106 C. C. A. 546; Williams v. U. S., 186 Fed. 479, 108 C. C. A. 457; Sinis Calchi v. Thomas, 195 Fed. 701, 115 C. C. A. 501; United States v. Williams (D. C.) 175 Fed. 274.

The grounds urged for discharge are that petitioners have not had a fair hearing and that there was no evidence whatever to support the charge in the warrant of arrest, or the finding in the warrant of deportation:

"That the said aliens (petitioners) are unlawfully within the United States, in that they have been found assisting, protecting, or promising to protect from arrest a prostitute or prostitutes."

[1] It is not necessary to determine, concerning the warrant of arrest, whether the charge, as set forth therein, would be sufficient to apprise petitioners with that of which they were accused, it not alleging the time, place, or naming the prostitute or prostitutes alleged to have been assisted, protected, or promised protection from arrest, as proceedings of this character are summary in their nature; and, if it appears from the return that petitioners were actually apprised of the nature of the accusation against them and had a fair hearing thereon, it is sufficient.

Petitioners were represented at the deportation hearing by one of their present counsel. They were tried and heard together. Petitioner Young, being first sworn and examined, was asked at the commencement of the examination and proceeding:

"Q. I believe that you have been tried in the United States court for certain offenses? A. Yes, I have been tried twice on the same offense.

"Q. What offense? A. Aiding and abetting in transporting a Japanese girl, Hana Saito, in the interstate commerce from Seattle to San Francisco, and I was tried in February, 1913, and acquitted, and I was reindicted by a grand jury, last grand jury, and tried for conspiring to violate the same Mann Act, and again acquitted for transporting Hana Saito. I have been acquitted by the jury on a second trial and rearrested by departmental warrant for practically the same thing."

The foregoing plainly shows that petitioners knew with what they were charged upon the deportation hearing.

The evidence shows that the woman, Hana Saito, had, prior to coming to Seattle, lived in a house of prostitution; that, after coming to Seattle, she was followed from San Francisco by a Japanese named Washio; and that the petitioners, at his solicitation, secured transportation for him and the woman to San Francisco and accompanied them by steamer to that city. When they arrived in San Francisco, the four went direct to the house of prostitution where Hana Saito had former-

ly been. There is some testimony that, before securing tickets to San Francisco, the petitioners were informed that this woman had, before coming to Seattle, been a prostitute living in this house.

There was no evidence that any warrant for the arrest of Hana Saito had ever been issued; but, on account of the conclusion reached, it is not necessary to determine whether the language of the statute, "promises to protect from arrest any prostitute," contemplates the actual existence of a warrant or proceeding for the arrest of a prostitute, from which she is promised protection, or whether it may not contemplate a promise of protection generally—either from the arrest to which those practicing prostitution are generally subject in municipalities, or the arrest to which alien prostitutes are subject under the laws of the United States.

[2] It is earnestly insisted by counsel for petitioners that the words "in any way assists, protects, or promises to protect from arrest" mean in any way assist from arrest, as by furnishing money to escape to one who is threatened with arrest. The argument is more ingenious than convincing. If such were the meaning, there are so many more apt words in which to express it that it seems unlikely that such could have been the intention.

On the other hand, if the words "any alien who in any way assists * * * a prostitute" are given their widest meaning, so as to include an alien who gives food, shelter, or medicine to a prostitute, which, it is contended, is the only other meaning of which they are capable, a conclusion is reached which is still more abhorrent to reason. A more satisfactory conclusion is that the intention was to declare unlawful the presence in this country of any alien who in any way assists a prostitute to practice prostitution, or towards its practice. Holy Trinity Church v. U. S., 143 U. S. 457, 12 Sup. Ct. 511, 36 L. Ed. 226.

Even a prostitute may be something more than a prostitute. For example, she may be a milliner as well. The one who assisted her in the latter business would be assisting a milliner and could not be fairly condemned as assisting a prostitute, and one who assisted her in the practice of prostitution could not be excused on the plea of assisting a milliner.

Under the act so construed, it cannot be said but that there was some evidence to support the finding of the inspector and acting secretary.

[3] The fact that both of the petitioners had been acquitted in this court by juries on charges involving the same transaction in no way defeats the action taken, or the determination reached by the immigration authorities, for to justify a verdict of guilty by a jury it was necessary that the jury be convinced of petitioners' guilt beyond a reasonable doubt, while no such rule is imposed upon the immigration authorities. William Williams v. United States ex rel. Antonios Bougadis, 186 Fed. 479, 108 C. C. A. 457.

The letter of the Commissioner of Immigration to the Commissioner General of Immigration, recommending the deportation of petitioners and made a part of the return herein, states:

"They (that is the petitioners) admit that they committed an act which was neither more nor less than the kidnapping of a prostitute, in the conveyance

of whom from Tacoma, Washington, to San Francisco, California, they assisted. They deny that they knew that the woman was a prostitute. It may be that when they were first approached that they did not know the woman's character, but they were certainly given due notice before the high-handed proceedings had gone very far."

The same contention was made by the government in both the criminal trials mentioned. Petitioners at all times have insisted that the woman went to San Francisco willingly.

While respondent's position upon the warrant—that petitioners assisted a prostitute, which necessarily implies willingness and consent upon her part—is not strengthened by the commissioner's conclusion that they were kidnapping her, which would, as necessarily, be an involuntary proceeding upon her part, yet, as the commissioner's report is only a part of the record upon which the warrant issued, and, as pointed out, there is some evidence to support the finding and warrant, this inconsistency will not defeat the ultimate conclusion reached and the warrant of deportation based thereon, providing petitioners were accorded a fair hearing on the charge upon which they were ordered deported. Sinis Calchi v. Thomas, 195 Fed. 701, 115 C. C. A. 501; United States v. Williams (D. C.) 175 Fed. 274.

Petition denied, and rule discharged.

LOVELL et al. v. LATHAM & CO. et al.

(District Court, S. D. Alabama. January 23, 1914.)

No. 279.

1. BANKRUPTCY (§ 279*)—PREFERENCES—RECOVERY.
   A preference by a bankrupt is voidable by the trustee who may recover the property or its value.
   [Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 419–424; Dec. Dig. § 279.*]

2. BANKRUPTCY (§ 279*) — PREFERENCES — RECOVERY — PERSONS ENTITLED TO SUE.
   No person other than the bankrupt's trustee may maintain an action to recover property, or its value, transferred by the bankrupt, either in fraud of creditors, or as a preference.
   [Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 419–424; Dec. Dig. § 279.*]

3. BANKRUPTCY (§ 257*) — PREFERENCES — RIGHT TO AVOID — ASSIGNMENT BY TRUSTEE.
   A trustee's right to recover property transferred by the bankrupt as a preference is not assignable.
   [Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 356, 357; Dec. Dig. § 257.*]

4. EQUITY (§ 197*)—PARTIES—CROSS-BILL—RIGHT TO FILE.
   One not a party to a suit in equity cannot file or join in a cross-bill or other pleading to the merits, until he becomes a party by some recognized mode of equity procedure.
   [Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 455–459; Dec. Dig. § 197.*]

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

5. ACTION (§ 1*)—"CAUSE OF ACTION."
A cause of action is a matter for which an action may be brought. It is the matter of a complaint or claim on which a given action is grounded, whether legally maintainable or not.
[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 1–7, 85; Dec. Dig. § 1.*
For other definitions, see Words and Phrases, vol. 2, pp. 1015–1019; vol. 8, p. 7598.]

6. BANKRUPTCY (§ 302*)—ACTION BY TRUSTEE—CROSS-BILL—RIGHT TO FILE.
A bankrupts' trustee sued to set aside a certain alleged preferential transfer of certain cotton by the bankrupts to L. & Co., whereupon cross-complainants intervened and filed a cross-bill seeking to impress a trust in their favor on various properties and certain cotton in the hands of the trustee. The cross-bill also prayed that the transfer of the bankrupts to L. & Co. be adjudicated invalid, and that the cross-complainants be subrogated to any right, title, and interest which the trustee may have in any and all cotton, bonds, and other property into which it was claimed the cross-complainants' money may have been converted, and that they be subrogated to any rights which the trustee may have under such bonds. *Held*, that the cross-bill alleged matters not pertinent to the original bill, and since it sought no relief against the original complainants, it was without equity.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 456, 457; Dec. Dig. § 302.*]

7. EQUITY (§ 195*)—"CROSS-BILL."
A "cross-bill" is one brought by a defendant in a suit against the complainant in the same suit, or against the other defendants in the same suit, or against both, touching the matters in question in the original bill.
[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 446–449; Dec. Dig. § 195.*
For other definitions, see Words and Phrases, vol. 2, pp. 1758–1761; vol. 8, p. 7624.]

8. EQUITY (§ 195*)—CROSS-BILL—CONTENTS.
Since a cross-bill is auxiliary to the original suit and dependent on it, such bill may not introduce new and distinct matters not embraced in the original bill, as they cannot be properly litigated in that suit, but constitute the subject-matter of an original, independent suit.
[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 446–449; Dec. Dig. § 195.*]

In Equity. Action by W. S. Lovell, trustee in bankruptcy of Knight, Yancey & Co., against Latham & Co., in which Knauth, Nachod & Kuhne filed a cross-bill. On motion to dismiss cross-bill. Sustained.

See, also, 186 Fed. 602.

Percy, Benners & Burr, of Birmingham, Ala., and Rich & Hamilton, of Mobile, Ala., for trustee in bankruptcy.

Howe, Fenner, Spencer & Cocke, of New Orleans, La., for Latham & Co.

W. B. Spencer, of New Orleans, La., for American Surety Co.

Stevens & Lyons, of Mobile, Ala., and Briesen & Knauth, of New York City, for Knauth, Nachod & Kuhne.

TOULMIN, District Judge. This suit is one in which the trustee in bankruptcy, representing all creditors of the bankrupt estate, seeks

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

to recover property, or a fund representing said property, which it is alleged and claimed was preferentially transferred to the defendants Latham & Co. by the bankrupts, Knight, Yancey & Co., in payment of an indebtedness to said Latham & Co. The suit seeks to avoid the alleged preferential transfer, and to recover the said fund to be administered by the bankrupt court for the benefit of all creditors of the bankrupts.

[1, 2] A preference is voidable by the trustee, and he may recover the property or its value. There is no authority in any other person to maintain the required action. Any other rule, even were the statute not clear on this point, would lead to confusion. Collier on Bankruptcy (9th Ed.) pp. 824, 827; Belding-Hall Mfg. Co. v. Mercer & Ferdon Lumber Co., 175 Fed. 335, 99 C. C. A. 123; In re Rothschild, 5 Am. Bankr. Rep. 587, 154 Fed. 194, 83 C. C. A. 288.

It is only through the instrumentality of the trustee that creditors can recover, and subject to the payment of their claims, the property which the bankrupt fraudulently transferred prior to the adjudication in bankruptcy. Creditors can have no remedy which will reach property fraudulently conveyed, except through the trustee. All such property, by the express words of the Bankrupt Act, vest in the trustee by virtue of the adjudication and of his appointment. Glenny v. Langdon, 98 U. S. 20, 25 L. Ed. 43; Trimble v. Woodhead, 102 U. S. 647, 26 L. Ed. 290; Collier on Bankruptcy, supra.

[3] If the delivery by the bankrupts of the cotton to Latham & Co. was a preference, the trustee only can maintain a suit to avoid it. He may not assign or transfer to another this right of avoidance. Bryan v. Madden, 15 Am. Bankr. Rep. 388, 109 App. Div. 876, 96 N. Y. Supp. 465; Collier on Bankcy. (9th Ed.) 824; Belding-Hall Mfg. Co. v. Mercer & Ferdon Lumber Co., 175 Fed. 335, 99 C. C. A. 123.

The issue in this case is whether the bankrupts made a preferential transfer to the defendants Latham & Co. of certain cotton as claimed and alleged in the complaint. If the plaintiff establishes his said claim he would be entitled to recover the cotton or its value. If he fails to establish said alleged transfer he would not be entitled to recover said cotton or its value. If such failure had any effect on the title to the cotton, it would be to make it good in Latham & Co., they having acquired the same by the said transfer of Knight, Yancey & Co., the bankrupts.

[4] The cross-complainants in this suit are not in fact named as defendants in the bill of complaint, or in the subpœna, and no relief is prayed against them, and no service has been had upon them. They are not parties to the original bill, and cannot rightly file or be parties complainant to a cross-bill thereon. United States Gypsum Co. v. Hoxie (C. C.) 172 Fed. 504.

It is a rule of equity pleading prevailing in the federal courts that one who is not a party to a suit cannot file or join in a cross-bill, or other pleading to the merits until he becomes a party to the suit by some recognized mode of equity procedure. United States Gypsum Co. v. Hoxie (C. C.) 172 Fed. 504; Ewing v. Seaboard Air Line Ry. (C. C.) 175 Fed. 517; United States v. Reese (C. C.) 166 Fed. 347.

The cross-complainants came into the case by invitation, contained in the prayer of the bill to unknown persons who might have, or claim to have, any right or interest in the subject-matter of the suit. Whereupon the cross-complainants came into court and asked permission to file a cross-bill. The granting or refusing permission to file a cross-bill is largely in the discretion of the court. Huff v. Bidwell, 151 Fed. 563, 566, 81 C. C. A. 43. The court, in the exercise of its discretion, granted permission to file the cross-bill, being at the time ignorant of its subject-matter and what its real purpose and allegations were. Subsequently, on motion of complainant and the defendants Latham & Co. to strike out said cross-bill, after argument thereon and examination of the cross-bill, the court was of opinion that it had improvidently granted permission to file it, and sustained the motion to strike. On appeal, the Circuit Court of Appeals (Knauth, Nachod & Kuhne v. Lovell, 200 Fed. 403, 118 C. C. A. 555) held that this court erred in summarily striking out the cross-bill and reversed the case for further proceedings. It now comes up on demurrers to the cross-bill and on motion to dismiss it for want of equity and on various other grounds set out in the demurrers and motion.

[5, 6] A cause of action is a matter for which an action may be brought. It is the matter of the complaint or claim on which a given action is in fact grounded, whether or not legally maintainable. The cause of action in this case is the alleged preferential transfer of certain cotton by Knight, Yancey & Co., bankrupts, to Latham & Co. On that cause of action the trustee in bankruptcy has the authority to maintain the required action to avoid the preference, to set aside the transfer, and to recover the cotton or its value. This court is, by the original suit, called upon by the trustee to ascertain and establish his right or title to certain cotton as against adverse claimants Latham & Co., who are made defendants to the suit, and not to any and all persons who may voluntarily come into the case and assert a claim to said cotton. The cross-complainants come into this case by a cross-bill, and seek to impress a trust in their favor upon various properties and certain cotton in the hands of the trustee in bankruptcy. Any such claim is not germane or pertinent to the original cause of action in the case, and cannot exert any influence in the trial and determination of the issue in it. If the issue made by the original bill can be completely disposed of without deciding upon any claim the cross-complainants may have, or be supposed to have, against Latham & Co., defendants to the original bill, or upon the cotton transferred to said Latham & Co. by the bankrupts, as alleged, then the cross-bill filed in this cause is not auxiliary or dependent upon the original suit. Hogg v. Hoag, 154 Fed. 1003, 83 C. C. A. 677.

The cross-bill prays that the bankrupts be adjudged and decreed to have received the sum of $98,000 from the cross-complainants, and to have held the same as their money and property. But the able counsel for cross-complainants, in his brief and argument, as I understood it, stated that they presented no personal demand against the bankrupts. The cross-bill has no prayer for relief against the trustee, the complainant in this suit, further than to seek a discovery from him

as to many matters which, in my opinion, are not involved in this suit and have no connection with it, so far as the complainant is concerned. In fact the counsel stated that the cross-bill is confined to an effort to impress a trust in favor of the cross-complainants upon various and certain property in the hands of the trustee in bankruptcy, but which he admits in his brief was beyond the power of this court in this cause. The cross-bill also seeks and prays that the transfer by the bankrupts to Latham & Co. of the cotton mentioned in the bill of complaint be adjudged "invalid and void and of no effect." It further seeks and prays that the cross-complainants be subrogated to any right, title, and interest which the trustee may have in any and all cotton, bonds, or other property into which their said money may have been converted, and that they be subrogated to any rights which the said trustee may have under said bonds. I think the law is well settled that if the transfer and delivery by the bankrupts of the cotton in question to Latham & Co. was a preferential transfer, as alleged in the original bill, the trustee only can maintain a suit to avoid it. He may not assign or transfer to another this right. Neither, in my opinion, can the cross-complainants be subrogated, that is, substituted for the trustee in the assignment of such rights as claimed. Collier on Bankcy. (9th Ed.) p. 824; Bryan v. Madden, 109 App. Div. 876, 96 N. Y. Supp. 465, 15 Am. Bankr. Rep. 388; Belding-Hall Mfg. Co. v. Mercer & Ferdon Lumber Co., 175 Fed. 335, 99 C. C. A. 123; Glenny v. Langdon, 98 U. S. 20, 25 L. Ed. 43; Trimble v. Woodhead, 102 U. S. 647, 26 L. Ed. 290, supra. A cross-bill which sets up matters not pertinent to the original bill, and seeks no relief against the original plaintiffs, is without equity. Andrews v. Hobson's Adm'r, 23 Ala. 219.

[7] A cross-bill is a bill brought by a defendant in a suit against the complainant in the same suit, or against the other defendants in the same suit, or against both, touching the matters in question in the original bill. 1 Beach on Modern Equity Practice, §§ 421, 422; Story's Equity Pleading, § 389. The matters sought to be brought by the cross-bill into controversy between the cross-complainants therein and their codefendants do not seem to me to be germane to, or to have any connection with, the matter in controversy between the complainant in the original bill and the said defendants Latham & Co.

"This is a litigation exclusively between the cross-complainants and said Latham & Co., with which the complainant in the original bill should not be embarrassed, or the record incumbered."

[8] The cross-bill should not introduce new and distinct matters not embraced in the original bill, as they cannot be properly examined in that suit, but constitute the subject-matter of an original, independent suit.

"A cross-bill is auxiliary to the original suit and a dependency on it." Ayres & Niles v. Carver et al., 58 U. S. (17 How.) 591, 594, 15 L. Ed. 179; Hogg v. Hoag, 154 Fed. 1003, 83 C. C. A. 677.

How are the facts alleged in the cross-bill auxiliary to the original suit? How do they give aid or furnish help to that suit, of which the cause of action is an alleged preferential transfer of certain cotton by Knight, Yancey & Co., bankrupts, to defendants Latham & Co.? The

cross-complainants are seeking to impress a trust upon certain cotton, a part of which they allege their money purchased, and that they have a trust fund in that cotton. The cotton is in the possession of defendants Latham & Co., the title to which they claim under the transfer and delivery to them by Knight, Yancey & Co. Assuming that the cross-complainants have and can trace a trust fund into the said cotton, how must they proceed to establish their claim and to impress their trust upon said cotton? Manifestly by a suit against said Latham & Co., who have said cotton in their possession and claiming it as their property. Some of the cross-complainants are resident citizens of New York state and some of Germany, while Latham & Co. are resident citizens of France. How and where does this court acquire jurisdiction to try and determine the controversy between these parties? It certainly acquires no such jurisdiction under the Bankrupt Act; and the general law conferring jurisdiction on the ground of diverse citizenship of the parties to the litigation has no application to the case, in view of the facts shown in it. No jurisdiction of the litigation between the cross-complainants and the defendants Latham & Co. has been acquired by the consent of said defendants. Collier on Bankcy. (9th Ed.) 482; In re Blake, 17 Am. Bankr. Rep. 668, 150 Fed. 279, 80 C. C. A. 167. On the contentions and admissions of the counsel for the cross-complainants this case, in substance and effect, is a suit by them against Latham & Co. of which, in my opinion, this court has no jurisdiction, whether the attitude of the so-called cross-complainants is that of cross-complainants or interveners, as they may be called.

A motion to dismiss a bill for want of equity should be sustained if, admitting the facts apparent on the face of the bill, whether well or ill pleaded, the complainant can have no relief. Seals v. Robinson & Co., 75 Ala. 363; Coleman v. Butt, 130 Ala. 268, 30 South. 364; Blackburn v. Fitzgerald's Adm'r, 130 Ala. 584, 30 South. 568.

I am of opinion that the motion to dismiss the cross-bill should be sustained, both for want of equity in said cross-bill and for want of jurisdiction in this court to entertain the same.

Let a decree be entered accordingly.

BUREAU OF NATIONAL LITERATURE v. SELLS et al.

(District Court, W. D. Washington, N. D. March 3, 1914.)

No. 24.

1. COPYRIGHTS (§ 82*)—INFRINGEMENT—BILL.

A bill alleging that complainant had copyrighted a work known as "Messages and Papers of the Presidents," and that defendants had obtained secondhand sets of the publication, which they had reconstructed and sold to the public as and for complainant's publication, etc., did not state a cause of action for infringement of copyright.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. §§ 72, 73; Dec. Dig. § 82.*]

2. COPYRIGHTS (§ 55*)—UNLAWFUL COMPETITION.

Where complainant sold copies of its copyrighted work to the public, its right to the exclusive sale of such particular copies thereby terminated,

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

and it could not maintain an action against defendants, who purchased such secondhand books, rebound and resold them, either for infringement or for unfair competition, without proof that the restored copies were sold as and for complainant's goods, and as new and original copies.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 52; Dec. Dig. § 55.*]

3. COPYRIGHTS (§ 55*)—UNLAWFUL COMPETITION.

Where defendants purchased secondhand copies of a copyrighted set of books put out by complainant, and after restoring and rebinding delivered them in fulfillment of orders taken for new sets, such act did not constitute a sale of new books or an infringement of complainant's copyright, but at most constituted unfair competition, in so far as it consisted of a palming off of restored goods as those of complainant.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 52; Dec. Dig. § 55.*]

4. EQUITY (§ 39*)—CAUSES OF ACTION—FORMS OF RELIEF.

Where a complaint states a cause of action for an injunction for unfair competition, it is not objectionable because complainant also demands damages, under the rule that, when equity obtains jurisdiction to administer one of its peculiar remedies, it will afford complete relief.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 104–114; Dec. Dig. § 39.*]

5. COURTS (§ 280*)—JURISDICTION—EXAMINATION OF BILL.

Where a bill prays for an injunction and damages, the question of the court's jurisdiction must be determined by examining the allegations of the bill with reference to equitable relief, as if no demand were made for damages.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 816–818; Dec. Dig. § 280.*]

6. COURTS (§ 328*)—FEDERAL COURTS—AMOUNT IN CONTROVERSY.

Where suit was brought in the federal court for an injunction, the amount in controversy, for the purpose of determining the court's jurisdiction, is the value of the injunction.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 890–896; Dec. Dig. § 328.*]

7. COURTS (§ 329*) — FEDERAL COURTS — JURISDICTION — AMOUNT IN CONTROVERSY.

Where in a suit to restrain unlawful competition, complainant prayed for an injunction and for $50,000 damages, the bill was insufficient to show federal jurisdiction for failure to allege that the value of the injunction exceeded $3,000, but such defect was amendable.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 897; Dec. Dig. § 329.*]

In Equity. Action by the Bureau of National Literature against B. R. Sells and others. On motion to dismiss bill. Denied on condition that plaintiff move for leave to amend.

E. C. Hanford, of Seattle, Wash., for plaintiff.

E. E. Heckbert, of Portland, Or., for defendant Sells.

NETERER, District Judge. This is an action in equity in which the plaintiff seeks an injunction and damages. B. S. Sells is the only defendant upon whom service was obtained. Plaintiff is a corporation organized under the laws of New York, and the said defendant is a citizen of Oregon. Plaintiff alleges that it is the owner of the copy-

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

right of a work known as "Messages and Papers of the Presidents," and "is now, and for a long period of time has been, engaged in the business of publishing, printing, producing, marketing, by subscription," the said work; "that plaintiff and its respective predecessors have expended a great sum of money and devoted a great deal of time, labor, and skill in preparing, producing, advertising, selling, and distributing said publication and bringing it to the attention of the public generally, * * * and that said publication, being the only one of its character sold in the United States, has a very extensive sale covering all the United States and territories, and amounting to $500,000 a year; * * * that plaintiff in the course of its business, or its respective predecessors, has originated, devised, prepared, produced, and uses in and about the sale of said publication * * * certain trade literature, trade material, and trade dress of unique and distinguishing features. * * *" It is also alleged that the defendant Sells, prior to the acts complained of in the bill, had been in the employ of the plaintiff as a salesman of said publication, and thereby became familiar with plaintiff's publication and the trade dress, trade material, and methods used in selling said publication; and that the defendants "have obtained, in many instances through the use of plaintiff's said subscription lists, from plaintiff's subscribers, and from other parties, * * * sets of said publication which the said defendants have overhauled, reconstructed, and sold to the public as and for the publication published and being sold by plaintiff, using in and about such fraudulent sales plaintiff's rights of copyright, exclusive right in said plates, plaintiff's trade literature, trade material, and trade dress, * * * and selling and delivering old rebound, reconstructed, or overhauled sets of said publication as and for the publication printed and sold under exclusive rights and copyright belonging to plaintiff." The bill prays an injunction restraining the defendants in the commission of said acts, and asks for damages in the sum of $50,000.

The defendant Sells has moved to dismiss the bill, and contends that the bill does not state a cause of action for infringement of copyright; that, although there is stated a cause of action for unfair competition, the court has no jurisdiction for the reason that the amount in dispute is not over $3,000. It is contended that, in an action in equity for unfair competition, damages may not be recovered, and that the amount in dispute is therefore not over $3,000; no value of the injunction being alleged. Defendant further contends that a bill praying for an injunction and for damages improperly joins an action at law with an action in equity, and that the bill must be dismissed for that reason.

[1] The complaint does not state a cause of action for infringement of copyright. In Doan v. American Book Co., 105 Fed. 772, 45 C. C. A. 42, the defendant obtained secondhand books, of which the plaintiff owned the copyright, restored them to their original condition, and sold them on the market. The court stated:

"We are satisfied that there is here no infringement of the right accruing to the appellee under the copyright laws of the United States. * * * The sale of them by the appellee carried with it the ordinary incidents of ownership in personal property, including the right of alienation (Harrison v. May-

nard, 10 C. C. A. 17, 61 Fed. 689); and the appellants, purchasing them, had the right to resell them. * * * It is urged, however, that the sale passed the right to the particular thing sold, and did not carry with it the right of repair or renewal. We cannot yield assent to the proposition in the broad terms in which it is couched." Singer Mfg. Co. v. Bent (C. C.) 41 Fed. 214; Harrison v. Maynard, 61 Fed. 689, 10 C. C. A. 17; Kipling v. Putman, 120 Fed. 631, 57 C. C. A. 295, 65 L. R. A. 873; Bobbs-Merrill Co. v. Straus (C. C.) 139 Fed. 155; Id., 147 Fed. 15, 77 C. C. A. 607, 15 L. R. A. (N. S.) 766.

The court in the Doan Case held, however, that, as the rebound books were likely to be mistaken by the public for the new books of the plaintiff, the placing of the rebound books upon the market, with nothing to distinguish them from plaintiff's new books, constituted unfair competition, and that there should be displayed a notice on each book that it was a rebound or secondhand book.

But counsel for plaintiff states:

"If he (defendant) dealt in secondhand sets of the authorized and original work as and for secondhand sets, then counsel is correct, and under the authority of the Doan Case there would be no infringement, and our action would be solely upon the ground of unfair competition; but the action set forth here is one of actual and fraudulent trading upon our copyright and in our copyright work, merely carried on by means of secondhand sets."

[2] If defendant "dealt in secondhand sets as and for secondhand sets," it is obvious that there would be no action, either for infringement or unfair competition. Plaintiff can claim no exclusive right to the sale of "secondhand sets." Its exclusive right of sale of a particular copy is gone when it parts with the title to such copy. Henry Bill Publishing Co. v. Smythe (C. C.) 27 Fed. 914. It is only, therefore, when the defendant sells his goods, the restored copies, as and for the plaintiff's goods, the new and original copies, that the defendant is guilty of unfair competition. It was the presence of this latter element in the Doan Case which induced the court to grant an injunction. If the defendant had actually sold and delivered copies to which the plaintiff still retained title, this would constitute an infringement under the rule laid down in Henry Bill Pub. Co. v. Smythe, supra.

[3] But defendant did not possess such copies and could not sell or deliver them. The fact that he took orders to sell new books and filled such orders by delivery of old books would not constitute a sale of new books. The fraudulent representation and palming off of the goods of the defendant as those of the plaintiff would constitute unfair competition, but not infringement of plaintiff's copyright. Kipling v. Putman, 120 Fed. 631, 636, 57 C. C. A. 295, 65 L. R. A. 873; Lawrence Mfg. Co. v. Tenn. Mfg. Co., 138 U. S. 537, 11 Sup. Ct. 396, 34 L. Ed. 997.

[4] Defendant contends that the action should be dismissed on the ground of improper joinder of an action in equity for an injunction and an action at law for damages. It is well settled that, when equity obtains jurisdiction to administer one of its peculiar remedies, it will afford complete relief, even though to do so may involve the giving of relief which might have been obtained at law.

"Where plaintiff has established a right to equitable relief, the court will not only grant that relief but all other relief essential to a complete adjust-

ment of the subject-matter among the parties, although it is thereby required to grant relief obtainable at law, and which, if the object of an independent action, could be obtained at law. * * * Thus, the jurisdiction of equity having been invoked to restrain the further commission of wrongful acts, damages already suffered will quite generally be awarded." 16 Cyc. 109, 110; Gottfried v. Moerlien (C. C.) 14 Fed. 170; Burdell v. Comstock (C. C.) 15 Fed. 395. See, also, Equity Rule 25 (198 Fed. xxv, 115 C. C. A. xxv)

[5] But the court's jurisdiction must be complete by reference to the equitable relief sought, and the legal relief asked for cannot be relied upon to aid in conferring that jurisdiction. In determining, therefore, whether the court has jurisdiction in this case, the bill must be looked at as if it contained merely a prayer for the equitable relief sought, namely, the injunction, and as if no demand had been made for $50,000 damages.

[6] Both parties seem to agree that, where an injunction is prayed for, the amount in controversy is the value of the injunction, and this, undoubtedly, is the correct rule. 16 Am. & Eng. Enc. of Law, 351; Hagge v. Kansas City S. Ry. (C. C.) 104 Fed. 391.

[7] The defendant contends that the bill does not allege that the value of the injunction exceeds $3,000, while the plaintiff contends that the allegation of $50,000 damages fixes the amount in controversy. The fallacy of the latter contention is readily apparent. Damages are to be recovered for losses already sustained, while an injunction is to prevent plaintiff from suffering losses in the future. Plaintiff's contention would place him in the unique position of either seeking damages which the injunction prayed for would make impossible, or seeking an injunction to prevent damages which have already been sustained. The fact that defendant's acts have already caused the plaintiff to suffer $50,000 damages may raise an inference that, if defendant is not enjoined, the damage he may yet occasion will amount to $50,000 or more, but this is merely an inference. Such an inferential statement is insufficient to support the jurisdiction of the court where the bill is attacked on that account in the trial court. Hagge v. Kansas City S. Ry. Co. (C. C.) 104 Fed. 391.

It does not follow, however, that the court must dismiss the bill because the value of the injunction is not alleged to exceed $3,000. The other jurisdictional facts appearing, the court should not dismiss a bill unless it clearly appears that the amount in controversy is less than that required by the statute. Wetmore v. Rymer, 169 U. S. 115, 18 Sup. Ct. 293, 42 L. Ed. 682; Barry v. Edmunds, 116 U. S. 550, 6 Sup. Ct. 501, 29 L. Ed. 729. When, from the allegations of the complaint, it may be inferred that the amount involved exceeds the amount required by the statute, the court should grant the plaintiff leave to move to amend.

In People's Tel. & Tel. Co. v. East Tennessee Tel. Co., 103 Fed. 212, 43 C. C. A. 185, the court said:

"The bill prays for an injunction, and also for a decree for the damages already incurred, and claims for the latter the sum of $3,000. No estimate is put or amount claimed for the value of the right, the invasion of which is anticipated. We should be disposed to agree with counsel for the appellants that there is no reasonable ground shown for believing that the damages al-

ready incurred amount to so much as $2,000, but it seems to us very probable that the value of the right to preserve the property of the complainant from the anticipated disturbance is more than that sum. If this objection had been taken in the court below, it is reasonable to suppose that court would have allowed an amendment which would have made more certain this ground of jurisdiction. And this would have been permissible."

In Whalen v. Gordon, 95 Fed. 305, 37 C. C. A. 70, the objection was made that the granting of an amendment to bring the amount claimed within the statutory requirement was an amendment which would constitute a jurisdictional averment. The Circuit Court of Appeals said:

"The case appears to have been one, therefore, in which there was a sufficient amount in controversy to give the court jurisdiction, but the defendants in error had failed to plead it. Where the facts warrant the exercise of the jurisdiction of the court, but the pleader has failed to state them properly, the court is not deprived of the usual power to permit him to do so by amendment by the mere fact that the amendment will constitute or contain a jurisdictional averment. Bowden v. Burnham, 8 C. C. A. 248, 59 Fed. 752, 19 U. S. App. 448; Carnegie, Phipps & Co. v. Hulbert, 16 C. C. A. 498, 70 Fed. 209, and 36 U. S. App. 81, 97."

In Home Ins. Co. v. Nobles (C. C.) 63 Fed. 641, the bill praying for an injunction alleged that the acts of the defendants "have already caused great damage to it which will increase daily," but there was no allegation of the amount of damages sustained or anticipated. The court said:

"The bill is therefore defective for want of averment that the amount in controversy is sufficient, under the act of Congress, to give this court jurisdiction. Consequently the present motion for a preliminary injunction cannot be entertained; but, as it does not affirmatively appear that the court is without jurisdiction of the cause, the bill will not now be dismissed, and the complainant has leave to move as it may be advised in view of this suggestion, upon due notice to defendant's counsel."

See, also, Johnston v. Trippe (C. C.) 33 Fed. 530; Carr v. Fife (C. C.) 45 Fed. 209; Id., 156 U. S. 494, 15 Sup. Ct. 427, 39 L. Ed. 508.

Plaintiff may have leave to move to amend its bill for the purpose indicated, and, if it does not do so within ten days, the bill will be dismissed.

TYOMIES PUB. CO. et al. v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. March 3, 1914.)

No. 2505.

1. CONSTITUTIONAL LAW (§ 197*)—EX POST FACTO LAWS—MAIL MATTER—REGULATION.

Pen. Code (Act March 4, 1909, c. 321, 35 Stat. 1129 [U. S. Comp. St. Supp. 1911, p. 1651]) § 211, making it an offense to mail obscene and filthy matter, is not unconstitutional as an ex post facto law.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 550; Dec. Dig. § 197.*]

2. CONSTITUTIONAL LAW (§ 90*)—LIBERTY OF THE PRESS.

Pen. Code (Act March 4, 1909, c. 321, 35 Stat. 1129 [U. S. Comp. St. Supp. 1911, p. 1651]) § 211, prohibiting the mailing of obscene and filthy matter, is not in derogation of the constitutional right of freedom of the press.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 172; Dec. Dig. § 90.*]

3. POST OFFICE (§ 2*)—NONMAILABLE MATTER—STATUTES.

Pen. Code (Act March 4, 1909, c. 321, 35 Stat. 1129 [U. S. Comp. St. Supp. 1911, p. 1651]) § 211, making it an offense to deposit in the mails obscene and filthy matter, is not invalid for failure to prescribe a standard by which the offense may be ascertained, nor as failing to restrict the offense to the deposit of matter in the United States mails.

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

4. POST OFFICE (§ 2*)—MAIL MATTER—REGULATION—STATUTES—VALIDITY.

Since the offense of depositing obscene and filthy matter in the mails, prohibited by Pen. Code (Act March 4, 1909, c. 321, 35 Stat. 1129 [U. S. Comp. St. Supp. 1911, p. 1651]) § 211, is made a felony by section 335, section 211 is not objectionable for failure to provide that persons who shall deposit nonmailable matter are guilty of a felony or misdemeanor.

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

5. POST OFFICE (§ 48*)—NONMAILABLE MATTER—OBSCENE AND FILTHY MATTER—INDICTMENT.

In a prosecution for depositing in the mails certain lewd and filthy pictures in violation of Pen. Code (Act March 4, 1909, c. 321, 35 Stat. 1129 [U. S. Comp. St. Supp. 1911, p. 1651]) § 211, the indictment was not objectionable because it did not refer to the entire publication of which the alleged nonmailable pictures were a part, since, as the statute makes it a crime to mail an obscene or filthy picture, it is only necessary that the jury should consider so much of the context as is essential to a proper understanding of what is claimed to be in violation of the statute.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 67–80; Dec. Dig. § 48.*]

6. INDICTMENT AND INFORMATION (§ 196*)—DEFECTS—WAIVER.

An objection, to an indictment for depositing certain nonmailable pictures in the mails, that it did not expressly charge that defendants were aware of the character of the pictures, not having been specifically urged before verdict, was within Rev. St. § 1025 (U. S. Comp. St. 1901, p. 720), providing that proceedings on an indictment shall not be affected by reason of any defect or imperfection in matter of form only which shall not tend to defendant's prejudice.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 628–635; Dec. Dig. § 196.*]

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

7. INDICTMENT AND INFORMATION (§ 71*)—REQUISITES.
An indictment is only required to contain facts which constitute the offense it charges with sufficient certainty to fairly inform defendant of the crime intended to be alleged, so as to make the judgment a complete defense to a second prosecution for the same offense.
[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 144, 174, 193, 194; Dec. Dig. § 71.*]

8. POST OFFICE (§ 49*)—NONMAILABLE MATTER—EVIDENCE.
In a prosecution for sending certain nonmailable pictures through the mails, evidence of certain words and dialogue appearing above and below the pictures, which was both identifying and characterizing, was admissible.
[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 84–86; Dec. Dig. § 49.*
Post office, nonmailable matter, see note to Timmon v. United States, 30 C. C. A. 79; McCarthy v. United States, 110 C. C. A. 548.]

9. POST OFFICE (§ 49*)—NONMAILABLE MATTER—DEPOSIT IN MAILS—PROOF.
Where a corporation publishing a newspaper and its manager were indicted for sending certain nonmailable pictures through the mails, it was not necessary, in order to sustain a conviction of the manager, that the government prove that he personally deposited the papers containing the alleged nonmailable pictures in the mails; the jury being authorized to find such fact from all the circumstances, including proof that the pictures were printed in the paper of which he was business manager and the publication of which he superintended.
[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 84–86; Dec. Dig. § 49.*]

10. CRIMINAL LAW (§ 829*)—TRIAL—INSTRUCTIONS—REQUEST TO CHARGE.
It is not error to refuse a request to charge sufficiently covered by the instructions given.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

11. POST OFFICE (§ 31*)—NONMAILABLE MATTER—"OBSCENE, LEWD, AND LASCIVIOUS."
The words "obscene, lewd, and lascivious," as used in Pen. Code (Act March 4, 1909, c. 321, 35 Stat. 1129 [U. S. Comp. St. Supp. 1911, p. 1651]) § 211, prohibiting the sending of obscene, lewd, and lascivious matter through the mails, signify that form of immorality that has relation to sexual impurity.
[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 50, 52; Dec. Dig. § 31.*
For other definitions, see Words and Phrases, vol. 6, pp. 4887–4889; vol. 8, p. 7735.]

12 POST OFFICE (§ 50*)—NONMAILABLE MATTER—"FILTHY."
In a prosecution for sending obscene and filthy matter through the mails, the court properly defined the term "filthy" to mean nasty, dirty, vulgar, indecent, offensive to the moral sense, morally depraving, and debasing, and left the question whether the pictures in question were obscene, filthy, lewd, and lascivious to the jury.
[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 87–89; Dec. Dig. § 50.*]

In Error to the District Court of the United States for the Northern Division of the Western District of Michigan; Clarence W. Sessions, Judge.

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

The Tyomies Publishing Company, John Nummivuori, and another were convicted of sending improper matter through the mails, in violation of Pen. Code, § 211, and they bring error. Affirmed.

Nicholas Klein, of Cincinnati, Ohio, and W. A. Burritt, of Hancock, Mich. (J. I. Sheppard, of Ft. Scott, Kan. of counsel), for plaintiffs in error.

Fred C. Wetmore, U. S. Atty., of Grand Rapids, Mich., and E. J. Bowman, Asst. U. S. Atty., of Greenville, Mich.

Before KNAPPEN and DENISON, Circuit Judges, and DAY, District Judge.

DAY, District Judge. The plaintiffs in error were convicted in the District Court of violations of section 211 of the Penal Code of the United States. The indictment contained three counts, but on the trial the first count was withdrawn and the jury was instructed that as to plaintiff in error John Salminen only the third count of the indictment should be considered.

The indictment in count 2 charged that the Tyomies Publishing Company, a corporation, and John Nummivuori, business manager of the corporation, did on the 24th of April, 1912, at the city of Hancock, Mich., knowingly and unlawfully deposit and cause to be deposited in the post office at Hancock about 3,000 copies of a publication known as "Lapatossu," printed in the Finnish language, containing a certain obscene, lewd, filthy, and indecent picture, identified in the indictment.

In count 3 the indictment charged that the Tyomies Publishing Company, and John Nummivuori, business manager, and John Salminen, editor, on the 13th of December, 1912, at Hancock, Mich., knowingly and unlawfully deposited and caused to be deposited in the post office about 3,000 copies of said publication "Lapatossu," containing a certain obscene, lewd, filthy, and indecent picture, identified in the indictment. Each of the pictures was identified by reference to the date of publication borne by the issue in which, and to the page thereof on which, the picture appears as well as by the dialogue connected therewith.

Pleas of not guilty were entered for each of the defendants; a motion to quash the indictment was overruled; and a motion to direct a verdict in favor of the defendants at the close of the government's testimony was overruled. The defendants were found guilty by the jury and sentence imposed. No exceptions were taken to the charge of the court, aside from the court's failure to charge certain requests submitted by the defendants.

It is urged that section 211 of the Penal Code is unconstitutional because it is an ex post facto law and because it abridges the freedom of the press. Section 211 was not enacted after the commission of the offense charged in the present case, nor has the situation changed in any respect to the disadvantage of the accused.

[1] The section of the statute under consideration does not conform to the settled definition of an ex post facto law. Duncan v. Missouri, 152 U. S. 382, 14 Sup. Ct. 570, 38 L. Ed. 485; Thompson v. Utah, 170

U. S. 351, 18 Sup. Ct. 620, 42 L. Ed. 1061; Kring v. Missouri, 107 U. S. 235, 2 Sup. Ct. 443, 27 L. Ed. 506.

[2] The statute is not in derogation of the constitutional rights and privileges of the defendants as publishers of a daily newspaper. The constitutional guaranty of a free press cannot be made a shield from violation of criminal laws which are not designed to restrict the freedom of the press, but to protect society from acts clearly immoral or otherwise injurious to the people. Ex parte Jackson, 96 U. S. 727, 736, 24 L. Ed. 877; In re Rapier, 143 U. S. 110, 133, 134, 12 Sup. Ct. 374, 36 L. Ed. 93; Public Clearing House v. Coyne, 194 U. S. 497, 506, 24 Sup. Ct. 789, 48 L. Ed. 1092; Knowles v. United States, 170 Fed. 409, 411, 95 C. C. A. 579; United States v. Journal Co. (D. C.) 197 Fed. 415, 418.

It is urged that the statute does not prescribe a standard by which the crime can be ascertained.

[3] With the addition of certain elements which do not vary the test to be applied, section 211 of the Penal Code is essentially the same as section 3893 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 2658), concerning which Mr. Justice Harlan, in the case of Rosen v. United States, 161 U. S. 29, 16 Sup. Ct. 434, 480, 40 L. Ed. 606, said:

"The inquiry under the statute is whether the paper charged to have been obscene, lewd, and lascivious was in fact of that character; and if it was of that character, and was deposited in the mail by one who knew or had notice at the time of its contents, the offense is complete, although the defendant himself did not regard the paper as one that the statute forbade to be carried in the mails. Congress did not intend that the question as to the character of the paper should depend upon the opinion or belief of the person who, with knowledge or notice of its contents, assumed the responsibility of putting it in the mails of the United States. The evils that Congress sought to remedy would continue and increase in volume if the belief of the accused as to what was obscene, lewd, and lascivious was recognized as the test for determining whether the statute has been violated. Every one who uses the mails of the United States for carrying papers or publications must take notice of what, in this enlightened age, is meant by decency, purity, and chastity, in social life, and what must be deemed obscene, lewd, and lascivious."

The specific argument that the criminality of the act charged is made to depend, not upon a clear expression of the statute, but upon standards personal to the jurors unknown at the time the act was committed, is answered by what was said in Nash v. United States, 229 U. S. 373, 376, 377, 33 Sup. Ct. 780, 57 L. Ed. 1296.

It is urged that under section 211 the offense is not restricted to depositing in the United States mail, but makes it an offense to deposit nonmailable matter anywhere. It is plain that only the post office establishment of the United States was contemplated by Congress, and, as the post office establishment was found to have been employed by the defendants in this case under consideration, surely no objection can be raised by them to this wording of the statute.

[4] It is contended that the statute is insufficient because it does not say that the persons who shall deposit nonmailable matter for mailing are guilty of a felony or misdemeanor. The statute does impose punishment by fine or imprisonment or both; this punishment is clear-

ly meant to be imposed by the courts. The offense described by section 211 is made a felony by section 335 of the Penal Code of the United States. The nonmailable matter, whose depositing is made punishable, is that expressly defined in the section providing a punishment.

[5] It is urged that the indictment is faulty because it seeks to charge these defendants with the commission of a crime, without referring to the entire publication of which the alleged nonmailable pictures were only a portion; the language accompanying the pictures not being alleged to be obscene. The statute distinctly makes it a crime to mail a picture of a lewd, lascivious, obscene, or filthy character, and it was only necessary that the jury should consider so much of the context as was essential to a proper understanding of what was claimed to be in violation of the statute. United States v. Bennett, Fed. Cas. No. 14,571; Burton v. United States, 142 Fed. 57, 64, 73 C. C. A. 243.

[6] The indictment alleged that defendants knowingly deposited the publication in the mails but did not expressly charge that they were aware of the character of the alleged nonmailable pictures. While there was a motion to quash the indictment because not setting forth "facts constituting a public offense under the laws of the United States," the alleged defect in question was not specifically pointed out by defendants before verdict, and the defect, if it was one, should be regarded under the circumstances as one of form under section 1025 of the Revised Statutes (U. S. Comp. St. 1901, p. 720), providing that the proceedings on an indictment found by a grand jury in any District Court, or other court of the United States, shall not be affected "by reason of any defect or imperfection in matter of form only which shall not tend to the prejudice of the defendant." Rosen v. United States, supra; Price v. United States, 165 U. S. 311, 17 Sup. Ct. 366, 41 L. Ed. 727.

[7] It is essential to the validity of an indictment that it contain averments of the facts which constitute the offense it charges so certain and specific as fairly to inform the defendant of the crime intended to be alleged and as to make the judgment of conviction or acquittal thereon a complete defense to a second prosecution of the defendant for the same offense. United States v. Hess, 124 U. S. 483, 486, 487, 8 Sup. Ct. 571, 31 L. Ed. 516; Stokes v. United States, 157 U. S. 187, 15 Sup. Ct. 617, 39 L. Ed. 667; Bennett v. United States (C. C. A. 6) 194 Fed. 630, 632, 114 C. C. A. 402; Hocking Valley R. R. Co. v. United States, 210 Fed. 735, decided by this court February 3, 1914. Judged by this standard, the indictment was sufficient.

[8] It is contended that the court erred in allowing the introduction in evidence by the government of certain words and dialogue appearing above and below the picture referred to in the third count of the indictment. This dialogue, together with the translation of the same, was offered in evidence for the purpose of identifying the picture; and it was not only identifying, it was characterizing as well; and it was receivable in evidence in order that the jury could fully understand the nature of this picture complained of.

[9] It is urged that the evidence did not show that John Nummi-

vuori deposited or caused to be deposited in the post office the papers containing the alleged nonmailable pictures. There was considerable evidence introduced tending to show that Nummivuori did deposit or cause the objectionable pictures to be deposited in the post office, and this issue was finally submitted to the jury under a proper charge. It was not necessary that there be express testimony that Nummivuori personally examined the pictures in question. The jury might properly find from all of the circumstances that he had knowledge or notice that these pictures appeared and were printed in the paper of which he was business manager, and the publication of which he superintended. Burton v. United States, 142 Fed. 57, 73 C. C. A. 243; Rosen v. United States, supra; Dunlop v. United States, 165 U. S. 486, 17 Sup. Ct. 375, 41 L. Ed. 799.

[10] We think the requested instructions that defendant Nummivuori could not be convicted without proof beyond a reasonable doubt, both that he deposited (or caused to be deposited) in the post office for mailing and delivery, and had knowledge of the contents of, the alleged nonmailable matter were sufficiently covered by the charge given.

It is contended that the court erred in refusing to charge the jury that the Tyomies Publishing Company and John Nummivuori should be acquitted because the alleged nonmailable picture referred to in the second count of the indictment was mailable. Section 3893 of the Revised Statutes did not contain the words "and every filthy," which were inserted at the time of the enactment of the Penal Code in 1909. It was plainly the purpose of Congress, in adding these words, to enlarge the scope of the statute so as to cover a class of publications that were not included in the old section. United States v. Dempsey (D. C.) 188 Fed. 450.

The trial judge submitted the issue, as to whether or not this picture was filthy, to the jury, saying:

"By the term 'filthy' is meant what it commonly or ordinarily signifies; that which is nasty, dirty, vulgar, indecent, offensive to the moral sense, morally depraving and debasing."

We consider that this question was properly submitted to the jury.

[11] It is contended that the picture described and referred to in the third count of the indictment was mailable and that the defendants should be acquitted on this count. The words "obscene, lewd, and lascivious," as used in the statute, signify that form of immorality which has relation to sexual impurity. Swearingen v. United States, 161 U. S. 446, 16 Sup. Ct. 562, 40 L. Ed. 765; United States v. O'Donnell (C. C.) 165 Fed. 218; United States v. Benedict (C. C.) 165 Fed. 221; Konda v. United States, 166 Fed. 91, 92 C. C. A. 75, 22 L. R. A. (N. S.) 304.

[12] The question as to whether the matter is obscene, filthy, lewd, and lascivious, as defined by the trial judge, was properly submitted to the jury. Konda v. United States, supra; Knowles v. United States, 170 Fed. 410, 95 C. C. A. 579; Rosen v. United States, supra; United States v. Davis (C. C.) 38 Fed. 326; United States v. Harmon (D. C.) 45 Fed. 418.

No error appears in the record which was prejudicial to the defendants, and, being of the opinion that they were fairly tried, the convictions will be affirmed.

THOMPKINS v. MISSOURI, K. & T. RY. CO. et al.

(Circuit Court of Appeals, Eighth Circuit. January 28, 1914.)

No. 3,866.

(Syllabus by the Court.)

1. CARRIERS (§ 411*)—SLEEPING CAR COMPANIES—DUTY TO PASSENGERS—ACTIONABLE NEGLIGENCE.

It is the duty of the Pullman Company to exercise reasonable care and diligence to protect the passengers in its cars from unlawful discomforts, attacks, inconveniences, insults, and injuries. That duty, however, does not require it or its employés to substitute their opinions of the law and of the duty of officers of the law for the judgment of the latter and to interfere with and obstruct the discharge by the officers of their duties, and the failure of the Pullman Company and its employés to obstruct, interfere with, or prevent the arrest and removal of a passenger from a car by the officers of the law does not constitute actionable negligence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1579, 1581; Dec. Dig. § 411.*

Duties and liabilities of sleeping car companies, see notes to Duval v. Pullman Palace Car Co., 10 C. C. A. 335; Edmundson v. Pullman Palace Car Co., 34 C. C. A. 386; Bacon v. Pullman Co., 89 C. C. A. 10.]

2. MALICIOUS PROSECUTION (§ 58*)—EVIDENCE—ADMISSIBILITY.

In an action for both actual and punitive damages for causing the ejection of a passenger from a train, his arrest, and his fine by a justice of the peace, the complaint, warrant, and a transcript of the record of the justice are, after the plaintiff has testified to the proceedings before the justice, admissible evidence to show what those proceedings were and who conducted them and to mitigate the damages or to defeat the claim therefor.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 117–124; Dec. Dig. § 58.*]

3. APPEAL AND ERROR (§ 263*)—EXCEPTION TO INSTRUCTIONS—NECESSITY.

An exception before the jury retires to the charge, or to the portion of the charge of the court which a litigant desires to challenge, is ordinarily indispensable to its review in a federal appellate court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1516–1523, 1525–1532; Dec. Dig. § 263.*]

4. APPEAL AND ERROR (§ 237*)—VERDICT—SUFFICIENCY OF EVIDENCE—SCOPE OF REVIEW.

A federal appellate court may not review the verdict or the finding of facts by a jury in the absence of a request to the trial court to instruct them in whose favor to find on the ground that evidence is so conclusive that no other verdict can be sustained.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1302½; Dec. Dig. § 237.*]

5. APPEAL AND ERROR (§ 978*)—DISCRETIONARY RULING—NEW TRIAL.

A ruling on a motion for a new trial on account of the bias and prejudice of the jury, unsupported by any evidence except the evidence on the issues tried, is discretionary with the trial court and is not reviewable by

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

a federal appellate court in the absence of proof of an abuse of the discretion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3866–3870; Dec. Dig. § 978.*]

6. COURTS (§ 405*)—FEDERAL COURT OF APPEALS—SCOPE OF REVIEW—ERRORS OF LAW.

A federal appellate court is, in an action at law, a court for the correction of errors of law of the trial court only. The burden is on him who alleges error to prove it to the appellate court by the record before it and in the absence of such proof the judgment below cannot be reversed, for the legal presumption is that the rulings of the court below were right.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1097–1099, 1101, 1103; Dec. Dig. § 405.*]

In Error to the District Court of the United States for the Western District of Missouri; A. S. Van Valkenburgh, Judge.

Action by William J. Thompkins against the Missouri, Kansas & Texas Railway Company and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Charles H. Calloway and W. C. Hueston, both of Kansas City, Mo., for plaintiff in error.

Ellison A. Neel, of Kansas City, Mo. (Joseph M. Bryson and Joseph W. Jamison, both of St. Louis, Mo., and Hadley, Cooper, Neel & Wilson, of Kansas City, Mo., on the brief), for defendant in error Missouri, K. & T. Ry. Co.

Cyrus Crane, of Kansas City, Mo. (Lathrop, Morrow, Fox & Moore and John H. Lathrop, all of Kansas City, Mo., on the brief), for defendant in error Pullman Co.

Before SANBORN, HOOK, and CARLAND, Circuit Judges.

SANBORN, Circuit Judge. The plaintiff complains of the trial of an action for damages for his ejection from a Pullman car in Oklahoma, and for his arrest, conviction, and fine for disturbing the peace. In the first count of his petition he alleged that at about 1 o'clock in the morning of December 31, 1910, at Kansas City, Mo., he purchased a railroad ticket of the railway company and a ticket for a berth in the Pullman car from the Pullman Company from Kansas City to McAlester, Okl., rode thereon and occupied his berth until about 9 o'clock that morning, when at Vinita, Okl., the defendant companies unlawfully, maliciously, and in an insulting manner compelled and caused officers of the law to compel him to leave the car and train and to remain at Vinita until the next train going toward McAlester came along and then to pay $3.81 fare for his passage to McAlester, to his injury in the sum of $25,003.81 actual damages and $25,000 punitive damages. In the second count of his petition he alleged the same facts, and that while he was detained at Vinita the defendants caused the officers of the law to take him before a justice of the peace under arrest on some charge of which he was not guilty and to compel him to pay $13, and he prayed damages in the sum of $25,016.81 actual damages and $25,000 punitive damages. The Pull-

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

man Company answered that the acts of which the plaintiff complained were not done by it or any of its servants, but by the officers of the law against its wishes and against such opposition as it was lawful for it to make. The railway company answered that the plaintiff was a negro, that the separate coach law of Oklahoma (Compiled Laws of Oklahoma 1900 [Snyder] c. 9, art. 2, § 434, etc.) required it to provide separate coaches or compartments for negroes and whites and to properly label them, prohibited the members of either race from occupying a coach or compartment set apart for the members of the other race and required its conductors to prevent them from doing so, that it had provided such coaches or compartments on all its passenger trains, and that there was on the train in which the plaintiff was riding a separate coach for negroes equal in safety, comfort, and convenience to the Pullman car in which he was riding, that the latter had been set apart for whites and was so labeled, that it had adopted and published for the conduct of its transportation business regulations to the effect that the members of each race were forbidden to ride in the state of Oklahoma in the cars or compartments set apart by it for the members of the other race, that after the train in which plaintiff rode arrived in Oklahoma its conductor notified the plaintiff of these laws and regulations and requested him to take a seat in the car set apart for negroes, that he refused to do so, that the servants of the company then notified the officers of the law at Vinita of these facts, and when the train arrived at Vinita they pointed the plaintiff out at the request of the officers, that the railroad company and its servants had nothing more to do with the matters alleged in the petition, that the officers notified the plaintiff that he was violating the law, took him off the train, charged him in some court with such violation, that he pleaded guilty, was fined, and paid his fine.

As the plaintiff was an interstate passenger and the defendants in transporting him were engaged in interstate commerce over which the Congress had exclusive and the state of Oklahoma no jurisdiction, the court below tried the case on the theory, and at the close of the trial charged the jury, that the separate coach law of Oklahoma furnished no defense or justification for the acts of the defendant railway company, but that as Congress had made no regulation regarding separate coaches for the members of the two races the railway company had the power and right to make lawful regulations to the effect that no member of either race should ride on its railroads in Oklahoma in a coach or compartment set apart for the members of the other race, provided always that there was no discrimination in the accommodations furnished to the members of the two races and that such accommodations were equal in safety, comfort, and convenience (Chiles v. Chesapeake & Ohio Ry. Co., 218 U. S. 71, 30 Sup. Ct. 667, 54 L. Ed. 936), and no exception was taken to this charge. So it is that every question regarding the separate coach law of Oklahoma is excluded from the consideration of this court in this case and that law is here dismissed.

[1] The plaintiff specifies two errors in the trial of the case against the Pullman Company, that the court sustained its demurrer to the

second count of the petition and that at the close of the plaintiff's case it granted the motion to instruct the jury to return a verdict in is favor. The record, however, discloses no demurrer of the Pullman Company and no ruling on any such demurrer, and it contains no evidence that the Pullman Company, or any of its officers or employés, ever requested, or in any way caused or instigated, the removal of the plaintiff from the Pullman car in which he was riding, or any of the acts of which the plaintiff complains. In view of this state of the evidence, counsel argue, what was not pleaded in their complaint, that the Pullman Company is liable in damages here because neither its conductor nor its porter prevented or actively interfered to prevent the arrest and removal of the plaintiff from the car. The evidence was that the Railway Company's conductor asked the plaintiff if he was a negro and he replied that he was. The conductor then told him that it was a violation of the laws of Oklahoma for him to ride in the Pullman car which was set apart for whites and requested him to go into the car set apart for negroes. The plaintiff said that he had Pullman service and inquired if there was a Pullman car set apart for negroes, and the conductor informed him that there was not. The plaintiff then declared that he was an interstate passenger and was not subject to the Oklahoma law and refused to leave the car. The train conductor then sent to the officers of the law at Vinita the information that there was a negro riding in a car set apart for whites and afterward, in answer to an inquiry by the Pullman conductor, told him what he had done. When the train arrived at Vinita, the deputy sheriff of the county came into the car, displayed his badge of office, arrested and took the plaintiff from the car in the presence of the Pullman conductor and porter, who neither protested, objected, nor took any action to prevent it.

The statutes of Oklahoma empower peace officers to arrest persons for public offenses committed or attempted in their presence, for felonies committed and for felonies charged upon reasonable cause though they were not present when those offenses were committed, and those statutes declare that every person who willfully delays or obstructs any public officer in the discharge or attempt to discharge any duty of his office is guilty of a misdemeanor. Comp. Laws of Oklahoma 1909 (Snyder) §§ 6603, 2207. It was the duty of the Pullman Company to exercise reasonable care and diligence to protect the passengers in its cars from unlawful discomforts, attacks, inconveniences, insults, and injuries; but that duty did not require it or its employés to substitute their opinions of the law and of the duty of officers of the law for the judgment of the latter and to interfere and obstruct the discharge by these officers of their duties, and the failure of the Pullman Company and its employés to obstruct, interfere with, or prevent the arrest and removal of the plaintiff from the Pullman car by the deputy sheriff did not constitute actionable negligence. Brunswick & W. R. Co. v. Ponder, 117 Ga. 63, 43 S. E. 430, 431, 60 L. R. A. 713, 97 Am. St. Rep. 152; Bowden v. Atlantic Coast Line R. Co., 144 N. C. 28, 56 S. E. 558, 12 Ann. Cas. 783.

[2] It is assigned as error that the trial court admitted in evidence copies of the complaint, warrant, and record in the court of the justice of the peace at Vinita in the case in which the plaintiff was fined on December 31, 1910, after he had been arrested and removed from the car. That complaint was made by Jacob Smith, the deputy sheriff, and it charged the plaintiff with "the crime of disturbing the peace" at the depot in Vinita. The warrant recited that Jacob Smith had filed a complaint which charged the plaintiff with that crime and commanded the sheriff to arrest and bring him before the justice. The record of the justice was that the complaint was filed, that the warrant was issued, that the plaintiff was arrested, brought into court and arraigned, and that he pleaded guilty, was fined one dollar and costs, paid the fine, and was discharged. When these copies were admitted in evidence, the plaintiff had testified to the acts of the conductor of the railway company on the train, to his arrest and removal from the train by the deputy sheriff Smith, that Smith met a judge and told him that the plaintiff was the man whom he took off the train, and the judge informed him he ought to have a warrant for him, that Smith took him to the justice of the peace and told the latter that he was a negro riding in the white folks car. The plaintiff answered, "No, I was riding in the Pullman car." The justice said, "What charge are you going to put against him?" Smith answered, "Disturbing the peace." The plaintiff said, "Whose peace have I disturbed?" The justice said, "Well, we will put a misdemeanor against you." The plaintiff said, "What misdemeanor have I committed?" The justice said, "Well, you were riding in the white folks car." The plaintiff said, "No, sir; in the Pullman car." The justice said, "Well, there were white folks in there." The plaintiff said, "Yes, sir; I suppose so." The justice said, "Well, your fine is $15." The plaintiff said, "I am not guilty of anything." He repeated it. Afterward he said: "I am not guilty. How much will it be to get out of this?" The justice said, "$15," but finally the justice reduced the fine to $13. The plaintiff paid it and left, and just as he went out the justice asked him his name. Evidence had also been introduced that there was a regulation of the railway company to the effect that a certain coach on the train on which the plaintiff rode should be used exclusively for negroes and the other cars on that train for whites, and that the conductor and the members of the train crew did not stop over at Vinita, but went on and left the plaintiff there in the hands of the deputy sheriff. One reason why counsel for the plaintiff argue that the complaint, the warrant, and the record of the justice were not admissible in evidence is that the justice had no jurisdiction of the case against the plaintiff because the actual charge against him was a violation of the separate coach law of Oklahoma and he was an interstate passenger; but there was evidence that he had violated a regulation of the railroad company. What the actual charge against him was was an issue on which he had testified, and the record of the justice, the complaint, the warrant, and the testimony of other witnesses who knew were all admissible to contradict his testimony and to disclose all the facts relating to the proceedings before the justice. Counsel also contend that the

complaint and warrant were inadmissible because they failed to state whose peace was disturbed and because they do not tend to prove or disprove any material issue in this case. But the plaintiff had charged and had testified to prove that the railway company was liable for punitive damages because he was arrested by the deputy sheriff, arraigned, and fined by the justice. The question in this case was not whether the complaint before the justice and the warrant issued were legally sufficient to warrant his trial and conviction, although in the absence of objection before judgment they undoubtedly were, but whether or not the railway company unlawfully, maliciously, and without probable cause inflicted the arrest, the detention, the arraignment, and the fine upon the plaintiff, and whether the proceedings before the justice were legal or illegal, valid or void, they and the record of them were competent evidence upon that issue to show what those proceedings were and who conducted them. In an action for both actual and punitive damages for causing the ejection of a passenger from a train, his arrest and his fine by a justice of the peace, the complaint, warrant, and a transcript of the record of the justice are, after the plaintiff has testified to the proceedings before him, admissible evidence to show what the proceedings were and who conducted them and to mitigate the damages or to defeat the claim therefor. Beckwith v. Bean, 98 U. S. 266, 279, 280, 25 L. Ed. 124; Woodall v. McMillan, 38 Ala. 622, 624.

[3] Specifications of error numbered 5, 6, and 9 in the brief of counsel for the plaintiff are leveled at certain statements in the charge of the court; but those statements are not reviewable here because at the close of the charge the court inquired whether or not there were any exceptions, to which counsel for the plaintiff replied, "We have none," and none was taken. An exception before the jury retires to the charge of the court, or to the part of the charge a litigant questions, calls the attention of the trial court sharply to the legal proposition challenged and gives it an opportunity to correct it before injury can ensue. A failure to take such an exception tends to remove any possible doubt from the mind of the court and to confirm the opinion it has expressed and thereby ordinarily estops the litigant from assailing the proposition after a verdict thereon has been rendered. Hence an exception before the jury retires to the charge, or to the portion of the charge a litigant desires to assail, is ordinarily indispensable to its review in a federal appellate court. Lincoln v. Claflin, 74 U. S. (7 Wall.) 132, 139, 19 L. Ed. 106; Southern Pacific Company v. Arnett, 126 Fed. 75, 81, 61 C. C. A. 131, 137; Cass County v. Gibson, 107 Fed. 363, 367, 46 C. C. A. 341.

[4] The eighth specification in the brief is that the jury erred upon the whole record in failing to find a verdict for the plaintiff. But this court is prohibited from reviewing this question by the fact that no request was made to the court to instruct the jury to return a verdict for the plaintiff on the ground that the evidence was so conclusive in his favor that the court would not sustain a contrary verdict, and by the seventh amendment to the Constitution, which prohibits the reexamination by any court of the United States of any facts tried by a

jury in an action at common law where the value in controversy exceeds $20, except by means of the grant of a new trial by the court which tried the issue, or by an award by an appellate court of a new trial for some error of law which intervened in the proceedings. Parsons v. Bedford, 3 Pet. 433, 443, 446, 448, 7 L. Ed. 732.

The specification numbered 11 in the brief for plaintiff in error, which is that the verdict and judgment are violative of the Constitution of the United States, presents no reviewable question here in the state of the record before us for the same reason, that is to say, because the issues of fact which condition the constitutionality of the verdict and judgment are not reviewable by this court and no ruling of the court below on the question of law involving that issue is presented for our consideration by the record.

[5] The tenth specification in the brief is that the verdict of the jury was reached through bias and prejudice against the plaintiff because he was a colored person. But this question was not presented in any other way than by a motion to the court below for a new trial which that court denied. No affidavit of bias or prejudice and no other evidence appears in the record in support of that motion, except the bill of exceptions which contains the evidence upon the trial of the issues made by the pleadings. Under such circumstances a ruling on a motion for a new trial is discretionary with the trial court and is not reviewable in this court in the absence of proof of an abuse of the discretion and there is no such proof in this record.

[6] Finally, it is assigned as error that "the court erred in sustaining the demurrers of both defendants and each of them to the second count of the petition." But, as we have seen, the Pullman Company never demurred to the petition, or to any part of it, and its motion for a directed verdict at the close of the plaintiff's evidence was rightly granted. The court received all the evidence under each count of the petition and under the answers thereto, and then at the close of the trial sustained the railway company's demurrer to the second count of the petition. There are two reasons why the judgment below is not reversible on account of this ruling. First, a federal appellate court is, in an action at law, a court for the correction of the errors of the court below only, and, unless it appears in the record before it that the lower court committed an error of law, it may not reverse its judgment. The legal presumption is that the rulings of the trial court were right, and the burden is on him who asserts that one of them was erroneous to make that fact appear by the record he presents to the appellate court. United States v. Ute Coal & Coke Co., 158 Fed. 20, 22, 85 C. C. A. 302, 304.

The court fails to find in the brief of counsel, as required by Rule 24, § 2, subd. 3 (109 C. C. A. xvi, 188 Fed. xvi), any reference to the pages of the record where the demurrer of the railway company or the ruling upon it, of which they complain, appear, and this court might well follow its established practice that:

"Where counsel for plaintiff in error considers the errors he assigns too trivial to warrant him in finding and citing the pages of the record which present them, the court will not deem them of sufficient importance to require it

to search for them." Hoge v. Magnes, 85 Fed. 355, 358, 29 C. C. A. 564, 567; City of Lincoln v. Sun-Vapor Street-Light Co., 59 Fed. 756, 759, 8 C. C. A. 253, 255; National Bank of Commerce v. First National Bank, 61 Fed. 809, 811, 10 C. C. A. 87, 89; Shoe Co. v. Needles, 67 Fed. 990, 994, 15 C. C. A. 142, 147; Haldane v. United States, 69 Fed. 819, 821, 16 C. C. A. 447, 448.

But that no injustice may result this court has searched the entire record for this demurrer and the ruling upon it, and all it has been able to find is a recital that before the railway company answered it filed a demurrer, which the court overruled, that at the close of the plaintiff's evidence the railway company "filed a demurrer to both counts of the plaintiff's petition ruling on which demurrer was reserved by the court," and that after all the evidence had been received and before the case went to the jury, the court overruled the railway company's demurrer to the first count of the petition and sustained it as to the second count. Neither the demurrer nor any copy of it, so far as we can find, appears in the record in this court. The statutes of Missouri specify seven grounds of demurrer to a petition and require the demurrer to specify distinctly the grounds of objection to the petition. Revised Statutes of Missouri 1909, §§ 1800, 1801. The result is that, as the plaintiff has failed to present the demurrer to this court and to show thereby that it presented no tenable ground of demurrer to the second count of the petition, he has failed to bear the necessary burden of proving that the ruling of the court below here was erroneous and the legal presumption that the demurrer specified some sound objection to the petition must prevail.

Second. If this court should go farther and should presume that the demurrer contained no tenable objection to the second count of the petition, even then the judgment below could not be lawfully reversed. All the admissible evidence on both counts of the petition was introduced at the trial. The first count charged the defendant with the unlawful and malicious ejection of the plaintiff from the train by means of its use of the officers of the law to his injury in the sum of $25,003.81 actual damages and $25,000 punitive damages. The second count charged the defendant with the same ejection by the same means and with arresting and fining him without just cause by use of the officers of the law to his injury in the sum of $25,016.81 actual damages and $25,000 punitive damages. The evidence was conclusive that neither the defendant nor any of its agents caused the arrest, detention, and fine, unless their information to the officers of the law that a negro was riding in the car set apart for whites and their designation to the officers of the law of the plaintiff as the negro who so rode caused it. But the jury found by its verdict on the first count of the petition that the railway company was not liable in damages for the ejection of the plaintiff from the train on account of those acts, and that finding is a demonstration that they could not and would not have found the railway company liable in damages for the arrest, detention, and fine. Thus it clearly appears beyond doubt that, if the court was in error in sustaining the demurrer to the second count of the petition, that error did not prejudice and could not have prejudiced the plaintiff, and error without prejudice is no ground for reversal.

The judgment below must be affirmed. And it is so ordered.

Since the foregoing opinion was written, the concurring opinion of Judge HOOK has been prepared and presented, in which it is contended that the complaint in McCabe v. Atchison, Topeka & Santa Fé Ry. Co., 186 Fed. 966, 109 C. C. A. 110, gave this court no jurisdiction to determine the constitutionality of the separate coach law of Oklahoma and deprived that decision of authority. To avoid the possible inference that the writer assents to that contention, he adds: First, that since in deciding the case in hand it is unnecessary to consider or determine any question regarding the authority or effect of the decision in McCabe v. Atchison, Topeka & Santa Fé Ry. Co., 186 Fed. 966, 109 C. C. A. 110, and since, as is well said in the concurring opinion, "From the earliest times in this country and in England it has been the rule that observations in an opinion not called for by the issues of the case are not in judgment and are not authoritative," nothing that may be said about it in this case can have any authoritative or judicial effect, and hence its discussion seems futile; and, second, the complaint in that case alleged that the separate coach law of Oklahoma was unconstitutional and that the defendant railway company by virtue thereof was depriving, and threatened to continue to deprive, the complainants and other negroes of their constitutional rights. A demurrer to the complaint had been sustained, and the appeal presented that ruling for review. This court sustained that ruling on the ground that the separate coach law was constitutional, the writer dissenting, and devoted more than nine-tenths of the majority opinion to the discussion of that question. The question whether or not this court had jurisdiction to consider and decide that legal issue was then squarely at issue in that case, and in the opinion of the writer was then authoritatively decided in favor of the jurisdiction. If it had not been so decided, the majority of the court certainly would not have devoted so much of their opinion to the discussion and decision of the constitutionality of that law. Moreover, the decision that the separate coach law was constitutional was solid ground for sustaining the demurrer, and if this court had decided that the coach law was constitutional, as it did, and had then gone farther and decided that even if it was unconstitutional the complainants had not alleged such facts, as it seems to me they did, as entitled them to question it, the decision of the former question would have been, as it seems to me it is now, authoritative and res adjudicata. Where a judgment or decision rests upon two grounds, either of which is sufficient to sustain it, the ruling upon neither ground is obiter, but each ruling is the authoritative decision of the court and is res adjudicata. Union Pacific Railroad Co. v. Mason City & Fort Dodge R. Co., 199 U. S. 160, 165, 166, 26 Sup. Ct. 19, 50 L. Ed. 134; Union Pacific R. Co. v. Mason City & Fort Dodge R. Co., 64 C. C. A. 348, 354, 128 Fed. 230, 236, and cases there cited.

Affirmed.

HOOK, Circuit Judge (specially concurring). The railway company pleaded in defense the separate coach statute of Oklahoma and in brief and argument relied on McCabe v. Railway, 109 C. C. A. 110. 186 Fed. 966. It may not be inappropriate to direct attention to some features of the McCabe case, in the decision of which the writer con-

curred, to the end that it may be made plain that the constitutionality of the statute was not involved in that case and that, had it been, the discussion of the proviso of section 7 (Laws Okl. 1907–08, c. 15, art. 1 [Comp. Laws 1909, § 440]) was unnecessary. The McCabe case was a suit by five negro citizens of Oklahoma to enjoin certain railroad companies in that state from complying with the statute. It was begun before the statute took effect. An amended bill was filed a few days afterwards. The trial court sustained a demurrer to the amended bill, the plaintiffs stood on their pleading and came here by appeal. In their amended bill the plaintiffs disclosed no interest whatever in the prospective effect or operation of the separate coach statute except as they were members of the African race and lived in Oklahoma. It was not claimed that any personal right had as yet been in fact violated. It was not even alleged that the plaintiffs had ever traveled or definitely expected to travel on defendants' railroads. The nearest approach to that was in the averment:

"That the acts and conduct of the defendants and each of them are being done under the provision of the state (statute) of Oklahoma above set out and will be continuous and will work great hardship upon your orators and all persons of the negro race desiring to travel on railroads in the State of Oklahoma."

And in order to show a ground of jurisdiction in equity, which was indispensable to the maintenance of the suit, the averment continued:

"And unless restrained and enjoined by your honors from carrying out the intended injury, a multiplicity of suits will ensue; there being at least 50,000 persons of the negro race in the state of Oklahoma who will be injured and deprived of their civil rights unless so restrained by this honorable court."

This was the only averment to invoke the equitable jurisdiction of the court. The trial court gave no opinion showing the grounds for its action, but it is manifest from long-settled principles of law and procedure that the dismissal of the suit by that court and also the affirmance of its action by this court were imperative for reasons not reaching or touching in any degree the constitutionality of the legislation.

But suppose the above obstacles, which would seem insuperable, had not been in the way, and it became necessary to consider the proviso of section 7 of the Oklahoma statute that:

"Nothing herein contained shall be construed to prevent railway companies in this state from hauling sleeping cars, dining or chair cars attached to their trains to be used exclusively by either white or negro passengers, separately but not jointly."

Clearly there is nothing on the face of this provision that affirmatively commands a violation of anybody's constitutional rights. Violations could only arise from the future conduct of the railroad companies in particular cases, not from the letter of this provision. But even were the letter of the provision ambiguous and fairly susceptible of two constructions, one making the statute valid, the other making it unconstitutional, a court would adopt the former when a specific case arose requiring it to decide the question (United States v. Delaware & Hudson Co., 213 U. S. 366, 29 Sup. Ct. 527, 53 L. Ed. 836), but it would not indulge in prevision or conjecture. It may be convenient at times to test out beforehand what a law or some part of it means and what may

or may not be done under it; but cases brought for that purpose are moot cases, and courts are not authorized to decide them.

From the earliest times in this country and in England it has been the rule that observations in an opinion not called for by the issues of the case are not in judgment and are not authoritative. It has its foundations in the necessary limitations of the judicial power which deny legislative functions and forbid decision upon cases or conditions not in court, and also in the limitations of the human mind which perceives less distinctly and less accurately those things that lie outside the path of a cause but are regarded as analogies, arguments, or illustrations pointing the way to the end. It is a rule of justice and necessity and is of constant application in the courts and among the judges of a court not only to the opinions of other tribunals and judges but also to their own. As was said years ago in Lucas v. Commissioners, 44 Ind. 525, 541:

"The members of a court often agree in a decision, but differ decidedly as to the reasons or principles by which their minds have been led to a common conclusion. It is therefore the conclusion only, and not the process by which it has been reached, which is the decision of the court, and which has the force of precedent in other cases."

In the trial of the case at bar in the court below the opinion in the McCabe case was relied on as controlling authority. As one of the judges who sat in the McCabe case, I have deemed it my duty to those who may feel bound by expressions in the opinions of this court to state clearly and accurately the real status of that litigation. Having done so, the responsibility in the future must rest with those who continue to regard the views expressed as judicially authoritative or res adjudicata.

ROSSMANN v. GARNIER.

(Circuit Court of Appeals, Eighth Circuit. January 27, 1914.)

No. 3783.

1. COURTS (§ 292*)—JURISDICTION OF UNITED STATES COURTS—CASES ARISING UNDER TRADE-MARK LAWS.

The federal courts have jurisdiction of all matters arising under the trade-mark statute, even though both parties be citizens of the same state.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 834; Dec. Dig. § 292.*]

2. COMMERCE (§ 3*)—STATUTORY PROVISIONS—VALIDITY—"TRADE-MARK."

Congress had power under Const. U. S. art. 1, § 8, cl. 3, authorizing it to regulate foreign and interstate commerce and commerce with the Indian tribes, to enact the trade-mark laws (Act March 3, 1881, c. 138, 21 Stat. 502 [U. S. Comp. St. 1901, p. 3401]; Act Aug. 5, 1882, c. 393, 22 Stat. 298 [U. S. Comp. St. 1901, p. 3404]; and Act Feb. 20, 1905, c. 592, 33 Stat. 724 [U. S. Comp. St. Supp. 1911, p. 1459]), especially as a "trade-mark" is a distinctive mark of authenticity through which the products of particular manufacturers or the vendible commodities of particular merchants may be distinguished from those of others.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 3; Dec. Dig. § 3.*

For other definitions, see Words and Phrases, vol. 8, pp. 7042–7048.]

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

3. TRADE-MARKS AND TRADE-NAMES (§ 42*) — STATUTORY PROVISIONS — VALIDITY.

The provision of Trade-Mark Act Feb. 20, 1905, c. 592, § 5, 33 Stat. 725 (U. S. Comp. St. Supp. 1911, p. 1461), that nothing therein shall prevent the registration of any mark used by the applicant or his predecessor or by those from whom title to the mark is derived in interstate or foreign commerce or commerce with Indian tribes which was in actual or exclusive use as a trade-mark of the applicant or his predecessor for ten years next preceding the passage of that act, is not unconstitutional.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 47; Dec. Dig. § 42.*]

4. TRADE-MARKS AND TRADE-NAMES (§ 3*)—MARKS SUBJECT TO OWNERSHIP—DESCRIPTIVE WORDS.

Such provision of Act Feb. 20, 1905, c. 592, § 5, 33 Stat. 725 (U. S. Comp. St. Supp. 1911, p. 1461), is not limited to technical trade-marks, and a word used exclusively for ten years may be registered under that provision even though it is a descriptive word.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 4–7; Dec. Dig. § 3.*]

5. TRADE-MARKS AND TRADE-NAMES (§ 59*)—INFRINGEMENT—WHAT CONSTITUTES.

A trade-mark, consisting of the word "Abricotine" in connection with the initials P. G. on a tabret or shield and the facsimile of a signature was infringed by using the word Abricotine in connection with similar goods.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 68–72; Dec. Dig. § 59.*]

6. TRADE-MARKS AND TRADE-NAMES (§ 82*)—ACTIONS—NOTICE AS CONDITION PRECEDENT.

Under the express provisions of Trade-Mark Act Feb. 20, 1905, c. 592, § 28, 33 Stat. 730 (U. S. Comp. St. Supp. 1911, p. 1470), where the registrant neither gave notice of the registration by affixing a notice to that effect to the articles sold under such trade-mark, nor notified defendant of the infringement, damages were not recoverable for the infringement.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 92; Dec. Dig. § 82.*]

7. EVIDENCE (§ 16*)—JUDICIAL NOTICE—FOREIGN LANGUAGE.

In a suit for infringing a trade-mark, judicial notice would not be taken that the word "Abricotine" is a word in general use in the French language in connection with French commerce and descriptive of apricot cordial, since, while the court is bound to take judicial notice of the ordinary meaning of words in our own language, it has judicially neither memory nor understanding of the French language, and judicial notice as to uses and customs is confined to our own country.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 20; Dec. Dig. § 16.*]

8. TRADE-MARKS AND TRADE-NAMES (§ 93*)—ACTIONS—SUFFICIENCY OF EVIDENCE.

Under Trade-Mark Act Feb. 20, 1905, c. 592, § 5, 33 Stat. 725 (U. S. Comp. St. Supp. 1911, p. 1461), authorizing the registration of any mark in actual and exclusive use as a trade-mark by the applicant or his predecessor in title for ten years next preceding the passage thereof, and section 16, making the registration of a trade-mark prima facie evidence of ownership, the prima facie case made by the registration of a trade-mark, containing as a part thereof the word "Abricotine" in connection with cordials, was not overcome by the presence of the word "Abricotine" as applied to liqueurs in a French encyclopedia bearing a date subsequent to the date of the beginning of the ten-year period and more than 20 years

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

after the original registration of complainant's French trade-mark; it not appearing that it was not complainant's product that placed the term in the encyclopedia.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 104–106; Dec. Dig. § 93.*]

9. TRADE-MARKS AND TRADE-NAMES (§ 47*) — EFFECT OF FOREIGN REGISTRATION.

Under article 6 of the convention of March 20, 1883 (25 Stat. 1376), for the protection of industrial property, providing that every trade-mark regularly deposited in the country of origin shall be admitted to deposit and so protected in all other countries of the Union thereby constituted, the owner of a trade-mark registered in France was entitled to protection in this country, whether or not such mark would have been allowed under the laws of this country.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 55; Dec. Dig. § 47.*]

Hook, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

Suit by Caroline Henriette Garnier against Tekla Rossmann. From a decree for plaintiff (195 Fed. 175), defendant appeals. Modified and remanded, with directions.

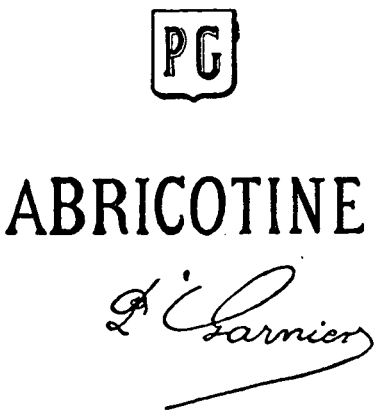
James A. Carr, of St. Louis, Mo. (Albert C. Davis, of St. Louis, Mo., on the brief), for appellant.

James L. Hopkins, of St. Louis, Mo. (A. Parker Smith, of New York City, on the brief), for appellee.

Before HOOK and SMITH, Circuit Judges, and VAN VALKENBURGH, District Judge.

SMITH, Circuit Judge. This suit was brought by the appellee, Caroline Henriette Garnier, to enjoin the appellant, Tekla Rossmann, from infringing a registered trade-mark, to restrain her from unfair trade, and for an accounting, and resulted in a decree as prayed.

November 1, 1910, Caroline Henriette Garnier registered in the Patent Office as a trade-mark for cordials the following:



She alleged in her statement that she was a citizen of France residing at Enghien-les-Bains, France, and the trade-mark had been used in her business and that of her predecessor, Andre Georges Garnier, since on or about the 1st day of August, 1872. She alleged in her declaration that said trade-mark had been registered in France and that the same had been in actual use as a trade-mark of the appellant and her predecessor from whom title was derived for ten years next preceding the passage of the act of February 20, 1905, and to the best of her knowledge and belief

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

such use had been exclusive. In her bill of complaint Mrs. Garnier says that defendant Tekla Rossmann is engaged in selling a cordial under the name "Abricotine" upon which the complainant claims a trademark in commerce between the several states.

The appellant first denies that the court had any jurisdiction of this suit except under the trade-mark law because it is not shown that the complainant is a citizen of France.

In the view taken by the court it is sufficient to say that all the matters which will be passed upon arise under the trade-mark law, and it is therefore unnecessary to consider this question.

[1] The federal court has jurisdiction of all matters arising under the trade-mark statute even though both parties be citizens of the same state. Elgin National Watch Co. v. Illinois Watch Case Co., 179 U. S. 665, 21 Sup. Ct. 270, 45 L. Ed. 365.

[2] The defendant claims the entire trade-mark law of 1905, 33 Stats. 724, is unconstitutional, and inferentially the same contention is made as to the act of 1881, 21 Stats. 502, and of 1882, 22 Stats. 298.

The first trade-mark legislation passed by Congress was in 1870, chapter 230 of the Laws of the Forty-First Congress, and is found in 16 Stats. 198. That was entitled "An act to revise, consolidate, and amend the statutes relating to patents and copyrights."

Sections 77 to 84 of this act referred exclusively to trade-marks. There was nothing in the act to refute the presumption quite apparent from its title that it was enacted by Congress in the supposed exercise of its powers under the eighth clause of the eighth section of the first article of the Constitution.

"Sec. 8. The Congress shall have power: * * * To promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."

In 1876, 19 Stats. 141, Congress passed an act to punish the counterfeiting of trade-mark goods and the selling or dealing in such goods. This act was for the further security or protection of trade-mark holders under the act of 1870.

In the Trade-Mark Cases, 100 U. S. 82, 25 L. Ed. 550, the Supreme Court held that no power to pass trade-mark legislation was conferred by the provision of the Constitution quoted and that, as the laws of 1870 and 1876 made no distinction between trade-marks used in intrastate commerce and those used in foreign commerce, interstate commerce, and commerce with the Indian tribes, both of said acts were necessarily void. This decision was rendered in October, 1879, and it was in conformity with what was supposed to have been laid down by the Supreme Court in those cases that all the subsequent legislation upon the subject has been enacted. It is probably true that the constitutionality of the more recent legislation has never been expressly passed upon by the Supreme Court of the United States, but that legislation has now stood for more than 30 years. It has been enforced by the United States Supreme Court and all the other courts of the United States, and we see no reason to suppose the law is not sustainable under clause 3 of section 8 of article 1 of the Constitution:

"The Congress shall have power: * * * To regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

In the Trade-Mark Cases, supra, the Supreme Court said:

"Whether the trade-mark bears such a relation to commerce in general terms as to bring it within congressional control, when used or applied to the classes of commerce which fall within that control, is one which, in the present case, we propose to leave undecided."

And again:

"In what we have here said we wish to be understood as leaving untouched the whole question of the treaty-making power over trade-marks, and of the duty of Congress to pass any laws necessary to carry treaties into effect."

In Elgin National Watch Co. v. Illinois Watch Case Co., 179 U. S. 665, 673, 21 Sup. Ct. 270, 273 (45 L. Ed. 365), the Supreme Court said:

"The term (trade-mark) has been in use from a very early date, and, generally speaking, means a distinctive mark of authenticity, through which the products of particular manufacturers or the vendible commodities of particular merchants may be distinguished from those of others."

Surely if this be a correct definition of a trade-mark regulations for the registering and protection of them in connection with commerce, interstate or foreign, or with the Indian tribes, is legitimate legislation in connection with the regulation of such commerce. Surely if such marks are distinctive badges of authenticity it is as much a part of the regulation of interstate commerce to regulate them as are the branding features under the pure food law.

This court cannot therefore hold that such legislation is unconstitutional en bloc.

[3, 4] The act of 1905 contains the following provision:

"That nothing herein shall prevent the registration of any mark used by the applicant or his predecessors, or by those from whom title to the mark is derived, in commerce with foreign nations or among the several states, or with Indian tribes, which was in actual and exclusive use as a trade-mark of the applicant or his predecessors from whom he derived title for ten years next preceding the passage of this act." 33 Stats. 726, § 5.

It is contended that at least this so-called ten-year clause is unconstitutional. It was held otherwise in Thaddeus Davids Co. v. Davids et al., 178 Fed. 801, 102 C. C. A. 249; Id. (C. C.) 190 Fed. 285; Id., 192 Fed. 915, 114 C. C. A 355; Coca-Cola Co. v. Deacon Brown Bottling Co. et al. (D. C.) 200 Fed. 105; Coca-Cola Co. v. Nashville Syrup Co. (D. C.) 200 Fed. 153, 157; Hughes et al. v. Alfred H. Smith Co. (D. C.) 205 Fed. 302; In re Cahn, Belt & Co., 27 App. D. C. 173.

The last case presents a question of construction but not one of constitutionality.

It is apparent that a technical trade-mark is entitled to registration without reference to the ten-year clause, and, if none but technical trade-marks are entitled to be registered under it, then it might as well have been omitted.

It will be observed that section 5 provides that any mark, not trade-mark, which was in actual and exclusive use as a trade-mark for ten years before the passage of the act, may be registered. This contemplates that any mark which was not a technical trade-mark, but which had been actually and exclusively used by the applicant or his predecessor for the required time could be registered as a trade-mark. This

being true, there was no reason why the complainant could not register the word "Abricotine" under the ten-year clause, even assuming it was a descriptive word, if she and her predecessors had used it exclusively for the ten-year period as a trade-mark. Section 16 of the act of 1905 provides that the registration of a trade-mark under the provisions of this act shall be prima facie evidence of ownership. The application having been made under the ten-year clause, and there being no evidence tending to negative the prima facie case made under section 16, the court finds that complainant owned the trade-mark under the ten-year clause, and this entirely aside from the question as to whether Abricotine was the proper subject of a trade-mark aside from the ten-year clause.

[5] It is insisted that the trade-mark registered was the tabret or shield and the initials which appeared thereon and the facsimile of the signature of "P. Garnier" or else was of the entire inscription, and that defendant had the right to use the word "Abricotine" taken from said trade-mark.

This seems to have been fully answered in Saxlehner v. Eisner & Mendelson Co., 179 U. S. 19, 21 Sup. Ct. 7, 45 L. Ed. 60, where it is said:

"It is not necessary to constitute an infringement that every word of a trade-mark should be appropriated. It is sufficient that enough be taken to deceive the public in the purchase of a protected article. * * * The reports are full of cases where bills have been sustained for the infringement of one of several words of a trade-mark."

In that case it was held that a trade-mark upon bitter waters of "Hunyadi Janos" was infringed by the use of the words "Hunyadi Matyas" on similar waters.

The defendant contends there is no evidence that she has sold the cordial in question except locally in Missouri. She ignores the fact that she filed the following in the trial court:

"And for answer to the interrogatory numbered 1 contained in said bill of complaint this defendant says that she has never sold or caused to be sold any cordials or liquor or goods of similar descriptive properties under the trade-mark Abricotine; but that she has sold such goods bearing a label having the word Abricotine thereon as a descriptive word in association with other matter as hereinbefore stated and that such goods have been sold in commerce between the several states of the United States since the 1st day of November, 1910."

The appellee seems to place some reliance on the fact that she claims to be a citizen of France and, as we understand it, claims certain rights under the trade-mark convention proclaimed July 6, 1869; but owing to doubt as to the sufficiency of the evidence to show her citizenship of France, to the absence of proof of compliance with the terms of that convention, and doubts as to the effect upon such convention of the provisions of the act of 1905, we leave all questions as to whether she has any rights under said convention undisposed of.

[6] The court below not only granted an injunction as prayed, but granted an accounting.

Section 28 of the act of 1905, 33 Stats. 730, is as follows:

"Sec. 28. That it shall be the duty of the registrant to give notice to the public that a trade-mark is registered, either by affixing thereon the words

'Registered in U. S. Patent Office,' or abbreviated thus, 'Reg. U. S. Pat. Off.,' or when, from the character or size of the trade-mark, or from its manner of attachment to the article to which it is appropriated, this cannot be done, then by affixing a label containing a like notice to the package or receptacle wherein the article or articles are inclosed; and in any suit for infringement by a party failing so to give notice of registration no damages shall be recovered, except on proof that the defendant was duly notified of infringement, and continued the same after such notice."

It does not appear that in the use of the trade-mark the appellee ever complied with the requirement that she give notice to the public by affixing thereto the words "Registered in U. S. Patent Office," or "Reg. U. S. Pat. Off.," nor on a separate label, nor is there any evidence that any notice was ever given appellee of the infringement.

It follows that no damages can be recovered and no use would be subserved by an accounting.

The writer fully concurs in the separate opinion of VAN VALKENBURGH, District Judge.

The decree of the District Court is therefore affirmed as to all but the awarding of an accounting, but the case is remanded, with directions to the court to set aside so much of the decree as grants such an accounting.

VAN VALKENBURGH, District Judge (concurring). Counsel for appellant in their brief raise the following points:

1. The certificates of trade-mark are invalid and inoperative as evidence in this cause: (a) Because the trade-mark act of February 20, 1905, is unconstitutional and inoperative; (b) because said act limits infringements to such as occur in interstate commerce.

2. Said certificates of registration do not purport to protect the use of the word "Abricotine," but only the signature and initials on the shield.

3. Use in interstate commerce was not shown, and the jurisdiction therefore failed.

4. The word "Abricotine" is descriptive and incapable and adoption as a trade-mark.

5. The court erred in awarding an accounting of profits.

It is doubtful whether the assignments of error are broader than this; but, if so, such as are not included within the points relied on in the brief may be treated as abandoned. In the argument, beginning on page 5 of appellant's brief, the contentions are still further limited. It is evident that appellant elected to stand upon, first, unconstitutionality of the 10-year clause; second, failure of proof as to use in interstate commerce; third, the failure of the certificates to protect the word "Abricotine" apart from the signature, initials, and shield; fourth, the award of accounting.

We hold the act of 1905 to be constitutional. The mark was regularly registered under that act; this makes a prima facie case of ownership in appellee. Under that act the declarant is not limited to marks which are confessedly the subject of technical trade-mark; but terms not otherwise admissible as such are protected, provided the ten-year exclusive use of the mark is shown. This showing was made in the pre-

scribed manner to the Patent Office. It was accepted, and the certificate issued; this makes a prima facie case of ownership which it was incumbent upon appellant to overcome by satisfactory proof. Appellant has elected to stand upon the legal propositions urged. She made no attack by evidence upon the validity of certificate or mark.

When we uphold the act of 1905, many of the vexatious questions presented are removed. In the record it is conceded that the infringement occurred in interstate commerce. Registration under the act of 1905 established in appellee the ownership of a trade-mark, which stands for construction as any technical statutory mark. In Saxlehner v. Eisner & Mendelson Co., 179 U. S. 19–33, 21 Sup. Ct. 7, 45 L. Ed. 60, it was established that it is not necessary to constitute an infringement that every word of a trade-mark should be appropriated. It is sufficient that enough be taken to deceive the public in the purchase of a protected article. As this record stands, it would appear that the word "Abricotine" was an essential and vital part of the mark. This disposes of all the contentions of appellant except that respecting the accounting, and this point we have resolved in her favor.

[7, 8] I say this disposes of all the contentions of appellant, unless we may still consider whether the word "Abricotine" is a word in general use and merely descriptive of apricot cordial. As I have said before, I do not think we can do so upon this record in the face of a valid registration under a valid act of Congress which gives to this mark the same legal effect as any other recognized technical mark. Some substantial showing, of which we can take cognizance, would be necessary to that end. Appellant should abide by the theory upon which she has elected to submit her case. There is in the record nothing which places before the court the part which the word "Abricotine" plays in the French language, nor the relation between that name and the cordial in French commerce; nor do we take judicial notice of such facts whatever they may be. As to uses and customs, we are confined to our own country. Michie's Encyclopedia of United States Supreme Court Reports, vol. 7, p. 676; Dainese v. Hale, 91 U S. 13, 23 L. Ed. 190. The court is, of course, bound to take judicial notice of the ordinary meaning of all words in our own tongue (Michie, vol. 7, p. 680); and upon such a question dictionaries are admitted, not as evidence, but only as aids to the memory and understanding of the court (Nix v. Hedden, 149 U. S. 304–307, 13 Sup. Ct. 881, 37 L. Ed. 745). We have, judicially, neither memory nor understanding of the French language, and appellant has not seen fit to enlighten us by the record. We do take judicial notice of well-known facts in history such as political questions which go to form current history; well-known facts in legal history; certain recognized facts in economic history. But the question of use of a trade-mark, or trade-name, in foreign commerce is not history in this sense. Except in a very limited way and in matters of confessed notoriety, or involving universal experience, we do not permit presumed knowledge of such matters to control our decision in patent and trade-mark cases in our own country. Proof of use and the time and extent thereof are required; much less should we assume such knowledge affecting a foreign jurisdiction and a for-

eign language. The mere presence of the word "Abricotine" as applied to liqueurs in a French encyclopedia bearing a date subsequent to the beginning of the ten-year period, and more than twenty years later than the alleged original registration of complainant's French trade-mark, cannot be received as establishing a prior general use that would defeat complainant's claim. For aught that appears Garnier's product may have placed the term in the encyclopedia. As I have said, a prima facie case was made. The burden then shifted to defendant. She has elected to stand upon this meager record; and we are asked to try this case mainly by the French dictionary, in the absence of important and, perhaps, controlling concrete facts. Such a process is too abstract and incomplete for the determination of valuable property rights. C., B. & Q. R. Co. v. United States, 211 Fed. 12, 127 C. C. A. 438, decided at the September term of this court.

[9] In the view I take, then, I do not think we may here determine, as an independent proposition, whether the word "Abricotine" could be indulged as a technical trade-mark, nor whether appellee has enjoyed the exclusive use of that mark for the statutory period as she alleges. I freely concede, from the able and learned argument of the dissenting opinion, that those questions are debatable. I express no opinion respecting them, and do not think the court can do so in this case. This may be said, however, that if the appellee could and did obtain French trade-marks, as she swears she did in her affidavit for registration, then under article 6 of the treaty for the protection of industrial property of March 20, 1883 (25 Stat. 1376), to which both France and the United States were parties, she would be entitled to protection in this country, whether or not we would have allowed such a mark as an original proposition under our laws. However, as is pointed out in the majority opinion, it is doubtful whether her citizenship is sufficiently proved to enable her to avail herself of the benefits of this convention. I mention it to show that the probable equities are not all on one side in any view of the case. For the reasons stated, I am constrained to concur in Judge SMITH'S opinion.

HOOK, Circuit Judge (dissenting). This is a case of technical, statutory trade-mark, not of unfair competition. The trade labels of defendant are so unlike complainant's no one could be deceived. The sole resemblance is in the use of the word "Abricotine" as the name of the cordial or liqueur which both sell. In no other way is it claimed defendant trespasses. Complainant relies on two registrations of a trade-mark in the Patent Office, one November 6, 1906, the other November 1, 1910. The latter trade-mark is shown in the foregoing opinion to consist of a shield outline inclosing the initials "P. G.," the word "Abricotine," and the name "P. Garnier" in script. The former is precisely like it, except that it contains in addition the words, "Liqueur extraite du Fruit l'Abricot," facsimiles and descriptions of certain medals and the address, Enghien-les-Bains. Complainant evidently sought by each registration to avail herself of the provision of the act of February 20, 1905:

"That nothing herein shall prevent the registration of any mark * * * which was in actual and exclusive use as a trade-mark of the applicant or his

predecessors from whom he derived title for ten years next preceding the passage of this act." 33 Stat. 725, § 5.

The first application for registration lacked averment of the ten years' actual and exclusive use and was probably deemed insufficient under the above provision, so in the second the actual use for the ten years was stated, and it was averred that to the best of the applicant's knowledge and belief the use was exclusive. Recitals in the application show that each related to the same trade designations previously used, yet they were different in that, as already observed, some features of the first were omitted from the second. This difference is not important in itself, but is referred to merely to give point to a suggestion to be made presently.

The statute limits our inquiry to the ten years preceding its passage. During that period "Abricotine" was in the French language the common name of the liqueur having the flavor of the apricot which was used in its manufacture. Abricot has for centuries been the French name of the fruit we call apricot, and the word "Abricotine" came in the well-known way of the growth and development of languages—the addition of the suffix "in" or "ine" to root words—just as quinine, glycerin, glycerine, acontine, and a host of others. The beaten path was followed in naming the antiseptic listerine after Sir Joseph Lister, though an arbitrary term was probably coined, since Lister was not the root name of an element in the product. The period of exclusive use required by the statute and claimed by complainant is from February 20, 1895, to February 20, 1905. I have said that during this period "Abricotine" was the well-known, established, specific name of the article which both parties sell. Complainant did not coin it; it was in the vocabulary and she gave it no new meaning or application. In volume 22, La Grande Encyclopedie, published in Paris, May 22, 1895–June 30, 1896, under the title "Liqueur" is given a recipe for making the liqueur Kümmel, following which, it is said:

"On peut fabriquer ainsi une foule de liqueurs, anisette, abricotine, menthe, raspail, marasquin" etc.

A person can make in this way a large number of liqueurs, anisette, abricotine and so on. This appeared right at the beginning of complainant's alleged ten-year period of exclusive use. It is assumed in the opinion of the court that Abricotine may be a descriptive term. But more than that, it was from the commencement the specific, substantive name of the commodity. Complainant did not even adapt an old word to a new use; she took a current verbal coin of France, just as we of this country would call a hoe a hoe or a spade a spade, and asks a monopoly of it in this country. But, it is said, we have no judicial knowledge of the French language and there was no sworn testimony on the subject. Of course, broadly speaking, a court will not assume judicial knowledge of a foreign language; but the information needed here is far short of that. All agree that a court may resort to dictionaries in its own language to inform its understanding, and that embraces many things of which it was wholly ignorant before. This conceded right extends to phrases taken from foreign tongues, as, for

example, "en bloc," which appears in one of the foregoing opinions. We use Latin quite freely, and if ignorant or dull of memory we inform ourselves or refresh our understanding like the pupils in the schools. If a foreign dictionary were translated into English, or if some English lexicographer gave the foreign synonyms of the names of articles of trade and commerce (abricot appears as the French for apricot in our unabridged lexicons), doubtless we could consult the publications without testimony as to their accuracy. The real test whether a court may inform itself of the meaning of a word, phrase, or sentence in another language without sworn witnesses should be whether there are ready, convenient means commonly employed in the other walks of life, and whether the information so gained would be indisputably beyond controversy. Those conditions existing, it would seem quite vain to require proof under oath. If complainant had been engaged in putting up tinned meats in Germany instead of liqueurs in France and had applied her arbitrary trade symbol to "Kalbfleisch," could it reasonably be said that a court could not learn the English meaning except through sworn witnesses? A large part of our population, including school children, would know it at once, and most of the others could quickly and accurately inform themselves.

There are two aspects in which this case may be viewed: First, that complainant registered the name "Abricotine" as her trade-mark; second, that she registered an assemblage of marks, names, etc., in which "Abricotine" appeared as the commodity to which the marks were applied. In the foregoing opinion the first is assumed, I think, inadvertently. The trade-mark claimed by the last registration is shown in the opinion to consist of the three things already mentioned and the name "Abricotine." In the statement and verified declaration for the registration the combination is referred to as a whole; the particular name abricotine is not mentioned at all. But if the claim be confined to the word alone, complainant must fail because as a fact there was no exclusive use for the ten-year period. It would be an effort to secure a monopoly of the common name by which an article is known in trade and commerce. It is inconceivable that Congress contemplated such a thing. Though liqueurs are a small and not widely known group of commodities, yet necessarily the same principles apply as to others; and it could as well be said that complainant might appropriate for her sole use such descriptive words and settled names as "Pure Lard," "Corn Meal," and "Sweet Potatoes." There would be no escape from this conclusion. If the name by which an article of nature or manufacture goes has become so established and common that it is set forth in a dictionary or national encyclopedia, can it be said that a private individual thereafter enjoyed the exclusive use of it? Such an appropriation, susceptible of perpetuation by renewal of registration, would be so contrary to public policy that Congress manifestly did not intend it. The registration gives but a prima facie private right which yields to the public right when judicially known.

I think it evident that complainant never registered "Abricotine" as a trade-mark except as it was a part of an assemblage or the common name of the article to which the real trade-mark was applied. There

was no proof of the exclusive use of the name for the ten years except the qualified averment in the declaration for registration and that related to the assemblage as an entirety. Upon this aspect my Brothers say a trade-mark should be regarded as a whole and may be infringed by the use of part. Saxlehner v. Eisner, 179 U. S. 19, 21 Sup. Ct. 7, 45 L. Ed. 60, is cited for the rule that "it is not necessary to constitute an infringement that every word of a trade-mark should be appropriated." But there is a qualification of this rule, one phase of which is expressly recognized in that case. The case related to Saxlehner's trade-mark "Hunyadi Janos" applied to the bitter waters of a well in Hungary. Defendant asserted the right to use the word "Hunyadi" alone, but the court denied it. It said the trade-name selected was "neither descriptive nor geographical but purely arbitrary and fanciful." Defendant also urged that, after Saxlehner adopted the name, the word "Hunyadi" had become a generic term descriptive of the waters of a large number of wells in that region. As to this the court said (179 U. S. page 33, 21 Sup. Ct. 12, 45 L. Ed. 60):

"Of course, if it had become such with the assent and acquiescence of Saxlehner, he could not thereafter assert his right to its exclusive use," but, as he apparently made every effort to stop its use, "it ought not be charged up against his claim that the word had become generic."

Therefore a word may be lost from a trade-mark if it becomes a generic or descriptive name with the owner's acquiescence. It is equally true that if a word is the recognized and established name of an article, and hence not by itself susceptible to appropriation as a trade-mark, it cannot be appropriated by joining with it separable arbitrary symbols and other designations. There can be no doubt of the application of this rule to a case under the ten-year clause of the act of 1905, where the word sought to be appropriated has been so established as the name of the article that in the very nature of things the claimant could not have had its exclusive use. Otherwise the circumstance that no one else had happened to use the entire combination of separable designations could be employed to protect each part separately. The ordinary names of commodities in daily use and words and expressions descriptive of their qualities and properties could be privately monopolized if they happened to have been exclusively used with particular arbitrary symbols and proper names for the ten years preceding February 20, 1905; and quite likely there are many such cases in this country. If complainant's first registration had been effective under the ten-year clause, then by such a construction no other person could lawfully describe his apricot cordial as "Liqueur extraite du Fruit l'Abricot," nor have expressed on his labels the English equivalent of that description. The consequences of such a doctrine would be quite extraordinary. The complainant's just rights would be conserved by treating the trade-mark as consisting of the shield, the contained initials, and the name "P. Garnier," and as applying to the liqueur abricotine. As so construed, the affidavit for registration might be true, and other persons, defendant for instance, would be free to call their product by its right name, provided they did not use complainant's marks or symbols.

LISMAN et al. v. KNICKERBOCKER TRUST CO. et al.

SAME v. UNITED STATES MORTGAGE & TRUST CO. et al. (two cases).

(Circuit Court of Appeals, Sixth Circuit. January 13, 1914.)

Nos. 2120, 2121, 2145.

1. APPEAL AND ERROR (§ 843*)—REVIEW—MOOT QUESTIONS.

When without fault of the appellee a situation has arisen by which the issues raised by an appeal have become moot, so making a decision by the appellate court thereon nugatory, that court need not, and ordinarily will not, make such decision, and the rule is not altered by the fact that questions of costs are involved. Upon the point whether questions presented are in fact moot, the court may satisfy itself, if necessary, by extrinsic evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3331–3341; Dec. Dig. § 843.*]

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

In construing a state statute a federal court is bound by a decision of the highest court of the state construing a prior statute on the same subject, which would logically and necessarily require a similar construction of the one under consideration.

[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; Converse v. Stewart, 118 C. C. A. 215.]

3. RAILROADS (§ 118*)—PURCHASE OF CONTROLLING INTEREST IN OTHER COMPANIES—MICHIGAN STATUTE.

Under Pub. Acts Mich. 1901, No. 30, which authorizes any railroad company to acquire by lease or purchase, by purchase of stock or otherwise as the parties may agree, the road of another company, said railroads not having the same terminal points and not being competing lines, one railroad company of the state may lawfully purchase a majority of the stock of another for the purpose of acquiring the control and management of its road, where it is not in competition with its own line.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 375; Dec. Dig. § 118.*]

4. RAILROADS (§ 168*)—MORTGAGE—VALIDITY OF BOND ISSUE.

A mortgage by a railroad company to secure bonds provided for an additional issue thereunder to a maximum amount to be used in the purchase or construction of extensions, branches, or spurs, etc., and such other purposes as the board of directors might deem calculated to increase the business and earning capacity of the property. *Held*, that such provision authorized the issuance of such bonds by the directors to be used in payment for a controlling interest in the stock of another company for the purpose of acquiring control of the line of such company and operating it in connection with its own.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 534, 535; Dec. Dig. § 168.*]

5. RAILROADS (§ 186*)—SUIT TO FORECLOSE MORTGAGE—INTERVENTION—DISCRETION OF COURT.

In a suit to foreclose a railroad mortgage, it is within the discretion of the court to refuse permission to a bondholder to intervene for the purpose

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

of raising collateral issues which would not otherwise be concluded by the foreclosure decree.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 615, 616; Dec. Dig. § 186.*]

Appeals from the Circuit Court of the United States for the Eastern District of Michigan; Henry M. Swan, Judge.

Suit by the Knickerbocker Trust Company against the Detroit, Toledo & Ironton Railroad Company. From two certain decrees and an order of confirmation entered on behalf of other interveners, Frederick J. Lisman and others appeal. Affirmed.

The Detroit, Toledo & Ironton Railroad Company, which is the successor of the Detroit Southern Railroad Company, was organized May 2, 1905, under the railroad laws of Michigan, the organization being effected through the investment brokerage firm of Hollins & Co. Its main line extended from Ironton, Ohio, which is on the southern line of that state, in a generally northerly direction through Dundee, Mich., to Detroit. It owned all of its main line except three small portions, over which it had trackage rights. On its organization it gave to the Knickerbocker Trust Company (hereafter called the Knickerbocker Company), as trustee, its so-called "consolidated mortgage," securing items for which bonds of unquestioned validity to the extent of $4,357,000 were immediately certified and issued. This mortgage also provided for the issue of further bonds to the extent of $8,252,000, to be used for the purchase or construction of extensions, branches, or spurs, the improvement of certain terminals, the construction of a bridge or bridges across the Ohio river, and "the acquisition of additional terminals, rolling stock and equipment, the construction of betterments and improvements, and such other purposes as the board of directors of the railway company may deem calculated to increase the business and earning capacity of the property." Soon after this reorganization the railroad company purchased, through the brokerage firm of Rudolph Kleybolte & Co., for $5,000,000, a considerable majority of both the preferred and common stock of the Ann Arbor Railroad Company, a corporation likewise organized under the Michigan Railroad Laws, its road extending from Toledo, Ohio, in a generally northwesterly direction, through Dundee, Mich., to Frankfort in that state. To secure this purchase price, as well as the additional sum of $500,000 obtained through Kleybolte & Co., the Detroit, Toledo & Ironton issued its so-called collateral trust notes, semiannual interest coupon bearing, maturing December 1, 1908, in the amount of $5,500,000, securing these notes by pledge and deposit of the Ann Arbor stock, together with $5,000,000 of bonds issued under the consolidated mortgage; this pledge being evidenced by a so-called collateral trust agreement between the Detroit, Toledo & Ironton Railroad Company and the United States Mortgage & Trust Company (hereafter called the United States Company), as trustee, which agreement contemplated the purchase of further amounts of Ann Arbor stock and the issue of collateral trust notes therefor. By a supplementary arrangement, the lien of the consolidated mortgage was made to extend to such equity in the pledged stock and bonds as might remain after the satisfaction of the collateral trust notes. Since this purchase the Detroit, Toledo & Ironton Railroad Company, through directors elected by virtue of such stock ownership, has operated and controlled the Ann Arbor road.

The meritorious questions presented by this record concern the legality of this Ann Arbor purchase and the validity of the $5,000,000 of consolidated bonds issued therefor. Underlying this consolidated mortgage were two mortgages, one on the middle or Ohio Southern Division, under which about $4,500,000 of bonds had been issued and were outstanding; the other, a new mortgage called "the general lien and divisional first mortgage," given by the Detroit, Toledo & Ironton Railroad Company to the New York Trust Company, as trustee, which constituted a second mortgage upon the Middle Divi-

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

sion and a first mortgage upon two other divisions. Under this latter mortgage $4,253,000 of bonds were issued and outstanding.

On February 1, 1908, the Knickerbocker Company filed its bill in the court below against the Detroit, Toledo & Ironton Railroad Company, for the foreclosure of the consolidated mortgage on account of nonpayment of semiannual interest, that day maturing upon the entire issue of $9,357,000; two receivers were immediately appointed, a third being later added upon the application of the so-called Ramsey Committee, which represented the holders of a considerable majority of the collateral trust notes. Later Courtney, a preferred stockholder in, and the Citizens' National Bank, of Springfield, Ohio, a creditor of, the Detroit, Toledo & Ironton Railroad Company, were allowed to intervene; their proceeding was consolidated with the foreclosure suit, and the receivership extended to railroad property alleged not to be embraced within the lien of the consolidated mortgage. In December following, the United States Company, under power of sale in the collateral trust agreement, gave notice of sale at public auction of the Ann Arbor stock and the $5,000,000 of consolidated mortgage bonds. The proposed sale having been temporarily enjoined in a proceeding instituted in the Supreme Court of New York by one Redmond, who assailed the validity of the Ann Arbor purchase and the $5,000,000 bond issue, the railroad receivers then filed their petition in the Consolidated Mortgage foreclosure suit, calling attention to the contest over the validity of the $5,000,000 bond issue and the proposed auction sale in New York, and asking that the court below, which had jurisdiction of the res and of the persons interested, determine the questions involved. Under this proceeding the proposed sale of the pledged stock and bonds was restrained until further order. The United States Company immediately obtained permission to intervene in the consolidated mortgage foreclosure suit, and filed therein a petition, setting up the conflicting claims concerning the validity of the Ann Arbor purchase and the issue of the mortgage bonds thereon, and praying that the trustee's title under the collateral trust agreement be determined, for permission to sell the pledged stocks under the power of sale in that agreement, for injunction and for general relief. The Ramsey Committee intervened and asked relief similar to that prayed by the United States Company. This petition of the trustee was immediately followed by the filing, in the consolidated mortgage foreclosure suit, of its dependent bill, asking substantially the same relief as in the petition mentioned. Appellants comprise: First, the members of the investment brokerage firm of F. J. Lisman & Co., who are owners of a considerable number of consolidated mortgage bonds disconnected with the Ann Arbor purchase and certain Detroit, Toledo & Ironton preferred stock; and, second, the members of the so-called King Committee, which represents holders of such preferred stock. Upon the filing of the receivers' petition appellants asked leave to intervene and file a cross-bill, making defendants thereto the Knickerbocker Company, the United States Company, Hollins & Co., and the Ramsey Committee. A few months later it filed in the consolidated mortgage foreclosure suit a further intervening petition and dependent bill, making defendants thereto (in addition to those named in the proposed cross-bill) the Detroit, Toledo & Ironton Railroad Company, the three railroad receivers, and the Ann Arbor Railroad Company.

In all these proceedings by appellants the invalidity of the Ann Arbor purchase and the consolidated mortgage bonds issued therefor was asserted; and in the later pleadings it was, among other things, further alleged, in substance, that the Ann Arbor purchase was in pursuance of a fraudulent scheme between the promoters of the reorganization, whereby Ann Arbor stock, which cost the promoters but $3,500,000, was sold, practically to themselves as directors, for $5,000,000; that the default on the collateral trust notes was brought about by collusion between Hollins & Co., the United States Company and the controlling power of the two railroad companies, in the interest of a contemplated reorganization; it being alleged that a large amount of Ann Arbor funds available for the payment of dividends on its stock, and which if paid would have prevented default, had been wrongfully loaned to Hollins & Co.; also that the certification by the Knickerbocker Company of the $5,000,000 consolidated mortgage bonds was unlawful. Appellants asked that

the collateral trust bond issue be declared invalid and not secured by the consolidated mortgage; that Hollins & Co. be required to pay into court the value of certain stocks and bonds of the Detroit, Toledo & Ironton Railroad Company, claimed to have been issued to that firm in connection with the reorganization, and for other relief unnecessary to be stated. No formal leave was given appellants to file either the cross-bill or the dependent bill, or to intervene in any of the proceedings connected with the foreclosure suits. Although not made defendants to the dependent bill of the United States Company, or to the intervening petition of that company or of the Ramsey Committee, appellants filed answers to both petitions and entered appearance in the other proceeding, motion being made to strike the appearance and answers from the files. The Ramsey Committee and Knickerbocker Company filed formal objections to appellants' first petition to intervene and for leave to file cross-bill. Upon the filing of appellants' dependent bill subpœna was issued and order made for the appearance of nonresident defendants; a similar order of appearance being made under the amendment to the former petition for intervention and cross-bill. Motions to set aside the order of appearance and to quash service were made by the United States Company and by the Ramsey Committee, with respect at least to the dependent bill. The Knickerbocker Company demurred to that bill. Neither this demurrer nor either of the motions to which we have lately referred were, however, formally or specifically disposed of. Hollins & Co. seem never to have appeared generally, or even to have entered formal appearance, although they were recognized and heard by the court respecting certain of the proceedings.

In the order of reference to the master to take proofs upon the issues presented in the petition and dependent bill of the United States Company, in which the sale of the pledged collateral was asked, these issues, including the validity of the Ann Arbor purchase and the bonds issued thereon, appellants were "given an opportunity, if they so elect, to appear before said master to submit evidence and proofs and be heard upon the question of the validity of said securities and of the pledge thereof as special interveners for that purpose only; this order not to constitute them general interveners, or to entitle them to be heard or to offer proofs on other issues or proceedings in this cause or in said dependent cause," etc. Appellants unsuccessfully sought to have this order modified or set aside, because the complete issues presented by their proposed interventions and pleadings were not referred, and because of a fear that the limited appearance, if availed of, would (unless otherwise ordered) prejudice them in their rights to be heard upon such further issues. They declined to accept the opportunity so given, and offered no proofs before the master in regard to any question; but were heard by the court, both orally and by printed brief, in opposition to the validity of the securities and their pledge. A decree was accordingly made on September 27, 1910, under the dependent bill of the United States Company, adjudging the validity of the Ann Arbor purchase, of the consolidated mortgage bonds issued thereon, of the collateral trust note agreement, and of the supplemental collateral trust agreement, and directing master's sale of the pledged securities; and four days later decree was entered in the proceeding instituted in the consolidated mortgage foreclosure suit by the petitions of the receivers and the United States Company, respectively, adjudging the regularity and validity of all the proceedings and securities mentioned, and declaring all holders of the $5,000,000 of bonds issued on the Ann Arbor purchase entitled to share ratably with all other consolidated mortgage bondholders in the proceeds of the sale of the mortgaged properties. This latter decree contained no order of sale. Sale was had under the terms of the first-mentioned decree, and the pledged securities sold to the chairman of the Ramsey Committee, the Ann Arbor stock being struck off at $2,000,000, and the $5,000,000 of consolidated bonds at $500,000.

From these two decrees and the order confirming the report of sale the appeals here are taken. When taken, no decree or order of sale had been made in the Consolidated Mortgage foreclosure suit. The meritorious questions raised by the appeal from the order of confirmation and argued here, so far as they concern action since the decrees were rendered, relate to the re-

fusal to postpone the sale or its confirmation pending appeal from the order of sale, and, generally, to an alleged gross inadequacy of price brought by the sale. In connection with the hearing upon these three appeals, there was also heard the motion of the Knickerbocker Company, the United States Company, and the Ramsey Committee, to dismiss the appeals upon the ground that the questions raised thereby had become moot. It appears, by the undisputed showing in support of the motion, that since the decrees before us were rendered the entire Detroit, Toledo & Ironton Railroad property, with an exception hereafter stated, had been sold under foreclosures of the underlying mortgages, at prices barely sufficient to take care of the obligations and certificates of the receivers chargeable against the respective divisions, and the costs of foreclosure to date of sale, leaving nothing for distribution among the holders of the underlying bonds, and of course nothing for the consolidated mortgage bondholders. The exception stated is of 100 shares of stock of the Toledo Southern Railway Company and 1,014 shares of the preferred stock of the Ann Arbor Railroad Company, the combined value of both which stocks appears to be little, if anything, more than $50,000, which amount is shown to be insufficient to pay the trustee's fees and expenses and the costs of foreclosure of the consolidated mortgage, to say nothing of receivers' certificates, issued by order of court to the amount of $245,000.

Paskus, Cohen & Gordon, of New York City, and Doyle & Lewis, of Toledo, Ohio (John H. Doyle, of Toledo, Ohio, of counsel), for appellants.

Davies, Stone & Auerbach, of New York City (Charles E. Hotchkiss, of New York City, Leo M. Butzel, of Detroit, Mich., and Harold C. McCollom, of New York City, of counsel), for appellees Knickerbocker Trust Co. and others

Alexander L. Smith, of Toledo, Ohio, and F. Kingsbury Curtis and Irving M. Dittenhoefer, both of New York City, for appellees United States Mortgage & Trust Co. and another.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

KNAPPEN, Circuit Judge (after stating the facts as above). [1] The rule is well settled that an appellate court need not, and ordinarily will not, decide a question purely moot; that is to say, when, without the fault of the appellees, a situation has arisen by which the issues raised by the appeal have become dead, so making a decision by the appellate court thereon nugatory Upon the point whether the questions presented are in fact moot, the court may satisfy itself, if necessary, by extrinsic evidence. Mills v. Green, 159 U. S. 651, 16 Sup. Ct. 132, 40 L. Ed. 293; Jones v. Montague, 194 U. S. 147, 24 Sup. Ct. 611, 48 L. Ed. 913; Richardson v. McChesney, 218 U. S. 487, 31 Sup. Ct. 43, 54 L. Ed. 1121; Buck Stove, etc., Co. v. American Federation of Labor, 219 U. S. 581, 31 Sup. Ct. 472, 55 L. Ed. 345; Gompers v. Buck Stove, etc., Co., 221 U. S. 418, 451, 31 Sup. Ct. 492, 55 L. Ed. 797, 34 L. R. A. (N. S.) 874; Meyers v. Cheesman (C. C. A. 6) 174 Fed. 783, 785, 98 C. C. A. 491. The fact that questions of costs are involved does not alter the rule as to the dismissal of moot questions. Wingert v. First National Bank, 223 U. S. 670, 672, 32 Sup. Ct. 391, 56 L. Ed. 605. The appeal from the order confirming the master's report of sale of the stock and bonds pledged under the collateral trust agreement properly brings up for review only matters occurring since the decree appealed from. Every proceeding prior to those decrees may be reviewed, if at

all, only under the appeals therefrom, which are still pending and are now before us. Sage v. Railroad Co., 96 U. S. 712, 714, 24 L. Ed. 641. It is apparent that by the foreclosures of the underlying mortgages, for which appellees are not shown to be in any wise responsible, the criticisms upon the action of the court since the decrees were rendered have become moot. This is so because it is clear that a resale could not bring a sufficient price to leave anything applicable to appellants' securities under the supplementary lien of the consolidated mortgage. The value of the pledged bonds has been wiped out. If the Ann Arbor Railroad purchase was invalid, appellants are not concerned with the price brought on the trustee's sale of the Ann Arbor stock. If the Ann Arbor Railroad purchase is valid, appellants are not hurt by the low price brought or by the time of sale; for, although it may well be that the conditions imposed by the order of sale respecting the qualifications of bidders and the advantage given to some of the appellees, as well as the pending contest over the validity of the Ann Arbor purchase, would naturally tend to prevent substantial competition, and thus depress the sale price, yet there is no substantial evidence even tending to show that under the most favorable conditions possible the Ann Arbor stocks could be made to bring, either when sold or now, more than the $5,000,000 plus interest for which they were originally pledged, and so the appeal from the order of confirmation (No. 2145) should be dismissed.

The same considerations would naturally lead to a dismissal of the appeals from the two decrees, unless appellants' suggestion is well made that such dismissal, resulting in an adjudication of the meritorious questions of the validity of the Ann Arbor Railroad purchase and of the mortgage bonds issued therefor, might prejudice appellants in case of action against the Knickerbocker Company for unlawfully certifying bonds issued on account of the Ann Arbor purchase, or against certain others of the appellees on account of alleged misconduct connected with such railroad purchase or the defaults under the consolidated mortgage and the collateral trust agreement. We are not prepared to say that such dismissal might not have the effect stated; and so, without deciding that question, and without indicating an opinion whether or not the record tends to disclose basis for such suggested actions, we proceed to consider the meritorious questions last stated.

[3] In approaching this question we must assume that the purchase of the stock of the Ann Arbor Railroad was intended as a means of obtaining the control, operation, and practical ownership of that road, so far as such railroad ownership can result from ownership of a substantial majority of its stock, and the consequent ability to direct the railroad's affairs. Such is affirmatively shown to have been the intent of both parties to the purchase and sale, and such was the immediate and continued effect of the purchase. We, therefore, need not consider questions relating to mere stock purchase, not made and intended as a means of railroad purchase, control, and operation. In the absence of charter or other statutory provision therefor, the purchase in question would not be valid. Penn. Co. v. St. Louis, Alton Elec. R. Co., 118 U. S. 290, 309, 6 Sup. Ct. 1094, 30 L. Ed. 83. The

authority for the purchase relied upon by appellees is Act No. 30 of the Public Acts of Michigan of 1901 (page 50), which we cite in the margin.[1] The Supreme Court of Michigan has not construed this particular statute. That court has, however, in the case of Dewey v. Toledo, A. A. & N. M. Ry. Co., 91 Mich. 351, 51 N. W. 1063, construed the earlier statute of 1873 (How. Stat. § 3403, 2 Comp. Laws Mich. 1897, § 6328), relating to the same general subject-matter. The earlier statute, the first section of which we also cite in the margin,[2] provided

[1] "(No. 30.) An act to authorize any railroad company now organized or that may hereafter be organized under the laws of this state, to sell, lease and convey its property and franchises to any other railroad company, whether organized within or without this state; and to acquire by lease or purchase from the owner of any other railroad such road or any part or portion thereof, whether located within or without this state, together with the rights and franchises connected therewith; and to provide for securing payment therefor; and to repeal act number one hundred two of the session laws of eighteen hundred ninety-three.

"The People of the State of Michigan enact: Section 1. It shall be lawful for any railroad company organized, or that may be organized, under the laws of this state, to sell, lease and convey its road, together with the rights and franchises connected therewith, or any part or portion thereof, to any other railroad company, whether organized within or without this state; and to acquire by lease or purchase from the owner of any other railroad such road, together with the rights and franchises connected therewith, or any part or portion thereof, whether located within or without this state; and for the railroad company so purchasing or leasing to acquire and use such road rights and franchises by purchase of the stock, or otherwise, as may be agreed between the parties interested, said railroads not having the same terminal points, and not being competing lines: Provided, that the stockholders owning a majority of the stock of said companies shall consent thereto: And provided further, that the company so purchasing or leasing shall hold and operate such road and said property and franchises subject to all the duties and obligations and with all the rights and privileges prescribed by the general railroad laws of this state.

"Sec. 2. The railroad company purchasing or leasing by virtue of this act may issue its bonds, secured by trust deed or mortgage, upon its property, rights and franchises, including the property and rights thus acquired, to make payment therefor; and such trust deed or mortgage shall have the effect of a purchase-money security: Provided, that nothing herein contained shall prejudice the rights of pre-existing creditors of the corporation from which such property and rights are purchased or leased.

"Sec. 3. Act number one hundred and two of the session laws of eighteen hundred ninety-three and all acts and parts of acts in anywise contravening the provisions of this act are hereby repealed.

"This act is ordered to take immediate effect. Approved March 28, 1901."

[2] "(6328) Section 1. The People of the State of Michigan enact, that it shall be lawful for any railroad company in this state which shall have entered, in good faith, upon the work of constructing its road, and shall have become unable to complete the construction of the same or any part thereof, to sell, and convey the whole or any part of its road so partially completed, together with the rights and franchises connected therewith, to any other railroad company or corporation of this state not having the same terminal points and not being a competing line: Provided, that at any general or special meeting duly called for that purpose the stockholders carrying [owning] two-thirds of the stock of said company shall consent thereto: And provided further, that the company or corporation so purchasing shall hold such property and franchises, subject to all the obligations and duties, and with all the rights and privileges prescribed by the general railroad law of this state."

for the sale of the property and franchises of railroad companies, but limited the provision to uncompleted roads.

[2] The Dewey Case was a suit upon a note given for the purchase of the controlling stock of another railroad company. It was there expressly held that the sale of the stock of this other road to the Toledo, Ann Arbor & Grand Trunk Railway Company (the predecessor of the defendant in that case and of the present Ann Arbor Railroad) was authorized by the statute of 1873 (Laws 1873, No. 190). If the case before us involved the construction of the statute of 1873 we should be bound to accept the construction placed upon it by the Michigan Supreme Court, even though similar statutes of other states may have been differently construed by the highest courts of those states. Maiorano v. B. & O. R. R. Co., 213 U. S. 268, 29 Sup. Ct. 424, 53 L. Ed. 792; Audas v. Highland Land & Bldg. Co. (C. C. A. 6th Cir.) 205 Fed. 862, 863, and cases there cited. It is true that the statute of 1873 is not before us, but if it is clear that the construction placed upon that statute would logically and necessarily involve a similar construction of the statute of 1901, we should equally feel bound by the construction of the earlier statute adopted by the highest court of that state. Such is the rule respecting the construction of constitutional provisions (O'Brien v. Wheelock [C. C. A. 7th Cir.] 95 Fed. 883, 905, 37 C. C. A. 309, opinion by Mr. Justice Harlan; Gt. Southern Hotel Co. v. Jones, 193 U. S. 532, 547, 24 Sup. Ct. 576, 48 L. Ed. 778); and we think it equally applies to statutory construction. The statute of 1901 much more naturally suggests the legislative intent attributed in the Dewey Case to the 1873 statute than did that earlier statute. The statute of 1873 applied only to uncompleted roads, the later statute contains no such limitation, but extends to "any railroad company that may be organized"; the earlier statute made no provision for stock purchase, the later statute expressly provides for acquisition and use of the road, its rights and franchises "by purchase of the stock, or otherwise, as may be agreed upon by the parties interested"; the statute of 1873 required the consent of two-thirds of the stockholders of the selling road "at any general or special meeting duly called for that purpose"; the act of 1901 provides only that "the stockholders owning a majority of the stock of said companies shall consent thereto." We entertain no reasonable doubt that the Supreme Court of Michigan would construe the statute of 1901 fully as liberally as it construed the act of 1873. It is true that the action in the Dewey Case was against the maker of the purchase price note, and that the court gave, as an additional reason for its affirmance of the judgment below, that the contract had been completely executed, and so the defense of ultra vires was not available. But while it is true that a state decision, in order to be binding upon the federal courts, must be "based alone upon the statute construed" (Adelbert College v. Wabash R. R. Co. [C. C. A. 6th Cir.] 171 Fed. 805, 96 C. C. A. 465, 17 Ann. Cas. 1204, and cases there cited), we know of no rule which denies conclusive effect to an express and definite construction of a state statute, from the mere fact that an additional and wholly independent reason was given for sustaining the judgment under review. Moreover, the construc-

tion of the statute of 1873 was the utterance of the highest court of the state concerning the public policy of the state as declared by that statute; and we do not feel at liberty to disregard that construction. See Union Ry. Co. v. Illinois Central R. R. Co. (C. C. A. 6th Cir.) 207 Fed. 745, 750; also Zacher v. Fidelity Trust, etc., Co. (C. C. A. 6th Cir.) 106 Fed. 593, 599, 45 C. C. A. 480.

But were the rule respecting the decision of the state court otherwise than we have stated, the passage by the Legislature of the more explicit act of 1901, nine years after the decision of the Dewey Case, and presumably with knowledge of that decision, is compelling evidence of the legislative intent that the pertinent provisions of the later statute should be similarly construed; and it is common knowledge that more than one important railroad in Michigan has for many years been controlled through stock ownership by another railroad, and without apparent objection by the state authorities. We see no merit in the contentions that the statute authorizes such stock ownership only in aid of a prior acquisition of the physical property of the road, or that it imperatively requires either ownership of the entire stock or corporate action on the part of the selling company.

We may add that we think the title of the act of 1901 broad enough to sustain the construction we have put upon it. The two railroads are apparently within the purview of the statute of 1901. They have not the same terminal points, the southern terminus of the Detroit, Toledo & Ironton being on the Ohio river, its northern at Detroit, on the eastern shore of Michigan; the southern terminus of the Ann Arbor is at Toledo, its northern on the western shore of Michigan. The Detroit, Toledo & Ironton crosses the state line about 30 miles west of Toledo, taking a circuit of about 50 miles to reach Dundee (which is 30 miles or so north of Toledo), from which crossing the two roads run nearly at right angles to each other. The fact that the Detroit, Toledo & Ironton holds the portion of its line from Tecumseh to Dundee by terminable lease is not controlling. They are not in a proper sense competing roads; through the railroad connection at Dundee and the Ann Arbor ferry system at Frankfort a continuous line is formed between the Ohio river and the territory of the upper Great Lakes, a distance of over 600 miles, thus joining the south-bound transportation of northern iron ore with the north-bound carriage of southern coal. The only portions of the two roads permitting even a semblance of local competition is the part of the Ann Arbor between Toledo and Dundee and the portion of the Detroit, Toledo & Ironton between that place and the Michigan-Ohio line. But Dundee is not a terminal, it is a junction; and, in view of the network of railroads in the space inclosed by these portions of the two roads in question, connecting with both Toledo and Detroit, this competition would seem practically negligible. Such portions become in fact, as related to the main or through line, merely locals or branches. L. & N. Ry. Co. v. Kentucky, 161 U. S. at page 687, and following, 16 Sup. Ct. 714, 40 L. Ed. 849.

It is urged that this railroad purchase contravenes section 2 of article 19a of the Constitution of 1850, then in force, which requires at least 60 days notice of proposed railroad consolidation to be given to

all stockholders. The roads were never in fact consolidated, and there is nothing in the record action which indicates an intention to consolidate.

We conclude that the Ann Arbor purchase was authorized by the Michigan statute. We see nothing opposed to this conclusion in Mackintosh v. Flint & Pere Marquette R. R. Co. (C. C.) 34 Fed. 582, decided previous to the enactment of any Michigan statute providing for the purchase by one railroad of the completed road of another company.

The Ann Arbor purchase being authorized, the Detroit, Toledo & Ironton obviously had power to issue its mortgage bonds therefor, the statute giving the purchasing railroad express authority to—

"issue its bonds, secured by trust deed or mortgage, upon its railroad property, rights and franchises, including the property and rights thus acquired."

Such was precisely the course taken. The issuing, as a convenient method of financing, of collateral trust notes secured by the mortgage bonds and the purchased stock was not a departure from the statutory permission.

[4] Were the bonds in question properly securable under the consolidated trust mortgage? That instrument provided for issuing, to the maximum of $8,232,000, mortgage bonds, whose proceeds should be used—

"only for or in aid of the purchase or construction of extensions, branches or spurs, to the existing system of the railway company, the improvement of the terminals at Toledo or elsewhere upon the lines of the railway company, the construction of a bridge or bridges across the Ohio river * * * the construction of * * * extensions in the state of Kentucky or West Virginia or both * * * the acquisition of additional terminals * * * and such other purposes as the board of directors of the railway company may deem calculated permanently to increase the business and earning capacity of the property."

There is here no express authority for issuing bonds to pay for the purchase of railroad stocks; but if we have correctly interpreted the Ann Arbor purchase as one of a railroad property, for operation as such, the issue of the consolidated mortgage bonds would seem to be included in the broad terms "such other purposes as the board of directors of the railway company may deem calculated permanently to increase the business and earning capacity of the property," unless forbidden (as appellants contend) by the rule of ejusdem generis, on the ground that the Ann Arbor purchase is not of the same class as those which had previously been specifically enumerated. But assuming, as we must, that the Ann Arbor purchase was a railroad purchase, for purposes of railway operation, and that the railway directors did in fact, as shown by their resolution, deem such purchase "calculated permanently to increase the business and earning capacity of the property," such purchase would seem to be of the same broad general class as extensions to the existing system, improvement and acquisition of terminals, construction of bridges across the Ohio river (which would be an extension), or extensions in Kentucky and West Virginia. In our opinion, the issuing of the mortgage bonds in question was fairly authorized by the mortgage. These views as to the validity of the mort-

gage bonds relieve us from considering many interesting questions discussed by both parties.

In reaching the conclusion that the bonds issued upon the Ann Arbor purchase were validly secured by the consolidated mortgage, we of course have not considered the charge of alleged fraud as affecting the validity of the Ann Arbor purchase, because no satisfactory proof thereof has been made. Nor can appellants be heard to complain that the court below made its decision in the absence of such testimony, because appellants declined the permission given to present such proof as might be desired touching the invalidity of the bond issue as secured by the Consolidated Mortgage; and this permission was not limited to the presentation of the questions of law arising out of the statute, the mortgage and record action, individually or corporate, but must be held to have extended to all testimony, oral or otherwise, tending to establish the invalidity of the bond issue.

[5] We think also that the court was not bound to permit appellants, as a matter of right, to intervene generally for the purpose of trying out the question of liability of Hollins & Co. to account for railroad stocks acquired in connection with the reorganization, or the liability of that firm or others for profits on the Ann Arbor purchase, or for damages on account of defaults suffered under the mortgage and collateral trust agreement. These issues were collateral to the foreclosure suits, and were not concluded by the decrees made. The court was vested with a certain amount of discretion in determining whether to permit intervention for the purposes stated; this discretion does not appear to have been improvidently exercised, and no appeal lies from the action complained of. Credits Commutation Co. v. United States, 177 U. S. 311, 314, 20 Sup. Ct. 636, 44 L. Ed. 782; Toledo, St. L. & K. C. R. R. Co. v. Continental Trust Co. (C. C. A. 6th Cir.) 95 Fed. 497, 535, 36 C. C. A. 155. So far as concerns the effect of the alleged collusive defaults upon the right to decree of foreclosure and sale, it is apparent that when the decree was made the time had actually come, rightly or wrongly, when the sale should be no longer delayed. Indeed questions relating to the time of sale and restrictions upon bidding (as well as the practical application of the damages claimed from Hollins & Co. against the value of their Detroit, Toledo & Ironton bonds and stock) have become moot, so far as this present litigation is concerned, through the foreclosure of the underlying mortgages; and it cannot rightfully be claimed that the court's refusal to permit appellants to intervene, or its delay in rejecting their persistent efforts to that end, are responsible for their failure to realize on their securities.

The decrees in Nos. 2120 and 2121 are accordingly affirmed, with costs. The appeal from the order of confirmation in No. 2145 is dismissed.

TRIPP v. MITSCHRICH.

(Circuit Court of Appeals, Eighth Circuit. January 26, 1914.)

No. 3982.

(Syllabus by the Court.)

1. BANKRUPTCY (§ 170*)—RE-EXAMINATION OF ATTORNEY'S FEE—ISSUES.
In a proceeding by a trustee in bankruptcy against an attorney for a re-examination of the latter's fee, prosecuted under section 60d of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3446]), the question in limine is whether the debtor, in making the transfer to the attorney, was acting in contemplation of the filing of a bankruptcy petition by or against him.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 267, 271; Dec. Dig. § 170.*]

2. BANKRUPTCY (§ 288*) — RE-EXAMINATION OF ATTORNEY'S FEE — SUMMARY PROCEEDINGS—JURISDICTION.
If the contract with the attorney was not made by the debtor in contemplation of bankruptcy proceedings, the case is not within section 60d of the Bankruptcy Act of July 1, 1898, c. 541, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3446), and there is no jurisdiction to proceed summarily.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 447; Dec. Dig. § 288.*]

3. BANKRUPTCY (§ 288*)—RE-EXAMINATION OF ATTORNEY'S FEE—JURISDICTION.
If made in contemplation of such proceedings, the bankruptcy court is by section 60d of the Bankruptcy Act of July 1, 1898, c. 541, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3446), authorized to proceed summarily, but upon due notice, to determine to what extent, if any, the fee is excessive or, indeed, allowable at all.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 447; Dec. Dig. § 288.*]

4. BANKRUPTCY (§ 170*)—RE-EXAMINATION OF ATTORNEY'S FEE—"IN CONTEMPLATION OF THE FILING OF A PETITION BY OR AGAINST HIM."
The words "in contemplation of the filing of a petition by or against him" do not mean simply the consciousness by the debtor of a financial condition enabling him to file, or subjecting him to, such a petition, but such must have been of influence in the transfer of property or money which is being questioned under this section. There must be some relation, of cause and effect, between the knowledge of his condition and the transaction with the attorney.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 267, 271; Dec. Dig. § 170.*]

5. BANKRUPTCY (§ 170*) — RE-EXAMINATION OF ATTORNEY'S FEE — MATTERS CONSIDERED.
Whether, in making the transfer to the attorney, a purpose germane to the question of bankruptcy proceedings existed is to be ascertained either by direct testimony as to what the debtor said in making the transfer, or, in the absence of these, by the circumstances surrounding the transfer and, among other circumstances, the character of the services contracted for.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 267, 271; Dec. Dig. § 170.*]

6. BANKRUPTCY (§ 170*)—RE-EXAMINATION OF ATTORNEY'S FEE—NATURE OF ATTORNEY'S SERVICES.
If the case turn upon the latter, the service must be of a kind relevant to the matter of bankruptcy, not one which would be necessary and proper

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

in the ordinary course of business, whether bankruptcy was to supervene or not.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 267, 271; Dec. Dig. § 170.*]

7. BANKRUPTCY (§ 170*)—RE-EXAMINATION OF ATTORNEY'S FEE—CONTRACT IN CONTEMPLATION OF BANKRUPTCY.

A contract by the debtor, three days after a fire, with an attorney to collect insurance policies held on a stock of goods destroyed and upon which liability was being questioned by the insurance companies, is a proceeding in the usual course of business having no necessary relationship to bankruptcy, and such a contract cannot of itself justify the conclusion that it was made in contemplation of the filing of a bankruptcy petition either by or against the debtor.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 267, 271; Dec. Dig. § 170.*]

8. BANKRUPTCY (§ 170*)—RE-EXAMINATION OF ATTORNEY'S FEE—CONTRACT IN CONTEMPLATION OF BANKRUPTCY.

The additional fact that five days after the transfer certain creditors filed proceedings in bankruptcy against the debtor does not of itself raise the presumption that the debtor in making the transfer, was acting in contemplation of bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 267, 271; Dec. Dig. § 170.*]

Appeal from the District Court of the United States for the Western District of Oklahoma; John H. Cotteral, Judge.

Petition by Harry F. Tripp, trustee in bankruptcy for the estate of S. C. English, bankrupt, praying a re-examination of a fee received by Charles Mitschrich. The court reversed the action of the referee, holding that he had jurisdiction and that the fee was excessive, and the trustee appeals. Affirmed.

C. H. Nicholas and R. A. Lyle, both of Oklahoma City, Okl., R. L. Spencer and John C. Landis, Jr., both of St. Joseph, Mo., and L. M. Gensman, of Lawton, Okl., for appellant.

Charles Mitschrich, of Lawton, Okl., pro se, and Ames, Chambers, Lowe & Richardson, of Oklahoma City, Okl., for appellee.

Before SANBORN and SMITH, Circuit Judges, and POPE, District Judge.

POPE, District Judge. One S. C. English was a merchant at Lawton, Okl. On December 20, 1910, his stock of merchandise was destroyed by fire. On December 23, 1910, he entered into a written contract with the appellee, Mitschrich, an attorney at law, to represent him in collecting the fire insurance on the destroyed stock. This insurance aggregated between $16,000 and $20,000, distributed among some eight companies. The contract allowed the attorney 30 per cent. of the amount collected if without suit and 50 per cent. of all claims collected by suit, and gave a lien upon the proceeds for the fee. The percentage allowed the appellee was within the limits prescribed by the Oklahoma statute regulating contingent fees.

On December 28, 1910, and thus five days after the making of this contract, certain creditors filed a petition in bankruptcy against Eng-

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

lish. This petition was demurred to by him, the demurrer sustained, an amended petition filed, and an adjudication against him finally made on this last petition on April 7, 1911. Meanwhile, and between January 20, 1911, and February 20, 1911, Mitschrich made settlement on behalf of English with various insurance companies retaining under his contract 30 per cent., amounting to $4,805.88, as compensation; the balance going to English. On September 22, 1911, the appellant, Tripp, who had been appointed trustee in bankruptcy, filed a petition before the referee setting forth that the fee received by Mitschrich was excessive and praying a re-examination of it by the referee under section 60d of the Bankruptcy Act. Mitschrich was served personally with a copy of this order and filed an answer objecting to the jurisdiction of the court to proceed in the matter and further setting up his contract with English under which he claimed a lien for the amount held by him. The answer asserts that at the time that he entered into the contract with English he had no knowledge of the financial condition of English and denied that the contract was in contemplation of bankruptcy or for services rendered or to be rendered in connection with such proceedings. The referee held that the matter was within his jurisdiction and that the fee, so far as it exceeded $1,600, was excessive. Thereupon, upon petition for review, the court reversed the action of the referee, holding that there was no jurisdiction and dismissing the petition without prejudice to a suit at law or in equity by the trustee against Mitschrich. From this the trustee has appealed.

[1-3] We are of opinion that, unless the case be within section 60d, the matter asserted by the trustee against the appellee constituted a controversy in which the latter was claiming adversely and in which he was entitled to have his rights tested by plenary proceedings. Such rights as he asserted were under an instrument purporting to give a lien. This antedated by some five days the filing of the bankruptcy proceeding and preceded the adjudication some three or four months. Neither the bankrupt nor his trustee ever had possession of the money in dispute. It passed direct from third parties, the insurance companies, to the attorney some months before the adjudication and the appointment of the trustee. The case was therefore one of an adverse claim and could not be reached summarily, save by virtue of some special provision of statute. In re Rathman, 183 Fed. 913, 920, 106 C. C. A. 253. To this end section 60d is invoked by the trustee. It is as follows:

"If a debtor shall, directly or indirectly, in contemplation of the filing of a petition by or against him, pay money or transfer property to an attorney and counselor at law, solicitor in equity, or proctor in admiralty for services to be rendered, the transaction shall be re-examined by the court on petition of the trustee or any creditor and shall only be held valid to the extent of a reasonable amount to be determined by the court, and the excess may be recovered by the trustee for the benefit of the estate."

Since In re Wood & Henderson, 210 U. S. 246, 28 Sup. Ct. 621, 52 L. Ed. 1046, it is of course settled that this section justifies summary proceedings and a readjustment of the compensation of the attorney where the facts present a case within its terms. But that decision is specifically limited to cases where the debtor acts in contemplation of

bankruptcy. It is there said (210 U. S. 258, 28 Sup. Ct. 626, 52 L. Ed. 1046):

"This section in effect confers a special jurisdiction in a bankruptcy proceeding; it is only available when property has been transferred in contemplation of the filing of a petition in bankruptcy."

If English, therefore, in transferring property to Mitschrich was doing so in contemplation of a proceeding in bankruptcy, the case is within section 60d and remediable by summary proceedings, otherwise not. Thus the matter even at the threshold is one of fact. The referee held that what was done was in contemplation of a bankruptcy proceeding. The trial judge thought otherwise. Upon familiar principles of appellate procedure, unless this latter conclusion be found manifestly wrong upon the facts or clearly erroneous upon the law, the decision must be upheld.

[4] This involves a consideration of what is meant by the words "in contemplation of the filing of a petition by or against him," as used in section 60d, and, this being settled, there is the further consideration of whether the act of the bankrupt herein involved was in such contemplation.

The words "in contemplation of bankruptcy" refer to the state of mind of the debtor, not of the attorney. This results from an even casual reading of the section. But what is meant by contemplation? We are of opinion that as here used it means more than a simple consciousness of insolvency. As was said by Patteson, J., in Morgan v. Brundrett, 5 Barn. & Adolph. 297, cited in Jones v. Howland, 8 Metc. (Mass.) 377, 41 Am. Dec. 525: "A man may be insolvent and yet not contemplate bankruptcy." And in Buckingham v. McLean, 13 How. 151, 167 (14 L. Ed. 90): "He may contemplate insolvency and the breaking up of his business and yet not contemplate bankruptcy." Contemplation thus means more than the knowledge that a bankruptcy proceeding either by or against the debtor is impending. It means that in making the transfer the debtor is influenced by the possibility or imminence of such a proceeding. There must be some relation as of cause and effect between knowledge of his condition and the transfer. The latter must to some extent at least be attributable to his financial condition. This may be illustrated by gifts in contemplation of death. Such are not simply gifts made in light of the possibility that one may soon die. They are made because of a consciousness of this fact. In the case both of contemplation of death and in contemplation of bankruptcy proceedings, the possibility in each case must be upon the mind as an element leading to the result, to wit, the transfer. In a case under section 60d the debtor must of course be confronted with the possibility of a bankruptcy proceeding. But there must be more. There must be a transfer induced at least to some extent by such a situation. This is considered in Hayden v. Chemical National Bank, 84 Fed. 876, 28 C. C. A. 550. There, in dealing with the phrase "contemplation of insolvency," the court says:

"A bank or a business concern may be considered to be acting in contemplation of insolvency when, in making some disposition of its assets, it is actuated by its knowledge of its insolvency. * * * An act done by a corporation in

the ordinary and usual course of business, uninfluenced by the state of its affairs, cannot be said to have been done in contemplation of insolvency."

See, also, Jones v. Howland and Buckingham v. McLean, each cited supra.

[5] With this as the meaning of section 60d, there simply remains for determination in a given case whether this state of mind existed and actuated in the transfer involved. In ascertaining such, as in determining all human motive, we enter upon a domain where circumstances must usually be relied upon for enlightenment. True, the express statement of the party in making the transfer may afford direct evidence of the actuating thought. But more ordinarily this is to be ascertained from the surrounding circumstances. Or in still other cases it is to be determined by reasoning back from what he did to what he must have had in mind in so doing.

[6] It is in this latter aspect that the nature of the services to be rendered by the attorney under section 60 (a matter considerably treated in the authorities) becomes material. If what is done is the result of a contemplation of bankruptcy proceedings, it is immaterial to the question of jurisdiction what the nature of the services contracted for may be. Section 60 does not define these, and any character of legal service is re-examinable, provided, always, that the transfer providing for it is made in contemplation of bankruptcy proceedings. Of course we must at this point distinguish between what is re-examinable and what is allowable. The former relates to jurisdiction; the latter assumes jurisdiction and inquires what is a proper charge. We are dealing at the present moment with the jurisdictional question. In determining this, as has been pointed out, the character of the service is for consideration in order to determine whether the matter is one of summary jurisdiction. But the nature of the service is after all a secondary matter. The intent is the primary one. The considerations entering into a determination of this may perhaps be best stated by way of illustration. In a transfer made, by its terms, for services to be rendered in a voluntary proceeding which the debtor expects to bring, the transaction is clearly re-examinable and thus within the summary jurisdiction of section 60d; and this because the intent is present as shown by the very nature of the services contracted for. It is equally clear that, where a transfer is made in consideration of services in defending a bankruptcy proceeding which the debtor expects against him, the transfer is examinable in the summary manner prescribed by section 60d, and this likewise for the reason that the nature of the services contracted for conclusively shows that they are contracted for in contemplation of insolvency. But suppose we have a case where the contract upon its face is for services apparently disconnected with any apprehension of bankruptcy proceedings, as, for instance, a contract to defend the debtor for murder. Such a contract would prima facie not be in contemplation of bankruptcy proceedings, for the latter have no association with murder, which is a personal, not a business, affair. Such a transfer would thus, unless more be proved, not be re-examinable under section 60d. But suppose part of the service, contrary to the terms of the written contract, was in fact to be in connection with the

bankruptcy proceeding. Or suppose such a contract were a mere cloak under which, pretending to pay an attorney a large sum for a fee in a murder case, there was concealed an arrangement by which only a part of this was to go for such services but the remainder was to be held for the uses of the debtor and paid over to him in fraud of the apprehended bankruptcy proceedings. Would not such a case be within section 60d? We think so, and this for the reason that, while the transfer upon its face was for services not within section 60d, still the arrangement after all was in contemplation of and with a view to circumvent an apprehended and imminent bankruptcy proceeding. We are of opinion, therefore, that the intent or thought in the mind of the debtor is the thing which characterizes the whole matter, and, unless we can say from the facts that this intent exists, we cannot sustain a summary jurisdiction.

[7, 8] Applying these views to the present record, we search in vain for anything which shows that this contract with the appellee was prompted by impending bankruptcy. The store of the debtor was burned down. He felt the need of legal assistance in collecting the insurance. He contracted with the appellee for this assistance. This was a transaction in the usual course of business. There was nothing germane to the matter of bankruptcy in it. It mattered not whether English was to resume business or to go into bankruptcy. In either event he would want his insurance collected. There was therefore nothing in the character of the contract which impressed the transaction with the necessary statutory intent. Was there anything in the surrounding circumstances that so characterized it? Mitschrich by his answer asserts that he had no familiarity with the financial condition of English when this contract was made; that he did not then know whether English was insolvent or not. He also denies that any of the services contracted for or performed were in connection with the bankruptcy proceedings. Neither he nor English were sworn on the trial, and the only testimony presented by the trustee which is in the slightest degree enlightening upon this point is the mere fact that on December 28th, and thus five days after the making of this contract, a bankruptcy proceeding was instituted against English, and that, in certain negotiations with his creditors between Christmas and January 1st, Mitschrich represented him, and that subsequently, in resisting the bankruptcy suit, Mitschrich appeared for him. We cannot upon this state of the record hold that in making it English was acting in contemplation of proceedings against him. It is of course within the range of possibilities, as counsel suggests, that there was latent in this transaction a surplus of fee for the benefit of English to be paid over to him after the bankruptcy matter had all blown over. But, if any such arrangement existed, the trustee has failed to prove it either by direct evidence or by circumstances justifying our so inferring. The trial court, as we have above pointed out, was of the opinion that the contract was not made in contemplation of bankruptcy. Even conceding that there was room for divergent inferences from the testimony, we see no reason to say that there was manifest error in the conclusion reached by the trial judge. The case is thus not within section

60d. Whatever may be the rights of the trustee against Mitschrich in a plenary suit, there is no jurisdiction to proceed against him summarily.

A number of cases are cited which it is claimed necessitate a different conclusion. In re Wood & Henderson, 210 U. S. 246, 28 Sup. Ct. 621, 52 L. Ed. 1046, above referred to, is specially relied upon, but the question certified by this court to the Supreme Court in that case expressly embodied the statement that the transfer made by the debtor was "in contemplation of the filing of a petition in bankruptcy against him," and upon that basis the summary jurisdiction was sustained.

In re Cummins, 28 Am. Bankr. Rep. 385, 196 Fed. 224, decided in the United States District Court for the Southern District of New York, in May, 1912, holds that services as attorney in examining into the financial affairs of the bankrupt, evidently hoping to disentangle them, but with the final conclusion that bankruptcy was inevitable, were services within section 60d and thus protected. But this was a case manifestly dealing with services in contemplation of bankruptcy proceedings since they were with the purpose of preventing such, and as was said in Furth v. Stahl, 205 Pa. 439, 55 Atl. 29, "a man is usually very much in contemplation of a result which he employs counsel to avoid."

In the case last cited the services contracted for were services in bankruptcy proceedings which were then in contemplation by creditors and were to cover efforts to avoid the bankruptcy proceeding. And there it is further said:

"They (the services rendered) were none the less rendered in contemplation of filing of a petition in bankruptcy because directed primarily and principally to the prevention of such petition."

In re Kross (D. C.) 96 Fed. 816, is also cited. This was a case in which it was held that the fees allowable under section 60d were limited to the same services as contemplated by 64b, to wit, services rendered while performing the duties imposed upon the debtor by the Bankrupt Act. In other words, it was decided that the services contracted for must be germane to that act and must be of a character which would ordinarily be contracted for in contemplation of bankruptcy proceedings.

Our attention is also called to Pratt v. Bothe, 130 Fed. 670, 65 C. C. A. 48, decided by the Circuit Court of Appeals, Sixth Circuit. In this case the court, while recognizing the force of In re Kross, above cited, was influenced by the use of the words "solicitor in equity or proctor in admirality," found in section 60d, to say that the services within the meaning of this section would "seem" to be such as might be required "in general litigation or in the course of the debtor's business." But no such question was involved in the case; the matter for decision there being whether section 60d covered services rendered after the institution of the bankruptcy proceedings or not, and the court holding to the latter view. This is to some extent considered by this court in the case of Re Habegger, 139 Fed. 623, 71 C. C. A. 607, 3 Ann. Cas. 276, in which it was held, differing from Pratt

v. Bothe, that the kind of legal services covered by section 60d were such services only as "are rendered in aid of the purpose sought to be accomplished by the act, conserve and benefit the estate of the bankrupt, and thus inure to the benefit of creditors, or are such legal services as are contemplated by the act in bringing the bankrupt estate before the court, its subsequent administration and distribution to the creditors, and the like." It was further said in this case that legal services in negotiating with creditors for a settlement of the debtor's financial difficulties without resort to the bankruptcy court and like proceedings in agreeing to defend against criminal proceedings arising out of bankruptcy were not allowable within section 60d, but that all such claims for legal services were allowable only "as a general claim against the estate of the bankrupt in the hands of the trustee." In this case the court repudiates the suggestion that the terms "solicitor in equity or proctor in admiralty" require a different construction of the section, saying:

"We find no inherent reason in the character of the legal services performed by such professional talent in this country as would preclude their giving advice or rendering services to insolvent debtors which would inure to the benefit of the estate, or in the nature of things would preclude their preparing schedules of assets and liabilities and other like papers, for the purpose of bringing the estate before the bankrupt court for settlement."

In the case of Re Stolp (D. C.) 29 Am. Bankr. Rep. 32, 199 Fed. 488, Judge Geiger, sitting in the United States District Court for the Eastern District of Wisconsin, considered the question of whether the services to be rendered are "such as pertain to the contemplated bankruptcy, or may they be general professional services rendered by an adviser in any of the several capacities specified?" i. e., attorney, counselor, solicitor in equity, or proctor in admiralty. Discussing Pratt v. Bothe, supra, and In re Habegger, supra, he holds with this court that section 60d applies only to such services as are germane to the purposes of the act and does not cover general services.

But in none of these cases was the question one of jurisdiction. The crux of the controversy in each case was not whether the fee was reviewable but whether it was allowable. In each of these instances the attorney submitted his case to the court upon the merits, and these expressions were in determining how far he was entitled to the protection of section 60d. Were Mitschrich here submitting his case and asking the court to declare how far his fee was allowable, instead of resisting jurisdiction, the cases last quoted would be instructive. But this is not the situation.

Reiterating, the present question is whether or not his contract with English was made in contemplation of bankruptcy proceedings so as to make this a matter of summary jurisdiction within the case of Wood & Henderson. We are unable so to hold, and accordingly affirm the judgment of the trial court.

MAITLAND v. TRAVER.

(Circuit Court of Appeals, Seventh Circuit. October 7, 1913. Rehearing denied January 12, 1914.)

No. 1961.

1. BILLS AND NOTES (§ 451*)—DEFENSES—SPECIAL PLEAS.

A notice of special defense, authorized in actions on notes and other instruments for the payment of money or property authorized by Hurd's Rev. St. Ill. 1905, c. 98, §§ 9, 10, is limited to the defenses that the instrument was made without valuable consideration; that the consideration has wholly or partially failed; and that fraud has been used in obtaining the instrument.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1342, 1343, 1365, 1366; Dec. Dig. § 451.*]

2. BILLS AND NOTES (§ 97*)—DEFENSES—FRAUD—WANT OF CONSIDERATION.

After defendant had been induced by plaintiff's representations, etc., to purchase certain mining property, a corporation was organized to take over the same. Plaintiff agreed to sell the stock for the benefit of defendant and others and was to have 50,000 shares for his own benefit as promotion stock. Thereafter, in order to terminate plaintiff's interest in the company, defendant agreed to purchase his stock, and executed a note for $25,000 therefor. *Held*, that the purchase of such stock and the execution of the note was a separate transaction from the purchase of the properties and defendant's original investment therein, and hence evidence of plaintiff's alleged fraudulent representations; the fact that the properties had never paid, and that defendant was only entitled to such promotion stock on performance of his agreement to sell the balance of the stock, which he did not do, was inadmissible in defense of the note.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 166–173, 175–181, 185–192, 196–198, 200, 202–205, 208–212, 1372–1376; Dec. Dig. § 97.*]

In Error to the District Court of the United States for the Eastern Division of the Northern District of Illinois; George A. Carpenter, Judge.

Action by Wilber H. Traver against Alexander Maitland. Judgment for plaintiff, and defendant brings error. Affirmed.

The plaintiff in error, Maitland, was defendant below in a suit brought by Traver, the defendant in error, for recovery upon a promissory note made between the parties, bearing date February 7, 1903, for the principal sum of $25,000, upon which the plaintiff below recovered judgment, pursuant to verdict of the jury, and this writ of error is brought for reversal of such judgment.

The errors assigned for reversal rest on exclusions of evidence offered on behalf of the defendant below as tending to prove facts averred in his notice of special matter of defense filed therein, summarized in the brief in substance as follows:

(1) Offers of evidence of conspiracy and fraud in the transactions.

(2) Offers to prove that a prior contract between the parties was still in existence and unperformed by Traver.

(3) Offers to prove that Traver and his associates had contracted to sell $300,000 worth of the capital stock of the corporation to be organized, and that they never did sell the same, or any part thereof.

(4) Offers to prove that Traver owned no stock in the Penobscot Mining Company at the date of the instrument sued on and had no right to stock in said company, and that the note in suit was entirely without consideration.

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

(5) Offers to prove that the fraudulent representations made to Maitland prior to the making of the notes and at the time Maitland bought the options for the mining properties "were continuously being made while he was buying and developing the properties, and that he was acting under and relying upon those representations when he signed the note sued upon."

(6) Offers to prove that Traver and other parties named entered into a conspiracy to induce and did induce Maitland to pay one Bradburn $35,000 by representing to Maitland that Bradburn had bought $10,000 worth of stock in a mining company to be formed and by later representing that Bradburn had not bought stock in said company, but had bought an interest in the total investment to the extent of $10,000 which at that time was worth $35,000, whereby Maitland was induced to pay to Bradburn such sum of $35,000, which sum so paid was divided between the conspirators mentioned, pursuant to their conspiracy.

Error is also assigned upon several paragraphs of the instructions to the jury, involving the same questions as the above-mentioned rulings.

The instrument in suit bears date February 7, 1903, but the testimony is in dispute whether the delivery thereof was not postponed until December, 1903, as referred to in a letter of transmittal identified in evidence, and the instrument reads as follows:

"In consideration of the sale and transfer and assignment to me by Wilber H. Traver of all his right and claim to receive fifty thousand shares of the capital stock of the Penobscot Mining Company of South Dakota as evidenced by an instrument of transfer, bearing even date herewith, executed by the said Wilber H. Traver, I hereby agree to pay to Wilber H. Traver the sum of twenty-five thousand dollars ($25,000) on or before four years from this date without interest. I reserve the right to make partial payments on the twenty-five thousand dollars in such amounts and at such time as I may see fit before the expiration of said four years. [Signed] Alexander Maitland."

The instrument of transfer referred to in the above instrument reads as follows:

"In consideration of $25,000 to me paid by Alexander Maitland of Negaunee, Michigan, receipt whereof is hereby acknowledged, I do hereby sell, assign, transfer and set over to Alexander Maitland 50,000 shares of the capital stock of the Penobscot Mining Company which are coming to me from the said Alexander Maitland under and by virtue of a certain contract dated February 2, 1903, between the said Maitland on the one part and myself and one Frank R. Byrns on the other part, and I do hereby release, acquit and forever hold free and harmless the said Maitland from any and all claims and demands of whatsoever kind and nature arising out of and by virtue of said contract.

"[Signed] Wilber H. Traver."

Each of the above-mentioned assignments of error rests upon a "notice of special defense," interposed under the Illinois practice, stating in various forms that the "defendant will give in evidence and insist in his defense" that the instrument in suit was obtained "by fraud and circumvention" on the part of the plaintiff, and that the plaintiff and his associates (as named) "entered into a conspiracy to mislead, deceive, cheat, and defraud the defendant into buying the mines" and making the investments mentioned, with various specifications of the representations and promises relied upon in making such purchase of mining properties and investments for their development. The notice, however, neither states nor tenders proof to show that any representation so made and relied upon in reference to the mining properties, to induce the purchase and investment therein, were either false in fact or intended to mislead the defendant in any respect as to character, conditions, or value; nor does the notice raise any issue as to their actual character or value. Moreover, the only representation averred therein as false, in reference to an existing fact relied upon in making the purchases of and investments in the mining properties, relates to an incidental transaction with one Bradburn, in reference to which the notice states that the defendant was "further misled and deceived by the statement of plaintiff that he had procured one James Bradburn who would buy ten thousand dollars worth of said stock at once, without waiting until said proposed company was incorporated"; that the

plaintiff subsequently produced Bradburn's check for that amount and delivered it to the defendant, stating that it was given for such stock. It is further averred, in substance, that Bradburn subsequently denied and repudiated this transaction as a purchase of stock, and claimed that he had thereby purchased an interest in the mining properties; that Bradburn sued defendant for recovery of damages thereupon, and for settlement of such claim defendant paid $35,000 for a release thereof, pursuant to this plaintiff's advice to do so; that such transactions were conspiracies between the plaintiff and Bradburn to defraud the defendant; and that "the contract of February 2," 1903 (in reference to their respective shares in the promotion stock), was made "between defendant and plaintiff and Byrns for the purpose of" such settlement, and "did not in any way attempt to define the rights and interests of the parties signing said contract as between themselves."

The notice states, by way of summary or conclusion, as follows:

"Defendant will further show that, relying upon the representations of plaintiff and believing from all the aforesaid conversations and representations that plaintiff could and would sell forthwith 300,000 shares of the capital stock of the Penobscot Mining Company to be organized, he (defendant) agreed to pay plaintiff the sum of $25,000 for the 50,000 shares of stock to which plaintiff would become entitled when he (plaintiff) had kept and performed his aforesaid promises and agreements but defendant will show that, by reason of failure of plaintiff to carry out his agreement and promises with defendant as aforesaid, the said stock was and is wholly and entirely worthless; that he (defendant) has been deceived and defrauded by the false and fraudulent representations of plaintiff; and that the writing in plaintiff's declaration mentioned was and is without consideration and was obtained from defendant by fraud and deception on the part of plaintiff.

"Defendant will further show that none of the properties has as yet shown any evidence of containing a valuable vein or veins of gold ore; that no ore of any considerable value has been as yet taken therefrom; that across a nearby gulch, and about five miles distant from said properties, is located a valuable gold-producing mine, in no way connected with the transactions of the parties hereto; that whether the vein of ore in that mine has a continuation on this side of said gulch is as yet unknown; that, if ore in valuable and paying quantities is not located upon said properties in the near future, they will be of no value whatever to defendant, and defendant will lose his entire investment of about $500,000 therein, made by defendant upon the aforesaid promises and representations of plaintiff and his said associates."

The proceedings at the trial, testimony received, and rulings thereupon, and offers of proof which were excluded by the trial court, are stated in the opinion.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

Norman H. Pritchard, Wm. P. McCracken, Jr., and George S. Steere, all of Chicago, Ill., for plaintiff in error.

M. F. Gallagher and Henry W. Wales, both of Chicago, Ill., for defendant in error.

SEAMAN, Circuit Judge (after stating the facts as above). The verdict and judgment against Maitland, the plaintiff in error and defendant below, award recovery upon his written agreement to pay Traver, plaintiff below, $25,000 on or before four years from its date. Although the agreement is dated February 7, 1903, the testimony of the parties is conflicting as to the actual date of making and delivery. whether in February or in December, 1903, but this difference between them bears only on the credibility of their respective versions of the transaction as submitted to the jury and settled by the verdict. The agreement (promissory note) recites, as the consideration thereof, "the

sale, transfer and assignment to me by Wilber H. Traver of all his right and claim to receive fifty thousand shares of the capital stock of the Penobscot Mining Company of South Dakota, as evidenced by an instrument of transfer, bearing even date herewith, executed" by Traver; and the instrument referred to, dated February 7, 1903, and signed by Traver, was produced by Maitland at the trial and appears in evidence. It describes the 50,000 shares of stock, thereby sold, assigned, etc., as "coming to me from the said Alexander Maitland under and by virtue of a certain contract dated February 2, 1903, between the said Maitland on the one part and myself and one Frank R. Byrns on the other part," and further states:

"I do hereby release, acquit and forever hold free and harmless the said Maitland from any and all claims and demands of whatsoever kind and nature arising out of and by virtue of said contract."

Both of these instruments were prepared in Chicago by Maitland's attorney, and execution and delivery by Traver of the transfer and release passing title to all interests in the premises which had accrued or were to accrue in favor of Traver are undisputed facts; and it is conceded that no payment has been made by Maitland on his agreement.

[1] The contentions for reversal rest entirely on alleged error in rulings of the trial court excluding testimony offered as matter of defense, under a "notice of special defense" filed on behalf of the defendant. This notice is a form of pleading certain defenses, in actions upon notes and other instruments for payment of money or property, authorized by statute in Illinois, as between the original parties. Sections 9 and 10, c. 98, Hurd's Rev. Stat. 1905. Vide R. S. 1845, p. 385, §§ 10, 11. It is settled by decisions of the Supreme Court of the state that the defenses which may thus be set up are: (1) That the instrument was made without any valuable consideration; (2) that the consideration has wholly failed; (3) that there has been "a part failure of the consideration"; and (4) that "fraud and circumvention have been used in obtaining" the instrument. Sims v. Klein, 1 Ill. (Breese), 302, 303; Taft v. Myerscough, 197 Ill. 600, 603, 604, 64 N. E. 711.

Thus the issue for review is limited to the inquiry whether testimony was expressly offered on behalf of the defendant and rejected by the court, which would tend to prove one or more of the above-mentioned defenses embraced in the notice.

In reference to the notice of special defense, we believe the utmost import of the various specifications of matters the "defendant will give in evidence and insist in his defense" may be summarized in these propositions: (1) That the agreement in suit was induced and obtained by "fraud and circumvention" and through "conspiracy" on the part of the plaintiff and his associates. (2) That the plaintiff was not entitled to any of the shares of stock purporting to be transferred to the defendant, and consideration for the agreement "has wholly failed." (3) That prior to such agreement, and early in the year 1902, the defendant had been induced by fraudulent representations and conspiracy on the part of the plaintiff and his associates to purchase gold-mining

properties (named) in South Dakota, had taken titles thereto, and invested upwards of $500,000 in and about their development, without success or reimbursement in any manner. (4) That a purported corporation, Penobscot Mining Company, had been organized by Maitland, Traver, and one Byrns (to take over the mining properties when transferred by Maitland), with $500,000 of capital stock, whereof $300,000 was to be "treasury stock," which Traver represented and agreed would be sold by him to outside parties and the proceeds applied to reimburse Maitland's investment, and the remaining $200,000 to be issued to the incorporators after Maitland had been reimbursed, $100,000 to Maitland and $50,000 each to Traver and Byrns; and that the agreement of Traver to sell the treasury stock for reimbursement of Maitland was in full force entirely unperformed and entered into the agreement in suit and was relied upon to give value to the transfer, but remains wholly unperformed, so that the transfer is worthless. (5) That the mining properties so purchased by the defendant have shown no evidence of value, and whether they contain ore of value "is as yet unknown."

At the trial, the defendant Maitland testified at considerable length, detailing the circumstances of his purchases of the South Dakota gold-mining properties and of his investments for erection of a mill and development of the mines, together with representations and agreements on the part of the plaintiff and his associates which had induced him to make such purchases and investments; the court having overruled at that stage the objections raised to such testimony.

[2] It expressly appears therefrom: That all purchases were made from outside parties and his entire investments made long prior to the transaction in controversy, with titles preserved in him; that operations had been carried on throughout the year 1902 under his control, direction, and expense; that the corporation organized to take over the properties, with capital stock provided for as described in the notice of defense, had proceeded no farther than to place the stock in the hands of Maitland, to hold until it was disposed of as the parties had stipulated; that Traver had agreed to sell the treasury stock to outside parties for proceeds to be applied for reimbursements of Maitland; that Traver and Byrns stipulated in writing that Maitland was to be reimbursed for his cash investments "before there is to be any payments in the form of dividends or otherwise, to the promotion stock interests"; that Maitland had become dissatisfied with the status of affairs, and early in February, 1903, on his return with Traver from a visit to the mines, negotiations occurred between them for purchase by Maitland of Traver's claim of interest in the properties; and that such negotiations were continued in Chicago and resulted in the agreement in suit.

Upon this showing on the part of the defendant of the state of facts under which the agreement was concluded, the trial court became satisfied that the negotiations and transaction were separated from and independent of the prior transactions and investments, in time, purpose, and consideration; that the defense predicated thereon was inadmissible; and, ruling in conformity with that view, the above-men-

tioned testimony was excluded from submission to the jury, together with various tenders of proof in further support of the defense so predicated.

The defendant, however, was permitted to testify and testified in reference to the circumstances and conversations between the parties leading up to and attending the execution of the agreement in suit, including therein his version of an agreement by parol between them that the note was not to be paid when due unless Maitland (the promissor) "had previously received his money, or words to that effect," which version was denied by the plaintiff's testimony; and the court, assuming that an issue of fact arose in respect of this alleged oral understanding, submitted it to the jury for determination, and their verdict was adverse to such contention. Whether this testimony was admissible, in any view, to affect the instruments so executed by both parties may best be considered under the other branch of the defense. Thus the contract terms for payment of $25,000, if not otherwise conclusive, are settled by the verdict; and it is likewise settled, both by evidence and verdict, that the entire consideration entering therein was purchase and release of the promotion share of Traver in the venture (including his retirement from the corporation), which interest appeared, by written agreement between the parties, as 50,000 shares, or one-fourth of the "promotion stock," to be effective only when Maitland had been reimbursed for his investments. Its value was plainly understood by both parties to be problematical, contingent on developments of the mines, as referred to in the notice of defense, and it is equally clear that the purchase and release was treated and regarded by both as a valuable and sufficient consideration for the note, and that the benefits thereof were so accepted and retained by the defendant for his purpose of reorganizing a corporation to take over the mines, as disclosed by his testimony.

In the absence of evidence, either produced or expressly offered, tending to prove that execution of their agreement was obtained by "fraud and circumvention" on the part of the plaintiff (as the notice of defense repeatedly states the "defendant will give in evidence and insist in his defense"), we are of opinion that the testimony and offers of testimony in support of the averments of fraudulent representations and conduct in the transactions of the previous year were rightly excluded by the trial court. The bill of exceptions shows neither testimony nor offers of testimony tending to support the charge of fraud entering into the agreement; and it is conceded in the brief, submitted on behalf of the defendant (plaintiff in error), that such defense failed for want of proof. Nevertheless, it is contended that the testimony so excluded was admissible as tending to support the remaining defense set up under the statute, namely, that the consideration for the agreement "has wholly failed." The theory upon which this contention is urged by counsel is stated in their argument in two propositions, in substance as follows: (1) That the prior representations of Traver, both of "his ability to sell stock" and of purchasers "he had secured" to take stock, "had a direct bearing on the value of Traver's right to

promotion stock, which he was to receive only after he had sold the so-called treasury stock," and the fraud as to the value of the stock "constitutes failure of consideration." (2) That the note in suit "was one step only in a conspiracy entered into * * * to defraud Maitland through this mining scheme," and the representations which induced his prior investments in the properties, as the earlier "steps taken in pursuance of this design are admissible as being part of the same general transaction." If neither of these claims is tenable, it is obvious that error is not well assigned, and we are of opinion that both are not only fallacious and beside the issue presented by the suit, but that both are inconsistent with the conceded facts, and the second proposition is not within any tender of proof at the trial.

The testimony of the defendant had established (as before stated) that the representations referred to were made and the object consummated by the investments of Maitland in the mining properties, together with the provision for the promotion shares of Traver and Byrns in the corporation upon conditions stated, all apart from and long prior to the negotiations which resulted in the present contract for release of Traver's interest and participation in the venture. With this last transaction between these parties so separated from the alleged representations, both in character and event, its independence therefrom was in effect conceded by counsel for the defendant at the trial, in answer to an inquiry by the court, namely, that it was not claimed to have been within the contemplation of either party when the representations were made and acted upon. So, whatever may have been the bearing and force of these representations in the original transactions, as stated in the notice, we believe them to be irrelevant and without force for defense against the new contract, differing entirely in purpose and effect from the prior transactions, described in the notice as intended, induced, and accomplished through such representations.

Recurring to the notice of defense, its charges of fraud and conspiracy rest wholly on the representations there specified as inducing his investments in the property, and no doubt is entertainable that most of such representations are mere expressions of opinion and promises which do not amount to actionable fraud under the averments. For the purposes of this inquiry, however, we lay aside the question whether any of the representations stated support these charges, and proceed on the assumption that one or more thereof may be sufficient to that end, in reference alone to the original transactions. The testimony and offers of testimony which were excluded, with the possible exception of two offers to be separately considered, are predicated alone on the charges of fraud in the prior transactions, and we believe such rejection was required pursuant to the elementary rule of evidence against the reception of irrelevant matter to defeat or affect the independent contract. It is undoubted, of course, that competent evidence would be admissible to prove that any of these prior representations entered into and became part of the consideration for this contract by express agreement of the parties, thus making it a

new representation or promise for the new purpose, but the original representations have no force in that direction, as we understand to be the contention in each of the above propositions.

The last-mentioned view, that the prior representation must be renewed to become effective for the new purpose, appears to have received some measure of recognition in framing the defense, in the attempt to prove the agreement by parol, that payment of the note was conditioned upon the performance by Traver of his pre-existing promise to sell the treasury stock for reimbursement of Maitland's investment. While that version of the transaction was submitted to the jury and settled adversely, it is contended that the defendant became entitled, through such testimony, to submission as well of the prior representations and agreement referred to, so that error was committed in its exclusion. We believe it to be sufficient to remark, in answer to this proposition, that the consideration for the note was distinctly stated in writing, in both instruments, and, no "fraud or circumvention" entering into the execution (as conceded), extrinsic testimony to change their terms or effect was inadmissible, under any theory of the issues.

The record shows two offers of proof, above referred to as possible exceptions from the theory of the other offers, which were so urgently pressed at the trial that we have reserved them for special mention, although not impressed with either tender as presenting a meritorious question: (1) One of these offers was "to show that said mining properties have never paid, and have been shut down for upwards of five years, and are without value as mining properties or for any other purpose." On objection interposed that this was "a variance from the notice of defense," an amendment of the notice was allowed to conform thereto, but the offer was nevertheless rightly overruled as irrelevant. Laying aside its obvious inconsistency with the prior averments and testimony, it was both conceded and settled by the undisputed evidence that both parties entered into the contract in suit, equally well informed as to developments of ore in the mines, and that their producing value was "entirely problematical," and without concealment or fraud entering into such contract, so that liability for performance could not be affected by the proposed proof of their present value or want of value. (2) The other offer was thus stated: "To prove and show that at the time of the execution" of the instruments "the plaintiff owned no stock in the Penobscot Mining Company," had "no right to the stock," and the note given therefor "was entirely without consideration." For support of this offer, however, counsel relies upon the prior agreement between the parties postponing title to the stock until the treasury stock had been sold for reimbursement of Maitland, so that the foregoing ruling against its admissibility is applicable alike to this offer. As the entire interest of Traver in the undertaking was obtained in conformity with the mutual purpose of the bargain, with full understanding of its character, and no fraud, concealment, or mistake entered into the contract, under well-recognized general principles any failure of ultimate benefit or title through the purchase does not constitute failure of consideration to relieve from

liability upon the contract, and such is the settled rule as well in Illinois. Kerney v. Gardner, 27 Ill. 162, 168; Cobb v. Heron, 180 Ill. 49, 54, 54 N. E. 189. This principle is aptly stated by Chief Justice Mitchell, in Ingalls v. Miller, 121 Ind. 188, 22 N. E. 995:

"That one who, with all the facts before him, and without fraud, oppression, or imposition, decides his own case against himself cannot afterwards appeal to the courts to reverse his own decision."

We are of opinion, therefore, that error is not well assigned for reversal, and the judgment of the district court is affirmed.

WASHINGTON & CANONSBURG RY. CO. v. MURRAY.

(Circuit Court of Appeals, Third Circuit. January 23, 1914.)

No. 1773.

1. APPEAL AND ERROR (§ 1008*)—REVIEW—ACTION TRIED TO COURT—FINDINGS OF FACT.

Where an action in a federal court is tried by the judge, his findings of fact are conclusive in the appellate court unless there is no evidence to support them.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3955–3960, 3962–3969; Dec. Dig. § 1008.*]

2. BILLS AND NOTES (§ 497*)—RIGHTS OF INDORSEE—BONA FIDE PURCHASER.

A purchaser of a negotiable note for value before maturity is entitled to recover thereon, unless it is shown that in the transaction by which it was obtained he had knowledge of facts which would render it invalid, or was chargeable with bad faith, and the burden of proving such defense rests on the defendant.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1448, 1675–1681, 1683–1687; Dec. Dig. § 497.*]

3. BILLS AND NOTES (§ 367*)—RIGHTS OF INDORSEE—BONA FIDE PURCHASER.

A bank which purchased before maturity a note of a corporation payable to itself, executed and indorsed by its treasurer, *held* entitled to recover thereon, although a by-law of the corporation required all notes to be signed by both the president and treasurer, where such by-law was not known to the bank, and was never observed; the corporation having paid many notes signed by the treasurer alone without objection, and one of such notes having been previously purchased by the bank and indorsed by the president and vice president, who were also the principal stockholders of the corporation.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 947, 948; Dec. Dig. § 367.*]

In Error to the District Court of the United States for the Western District of Pennsylvania; James S. Young, Judge.

Action at law by Charles C. Murray, receiver of the Cosmopolitan National Bank of Pittsburgh, against the Washington & Canonsburg Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

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

The following is the opinion of the trial court:

This is an action by the receiver of the Cosmopolitan National Bank against the Washington & Canonsburg Railway Company, upon a promissory note made by the defendant for the sum of $25,000 and is to recover the balance of $9,232.84, with interest thereon from March 15, 1909. A stipulation was filed, signed by counsel for both parties, waiving a trial by jury, and the evidence was taken before the court.

From the evidence in this case we find the following facts:

First. That Francis J. Torrance and Arthur Kennedy were the promoters of the Washington & Canonsburg Railway Company, a street railway corporation incorporated under the laws of the commonwealth of Pennsylvania, with the powers conferred upon street railway companies by the laws of the said commonwealth, and during the whole period of its existence, from the year 1901 to January, 1906, owned all of its capital stock, excepting that at some time during that period 100 shares of the capital stock were transferred by Arthur Kennedy to W. L. Merwin. During the period from 1901 to January, 1906, said Torrance was president; and said Kennedy was vice president of said company, and Torrance, Kennedy, and W. C. Hagan were directors thereof, and there was one other director who was an employé of the company, but not a stockholder. W. C. Hagan was secretary and treasurer of the company from the time of its organization until January, 1906.

Second. There are no minutes of meetings of the directors or stockholders of the Washington & Canonsburg Railway Company recorded in its minute book as being held between June 4, 1902, and January 8, 1906. It seems probable that the stockholders and directors held meetings, but such meetings as were held were informal. The financial management of the company was largely in the hands of Kennedy and Hagan.

Third. That at the time of the transactions in this case the by-laws of the plaintiff company provided that "no notes or drafts of the company shall be made or checks drawn except by the president and treasurer jointly, and only when authorized by the board of directors," and this by-law was never complied with, although promissory notes signed by the company to the number of probably more than 400 were executed from time to time, between 1901 and 1906, and W. C. Hagan, as treasurer of the company, executed practically all of these notes. About 227 of such notes, executed on behalf of the company in its name by W. C. Hagan, were produced at the trial by said Hagan and offered in evidence, the majority of these notes were indorsed by Torrance and Kennedy. It appears that 54 of these notes were made in 1903, 43 of them were made between January and April, 1904, 70 of them were made between April 6, 1904, and December 30, 1904; and 60 of them were made in 1905, and all of these notes appear to have been paid or renewed by the Washington & Canonsburg Railway Company. No director, officer, or stockholder of the company ever objected to the exercise of authority by Hagan, as treasurer, to execute and issue notes on behalf of this company, and it is evident that the officers, directors, and principal stockholders must have had knowledge of the exercise of such authority by Hagan as treasurer.

Fourth. About May 2, 1903, notes made by the following makers and regularly indorsed generally and thereby made payable to bearer were brought to the Cosmopolitan National Bank by W. C. Hagan for discount, viz.:

Note of W. C. Hagan (Exhibit 8—C) for $20,000.
Note of F. R. Nichols (Exhibit 8—D) for $20,000.
Note of Arden Land Company (Exhibit 8—E) for $20,000.
Note of Francis J. McManus (Exhibit 8—F) for $15,000.
Note of Francis J. Torrance (Exhibit 8—G) for $20,000.
Note of East Washington Street Railway Company (Exhibit 8—H) for $20,000.
Note of T. Lee Clark (Exhibit 8—I) for $20,000.
Note of Pennsylvania Development Company (Exhibit 8—J) for $20,000.
Note of Washington & Canonsburg Railway Company (Exhibit No. 8) for $10,000.

Of these notes Exhibit No. 8, made by the Washington & Canonsburg Railway Company for $10,000, was signed by "Washington & Canonsburg Railway Co., by W. C. Hagan, Secty. & Treas.," to the order of "Ourselves," and indorsed "Washington & Canonsburg Railway Co., by W. C. Hagan, Secty. & Treas.," and had thereon no other indorsement and was made for the accommodation of the Pennsylvania Development Company. These notes were made payable to the order of the makers thereof, respectively, on demand, and were duly indorsed by the makers without restriction, and some of the notes were also indorsed by Torrance, Kennedy, and Andrews, as will appear by reference thereto. These notes were then discounted by the Cosmopolitan National Bank prior to maturity, and the proceeds thereof were credited to an account then opened on the books of the bank under the name of "W. C. Hagan, Treas.," and thereafter other deposits were made, from time to time, in said account, and the proceeds of said notes were checked out, from time to time, by checks signed by W. C. Hagan, treasurer. At the time said notes were discounted, the cashier of the Cosmopolitan National Bank knew that Hagan was treasurer of the Washington & Canonsburg Railway Company.

Fifth. T. Lee Clark was treasurer of the Pennsylvania Development Company during the period covered by the transactions involved in this case. W. C. Hagan was treasurer of some other corporations besides the Washington & Canonsburg Railway Company. When the loans were made by the Cosmopolitan National Bank on May 2, 1903, referred to in the fourth finding, supra, and the proceeds were credited to the account of W. C. Hagan, treasurer, the Cosmopolitan National Bank had no knowledge or notice of any facts showing that the proceeds of the note of the Washington & Canonsburg Railway Company, which were credited to the account of W. C. Hagan, treasurer, were being misappropriated, in any manner, by Hagan, who was treasurer of said company.

Sixth. On or about August 1, 1905, the Cosmopolitan National Bank demanded that the notes aggregating $165,000, which had been discounted on May 2, 1903, should be paid, renewed, or better secured. Thereupon T. Lee Clark, who was known to the Cosmopolitan National Bank to be an officer of and interested in the Pennsylvania Development Company, procured W. C. Hagan, of the Washington & Canonsburg Railway Company to make and indorse a note for $25,000 of the Washington & Canonsburg Railway Company, in suit, Exhibit No. 6, all of the handwriting on said note, including the description of the collateral therein, being in the handwriting of the said W. C. Hagan, who then delivered said note to said T. Lee Clark as treasurer of the Pennsylvania Development Company, and the latter then took said note and other notes, viz., note of F. J. Torrance for $50,000; note of T. Lee Clark for $50,000, and note of Pennsylvania Development Company for $40,000 (all of which were regular on their face, and duly indorsed in blank without restriction) to the Cosmopolitan National Bank, and tendered the same in payment of the notes aggregating $165,000, referred to in the fourth finding, supra, which had been discounted by the said bank on May 2, 1903, and D. J. Richardson, acting on behalf of said bank as its cashier, accepted said notes in payment of the other notes above mentioned of like amount, and surrendered to said T. Lee Clark the notes so paid. The note of the Washington & Canonsburg Railway Company for $25,000, dated August 1, 1905, being Exhibit No. 6, and being the note sued on, was signed, "Washington & Canonsburg Railway Co., by W. C. Hagan, Treas.," to the order of "Ourselves" and indorsed, "Washington & Canonsburg Railway Co., by W. C. Hagan, Treas.," and was made for the accommodation of the Pennsylvania Development Company. That when Clark took the note in suit, Exhibit No. 6, to the bank, it recited certain collateral, but no collateral in fact accompanied it, and that at the time the exchange of notes was made at the bank, Clark and the cashier of the bank took 18 Columbia Plate Glass bonds, 10 Sante Fé Central Railway bonds, and 7 Philadelphia M. & M. Co. bonds, which were then pledged on the McManus note, and attached them to Exhibit No. 6, the note in suit.

Seventh. That at the time said exchange or substitution was made, the plaintiff made and entered in its individual ledger, crediting the proceeds of

the note, Exhibit No. 6, to the Washington & Canonsburg Railway Company, and at the same time entered a charge on said individual ledger account as if the proceeds of the same had been paid out, while in fact no money whatever passed, but the transaction was merely a substitution of the four notes in lieu of the ten theretofore held.

Eighth. That at the time T. Lee Clark made this exchange of paper there was, in the plaintiff bank, the note of the Washington & Canonsburg Railway Company, Exhibit No. 8, and that said note, together with the nine other notes above mentioned, had been discounted by the bank and the proceeds of all of them placed to the credit of W. C. Hagan, treasurer.

Ninth. That at the time the proceeds of said note were credited to the account of W. C. Hagan, treasurer, said W. C. Hagan was known to be treasurer of seven or eight companies, including the Washington & Canonsburg Railway Company, the Pennsylvania Development Company, and the Arden Land Company.

Tenth. That after the receipt by the plaintiff of the note, Exhibit No. 6, plaintiff bank rendered bills for interest every 30 days until the day it closed its doors in September, 1908, rendering the same first to the Pennsylvania Development Company and afterwards to F. J. Torrance. That the plaintiff bank never rendered a bill for interest to the Washington & Canonsburg Railway Company, and no interest was ever paid by that company.

Eleventh. That with the exception of the notes, Exhibit No. 8 and Exhibit No. 6, the Cosmopolitan National Bank had never discounted any paper for the Washington & Canonsburg Railway Company.

Twelfth. At the time the notes aggregating $165,000 acquired by the Cosmopolitan National Bank, the latter received from said T. Lee Clark a separate document, Exhibit No. 7, of which the following is a copy:

"Pittsburgh, Pa., August 1, 1905.

"Whereas the Cosmopolitan National Bank of Pittsburgh, Pennsylvania, has this day discounted the following collateral notes:

Francis J. Torrance,	$50,000
Pennsylvania Development Co.,	40,000
Washington & Canonsburg Ry. Co.,	25,000
T. Lee Clark	50,000
Contractor & Rys. Supply Co.	35,000
East Brady Gas Co.	40,000

"And whereas the said Cosmopolitan National Bank has discounted two notes of W. S. Strickler, amounting to $15,000 jointly:

"Now, therefore, for value received we jointly and severally guarantee the payment of said notes and interest when due, at the times specified and according to the terms and conditions thereof.

"Witness our hands and seals this 1st day of August, A. D. 1905.

"Francis J. Torrance. [Seal.]
"T. Lee Clark. [Seal.]
"Arthur Kennedy. [Seal.]
"W. H. Andrews. [Seal.]

"W. C. Hagan, Witness to the Four Signatures."

Thirteenth. The cashier of the Cosmopolitan National Bank knew that the Washington & Canonsburg Railway Company had built or acquired and owned or operated a street railway, and that it had the power to make, issue, and negotiate notes in the regular course of its business, for its use and benefit, and also knew or understood that the Pennsylvania Development Company was in the business of constructing railroads, and that at the time said bank acquired the note of the Washington & Canonsburg Railway Company (Exhibit No. 6) it had no actual knowledge or notice that said note had been issued for an illegal and unauthorized purpose by said W. C. Hagan, treasurer, or that it had been made and issued by him for the accommodation of the Pennsylvania Development Company or of T. Lee Clark, or any of the per-

sons whose indebtedness to said bank was paid by T. Lee Clark in negotiating said note to said bank.

Fourteenth. The amount due on the note in suit is shown by the following statement, viz.:

Amount of note	$25,000 00	
Int. from July 1, 1908, to March 15, 1909	1,062 50	
		$26,062 50
Less credit of proceeds of two bonds of Columbia Plate Glass Company sold March 15, 1909	$ 1,889 66	
Also 16 of said bonds sold March 22, 1909	14,400 00	
Also interest coupons collected from said bonds	540 00	
		16,829 66
Balance		$ 9,232 84

On which balance, interest is due from March 15, 1909, to date of judgment.

We conclude as matter of law:

First. The evidence in this case does not prove that the said bank had any actual knowledge or notice of any infirmity in said note or defect in the title of T. Lee Clark, who was negotiating the same, or knowledge of such facts as made the act of said bank in taking the said instrument amount to bad faith.

Second. Plaintiff is entitled to judgment for the sum of $9,232.84, with interest from March 15, 1909.

Discussion.

The evidence in this case shows conclusively that Francis J. Torrance and Arthur Kennedy were the promoters of the Washington & Canonsburg Railway Company, and that they owned all the stock of that company, except possibly 100 shares, and that they were promoters with T. Lee Clark and others, and large stockholders of the Arden Land Company, Pennsylvania Development Company, and other corporations, and these corporations were financed together by Torrance, Kennedy, Clark, and other officers and directors of other companies by the making of notes, procuring them to be discounted, and the proceeds thereof placed to the credit of W. C. Hagan, treasurer, and by him used, from time to time in the business of the different companies, the proceeds of the respective notes never being credited to the company making them, but put into a general fund known as W. C. Hagan, treasurer. Thus these companies were illegally managed together, and it is impossible to determine to what extent they accommodated each other, or how far the notes made by them were ultra vires as to the particular corporations. It was impossible in any particular case to say that the note was primarily an accommodation note, or whether it was to pay a note given for its accommodation, or how much of the proceeds indirectly came to it. No one could, by an inspection of the note, or even by inquiry, ascertain whether a given note was an accommodation note, and it would have required a careful, extended, and expert examination of the books of these different companies, of the officers and directors thereof, and of their private books to determine that fact, so generally and persistently were the affairs of the companies and these individuals commingled and confused with each other.

As to the two notes in question, Exhibit 6 and Exhibit 8, we have found that they were accommodation notes because W. C. Hagan, the officer who made them for the railway company, has so testified, but we doubt if outside of this evidence it could be shown, because of the manner of doing business, as we have above stated, that the Washington & Canonsburg Railway Company did not receive a consideration for them, either in money or other notes. This much as to the manner of doing business by this and its confederate companies. It shows a state of facts that, if inquired into by one about to discount any one of these notes, would not have resulted in any definite information as to whether or not the notes were accommodation notes. It must be conceded in this case that the by-laws of the Washington & Canonsburg

Railway Company provided that no notes or contracts of the company shall be made or checks drawn, except by the president and treasurer jointly, and only when authorized by the board of directors, and that the note in suit was made by the treasurer alone, and if there was nothing more, the note would not be binding upon the company. But there is a notable exception to this rule, and that is, that authority may be conferred upon an officer to make a note by a continued practice in violation of the by-law: First National Bank v. Hotel Co., 226 Pa. 292, 75 Atl. 412; Case v. Bank, 100 U. S. 446, 25 L. Ed. 695. Between 300 and 400 notes were signed by Hagan as treasurer, beginning with the organization of the corporation in 1901, and continuing until January, 1906, when the entire stock of the railway company passed into other hands, and not only this, but the two persons, Torrance, the president, and Kennedy, the vice president, who owned all the stock except 100 shares, and were directors, indorsed, or guaranteed, or became surety upon, almost all of these notes thus signed by the treasurer, so that not only was there the continued practice of the treasurer in signing the notes, but there was the consent and the approval of the other officers, directors, and stockholders. Clearly, then, it is established that these notes do bind the corporation, unless the cashier of the Cosmopolitan National Bank had actual knowledge or notice that the note was for the accommodation of another, or knowledge of such facts that his action in taking the instrument amounted to bad faith. The negotiable instrument act of the commonwealth of Pennsylvania of the 16th of May, 1901, provides in section 56 that: "To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith." P. L. 1901, p. 202. This act, as we understand it, was merely declaratory of what the law was, as decided by the federal courts, and by many of the courts of the states. Collins v. Gilbert, 94 U. S. 753, 24 L. Ed. 170.

In Hotchkiss v. National Bank, 21 Wall. 354, 359 (22 L. Ed. 645) Mr. Justice Field, in delivering the opinion of the court, said: "The law is well settled that a party who takes negotiable paper before due for a valuable consideration, without knowledge of any defect of title, in good faith, can hold it against all the world. A suspicion that there is a defect of title in the holder, or a knowledge of circumstances that might excite such suspicion in the mind of a cautious person, or even gross negligence at the time, will not defeat the title of the purchaser. That result can be produced only by bad faith, which implies guilty knowledge or willful ignorance, and the burden of proof lies on the assailant of the title. It was so expressly held by this court in Murray v. Lardner [2 Wall. 110, 17 L. Ed. 857], where Mr. Justice Swayne examined the leading authorities on the subject, and gave the conclusion we have stated."

In Murray v. Lardner, 2 Wall. 110, 121, 17 L. Ed. 857, Mr. Justice Swayne, in delivering the opinion of the court, said: "The possession of such paper carries the title with it to the holder. 'The possession and title are one and inseparable.' The party who takes it before due for a valuable consideration, without knowledge of any defect of title, and in good faith, holds it by a title valid against all the world. Suspicion of defect of title or the knowledge of circumstances which would excite such suspicion in the mind of a prudent man, or gross negligence on the part of the taker, at the time of the transfer, will not defeat his title. That result can be produced only by bad faith on his part. The burden of proof lies on the person who assails the right claimed by the party in possession. Such is the settled law of this court, and we feel no disposition to depart from it. The rule may perhaps be said to resolve itself into a question of honesty or dishonesty, for guilty knowledge and willful ignorance alike involve the result of bad faith. They are the same in effect. Where there is no fraud there can be no question. The circumstances mentioned, and others of a kindred character, while inconclusive in themselves, are admissible in evidence, and fraud established, whether by direct or circumstantial evidence, is fatal to the title of the holder."

In Young v. Lowry, 192 Fed. 825, 829, 113 C. C. A. 149, 153 (Third Circuit), it is said by Judge Gray: "The rule of evidence in the federal courts, to which we have just referred, is well stated by the Circuit Court of Appeals for the Ninth Circuit, in the case of First National Bank v. Moore, 148 Fed. 953 [78 C. C. A. 581], as follows: 'But in the federal courts, it may now be considered as the settled rule that a person who takes negotiable paper before maturity for value is entitled to recover as against the maker, unless it is shown that, in the transaction by which title was acquired, the indorsee had knowledge of facts which would render the same invalid as against the maker, or was guilty of bad faith, and the burden of proving such knowledge or bad faith lies on the defendant.'"

In Swift v. Smith, 102 U. S. 442, 444, 26 L. Ed. 193, Mr. Justice Strong says: "There is nothing in the case to show that Smith's purchase was not in good faith. There was nothing upon the note, nor anything in the indorsement thereon, to notify him that it did not belong to Jackson, both legally and equitably. It was mercantile paper, and not due. One who purchases such paper from another, who is apparently the owner, giving a consideration for it, obtains a good title, though he may know facts and circumstances that cause him to suspect, or would cause one of ordinary prudence to suspect, that the person from whom he obtained it had no interest in it, or authority to use it for his own benefit, and though by ordinary diligence he could have ascertained those facts. Goodman v. Simonds, 20 How. 343 [15 L. Ed. 934]. He can lose his right only by actual notice or bad faith. It is true that if the bill or note be so marked on its face as to show that it belongs to some other person than the one who offers to negotiate it, the purchaser will be presumed to have knowledge of the true owner, and his purchase will not be held to be bona fide."

Let us test the case at bar by these decisions, remembering that the burden is on the defendant to prove either actual notice or knowledge, or knowledge of such facts as would make the bank's action in taking the note amount to bad faith, because the plaintiff made out his prima facie case by offering the note and proving the making of it.

The note in suit and the other notes making up the $165,000 were regular in form, indorsed by the payees, who were also the makers, and were not overdue, and were presented to the cashier of the bank by T. Lee Clark, and known to him as the treasurer of the Pennsylvania Development Company, a company engaged in constructing railroads. The original notes, to the amount of $165,000, discounted by the Cosmopolitan National Bank in May, 1903, were all the individual notes of stockholders and officers of the Pennsylvania Development Company, to the knowledge of the cashier, except the notes of Nichols and McManus, or were notes of corporations, the Arden Land Company, the East Washington Street Railway Company, or the Washington & Canonsburg Railway Company, which the cashier may well have supposed were indebted to the Pennsylvania Development Company. The cashier, with this knowledge in 1903, would not two years later, in August, 1905, when the notes of Torrance, Clark, the Pennsylvania Development Company, and the Washington & Canonsburg Railway Company, aggregating $165,000, were offered to him by Clark as treasurer of the Development Company, have any reason to believe that the $25,000 note of the Washington & Canonsburg Railway Company was an accommodation note. There was nothing in the note to arouse suspicion; much less was there sufficient to show any actual knowledge or notice of the defect in the paper. Nor was there in these facts, nor in any other evidence produced, sufficient to warrant a finding that the cashier had such knowledge as made it bad faith in him, as an officer of the bank, in accepting the note. The bank paid a consideration for the note in that it delivered up other notes of an equal amount. Altogether we are clearly of the opinion that the defendant has not sustained the burden of proof required of it. Judgment will be entered for the plaintiff for the amount of his claim.

Reed, Smith, Shaw & Beal, of Pittsburgh, Pa., for plaintiff in error.
John S. Wendt, of Pittsburgh, Pa., for defendant in error.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

BUFFINGTON, Circuit Judge. [1] In the court below, the plaintiff, Murray, receiver of the Cosmopolitan National Bank, sued the Washington & Canonsburg Railway Company to recover on a note. By stipulation a jury was waived and the case tried by the judge. He found a verdict for the plaintiff for the balance due on such note. On entry of judgment thereon defendant sued out this writ. Where, as here, a case is tried by a judge, the findings of fact by a court are conclusive, unless there was no evidence to support them. Hathaway v. First Nat. Bank, 134 U. S. 494, 10 Sup. Ct. 608, 33 L. Ed. 1004. We have, however, carefully considered all the proofs in this case, and we see no reason to differ from the conclusions reached by the judge below in his full and careful opinion. The negotiable note in question was given by the defendant company to its own order and was indorsed by it. Its execution and indorsement was by Hagan, as treasurer of the company, which office, as well as that of secretary, he held. The bank received it before maturity, and therefor surrendered notes of other companies it then held. There being evidence tending to show the bank was a holder for value before maturity, the court's finding to that effect is conclusive.

[2] Such being the case the bank was, as held by this court in Young v. Lowry, 192 Fed. 825, 113 C. C. A. 149, entitled to recover, unless it was shown that in the transaction by which title was obtained, it had knowledge of facts which would render it invalid, or was guilty of bad faith, and the burden of proving such defense rests on defendant.

[3] In that regard it is alleged the note was invalid because it was signed by the treasurer of the defendant, that a by-law of that company provided that notes could only be executed under the joint signatures of the president and treasurer, and only when authorized by the board of directors, and that the note was an accommodation note for which defendant received no value. We are satisfied, however, that there was evidence before the court tending to warrant the finding the court made, namely:

"The evidence in this case does not prove that the said bank had any actual knowledge or notice of any infirmity in said note, or defect in the title of T. Lee Clark, who was negotiating the same, or knowledge of such facts as made the act of the bank in taking the said instrument amount to bad faith."

The by-law was not known to the bank; it was never acted on by the company; the bank had for two years held a note of the defendant signed in the same way; several hundred notes executed in the same way to third parties, and paid by the defendant, were given in evidence. Messrs. Kennedy and Torrance, who owned practically all of the stock of the defendant, and who were directors and president and vice president, respectively, of the company, indorsed this note, and at the same time executed a sealed guaranty thereof to the bank. The proof was that no meetings of the directors or stockholders were held; the whole operations of the company being directed by the two said

stockholders. Far from showing any knowledge by the bank of an infirmity in this paper we think that all the facts that were known by it were calculated to inspire confidence in the integrity of the note.

What we have said, we think, justifies our conclusion that the judgment should be affirmed, and avoids our entering into a protracted discussion of all the evidence.

UNITED STATES v. TRINITY & B. V. RY. CO.

(Circuit Court of Appeals, Fifth Circuit. December 1, 1913.)

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

Act April 14, 1910, c. 160, § 4, 36 Stat. 298 (U. S. Comp. St. Supp. 1911, p. 1328), supplementary to the Safety Appliance Acts, contains a proviso "that where any car shall have been properly equipped as provided in this act and the other acts mentioned herein, and such equipment shall have become defective or insecure while such car was being used by such carrier upon its line of railroad, such car may be hauled from the place when such equipment was first discovered to be defective or insecure to the nearest available point where such car can be repaired without liability for the penalties imposed by section 4 of this act or section 6 of the Act of March 6, 1893 [chapter 196, 27 Stat. 532 (U. S. Comp. St. 1901, p. 3175)], as amended by the Act of April 1, 1896 [chapter 87, 29 Stat. 85 (U. S. Comp. St. 1901, p. 3175)], if such movement is necessary to make such repairs, and such repairs cannot be made except at such repair point." *Held*, that to entitle a railroad company to the benefit of such proviso it must show that the car was properly equipped at starting on its journey and became defective while in use on its road; and, where it was continued in the train in commercial use after it became defective, that such movement was necessary to reach the nearest point where it could be repaired.

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

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

In Error to the District Court of the United States for the Southern District of Texas; Waller T. Burns, Judge.

Action at law by the United States against the Trinity and Brazos Valley Railway Company. Judgment for defendant on the second count of the petition, and plaintiff brings error. Reversed.

Lock McDaniel, U. S. Atty., of Houston, Tex., and Philip J. Doherty, Sp. Asst. Atty. Gen., of Washington, D. C., for the United States.

N. H. Lassiter, of Ft. Worth, Tex., and Andrews, Ball & Streetman and Coke K. Burns, all of Houston, Tex., for defendant in error.

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

CALL, District Judge. On January 15, 1913, the plaintiff in error filed its petition against the defendant in error, claiming $100 for each of three violations of the safety appliance acts of Congress.

The charge in the second cause of action, the only one with which we are concerned, is as follows:

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

"For a second cause of action plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the state of Texas.

"Plaintiff further alleges that in violation of the act of Congress known as the Safety Appliance Act, approved March 2, 1893, contained in 27 Statutes at Large, page 531, as amended by an act approved April 1, 1896, contained in 29 Statutes at Large, page 85, and as amended by the act of March 2, 1903, contained in 32 Statutes at Large, page 943, said defendant on October 25, 1912, hauled on its line of railroad one car, to wit, C. R. I. & P., 32065, as a part of a train engaged in the movement of interstate commerce.

"Plaintiff further alleges that on said date defendant hauled said car as aforesaid over its line of railroad southeasterly from Houston, in the state of Texas, within the jurisdiction of this court, when the coupling and uncoupling apparatus on the 'B' end of said cars was out of repair and inoperative, the coupling chain being disconnected on said end of said car, thus necessitating a man or men going between the ends of the cars to couple or uncouple them, and when said car was not equipped with couplers coupling automatically by impact, and which could be uncoupled without the necessity of a man or men going between the ends of the cars, as required by section 2 of the Safety Appliance Act, as amended by section 1 of the act of March 2, 1903.

"Plaintiff further alleges that by reason of the violation of the said act of Congress, as amended, defendant is liable to plaintiff in the sum of one hundred dollars."

The defendant on the 14th of March, 1913, filed its first amended original answer, first, denying all and singular the allegations in the petition, and, second, pleaded as follows:

"For a further and special answer herein, if required, this defendant says that if it be true that extra freight train No. 38, left Tom Ball on October 25, 1912, destined to Galveston, hauled C. R. I. & P. car No. 32065, * * * that said extra freight train No. 38 was a through train from Tom Ball to Galveston, Tex.; that said train and all the cars therein, including the two cars above mentioned, were inspected by inspectors of the defendant company at Tom Ball, Tex., prior to the time that said train left Tom Ball; that no defects of any kind were found as to * * * and C. R. I. & P. car 32065; that if said two above-mentioned cars were defective in any particular at the time said train reached Houston, that said defects, if any, occurred between Tom Ball and Houston; that said train, as above indicated, was a through train; and that Houston was not a repair point or inspection point for said train; and that the defendant did not have the means or the proper facilities at Houston for making repairs to said defective cars in said train; that Galveston was the nearest repair point in the direction in which said train was moving; and that under the above circumstances defendant was authorized to haul said cars in said train from Houston to the nearest repair point in the direction in which said train was moving, for the purpose of making repairs to said cars as provided and authorized by the amendment of April 14, 1910, to the Safety Appliance Acts as amended by the acts of Congress of April 14, 1910, provided: 'That where any car shall have been properly equipped as provided in this act, and the other acts mentioned herein, and such equipment shall have become defective or insecure while such car was being used by said carrier on its line of railroad, such car may be hauled from the place where such equipment was first discovered to be defective or insecure to the nearest available point where such car can be repaired without liability for the penalties imposed,' etc."

Upon the issues thus made in the pleadings, the parties went to trial; the government producing evidence to show that the cars were defective as charged in the petition at Houston, and were hauled in a train commercially engaged, in this defective condition, from Houston to Galveston. The defendant, on the other hand, introduced evidence

tending to show that the train had been inspected at Tom Ball and no defects existed in said cars; that it maintained no repair shops at Houston, but did at Galveston; that defendant had no inspectors at Houston, and did not inspect through trains at that point, and did not discover the defect to the cars until after arrival at Galveston. The case having been submitted to the jury upon the evidence, under the charge of the court, a verdict was rendered for the plaintiff on the first and third cause of action, and for the defendant on the second, and judgment entered accordingly.

The plaintiff sued out writ of error seeking to reverse the action of the court in rendering judgment for the defendant on the second cause of action, and assigns as error the following:

"First. The court erred to the prejudice of plaintiff in refusing to peremptorily instruct the jury to find for the plaintiff as was orally requested by counsel for plaintiff at the conclusion of the taking of testimony in the case.

"Second. The court erred to the prejudice of the plaintiff in failing to instruct the jury in any part of its general charge that where defendant claims immunity from liability to penalty for moving cars upon which any of the safety appliances are defective, upon the ground that the cars were either so moved to the most available point at which repairs could be made, for the purpose of having such defects repaired, the burden of proof is on the defendant to show by a preponderance of testimony that the existence of such defects were known to defendant's agents and employés in charge and in control of the train to which such defective cars were attached, and that such cars were being moved for the express purpose of having such defects repaired in accordance with the proviso of the Safety Appliance Act of April 14, 1910.

"Third. The court erred to the prejudice of the plaintiff in the seventh paragraph of its general charge in instructing the jury in the second clause, as follows, to wit: 'If you further believe from the evidence that upon leaving Tom Ball they (the cars complained of) were not defective in the particulars designated, but they were defective upon their arrival at Houston later on the same day, then you would be authorized from the evidence to conclude that the defects named occurred between Tom Ball and Houston. And if you so believe you will be authorized to find for defendants upon counts one and two.'

"Fourth. The court erred to the prejudice of plaintiff in the ninth paragraph of its general charge by substantially charging the jury the same as in the seventh paragraph hereinbefore complained of in plaintiff's second assignment, the court using the unqualified language following, to wit: 'Then the court instructs you that, notwithstanding the fact that defects existed at Houston, it not being the destination of the train, and that defendant had no facilities at Houston for making of like repairs, then the defendant, under the law, would be authorized to transport the cars to the nearest repair point in the direction in which the train was moving.'

"Fifth. The court erred to the prejudice of plaintiff in refusing to give to the jury as part of the law of the case either and every of five several special charges written on two sheets of paper and numbered consecutively from 1 to 5, inclusive, for the reason that the general charge of the court failed even substantially to cover either of the phases of the law of the case suggested by said five several special charges respectively.

"Sixth. The court erred to the prejudice of plaintiff in the tenth paragraph of its charge, because from the language employed it is very probable that the jury were misled into the belief that, as a matter of law, it was the duty of Inspector Lawson to have called the attention of the conductor of the train to which the defective cars complained of were attached to the defects discovered by his associate and himself while said train was stopping temporarily at Houston, and that the failure to do so relieved the defendant from

liability to penalties for moving said cars on to Galveston, although, as a matter of fact, the said defects had not been discovered by and were unknown to said conductor or any of his crew; and because said language was calculated to, and probably did, influence the jury to believe that in law the discovery of the defects by a government inspector at Houston, although not communicated to the said conductor, had the effect of relieving the defendant from liability the same as if the discovery had been made by said conductor or other agent or employé of the defendant company."

The only assignments of error that can be considered by us are the first and fifth. There are no exceptions shown in the bill of exceptions to any portions of the court's general charge, and the assignments of error based thereon cannot therefore be considered.

The special charges asked by the plaintiff and refused by the court, and to which refusal, each and every, exception was taken and allowed, are five in number, and are as follows:

"1. The burden is on the defendant to bring itself strictly within the letter and reason of the proviso to the Safety Appliance Act of April 14, 1910, permitting the movement under certain circumstances for the purpose of repair.

"2. The complete equipment of a car with all the appliances provided for and required by the Safety Appliance Act of March 2, 1893, as amended April 1, 1896, and March 2, 1903, and the act of April 14, 1910, is a condition precedent to any right of the defendant to haul such car with defective safety appliances for the purpose of repair.

"3. In order to bring itself within the terms of the proviso to the act of April 14, 1910, the defendant must show the place where it first discovered a car to be defective and that it was hauling such defective car from that place to the nearest available point where such car could be repaired, in an honest movement for the purpose of repair. Defendant must further show that such movement was necessary to make such repairs, and that such repairs could not be made except at such repair point.

"4. If you believe that the cars in question were hauled from Houston, Tex., in the defective condition testified to by the government inspector, and if you further believe that the defendant had not discovered the defects, and did not know of them, then defendant cannot be said to have been hauling these cars for the purpose of repair.

"5. The act of April 14, 1910, does not permit the hauling of defective cars in association with other cars, that are commercially used, unless such cars contain live stock or 'perishable' freight."

The act of Congress, approved March 2, 1893, as amended by act approved April 1, 1896, in the second section provides as follows:

"That on and after the first day of January, 1898, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

In April, 1910, the Congress passed an act to supplement the Safety Appliance Acts theretofore approved, which last act was approved April 14th and provided in the fourth section as follows:

"Provided, that where any car shall have been properly equipped, as provided in this act and the other acts mentioned herein, and such equipment shall have become defective or insecure while such car was being used by such carrier upon its line of railroad, such car may be hauled from the place where such equipment was first discovered to be defective or insecure to the nearest available point where such car can be repaired, without liability for the penalties imposed by section four of this act or section six of the act of March 2, 1893, as amended by the act of April 1, 1896, if such movement is

necessary to make such repairs and such repairs cannot be made except at such repair point."

The first question to be determined is: Did the court err in refusing a peremptory instruction to find for the plaintiff?

The proof of the plaintiff showed without contradiction the existence of the defect, and that the car, while this defect existed, was moved in a through freight train engaged in interstate commerce, from Houston to Galveston. The defendant's testimony tended to show an inspection at Tom Ball, the divisional point, and that all cars in that particular train were properly equipped; that the defendant did not maintain at Houston a repair shop, but that the terminal company did repairs for it in cases of necessity; that defendant did not inspect through trains at that point, which was a few hours run from Tom Ball; that it did maintain a repair shop at Galveston, which was a few hours run from Houston. There was evidence tending to show that the defendant was not aware of the defect until it was pointed out to one of its employés in the yard at Galveston.

For the purpose of testing the correctness of the court's ruling on the motion for a peremptory instruction, it must be admitted that the car was equipped properly when the train left Tom Ball to be carried to Galveston.

Does the evidence of the defendant bring it under the proviso of the act of April 4, 1910? Bearing in mind the language of Mr. Justice Harlan, in C., B. & Q. Ry. v. United States, 220 U. S. 559, on page 569, 31 Sup. Ct. 612, on page 613 (55 L. Ed. 582), he uses this language:

"After referring to various cases holding that the omission of Congress to make knowledge and diligence on the part of the carrier ingredients of the act condemned, the trial court said: 'Its omission was intentional, in order that this statute might induce such a high degree of care and diligence on the part of the railway company as to necessitate a change in the manner of inspecting appliances, and to protect the lives and safety of its employés, provided the accident occurs from a defective appliance such as is designated in this act. And for these reasons the jury will be peremptorily instructed to find a verdict for the government.'"

And after discussing approvingly the case of St. L., I. M. & S. R. Co. v. Taylor, in 210 U. S. 281, 28 Sup. Ct. 616, 52 L. Ed. 1061, affirms the judgment of the trial court.

Unless the evidence of the defendant tends to show, in addition to the facts above recited, to wit (that the car was properly equipped at starting on the journey, and became defective while being used on the line of railroad of defendant), that the movement of the car in the train was necessary to repair the defect, and that the repair could not have been made except at such repair point, then the defendant has not brought itself under the proviso, and there was no question of disputed facts to submit to the jury. Certainly there is no evidence in the record that in the slightest degree tends to prove these last-mentioned requisites. Bear in mind that under the Safety Appliance Act of 1893, and the amendments, ignorance of defects does not excuse. The duty to have and maintain in good order the safety appliances required is a positive duty imposed on the carrier by the statute, and that the de-

fendant in the instant case seeks to avoid responsibility for the violation of this duty by pleading the proviso of the act of 1910. By all the canons of construction, it must clearly bring itself within the terms of the proviso before it can demand immunity. U. S. v. Dickson, 15 Pet., star page 165, 166, 10 L. Ed. 689.

The case of Galveston, H. & S. A. Ry. Co. v. U. S., 199 Fed. 891, 118 C. C. A. 339, does not militate against or conflict with the views above expressed.

The peremptory instruction should have been given, and the court's refusal to do so is reversible error.

It is not necessary for us to consider the fifth assignment of error, wherein the refusal to give the special instructions numbered from 1 to 5, asked by the plaintiff, is insisted upon. We therefore express no opinion on those.

It is therefore ordered that the judgment of the lower court on count No. 2 of plaintiff's petition be, and the same is hereby, reversed and vacated, and the cause remanded to the lower court for a new trial on said count No. 2 in plaintiff's petition in conformity with the views herein expressed.

LOOMIS v. PEOPLE'S CONST. CO. et al.

(Circuit Court of Appeals, Sixth Circuit. March 3, 1914.)

No. 2407.

1. COMMERCE (§ 46*)—FOREIGN CORPORATIONS—RIGHT TO DO BUSINESS—CONDITIONS.

It is competent for a state to prescribe the conditions on which a foreign corporation may enter and do business therein, provided its action does not interfere with or restrain the free exercise of interstate or foreign commerce.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 100, 113, 126; Dec. Dig. § 46.*]

2. CORPORATIONS (§ 642*)—FOREIGN CORPORATIONS—REGULATION—STATUTES.

Statutes requiring a corporation to maintain an office within the state for the transaction of business are generally held not to relate to isolated transactions.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2520–2527; Dec. Dig. § 642.*]

3. COURTS (§ 366*)—FEDERAL COURTS—STATE STATUTES—RULES OF DECISION.

The Supreme Court of Wisconsin having held that St. 1913, Wis., § 1770b, providing that every contract made by or on behalf of any foreign corporation affecting its personal liability before it shall have complied with the provisions of the act specifying the terms on which it might do business within the state, should be wholly void, was applicable to single transactions, such construction would be followed in the federal courts.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 954–957, 960–968; Dec. Dig. § 366.*

State laws as rules of decision in federal courts, see notes to Wilson v. Perrin, 11 C. C. A. 71; Hill v. Hite, 29 C. C. A. 553.]

4. COMMERCE (§ 46*)—INTERSTATE COMMERCE—CONTRACT—CONSTRUCTION.

Defendant construction company having been awarded a contract for the building of a sewer in J., Wis., contracted with defendant pipe com-

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

pany, a West Virginia corporation, having its central office in Michigan, whereby the pipe company was to manufacture concrete sewer pipe, furnishing the superintendent, also all the forms, steel reinforcements, saddle, etc., the construction company furnishing the cement and gravel and the labor necessary to make the pipe on the ground where it was to be used. The pipe company's forms, derrick, and saddle, together with the reinforcing material, was shipped to J. from outside the state. *Held*, that the contract was not a transaction of interstate commerce, and, the pipe company never having complied with the Wisconsin law regulating the transaction of business in that state by foreign corporations, the contract was void and unenforceable for the benefit of the company or its assignee, under Wisconsin Stats. § 1770b, providing that every contract made by or on behalf of any such corporation affecting its personal liability, or relating to property within the state before it has complied with the requirements prescribed for doing business within the state, shall be wholly void on its behalf and on behalf of its assigns.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 100, 113, 126; Dec. Dig. § 46.*]

In Error to the District Court of the United States for the Eastern District of Michigan; Alexis C. Angell, Judge.

Action by Peter B. Loomis against the People's Construction Company and the Title Guaranty & Trust Company. Judgment for defendants, and plaintiff brings error. Affirmed.

G. A. Miller, of Detroit, Mich., and Miner & Reece (Alex. J. Groesbeck, of Detroit, Mich., of counsel), for plaintiff in error.

L. W. Goodenough, of Detroit, Mich. (Wilson & Cobb, of Jackson, Mich., of counsel), for defendants in error.

Before KNAPPEN and DENISON, Circuit Judges, and COCHRAN, District Judge.

KNAPPEN, Circuit Judge. In the year 1908, the People's Construction Company, an Iowa corporation (which we shall hereafter call the Construction Company), was awarded the contract for certain sewer construction in the city of Janesville, Wis. Following the award, the Reinforced Concrete Pipe Company (hereafter called the Pipe Company), a West Virginia corporation, having its "central office" at Jackson, Mich., entered into a written agreement (made at Janesville) with the Construction Company for the manufacture for the latter company of upwards of 10,000 lineal feet of reinforced concrete pipe of different sizes, at an aggregate price of more than $11,000; the Pipe Company furnishing all the forms required for the construction, the steel reinforcement (which was both longitudinal and lateral), the derrick for lowering the pipe into the trench, and a saddle (presumably for use in so lowering the pipe), as well as the superintendent; the Construction Company furnishing the cement and gravel required for the concrete, as well as the labor required in making the pipe, which was to be manufactured in Janesville "along the line of sewer construction of said city"; the Pipe Company agreeing to use in the manufacture of the concrete given proportions of specified cement and gravel, and to reinforce the same "in keeping with the standard of reinforcement in use by" the Pipe Company; also to provide openings

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

for house and catch basin connections as "shown by the plans of said sewer construction." The Pipe Company had thus nothing to do with opening or filling the trenches or with laying the pipe therein, aside from furnishing the derrick and saddle therefor; and the Construction Company had nothing to do with the actual manufacture of the pipe itself previous to putting it into the trench except furnishing the labor, cement, and gravel, and perhaps the mixer. The pipe joint was patented, and the contract price was apparently intended to cover any royalty charge. The Pipe Company's forms, derrick, and saddle were, for the purposes of this work, shipped to Janesville from outside the state; the reinforcing material was shipped to Janesville from Chicago. The pipe manufacture continued from August to November. The Pipe Company had no office or general place of business in Wisconsin; whether it had an actual factory anywhere does not appear. To secure the performance of the contract between the city and the Construction Company, the latter gave a bond to the city with the Title Guaranty & Surety Company (a Pennsylvania corporation) as surety, conditioned, among other things, to "pay for all work and labor performed and materials furnished to complete" the sewer construction.

The Wisconsin statute (section 1770b) provides that:

"No corporation, incorporated or organized otherwise than under the laws of this state * * * shall transact business or acquire, hold, or dispose of property in this state until such corporation shall have caused to be filed in the office of the Secretary of State a copy of its charter, articles of association or incorporation"

—the officer named being made the corporation's attorney for the service of process. Failure to comply with the statute makes the corporation and those acting for it in the state liable to fine. It further provides that:

"Every contract made by or on behalf of any such foreign corporation, affecting the personal liability thereof or relating to property within this state, before it shall have complied with the provisions of this section, shall be wholly void on its behalf and on behalf of its assigns, but shall be enforceable against it or them."

A fee of $25, with an added percentage on capital employed in the state above a stated amount, is required. The Pipe Company never complied with this statute. The Construction Company paid the Pipe Company about $4,800 under the contract, failing to make further payments by reason of certain claims not important here. The Pipe Company assigned its right of action to the plaintiff, who brought suit upon the contract in a state court of Michigan, against the Construction Company and the Surety Company, on the theory that the bond inured to the benefit of the Pipe Company, as a furnisher of labor and materials for a public work. The suit was removed to the United States Circuit Court by reason of diversity of citizenship of the parties. The Construction Company was not served with process, and did not appear; the Surety Company defended. At the conclusion of the trial the court directed verdict for defendant, upon the grounds, first, that the action, it it lay at all, must be brought in the name of the city of Janesville; second, that the Pipe Company was not a material-

man or laborer, but was a subcontractor; and, third, that the Pipe Company had not qualified itself to transact business in Wisconsin.

[1] Turning to the last-stated ground of the trial court's action: It was entirely competent for the state to prescribe the terms upon which a foreign corporation might enter and do business in the state, provided its action did not directly restrain or interfere with the free exercise of interstate or foreign commerce. Cooper Mfg. Co. v. Ferguson, 113 U. S. 727, 732, 5 Sup. Ct. 739, 28 L. Ed. 1137; New York State v. Roberts, 171 U. S. 658, 665, 19 Sup. Ct. 58, 43 L. Ed. 323; Oakland Sugar Mill Co. v. Fred W. Wolf Co. (C. C. A. 6th Cir.) 118 Fed. 239, 244, 55 C. C. A. 93. Of course, a statute imposing such restraint would be void, and, whether or not so intended, could not be made to effect such restraint.

[2] The question then arises whether what was done by the Pipe Company amounted to a transacting of business within the state of Wisconsin, or whether its contract sought to be enforced here was one "affecting the personal liability" of that company, within the meaning of the Wisconsin statute. Statutes requiring a foreign corporation to maintain an office within the state for the transaction of business have been generally held not to relate to isolated transactions such as the one in question is said to be. Cooper Mfg. Co. v. Ferguson, supra; Natural Carbon Paint Co. v. Fred Bredel Co. (C. C. A. 7th Cir.) 193 Fed. 897, 114 C. C. A. 111. But see Chattanooga Bldg. & Loan Ass'n v. Denson, 189 U. S. 408, 414, 23 Sup. Ct. 630, 47 L. Ed. 870.

[3] But the Wisconsin statute makes no requirement of the maintaining of office within the state; and it has been expressly held by the Supreme Court of that state, not only that the act in question does not relieve foreign corporations not having a portion of their capital invested in Wisconsin from complying with the act, if such corporations actually transact business within the state or make contracts therein upon which they assume a personal liability (Southwestern Slate Co. v. Stephens, 139 Wis. 616, 626, 120 N. W. 408, 29 L. R. A. [N. S.] 92, 131 Am. St. Rep. 1074), but that "a single contract falls within the ban of the statute." Southwestern Slate Co. v. Stephens, supra; citing Allen v. Milwaukee, 128 Wis. 678, 106 N. W. 1099, 5 L. R. A. (N. S.) 680, 116 Am. St. Rep. 54, 8 Ann. Cas. 392. The case of Southwestern Slate Co. v. Stephens was an action by a foreign corporation to collect a stock subscription under contract made in Wisconsin. The corporation had offices in at least two other states; it does not appear by the opinion that it had an office in Wisconsin, or that it was doing business there except the sale of the stock. It was said (139 Wis., page 623, 120 N. W., page 410, 29 L. R. A. [N. S.] 92, 13 Am. St. Rep. 1074):

"The trial court found as matter of fact that the subscription contract was made in Wisconsin, and that it affected the personal liability of the plaintiff. If there is sufficient evidence in the record to sustain this finding, the judgment must be affirmed. This result must follow regardless of whether the plaintiff was or was not transacting business in this state within the meaning of subdivision 2, § 1, of the 1905 law."

This construction of the statute so made by the highest court of Wisconsin will be respected by the federal courts. See Chattanooga Bldg. & Loan Ass'n v. Denson, supra. The contract on which the suit is here brought was made in Wisconsin, and it is clear that it affected the personal liability of the Pipe Company. The case is thus brought directly within the decision last cited.

[4] Was the transaction in question one of interstate commerce? Had the contract been merely for the manufacture of the pipe in Michigan and its shipment to and delivery in Wisconsin, a transaction in interstate commerce would have been presented. Robbins v. Shelby Co. Taxing District, 120 U. S. 489, 494, 7 Sup. Ct. 592, 30 L. Ed. 694; Crenshaw v. Arkansas, 227 U. S. 389, 33 Sup. Ct. 294, 57 L. Ed. 565, and cases there cited; Coweta Fertilizer Co. v. Brown (C. C. A. 6th Cir.) 163 Fed. 162, 168, 89 C. C. A. 612. And again, had the contract involved merely a manufacture out of the state and an installation in Wisconsin, the transaction, under many authorities, would still be held one in interstate commerce. See Haughton Elevator Co. v. Candy Co., 156 Mich. 25, 27, 120 N. W. 18; Imperial Curtain Co. v. Jacob, 163 Mich. 72, 76, 127 N. W. 772; Buffalo Refrig. Mach. Co. v. Penn Heat & Power Co. (C. C. A. 3d Cir.) 178 Fed. 696, 102 C. C. A. 196. But neither of the features stated exists here. The dominant feature of the transaction is its local character. The contract relates to the manufacture of the sewer pipe in Wisconsin, and in that state alone. In this respect it does not differ materially from the contract taken by the Construction Company. The mere fact that the forms, derrick, and saddle were shipped in from without the state does not overcome the force of the local and determinative character of the transaction. The following cases, among others, support this conclusion, some of them emphasizing the distinction we have expressed. Haughton Elevator Co. v. Candy Co., supra; Imperial Curtain Co. v. Jacob, supra; Independent Tug Line v. L. S. Lumber & Box Co., 146 Wis. 121, 131 N. W. 408; Buffalo Refrig. Mach. Co. v. Penn Heat & Power Co., supra. See, also, Diamond Glue Co. v. United States Glue Co., 187 U. S. 611, 616, 23 Sup. Ct. 206, 47 L. Ed. 328.

We are thus brought to the question whether the statute makes the contract before us absolutely void, or whether it merely imposes some other penalty for failure to comply with it. Had it merely forbidden suit in the state courts, or merely imposed the liability of the corporation and its officers to penalties, without in terms declaring the contract void, it should be held that such prohibition or penalty was regarded by the Legislature as ample to effect the legislative object; and in such case the statute would create no impediment to suit in the courts of other states or in the federal courts. Cooper v. Ferguson, supra; Fritts v. Palmer, 132 U. S. 282, 289, 10 Sup. Ct. 93, 33 L. Ed. 317; Allen v. Alleghany County, 196 U. S. 458, 462, 25 Sup. Ct. 311, 49 L. Ed. 551; David Lupton's Sons v. Automobile Club of America, 225 U. S. 489, 496, 32 Sup. Ct. 711, 56 L. Ed. 1177, and cases cited; Johnson v. New York Breweries Co., Ltd. (C. C. A. 2) 178 Fed. 513, 101 C. C. A. 639. And had the statute imposed both the prohibition and penalty referred to, perhaps the result above stated would equally follow. But if the

statute has expressly declared the contract void, such invalidity must, in our opinion, be recognized by the courts, state and federal, in whatever state suit may be brought for its enforcement. See Harris v. Runnels, 12 How. 79, 83, 13 L. Ed. 901, and notes; Alleghany County v. Allen, 69 N. J. Law, 270, 274, 55 Atl. 724; Johnson v. New York Breweries Co., Ltd., supra; Blodgett v. Lanyon Zinc Co. (C. C. A. 8th Cir.) 120 Fed. 893, 896, 58 C. C. A. 79; Dunlop v. Mercer (C. C. A. 8th Cir.) 156 Fed. 545, 554, 86 C. C. A. 435; Thomas v. Birmingham Ry., Lt. & P. Co. (D. C.) 195 Fed. 340, 342.

The statute provides that contracts of a foreign corporation which has not complied with the requirements of the section "shall be wholly void on its behalf and on behalf of its assigns, but shall be enforceable against it or them." The Supreme Court of the state has construed the statute as making absolutely void all contracts made by foreign corporations affecting their liability, or relating to property within the state, before compliance with the statute (Ashland Lumber Co. v. Detroit Salt Co., 114 Wis. 66, 76, 89 N. W. 904; Allen v. Milwaukee, 128 Wis. 678, 687, 106 N. W. 1099, 5 L. R. A. [N. S.] 680, 116 Am. St. Rep. 54, 8 Ann. Cas. 392); and this court is bound by that construction, which also has been recognized and applied by the Supreme Court of the United States in Diamond Glue Co. v. United States Glue Co., supra. True the Supreme Court of the State, in Lanz-Owen & Co. v. Garage Equipment Co., 151 Wis. 555, 139 N. W. 393, decided since the contract in question was made (and, indeed, since the decision of this case below), has said of contracts made before compliance with the statute that they are not "absolutely void," but are "void only at the election of the party dealing with the corporation," but that decision again affirms that such contracts are "wholly void on its [the foreign corporation's] behalf and on behalf of its assigns," and that "neither the corporation nor its assigns could enforce it against the other party." We think the expressions contained in this later opinion do not, so far as respects the instant case, change the rule before announced by that court. Indeed the right of the opposite party to enforce the contract was expressly written in the statute when previously construed by the Wisconsin decisions, as well as in Diamond Glue Co. v. U. S. Glue Co. The basis of plaintiff's asserted right of action is, and must be, the contract between the Pipe Company and the Construction Company. The latter has not affirmed the contract; it is not in court; there is no limitation of time within which it must elect whether or not to enforce; and the Surety Company, if pursued, has, we think, as a party in interest, the right to assert the void nature of the contract as against the Construction Company. Hanna v. Kelsey Realty Co., 145 Wis. 276, 282, 129 N. W. 1080, 33 L. R. A. (N. S.) 355, 140 Am. St. Rep. 1075; Lanz-Owen & Co. v. Garage Equipment Co., supra.

It results from these views that verdict was properly directed for defendants. This conclusion makes it unnecessary to consider the other grounds upon which the action of the trial court is based; and we accordingly intimate no opinion thereon.

The judgment of the district court is affirmed, with costs.

COPPER RIVER & N. W. RY. CO. et al. v. HENEY.

(Circuit Court of Appeals, Ninth Circuit. March 3, 1914.)

No. 2300.

1. TRIAL (§ 419*)—MOTION FOR NONSUIT—WAIVER—INTRODUCTION OF TESTIMONY.
On denial of defendant's motion for a nonsuit at the close of plaintiff's evidence, the motion is waived by defendant's subsequent introduction of testimony in its own behalf.
[Ed. Note.—For other cases, see Trial, Cent. Dig. § 982; Dec. Dig. § 419.*]

2. COMMERCE (§ 8*)—INJURIES TO SERVANT—EMPLOYERS' LIABILITY ACT—STATE LAW.
The federal Employers' Liability Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp. 1911, p. 1322) supersedes state and territorial laws in the matter with which it deals.
[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 5; Dec. Dig. § 8.*]

3. MASTER AND SERVANT (§ 86*)—INJURIES TO SERVANT—EMPLOYERS' LIABILITY ACT—CARRIERS.
Where, in an action for injuries to a servant while retimbering a railroad tunnel, the complaint alleged that the C. company was operating the line of railroad, that defendant K. company was a subsidiary company of the railroad company, and that the latter in operating its road did so partly through the K. company as its agent, and the evidence sustained such allegations, both defendants would be regarded as common carriers as to which the federal Employers' Liability Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp. 1911, p. 1322) was applicable.
[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 137; Dec. Dig. § 86.*]

4. PLEADING (§ 369*)—TRIAL (§ 169*)—CAUSES OF ACTION—MISJOINDER—REMEDY.
Where an alleged misjoinder of causes of action is disclosed by plaintiff's evidence, defendant's remedy is by motion to compel plaintiff to elect, and not for the direction of a verdict.
[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1199–1209; Dec. Dig. § 369;* Trial, Cent. Dig. §§ 341, 381–387, 389; Dec. Dig. § 169.*]

5. MASTER AND SERVANT (§ 286*)—INJURIES TO SERVANT—NEGLIGENCE.
In an action for injuries to a servant of certain carriers, evidence *held* sufficient to entitle plaintiff to go to the jury on the question of defendants' negligence in failing to properly light and guard a dangerous opening in a platform in the tunnel.
[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010–1015, 1017–1033, 1036–1042, 1044, 1046–1050; Dec. Dig. § 286.*]

6. APPEAL AND ERROR (§ 272*)—INSTRUCTIONS—EXCEPTIONS—TIME.
Exceptions to instructions given and to the refusal of requests taken after the verdict has been returned are unavailable.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1611–1619; Dec. Dig. § 272.*]

In Error to the District Court of the United States for the Third Division of the Territory of Alaska; Peter D. Overfield, Judge.

Action by James Heney against the Copper River & Northwestern

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

Railway Company and the Katalla Company. Judgment for plaintiff, and defendants bring error. Affirmed.

The defendant in error was the plaintiff in an action to recover damages for personal injuries sustained in falling through an opening in a platform in a tunnel on the line of the Copper River & Northwestern Railway Company (hereinafter designated the Copper River Company) in Alaska. In his complaint he alleged that he was employed nominally by the Katalla Company, a corporation, but that in reality he was working for the Copper River Company, of which the Katalla Company was the agent. He alleged negligence on the part of both corporations defendant in that the tunnel in which he was working was not sufficiently lighted, and that the opening in the platform was not properly safeguarded. The defendants in the action answered separately, denying all the allegations of the complaint except the allegations that they were incorporated and doing business in Alaska. They each pleaded the affirmative defenses of contributory negligence and assumption of risk. The jury returned a verdict for $2,025 in favor of the plaintiff. Thereupon judgment was rendered.

Several months prior to the accident the tunnel had caved in. The plaintiff had been engaged for about a month in the work of retimbering it. In doing this a structure had been made two stories in height, so that about 21 feet above the railway track a platform or floor had been placed covering the entire width of the tunnel, and it had been extended some 200 feet. The plaintiff and three others were engaged in placing lagging between the timbers on the sides of the tunnel above the platform. When that work in the tunnel began, the working place was well lighted by two powerful acetylene lamps. These had been removed, and torches had been substituted. But for three or four days before the accident the only light furnished was hand lanterns, and for the four men working on the platform but three lanterns had been furnished. At times when the tunnel was filled with smoke from passing engines it was very difficult for the men to see; the lanterns showing merely a faint red glow. There was evidence that the men asked for more lights, and that their request had not been complied with. Just prior to the accident a train had gone through the tunnel, leaving smoke which rose through the platform into the space above. The plaintiff, at the instance of one of his fellow workmen, proceeded along the platform in the direction of the opening therein, carrying his lantern, intending to measure a space for lagging near the edge of the opening. The smoke was so dense as it came up from below that he could not see the platform on which he walked, although he could discern the timbers along the sides. He testified: "As I was groping along going back looking for the place where I was going to work, I walked into this hole. The smoke was coming up so thick, and I had the lantern in my hand, but I could not see the hole."

R. J. Boryer, of Cordova, Alaska, and W. H. Bogle, Carroll B. Graves, F. T. Merritt and Lawrence Bogle, all of Seattle, Wash., for plaintiffs in error.

E. E. Ritchie, of Valdez, Alaska, T. C. West and Fernand de Journel, both of San Francisco, for defendant in error.

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

GILBERT, Circuit Judge (after stating the facts as above). [1] We may pass by the defendants' motion for a nonsuit, made at the close of the plaintiff's evidence, the denial of which is assigned as error, for the defendants thereafter waived their motion by offering testimony in defense of the action.

[2] Error is assigned to the refusal of the court to direct a verdict in favor of the defendants. The motion was based on the grounds: That the plaintiff had failed to establish that both the defendants were engaged in the business of a common carrier; that he failed to establish that he was employed or working for the Katalla Company; that the evidence proved his contributory negligence; and that there was no evidence to make out a case against the defendants. The argument made in support of this assignment of error presents grounds in addition to those which were expressed in the motion for a directed verdict, and it is said that a joint action against the two corporations cannot be maintained; that the action must be based either on the Employers' Liability Act or on the common law, and not on both, and that if the act applies to either defendant as a common carrier, it supersedes all common law and statutory liability on its part. It is true that the act of Congress supersedes state and territorial laws "in the matter with which it deals." Francis v. McNeal, 228 U. S. 695, 33 Sup. Ct. 701, 57 L. Ed. 1029; El Paso & N. E. Ry. v. Gutierrez, 215 U. S. 87, 30 Sup. Ct. 21, 54 L. Ed. 106. But if the Katalla Company is not a common carrier, as contended by the defendants, it is not within the act, and common-law remedies against it remain unimpaired.

[3] While neither the complaint nor the answers alleged that either of the corporations was a common carrier, the complaint alleged that the Copper River Company was operating a line of railroad, and that the Katalla Company was a subsidiary company of the Copper River Company, and that the latter in operating its road did so partly through the Katalla Company as its agent. The testimony established these allegations. It was proven that the Copper River Company was at the time of the accident a common carrier. It was also shown that the Katalla Company transacted the business of the road, issued in its own name bills of lading for goods carried thereon and tickets for passengers bearing the heading, "Katalla Company Constructing and Operating the Northwestern Railway Company." The resident engineer of the road, who had charge of the work in the tunnel, and who was called as a witness by the plaintiff, testified that he was unable to state which of the two corporations was engaged in conducting the business of a common carrier, but that he got his pay by the checks of the Katalla Company. There was evidence that the Copper River Company was paying the license fee required by law as a common carrier; and, while there was evidence tending to show that the Katalla Company did not pay such a license, there was no positive proof to that effect. And whether it paid a license fee or not, it was a common carrier within the provision that the Employers' Liability Act shall include "persons or corporations charged with the duty of the management and operation of the business of a common carrier." The plaintiffs in error not only did not plead that one of the corporations was a common carrier, and that the other was not, or that two causes of action were improperly united, but on the trial they offered no evidence whatever to show that such was the case, or to explain the relations between the two corporations, and at no time did they move that the plaintiff be re-

quired to elect between causes of action. There was no misjoinder, therefore, of causes of action.

[4] But if it had been true, as contended by the defendants, that misjoinder was disclosed by the plaintiff's evidence, that fact, it is clear, would not entitle the defendants to a directed verdict in their favor. Their remedy was to move the court at the conclusion of the testimony to require the plaintiff to elect as against which of the defendants he would proceed. 21 Cyc. 653; French v. Central Construction Co., 76 Ohio St. 509, 81 N. E. 751, 12 L. R. A. (N. S.) 669, 118 Am. St. Rep. 891.

[5] As to the other grounds of the motion, it was shown that the plaintiff was paid by the checks of the Katalla Company, and upon the case made by the plaintiff there was evidence to go to the jury tending to prove the negligence of the defendant in not properly lighting the dangerous opening in the platform, or in failing to guard the same by railing; precautions which would necessarily be suggested by reasonable care for the safety of the employés. The defense of contributory negligence of the plaintiff as a complete defense was eliminated by the uncontradicted evidence that both the defendants were common carriers.

[6] We are precluded from considering the assignments of error which are based upon instructions to the jury and refusals to instruct, for the reason that it does not appear that timely exceptions were taken to the instructions so given or denied. On May 10, 1913, two days after the jury had returned their verdict, the plaintiffs in error filed in the court below a paper containing their exceptions to the court's instructions and refusals to instruct; and it does not appear in the bill of exceptions that prior to that date, or at any time during the trial, any such exceptions were taken. It seems unnecessary to cite authorities to the proposition that exceptions to the charge taken after the jury had brought in a verdict are of no avail in an appellate court. Reference may be made to Western Union Telegraph Co. v. Baker, 85 Fed. 590, 29 C. C. A. 392, and cases there cited. Bidwell v. George B. Douglas Trading Co., 183 Fed. 93, 105 C. C. A. 385, and Star Co. v. Madden, 188 Fed. 910, 110 C. C. A. 652.

The judgment is affirmed.

HOLSTEIN v. ZEELAND ORNAMENTAL CO.

(Circuit Court of Appeals, Sixth Circuit. February 3, 1914.)

No. 2,408.

PATENTS (§ 328*)—INFRINGEMENT—PROCESS OF MAKING FABRIC-COVERED ORNAMENTS.

The Holstein patents, No. 683,425, for a process of making fabric-covered ornaments in which a plastic material is pressed into ornamental configuration by means of a die and the fabric caused to adhere thereto in a single operation, and for the product of such process, and No. 779,651, for a similar process in which two operations are required, construed, and *held* not infringed.

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

Appeal from the District Court of the United States for the Western District of Michigan; Clarence W. Sessions, Judge.

Suit in equity by Adolph M. Holstein, doing business under the name of the Syracuse Ornamental Company, against the Zeeland Ornamental Company. Decree for defendant, and complainant appeals. Affirmed.

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

Complainant is the owner of two patents (Nos. 683,425 and 779,651), relating to claimed improvements in the art, process, and method of manufacturing cloth or fabric-covered ornaments. The bill of complaint is in the usual form alleging infringement and unfair competition, and praying for an injunction, discovery, and an accounting with a decree for profits and damages. The defendant in its answer denies infringement and unfair competition, and alleges the invalidity of the patents for lack of invention and novelty. The question of infringement is the principal one to be determined.

In the specification of patent No. 683,425, it is stated:

"This invention relates to improvements in the art and process of manufacturing fabric-covered ornaments or moldings, the primary object being to reduce to a minimum the cost of producing ornamental fabric-covered surfaces of any desired configuration by combining an adhesive plastic or other material with a fabric or equivalent facing and simultaneously pressing the fabric-covered surface into the desired ornamentation or configuration. * * *

"In the art of manufacture of fabric-covered ornaments and moldings it has been the practice to first produce the ornamented surface on a plastic or other material, and then to apply the fabric covering to the ornamented surface by hand, which process, it is well known, is laborious, expensive, and entirely impracticable in extremely intricate and fine ornamentation or in extra heavy and sharp relief work, and that even in ordinary ornamentation the sharpness of the relief or configuration is frequently lost by the inability of the operator to force the fabric into contact with every minute detail of such configuration.

"Our improved method or process consists, broadly: First, in the mechanical application of the fabric or equivalent facing to any ornamented or plain surface by a single operation; second, the simultaneous formation of the same configuration or ornamentation in both the plastic material and fabric covering or facing; and, third, the pressing together in one die or mold of an adhesive plastic body and a fabric, with the fabric adjacent to the negative mold or die, whereby the ornamentation is produced, first, upon the fabric and then upon the plastic material, and both are caused to adhere to each other. * * *

"The essential steps in the process of making fabric-covered ornaments consists, first, in interposing the fabric between the plastic material and the negative die and then pressing the whole by mechanical means against the negative, whereby the contour of the negative is positively and simultaneously transmitted to the fabric and to the plastic material by a single operation. The plastic material being provided with an adhesive element causes the fabric to retain the same configuration as the die and plastic material, and the fabric serves to reinforce the plastic body, which on account of its pliability may be readily bent and made to conform to any contour to which the ornament or molding may be applied."

Claims of the inventors are stated as follows:

"1. The method and process of making fabric-covered ornaments or moldings consisting in the mechanical application of a fabric to an ornamented surface whereby the fabric in its natural dry state is made to assume the same configuration as said ornament-surface without further treatment.

"2. The method and process of making fabric-covered ornaments or moldings consisting in subjecting a fabric-covered surface of plastic material to pressure against an ornamented surface, whereby the ornamentation is positively and simultaneously stamped into the fabric and plastic material, said

fabric being applied to the surface of the plastic material in its natural dry state, and made to adhere thereto without further treatment.

"3. The method and process of making fabric-covered ornaments or moldings consisting in interposing a fabric between a yielding surface of a body of material and an ornamented surface and then forcing the whole against said ornamented surface for simultaneously producing a positive impression in the fabric and yielding surface, said fabric being forced into the intaglio parts of the ornamented surface and made to adhere thereto without additional treatment.

"4. As a new article of manufacture, a body of permanently pliable material containing an adhesive element and having an ornamented surface and a fabric facing of silk, satin, broadcloth, or plush impressed into the same configuration as said ornamented surface."

Claims 1, 2 and 3, considered in connection with the specification, are correctly construed and interpreted by complainant's expert witness:

"The fundamental feature of novelty in each of these claims therefore consists in pressing a cloth-covered plastic body against the negative ornamental surface of a mold under mechanical pressure whereby the positive ornamentation is simultaneously impressed in the fabric and plastic body corresponding in minutest detail to the surface of the negative.

"The other broad feature of novelty of the process consists in causing the cloth to adhere to all parts of the ornamented surface by the same pressure which formed the ornamentation."

Claim 4 necessarily refers and pertains to the article of manufacture produced by the process set forth in claims 1, 2, and 3 and the specification, and must be construed and interpreted in the same way.

In his specification of patent No. 779,651, complainant says:

"This invention relates to improvements in the method of manufacturing cloth-covered ornaments for burial caskets. These ornaments are made of a composition material of a putty nature, which is molded to the desired form while in a plastic or semiplastic condition, and contains a suitable bond and an adhesive substance which are thoroughly mixed with the putty base, so that by slightly steaming the ornament after being molded it becomes easily pliable, but when cold becomes hard, although tenacious and somewhat pliable. Heretofore I have made these ornaments under my patent No. 683,425, dated October 1, 1901, by applying the cloth in a dry state to the ornamental surface while the composition material was in a somewhat green state—that is, the cloth was applied by the same dies by which the ornament was formed and during the operation of forming the ornament. This has proved to be a very satisfactory method of applying the cloth; but I have found that different manufacturers cover their caskets with different makes of cloth, and that these cloths vary slightly in shade or tint, and it therefore becomes necessary for each manufacturer for whom my ornaments are made to supply me with their particular shade of cloth, so that there may be no difference between the color of the cloth in the ornaments and that on the body of the casket. The orders for these ornaments are necessarily filled in great haste, and it therefore becomes necessary to provide some means of applying the cloth to the ornaments as soon as the order is received. In order that this may be done expeditiously, a certain quantity of adhesive substance, as cement or glue, is thoroughly mixed in the composition, after which the ornaments are pressed to the desired form without applying the cloth, and, of course, these ornaments soon become cold and dry, and I have found that by slightly steaming the ornamented surface the cloth may be readily applied, either by hand or in the same press or dies by which the ornament was made, the latter method being preferred, as it impresses the cloth more evenly against all parts of the adhesive surface.

"My improvement, therefore, consists in steaming the ornamented surface, which is done very quickly by simply moving the ornament across a jet of steam, after which the cloth is applied by the same dies which form the ornament and by hand, and the adhesive element, being moist, readily grips the cloth and soon cools, thus firmly securing the cloth to the ornament. The work of steaming is done almost instantaneously, and therefore permits a

large number of these ornaments to be covered within a very short period of time."

His claim is thus stated:

"The herein-described method of manufacturing cloth-covered ornaments consisting in mixing with a composite body a quantity of adhesive and then pressing the desired ornamentation in the surface of said body and allowing the composite body to dry; then slightly steaming the ornamented surface to soften the adhesive and immediately, afterward applying the cloth facing, whereby the adhesive is caused to permanently secure the cloth to the composite body."

Defendant's process of manufacturing fabric-covered ornaments is stipulated to be as follows:

"First. The defendant takes a wooden block *A*, which is routed out in one of its faces as shown at "*a*" for the purpose of forming a recess, in which recess is placed a material susceptible to receiving an impression, and which subsequently hardens and forms a die *b*.

"Second. The plastic materials *B* from which the ornament is made is placed over the die or mold and pressed by suitable appliances into the die. The ornament is then removed from the die and allowed to dry and become hard, and the edges are then removed or trimmed off in any suitable way as if trimmed by hand.

"Third. The plastic material forming the ornament is composed of glue, whiting, rosin, and ground wood.

"Fourth. The dry ornaments are then covered with a coating of glue and the fabric or cloth covering is placed upon the face of the ornament and by hand the fabric is worked into the interstices, depressions, and cavities of the ornaments.

"(The ornament as thus covered is then replaced in the die and pressure again applied to finish the face of the ornament, and more perfectly work the fabric into the interstices, crevices, and valleys of the ornament.)

"Fifth. The ornament with its face covering is then removed from the die and the edges trimmed off and pasted over onto the back of the ornament by hand."

It appears by the proofs that in defendant's process glue is applied to the surface of the ornaments by means of a brush.

An examination of complainant's inventions, as defined and described in the specifications and claims above quoted, and a comparison of such inventions with the method and process employed and used by defendant, clearly demonstrate that there is no infringement of the first patent and none of the second unless the hand coating of the hard and dry face of an uncovered ornament with glue is the equivalent of steaming, and thus softening its surface and making it plastic and adhesive. The alleged infringement consists neither in the ingredients and composition of the plastic material, nor in the formation of the uncovered ornament, but rather in the method and process of combining and uniting the plastic ornament with the fabric cover. The process of attaching a cloth or fabric covering to a surface coated with solvent glue or other adhesive substance, either by hand or by mechanical pressure, is familiar to every one, and very old. The process covered by complainant's first patent consists essentially of impressing the ornamentation or configuration upon the fabric covering and the soft and plastic body of the ornament simultaneously, by subjecting both to the same pressure in a mold or die, and thereby not only producing and completing an ornament in a single operation but also combining its parts into nearly an homogeneous whole. The process of the second patent is essentially the same as that of the first, differing therefrom only in the fact that it calls for an interrupted instead of a continuous operation, or, to speak more accurately, two operations instead of one. In other words, in the process covered by the second patent, the body of the ornament is first molded and formed in the die from the soft and moist materials, then removed from the die and permitted to dry and become hard, then again partially softened and moistened by steaming, and finally replaced in the mold or die with the cloth covering thereon, and by pressure reshaped, remolded, and re-formed, the resultant product being substantially identical with that of the process covered by the first patent.

Complainant contends that defendant, by applying solvent or liquid glue to the surface of the dry body of the ornament, also softens it and by replacing it in the die with the cloth cover and subjecting both to pressure, not only remolds, re-forms and reshapes the ornament, but also forces the substance of the one into the fabric of the other. He insists that, unless softened and made plastic, the body of the ornament and the additional cloth covering could not be placed in the original mold or die and subjected to pressure without cutting, tearing or otherwise injuring the fabric and defacing the ornamentation. The defendant claims that the green and moist body of the ornament, as it comes from the die or mold in the first instance, will shrink sufficiently in drying to admit into the die the cloth covering in addition to itself. The testimony upon this subject is very conflicting, and it is sufficient to say that the evidence on the part of the defendant is more satisfactory, reasonable, and convincing than that in behalf of complainant.

The evidence does not establish a case of unfair competition and there being no infringement, other questions need not be considered.

A decree will be entered dismissing the bill of complaint, with costs to the defendant to be taxed.

E. A. Thompson, of Syracuse, N. Y. (Howard P. Denison, of Syracuse, N. Y., of counsel), for appellant.

J. N. Clark, of Zeeland, Mich., for appellee.

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

PER CURIAM. The decree of the district court is affirmed upon the grounds stated in the opinion of Judge Sessions in that court, which is approved.

TURNER v. MOORE et al.

(Circuit Court of Appeals, Eighth Circuit. January 19, 1914.)

No. 3801.

1. PATENTS (§ 26*)—INVENTION—COMBINATION OF OLD ELEMENTS.

It does not constitute patentable invention to bring elements, all of which were clearly disclosed in prior patents, although separately, together in a combination in which each performs merely its old function.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 27–30; Dec. Dig. § 26.*

Patentability of combinations of old elements as dependent on results attained, see note to National Tube Co. v. Aiken, 91 C. C. A. 123.]

2. PATENTS (§ 328*)—INVENTION—REINFORCED CONCRETE CONSTRUCTION.

The Turner patent No. 985,119, for a reinforced concrete building construction, *held* void for lack of invention in view of the prior art.

Appeal from the District Court of the United States for the District of Minnesota; Charles A. Willard, Judge.

Suit in equity by Claude A. P. Turner against Morris E. Moore and Edward J. Scriver, partners under the name of Moore & Scriver. Decree for defendants, and complainant appeals. Affirmed.

For opinion below, see 198 Fed. 134.

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

Charles J. Williamson, of Washington, D. C. (Louis A. Hubachek, of Minneapolis, Minn., on the brief), for appellant.

H. E. Fryberger, of Minneapolis, Minn., for appellees.

Before HOOK and SMITH, Circuit Judges, and VAN VALKENBURGH, District Judge.

HOOK, Circuit Judge. Turner sued Moore & Scriver for infringement of claims 1, 4, and 6 of his patent No. 985,119, February 21, 1911, for new combination in reinforced concrete building construction. He appeals from a decree of the trial court dismissing his bill on the ground of noninfringement.

The claims of the patent contemplate reinforced concrete columns in a building structure of one or more stories, with intervening slab floors integral therewith; the columns having cantilever heads; the column reinforcement being vertically continuous, that of the cantilever heads independent thereof, and that of the floor slabs being groups of rods running across the column heads from column to column in various directions. The cantilever rods are elbow shape, the lower portions extending downward into their respective columns, and the upper portions radiating laterally from the column tops into the floor structure. In another form specified the elbow extensions are supplemented by rods crossing the columns and projecting into the slab. In one of the claims the lower members of the elbow rods are not expressed as being independent of the vertical column rods. In the structure of the patent, beams or girders as floor supports are dispensed with.

[1, 2] The column and flat slab construction was old in the art, and was so declared by the Patent Office. Except as to the elbow rods the evidence before the trial court was full and convincing that none of the plaintiff's particular elements were new. This was so completely established by prior patents, publications, and designated structures that no pains need be taken to enumerate and discuss them. Counsel argue that as no single prior patent, publication, or structure exhibited all the elements of the claims in suit, the defense must fail. But if they were clearly disclosed before, though separately, it was not invention to bring them together as the plaintiff did. For example, it is not invention to take a fire pot from an old stove, a flue from another, and a coal reservoir from a third and assemble them, where each merely performs its old functions in its new location. Hailes v. Van Wormer, 20 Wall. 353, 22 L. Ed. 241. Plaintiff's column rods were, in function, the old column rods, and nothing more. His floors of flat slabs without beams or girders were old and so of their reinforcement by groups of rods passing in various directions over the points of support. The cantilever rods extending across the tops of the columns into the supported structure were also old. The plaintiff merely selected and assembled old things in aggregation, and pushed them with enterprise and publicity.

The elbow device is plainly disclosed in patent No. 667,871 to Ellinger, February 12, 1901. His was a column, beam, and floor construction, but the extension of the horizontally bent rods into the floor

itself was suggested, even if it would not naturally occur to a person of ordinary skill in the art. In Ellinger's specifications it is said:

"As shown in Figs. 1 and 2 the column and beam are in one continuous structure, the upper ends of the rods 1 on the opposite sides of the column being turned outwardly at right angles and embedded in the cemented material of the beam. The column may, however, be made separately from the beam, or it may be formed integral with a section of the floor or other structure which it is to support."

In this patent the lower members of the elbow rods are employed as column reinforcement, and seem to extend to the foot of the column, whereas in two of the three claims in suit they are separate or independent. But this difference is for economy in the use of metal and for convenience in working, and a change from one to the other would hardly deserve the dignity of invention. Thus in his original application the plaintiff specified that:

"When the column reinforcement consists in the banded and bound vertical rods I bend the rods outward at the top of the column and extend the laterally bent portions thereof horizontally; but where the column reinforcement consists of the banded and bound bars of structural steel (members too rigid to be practically bent) I employ the elbow ribs the vertical portions of which I arrange within the column and the horizontal portions of which I arrange within the floor slab," etc.

In the final amendment of the specifications which are incorporated in the patent as issued emphasis is put upon the independency of the elbow and column rods. The idea seems to have come with the struggle in the Patent Office. The extension of the lower members of the elbow rods into the column is for anchorage, and in Ellinger's device it is accomplished by the upper part of his column rods. For this function the devices are mechanical equivalents, and so nearly alike that a change from Ellinger's to plaintiff's would naturally suggest itself to a person who in building a structure of two or more stories desired the column rods continuous instead of bent out laterally at the top of each column. But even this independency was not the plaintiff's invention. It was disclosed in the work of Berger and Guillerme entitled La Construction en Ciment Armé, published in Paris in 1902, which testimony shows is a standard work of high authority. One volume consists largely of text and illustrations and the other of plans and drawings. Plate xlii in the latter shows a reservoir with a flat slab bottom and a column in the center supporting an arch slab top. Some of the vertical column rods are bent elbow like outward into the footing of the column and rods in the roof or top are bent downward into the column where they are independent of the column reinforcement. A cross-section of the top of the column shows the horizontal rods radiating into the adjacent structure. It may also be observed that Plate xlvi of the same volume shows in skeleton form the reinforcement rods of a column bent outward elbow like at both top and bottom. Indeed, passing all other evidences of the prior art, including physical structures in various parts of the country, this work, published about eight years before plaintiff's application for the patent before us, and more than two years before the application for his prior patent, No. 859,858, discloses by itself almost every other ele-

ment of the claims now in suit—columns with vertical rods, integral with and supporting flat slab floors without beams or girders, and groups of rods in flat slab construction running in different directions over the columns from column to column. Circumferential rings and struts or braces in the enlargement of the column heads are also illustrated. Cantilever bars lying across and projecting beyond the heads of supports were old with Hennebique. One disposition of them is shown in his patent No. 611,907, October 4, 1898, for a joist or girder construction, and their adaptability to a flat slab is obvious.

The decree is affirmed.

VAN VALKENBURGH, District Judge (concurring). Both the Supreme Court and this court have distinctly announced the conditions under which a new combination, all the constituents of which were well known and in common use before the combination was made may be patentable. Parks v. Booth, 102 U. S. 96–102, 26 L. Ed. 54; Loom Co. v. Higgins, 105 U. S. 580, 26 L. Ed. 1177; Potts v. Creager, 155 U. S. 597, 606, 608, 15 Sup. Ct. 194, 39 L. Ed. 275; National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co. (C. C. A.) 106 Fed. 693, 45 C. C. A. 544; J. L. Owens Co. v. Twin City Separator Co. (C. C. A.) 168 Fed. 259, 93 C. C. A. 561; Naylor v. Alsop Process Co. (C. C. A.) 168 Fed. 911–917, 94 C. C. A. 315; also Hailes v. Van Wormer, 20 Wall. 353, 22 L. Ed. 241. In the latter case it was said:

"Merely bringing old devices into juxtaposition, and there allowing each to work out its own effect, without the production of something novel, is not invention."

Here, as pointed out in the opinion of the court, the constituent elements of the patent in suit were well known, and performed the same functions in the same art, though not all disclosed in a single prior patent, publication or structure. For this reason, and for the additional reason that I believe the trial court was correct in its conclusion that defendant's building did not infringe complainant's patent, I concur in the foregoing opinion.

NEY MFG. CO. v. G. A. SWINEFORD CO.

(District Court, N. D. Ohio, E. D. April 22, 1913.)

No. 15.

1. PATENTS (§ 328*)—VALIDITY—TRACK FOR HAY-CARRIER.
The Taylor patent, No. 486,812, for a track for hay-carriers, claim 1, *held* void as covering a broad combination of which the patentee never claimed under oath to be the originator or inventor.

2. PATENTS (§ 102*)—PROCEEDINGS TO OBTAIN—AMENDMENT OF APPLICATION.
An amendment of a patent application introducing a claim not contained in the original application and embodying a construction not specified nor claimed therein must be verified by the supplementary oath of

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

the applicant in the terms prescribed by Rev. St. § 4892 (U. S. Comp. St. 1901, p. 3384).

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 142; Dec. Dig. § 102.*]

In Equity. Suit by the Ney Manufacturing Company against the G. A. Swineford Company. On final hearing. Decree for defendant.

Bond & Miller, of Canton, Ohio, for plaintiff.

Fay & Oberlin, of Cleveland, Ohio, for defendant.

DAY, District Judge. The bill of complaint of the Ney Manufacturing Company prays for an injunction and accounting against the G. A. Swineford Company for the infringement of United States letters patent No. 486,812, for track for hay-carriers, issued November 22, 1892, to the Ney Manufacturing Company, as the assignee of Bruce Taylor.

Hay-carriers include an overhead track on which runs a trolley from which hay may be suspended to facilitate its removal from one place to another. The patent describes a track made up of sections placed end to end, each section comprising two parallel angle-bars laterally spaced apart by double-shouldered rivets; and a clamp coupler for securing together the ends of the adjacent sections of track.

The patent contains three claims relating to the coupler: Claim 1, claiming broadly the combination with the old double angle-bar track spaced by double-shouldered rivets, of a coupler consisting of a base-plate, a cap-plate, and bolts for clamping the two together; while claims 2 and 3 are limited to the specific form of coupler illustrated in the drawing of the patent.

The defendant claims that the patent in suit was invalid: First, because Bruce Taylor, the patentee, was not the originator of the coupler broadly claimed in claim 1, but that such a coupler was disclosed and explained to him by John Hall, Jr., a dealer in agricultural implements, of Pittsburgh, Pa., and that what Taylor did was to alter the coupler explained by Mr. Hall into the specific form of a coupler described in the patent and set forth in claims 2 and 3. Second, that no claim embodying the subject-matter of claim 1 was in the application originally sworn to by Bruce Taylor, the patentee, but that claim, as well as the complete specification and claims of the issued patent, were substituted by an associate attorney during the prosecution of the application, without the knowledge of the patentee. Third, that the subject-matter of claim 1 did not involve invention in view of patents issued prior to Taylor's alleged invention. Fourth, that the couplers manufactured by the defendant do not respond in terms or spirit to claim 1 of the patent in suit, and therefore do not infringe that claim.

Claim 1, which alone is in issue, reads:

"The combinations, in a track for hay-carriers, of the angle-bars placed side by side, a coupler consisting of a base-plate, a cap-plate, bolts for clamping the two together, and double-shouldered rivets located between said angle-bars with their reduced ends projecting therethrough, whereby said angle-bars are retained against vertical and lateral displacement, substantially as set forth."

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

Claims 2 and 3, infringement of which is not charged, relate to the specific form of coupler described in the patent.

[1] Bruce Taylor, the patentee, testified that while he was employed as a salesman by the complainant, in the fall of 1891, John Hall, Jr., at Pittsburgh disclosed to him a plan he had of a coupler to couple these angle-bars together, and that at this time Mr. Hall made a rough sketch to illustrate this coupler; that this coupler disclosed to Taylor included an upper plate having a bar which extended about a quarter of an inch down into the space between the angle-bars which formed the track; a lower plate having a bar which extended about a quarter of an inch upwardly into the space between the angle-bars; and two bolts extending through the upper and lower plates by which the plates could be clamped against the track, these bolts being located behind and in engagement with the space-ferrules or double-shouldered rivets, which spaced apart the angle-bars of the track. The bars which extended from the two plates into the space between the track angle-bars were designed to prevent the track from giving sideways at the joint; and the bolts which clamped the two plates together were located back of, and in engagement with the space-ferrules or double-shouldered rivets in order to keep the track from pulling apart endwise.

Substantially these same facts were testified to by Hall. There is considerable dispute in the testimony; evidence being introduced tending to show that Taylor was discharged by the complainant for excessive drinking, and, as a consequence thereof, had considerable ill feeling against complainant company.

The record does not establish that Taylor was the inventor of the device described by claim 1 of the patent; it does not appear that he claimed any other invention than the specific form of coupler described in claims 2 and 3.

There is no doubt that the invention in claims 2 and 3 was the invention of Taylor, and I have cited this part of the record, in order that I may more intelligently refer to the contention made by the defendant, that no claim embodying the subject-matter of claim 1 was in application originally sworn to by Bruce Taylor, the patentee.

Defendant offered in evidence file wrapper of the patent in suit, showing the Patent Office record of the patent application. The file wrapper disclosed that, in the application originally sworn to by Taylor, there were no claims purporting to cover the subject-matter of claim 1 of the patent, and each of the claims which related to the coupler set forth in variant terms the specific form of coupler illustrated and described in the patent. It was this particular form of coupler which Mr. Taylor testified he invented or produced by altering the coupler disclosed to him by John Hall, Jr.

The file wrapper discloses that, after the application was filed in the Patent Office, definite action was deferred until the specifications should set forth the alleged invention in clear, concise, and exact terms, and the Patent Office Examiner stated that:

"If the object had been to furnish a confused specification and contradictory claims, such object could not have been much more completely attained."

It appears from the record that, aside from executing the oath to the original application, Taylor, the patentee, had nothing to do with the application for this patent. After the criticism of the Patent Office, another attorney was secured by the complainant, who shortly thereafter amended the application by canceling completely the original description and claims and substituting therefor a new description, and a new series of claims.

In this amendment there was not presented any claim covering the subject-matter of claim 1 of the patent. Nor was any such claim presented in the next amendment, and not until the final amendment was filed in the case was the present claim 1 submitted.

[2] None of these amendments was verified by a supplementary oath of Taylor, the patentee, and none of these amendments was even submitted for his inspection, or his approval, for he was not consulted after the filing of the application. It is quite plain to me from this Patent Office record that Bruce Taylor never claimed to be the originator of the construction set forth in claim 1. This is developed by files of the Patent Office, and to this effect he testified in this case. It then appears that claim 1 was not included in the original application supported by Taylor's oath, and the amendment submitting the claim was not supported by his supplementary oath. In this case the drawings were the same as in the sworn original Taylor application, and in the unsworn substitute application as later amended by the unsworn insertion of claim 1. Taylor never claimed by sworn statement to be the originator of the subject-matter of claim 1, and that subject-matter was first claimed by an associate attorney in the third and last amendment which he filed.

The record does not disclose that Taylor ever claimed under oath to be the originator of the construction embodied in claim 1. On the contrary, it appears from an investigation of the file wrapper and the entire record that he did not do-so. This being the situation, the patent is invalid. The amendment required an oath which had to be subscribed to by Taylor. This oath is lacking, and for want of it the patent is void. Revised Statutes, § 4892 (U. S. Comp. St. 1901, p. 3384); Steward v. American Lava Co., 215 U. S. 161, 30 Sup. Ct. 46, 54 L. Ed. 139, affirming the decree of the Sixth Circuit Court of Appeals reported in 155 Fed. 731, 84 C. C. A. 157; Railway Co. v. Sayles, 97 U. S. 554, 24 L. Ed. 1053; Eagleton Manufacturing Co. v. West, Bradley & Carey Manufacturing Co., 111 U. S. 490, 4 Sup. Ct. 593, 28 L. Ed. 493; Kennedy v. Hazelton, 128 U. S. 667, 9 Sup. Ct. 202, 32 L. Ed. 576; De La Vergne Refrigerating Machine Co. v. Featherstone, 147 U. S. 209, 229, 13 Sup. Ct. 283, 37 L. Ed. 138.

From an examination of the record, I am also of the opinion that this is one of those cases wherein the language of the court in Merriam Co. v. Ogilvie, 170 Fed. 167, 95 C. C. A. 423, and Perkins Electric Switch Manufacturing Co. v. Yost Electric Mfg. Co. (C. C.) 189 Fed. 625, that "an inquiry as to the damages or profits which yield no compensatory profits, or damages, proportionate to the cost of the investigation," describes the situation clearly.

The patent has expired over three years ago, the amount involved

is very small indeed, and from the view which I take of the case the patent is invalid.

The bill of complaint will be dismissed.

BUCHER & GIBBS PLOW CO. v. INTERNATIONAL HARVESTER CO. OF AMERICA.

(District Court, N. D. Ohio, E. D. November 25, 1913.)

No. 115.

1. PATENTS (§ 26*)—INVENTION—NEW COMBINATION OF OLD ELEMENTS.
   A new combination of elements old in themselves, but which produces a new and useful result, involves invention and entitles the inventor to a patent.
   [Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 27–30; Dec. Dig. § 26.*]

2. PATENTS (§ 283*)—VALIDITY OF REISSUE—INTERVENING RIGHTS.
   An infringer cannot claim an estoppel against a reissue patent as having acquired intervening rights, where its structure contains all the elements of the original patent.
   [Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 448–450, 452; Dec. Dig. § 283.*]

3. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—DISC HARROW.
   The Niesz reissue patent, No. 13,163 (original No. 916,361), for a disc harrow, is for the same invention as the original patent, was properly granted, was not anticipated, and discloses patentable invention, also *held* infringed.

In Equity. Suit by the Bucher & Gibbs Plow Company against the International Harvester Company of America. On final hearing. Decree for complainant.

A. S. Pattison, of Washington, D. C., for plaintiff.
Banning & Banning, of Chicago, Ill., for defendant.

DAY, District Judge. This case is a suit charging infringement of the Niesz reissue patent, No. 13,163, of November 1, 1910, relating to disc harrows. The Niesz patent was issued to the Bucher & Gibbs Plow Company, the complainant herein, as the assignee of Frank B. Niesz, the inventor. Original patent No. 916,361, of which the patent in suit is a reissue, was dated March 23, 1909, and the application for the reissue was filed July 19, 1910. The original and reissued patents are for the same invention and both for a new type of harrow. The new patent was issued under the provision of Revised Statutes, § 4916 (U. S. Comp. St. 1901, p. 3393), and chiefly for the reason that the claim of the original patent was defective, incomplete, and insufficient for the purpose of protecting the invention disclosed and described in the original patent. Complainant commenced the manufacture and sale of the device in controversy in August, 1908, and by June, 1909, had sold 678 harrows. In May, 1909, the defendant purchased one of the complainant's harrows, involving the claims of the invention here in controversy.

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

Now, on examination of the harrows manufactured by the complainant and the defendant, it is plain that the defendant's harrow is an exact duplicate of the structure manufactured by the complainant under its patents, with the exception that the so-called anti-tilting device placed upon the defendant's structure has a different arrangement from that placed upon the complainant's structure, so that, if the complainant is entitled to the protection of the patent claimed, there is no question but that the defendant's structure infringes. The type of harrow in controversy is what is known as a double-disc harrow. The structure comprises a front harrow frame and a rear harrow frame; the object being to provide a harrow disc construction in which two sets of harrow discs shall be arranged in tandems flexibly connected to facilitate the turning of the structure as a whole and to avoid throwing the ground up into ridges when turning corners or when the harrow is moved out of a straight line. The rear harrow frame is flexibly connected to the center of the front harrow frame in the form of a vertical pivot, between the forwardly extending reach of the rear harrow frame and the center of the rear portion of the front harrow frame. The front and rear harrow frames each carry two separate gangs of discs, which, disc gangs or frames are pivoted to the front and rear frames and capable of adjustment to the end that the disc gangs or frames may be set at angular relation to each other. This adjustment is accomplished by means of levers. By reason of the adjustability of the four sets of discs, it is possible to adjust the disc gangs in the forward frame at an angle to each other, the lines of the angle diverging rearwardly, and to adjust the two gangs on the rear frame at an angle to each other with the lines of the angle converging rearwardly. For the purpose of overcoming the strains on the pivots of the rear gangs while in operation, the rear harrow frame has rigidly secured thereto a horizontal member which is engaged by a horizontal member on the inner end of each of the disc gangs; the one sliding with relation to the other to permit of the adjustment of the gangs to the desired angle, and at the same time affording a support to the inner ends of the gangs to overcome the tendency to irregularity in entering the soil. The flexible connection between the front and rear harrow frames permits of the automatic adjustment of the harrow to the inequalities of the soil, and enables the entire structure to be turned in a narrow space. The structure enables the double cultivation to be performed in the same time that a single cultivation could be performed by a single harrow frame.

The reissue patent contains six claims, but the fourth claim is perhaps the broadest. It provides:

"(4) In a harrow, the combination with a front harrow frame, and adjustable disc shafts carried thereby, of a rear harrow frame flexibly connected at its front end to the front frame at the point between the ends of the front frame, separate disc frames vertically pivotally connected to the rear frame, means adjustably turning the frames on their vertical pivots, and horizontal slidable engaging members between the disc frames and the rear frames to prevent a tilting movement of the disc frames."

The defendant contends that the invention sought to be protected by the reissue patent was a different invention from that covered by the

claims of the original patent; that the bill is wanting in equity by reason of the fact that the defendant has acquired intervening rights by the manufacture and sale of a certain number of harrows; and also that the patent is invalid.

As bearing upon the prior art, defendant has set up seventeen patents. Nine of them, Galt & Tracy (two), Nauman, Little, La Dow, Sharp (two), Lingren, and Wildman, consist of a single disc harrow. Five of these patents, Wilson, La Dow 388,567, Wright, Clark 712,996, and McVicar, are for a rigid double-disc harrow. It is quite probable that by combining various of these patents, and by making certain changes, removing certain parts, or reorganizing some of the parts which are found in these various patents, the structure claims by the Niesz patents can be built up. It is argued that Niesz had before him these prior structures, disclosed by these patents, and that the combining of these structures into the harrow of the Niesz invention was an obvious thing to do; that any mechanic would do it. It does seem simple, yet nevertheless it never was done before, and the novel combination of Niesz's evidently presented great utility, as shown by the adoption of this device by the defendant company.

[1] It is well settled that a new combination of elements old in themselves, but which produce a new and useful result, entitles the inventor to the protection of a patent. Expanded Metal Co. v. Bradford, 214 U. S. 381, 29 Sup. Ct. 652, 53 L. Ed. 1034; Potts v. Creager, 155 U. S. 197, 15 Sup. Ct. 194, 39 L. Ed. 275; Kryptok Company v. Stead-Leans Co., 207 Fed. 85.

The five patents showing efforts in the double-disc harrow field fail to disclose the combination and arrangement of parts which are the subject-matter of the Niesz patent in suit, which combination has undeniable advantages. It is important to determine whether the proper foundation for the granting of the reissue patent has been laid.

The claim of the original Niesz patent is:

"In a disc harrow the combination of a front and rear disc frame, the rear disc frame consisting of parallel bars journaled intermediate their ends and a connecting bar, a head secured to said connecting bar and spaced plates secured to the head and means for rocking the rear disc frames upon their pivoted points, substantially as and for the purpose specified."

The structure of the defendant is practically a copy of the structure made by the complainant, with the exception that the anti-tilting devices are different in form and the manner of location, but perform substantially the same functions.

[2] The record discloses that the defendant knew of the Niesz patent at the time it was developing its harrow, and that the structure developed by the defendant was considered by the patent department of the defendant company, as whether or not it was within the scope of the original Niesz patent. It is also plain that the defendant's structure contains all the elements of the claim of the original Niesz patent.

The defendant, being in possession of these facts, cannot well claim an estoppel against the reissue patent. No intervening rights accrued to the defendant in this case upon which, in equity, it can rely. The

reissue of the patent under section 4916, Rev. Stats., has been frequently considered by the Supreme Court of the United States, and in the case of Topliff v. Topliff, 145 U. S. 156, 12 Sup. Ct. 825, 36 L. Ed. 658, the court has summarized all of the various decisions bearing upon this subject. The court said:

"From this summary of the authorities it may be regarded as the settled rule of this court that the power to reissue may be exercised when the patent is inoperative by reason of the fact that the specification, as originally drawn, was defective or insufficient, or the claims were narrower than the actual invention of the patentee, provided the error has arisen by inadvertence or mistake, and the patentee is guilty of no fraud or deception; but that such reissues are subject to the following qualifications: First. That it shall be for the same invention as the original patent, as such invention appears from the specification and claims of such original. Second. That due diligence must be exercised in discovering the mistake in the original patent, and that, if it be sought for the purpose of enlarging the claim, the lapse of two years will ordinarily, though not always," be held as abandonment "to the public to the same extent that a failure by the inventor to apply for a patent within two years from the public use or sale of his invention is regarded by the statute as conclusive evidence of an abandonment of the patent to the public. Third. That this court will not review the decisions of the commissioner upon the question of inadvertence, accident, or mistake, unless the matter is manifest from the record; but that the question whether the application was made within a reasonable time is in most, if not all, such cases a question of law for the court.

"To hold that a patent can never be reissued for an enlarged claim would be not only to override the intent of the statute, but would operate in many cases with great hardship upon the patentee. The specification and claims of a patent, particularly if the invention be at all complicated, constitute one of the most difficult legal instruments to draw with accuracy, and, in view of the fact that valuable inventions are often placed in the hands of inexperienced persons to prepare such specifications and claims, it is no matter of surprise that the latter frequently fail to describe with requisite certainty the exact invention of the patentee, an error either in claiming that which the patentee had not in fact invented, or in omitting some element which was a valuable or essential part of his actual invention. Under such circumstances, it would be manifestly unjust to deny him the benefit of a reissue to secure to him his actual invention, provided it is evident that there has been a mistake, and he has been guilty of no want of reasonable diligence in discovering it, and no third persons have in the meantime acquired the right to manufacture or sell what he had failed to claim. The object of the patent law is to secure to inventors a monopoly of what they have actually invented or discovered, and it ought not to be defeated by a too strict and technical adherence to the letter of the statute, or by * * * artificial rules of interpretation."

[3] The claim of the original patent was defective and insufficient. The Niesz reissue is clearly for the same invention as the original, because the reissue claims cover the exact construction of the original patent. They do not include anything which is not contemplated and included in the disclosure and description of the original patent. It would not be equitable that the inventor should be defeated in protecting his real invention because of a mistake or inadvertence of his solicitor in drawing the claim of the original patent. In this single insufficient claim of the original patent, the patentee was attempting to claim the invention which was set forth and described in the specifications and illustrated in the drawings, and this same invention set forth and described in the specifications and illustrated in the drawing is the one defined in detail in the claims of the reissue patent in suit. The in-

ability of the solicitor of the patentee to put the claims in proper form to cover the real invention was plainly inadvertence on his part and would authorize a reissue, and in such case the cancellation of the claims of the original application or their rejection by the Patent Office would not be an abandonment of the invention, and would not preclude a reissue and a substitution of claims which properly defined the real invention. Toledo Computing Scale Co. v. Moneyweight Scale Co. (D. C.) 178 Fed. 557.

I accordingly reach the conclusion that the Niesz reissue patent is for a novel combination of elements, evidencing a new type of double-disc harrow; that the defendant's structure is an infringement of the reissue patent; that the reissue patent is for the same invention as that described and claimed in the original patent; that the original patent was defective and insufficient with reference to its single claim; that the defendant's structure includes all of the elements of the insufficient claim of the original patent; that the defendant cannot utilize the doctrine of equitable estoppel or intervening rights.

A decree may be drawn in favor of the complainant.

WILLIAM SHAKESPEARE, JR., CO. v. ENTERPRISE MFG. CO.

(District Court, N. D. Ohio, E. D. June 2, 1913.)

No. 22.

1. PATENTS (§ 283*)—SUIT FOR INFRINGEMENT—DEFENSES.
   One who has copied the very device of a patent cannot deny its utility when sued for infringement.
   [Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 448–450, 452; Dec. Dig. § 283.*]

2. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—FISH BAIT OR LURE.
   The Rhodes patent, No. 777,488, for a fish bait or lure, discloses patentable novelty, and is valid. Also, *held* infringed by a device made by defendant, copied from that commercially made and sold by complainant, which, although an improvement on that shown in the drawings of the patent, embodied the patented combination, with equivalent elements, though some were changed in form.

In Equity. Suit by the William Shakespeare, Jr., Company against the Enterprise Manufacturing Company. On final hearing. Decree for complainant.

Chappell & Earl, of Kalamazoo, Mich., for plaintiff.
Fay & Oberlin, of Cleveland, Ohio, for defendant.

DAY, District Judge. William Shakespeare, Jr., Company, which is engaged in Kalamazoo, Mich., in the manufacture and sale of fishing tackle, instituted the present suit against the Enterprise Manufacturing Company, which is engaged at Akron, Ohio, in the manufacture of fishing tackle, charging infringement of United States letters patent No. 777,488, for a fish bait or lure, issued December 13, 1904, to Fred D. Rhodes, and transferred by mesne assignments to the complainant

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

company; the bill containing the usual prayer for an injunction and accounting.

The improvements claimed are described in the patent in suit as follows:

"Referring to the drawings, the body portion *A* of my improved bait or lure is preferably shaped like a minnow, and may be suitably painted or decorated as desired. Arranged longitudinally through the body portion *A*, which is secured thereto, is a rod *A*, the front end of the rod, *B*, is formed into a loop for convenience in attaching the line. The tail or trailing hook, *F*, is secured to the rear end of the rod *B*. Transverse openings *A'* are formed through the body, one for each pair of hooks which it is desired the body shall carry. These openings are provided with suitable metal socket-rings as clearly appears in figure 2. A split-ring (*a*) is provided for each pair of hooks, by this means the hooks are detachably secured in position and may be readily changed as desired or, in case one should become broken, may be readily renewed. The shanks of the hooks rest on the edges of the holes or sockets so that the points of the hooks are supported out from the body in position to receive the strike of the fish. They are also supported so that the body of the minnow is not abraded, by the friction of the hook point against the same."

The claims insisted upon, namely, claims 8, 9, and 10, are:

"8. In a bait or lure, the combination of a body having a transverse opening therethrough; a rod arranged transversely through said opening; a split-ring on said rod arranged in said opening; and a pair of oppositely arranged hooks on said ring, for the purpose specified.

"9. In a bait or lure, the combination of a body having a transverse opening therethrough; a rod arranged transversely through said opening; and a hook secured thereto.

"10. In a bait or lure, the combination of a body having a transverse opening therethrough; a rod arranged transversely through said opening; a split-ring on said rod arranged in said opening; and a suitable hook on said ring, for the purpose specified."

The wooden minnows manufactured by the defendant and complainant compose a wooden minnow having a body with a transverse opening therethrough, a rod extending longitudinally of the body and transversely through the opening, hooks, and a split-link on the rod for attaching the hooks.

By this combination the hooks are supported in such a manner so that their shanks engage the body sockets preventing the hooks on opposite sides of the body from becoming tangled, and so that the hooks are presented in a proper manner to receive the strike of the fish.

The connection is flexible, and the hooks are given a ready movement, as well as being supported from the body in such a manner as to afford the greatest opportunity for the hooks to engage a fish. The combination permits of the hooks being readily changed or renewed by unscrewing the longitudinal rod, removing the split link or ring, taking the hook therefrom, and placing another one thereon.

In 1905, Shakespeare purchased the patent in suit, paying for the same with two patents relating to a mechanical frog and a small stock equipment for the manufacture of the bait, the sum of $6,000; and the Shakespeare Company commenced the manufacturing of the present commercial bait of the Shakespeare Company.

The defendant company commenced to manufacture a bait similar to the commercial bait of the Shakespeare Company in 1907 or 1908.

The commercial bait differs from the bait as outlined by the draw-

ings in the Rhodes patent, in that in the drawings of the Rhodes patent the longitudinal rod extends entirely through the wooden body and has a bent loop on either end, and the connecting ring is the split-ring of commerce; while, in the commercial product manufactured by both of these contending companies, the longitudinal rod passes only partially through the wooden body with an engaging screw end, and the connecting link is elongated in form with an opening in the center and the two ends so formed as to permit of hooks being readily placed thereon, and readily taken therefrom.

J. B. Rhodes, who was familiar with fishing tackle and fishing devices, modified this form of split-ring or fastening, and made a fastener which was used in all fish bait manufactured thereafter by himself, and by the Shakespeare Company.

The modification consisted of changing the round split ring or link as shown in the patent in suit, into an elongated link such as is in present use. The elongated link has decided advantage over the split-ring in that it can be used in round-bodied baits and it is also readily used in connection with the putting on, or taking off of hooks, while with the split-ring of commerce this was quite difficult.

The split-ring of commerce can readily be changed into the connecting link of the present devices by elongating the same. J. B. Rhodes also used the threaded longitudinal rods to make them more easily removable from the bait than the long rod fastened from end to end which had been contemplated by the patent. It is apparent that the closest competitor and nearest approach to the minnow in suit was one known as the Dowagiac, or Heddon bait. This was a wooden minnow with a depression in the side of the bait which was a brass socket. In the bottom of the socket was a hole, and through this hole was a screw eye, in which the hook was held in the eye, part of the screw eye, and the screw eye screwed into the wooden part of the bait, holding the hood in the socket. The hooks of the Heddon bait or Dowagiac minnow are quite easily detached by screwing them out, and disengaging them, but the hooks under the Rhodes patent are more flexible, and are more practical to a fisherman when it is considered that a fish could not tear off of the hooks of the Rhodes bait with as much readiness as it could from the hooks of the Heddon bait.

Earl Wiest, a former employé of the Shakespeare Company, was employed by the defendant company during the winter seasons of 1906, 1907, and 1908. He was in conference with Mr. Joseph E. Pflueger of the Enterprise Company, and they had before them the Rhodes patent, and the Heddon patent, and the baits manufactured by the owners of these patents, and, as a result of many conferences and experiments, the defendant company placed on the market the alleged infringing device, and advertised this device extensively as a very desirable, and most improved product in the fishing tackle line. Later on the Enterprise Company applied for a patent and received a patent on the very device manufactured by both companies.

This must necessarily have been done with a knowledge on behalf of the officials of the Enterprise Company that in the prior art and in

extensive use was the very device upon which the company applied for and received a patent.

Known to the prior art were many various wooden minnows, baits, and lures; among them being the so-called "Troy minnow," "muscallonge minnow," "the floating meadow frog," "Trory minnow," No. 2 "the yellow jacket," "Pflueger minnow," either manufactured by the Enterprise Manufacturing Company or the Pfluegers.

None of these various baits or lures have the transverse hole, the longitudinal rod disposed transversely through the hole and through a split attaching ring or link whereby the hooks are attached and supported.

[1] In any event, it does not appear that any of these prior art devices were successful as was the device in controversy. It is contended by the defendant that the patent is of no utility. Inasmuch as the defendant company is employing the very device made by the complainant company, it is in no position to deny the utility of such a device. Gandy et al. v. Main Belting Co. et al., 143 U. S. 587, 12 Sup. Ct. 598, 36 L. Ed. 272; Lehnbeuter v. Holthaus, 105 U. S. 94, 26 L. Ed. 939; Hancock Inspirator Co. v. Jenks (C. C.) 21 Fed. 911; Niles Tool Works v. Betts Machine Co. (C. C.) 27 Fed. 301.

A number of prior patents were introduced in proof. However, it appears that, with the exception of the Heddon patent, none of the patents contained a structure that was successful commercially.

In the Heddon patent in order to turn the hooks around to disengage them you would have to screw and unscrew the eye that held the hook in place. This caused the hooks to be rigid, and would not engage and hold a fish in the same successful manner as a flexible hook or hooks. All of the patents of the prior art were considered by the Pfluegers when they were attempting to devise a bait to compete with the Rhodes and Heddon baits, and nothing from these patents would suggest the device employed in the patent in suit.

[2] If the defendant's structure is a mere modification or change in form from the structure of the patent in suit, and an exact duplicate of complainant's structure, as manufactured for the market, there is little to be said on the question of infringement.

There is no question but that the two commercial structures of the complainant and defendant are identical.

The round split ring or link of the patent is changed into an elongated split ring or link to accommodate the different form of bait body and also to afford a more ready manner of engaging and disengaging the hooks. A split-link is used, and this split-link possesses utility over the exact structure shown in the patent.

But the patent involves the idea of the combination of the transverse holes, the split-ring, and the longitudinal rod, and, although this split-link is an improvement over the split-ring of the patent, this does not necessarily alter or avoid infringement. Risdon Iron & Locomotive Works v. Trent (C. C.) 92 Fed. 389.

The essential ideas of the combination present in the Rhodes patent are present in the manufactured minnows of the defendant company.

It has been held that a patentee was protected against an improver

as well as the general public. Columbia Wire Co. v. Kokomo Steel & Wire Co., 143 Fed. 116, 74 C. C. A. 310.

If any improvements were made over the original patent, they were made not by the defendant, but by the predecessor in title to the complainant company.

I am of the opinion that the complainant is entitled to a full range of equivalents.

The patent described a split-ring, and showed a split-ring in the form in which rings are commonly commercially known. But the novelty evidenced by the patent was not the use of a split-ring of a particular form, it was not of the essence of the invention, nor was the particular form of the longitudinal rod disposed through this split-ring of the essence of the invention; but Rhodes did produce a combination of elements which was entirely new and which proved to possess great merit.

If the rod with the screwed end and the split elongated link are equivalent to the long longitudinal rod of the original patent, and the split-ring of that patent, then, the same combination being employed, the patent is valid, and the defendant's device would infringe.

I am of the opinion that these elements are equivalents, for, as said by Walker on Patents, § 354:

"An equivalent is a thing which performs the same function, and performs that function in substantially the same manner as the thing of which it is alleged to be an equivalent."

I am of the opinion that the invention of the patent showed a decided advance in the art of manufacturing fishing baits or wooden minnows, and that the defendant has very plainly infringed this patent.

A decree may be entered finding infringement, and awarding costs, and ordering an injunction and accounting.

CARTER v. BURCH PLOUGH WORKS CO.

(District Court, N. D. Ohio, E. D. April 23, 1913.)

No. 77.

PATENTS (§ 328*)—INFRINGEMENT—CULVERT.

The Carter patent, No. 777,714, for a culvert, claim 1, must be narrowly construed in view of the prior art, and as so construed *held* not infringed.

In Equity. Suit by Lucy L. Carter against the Burch Plough Works Company. On final hearing. Decree for defendant.

John W. McCarron, of Galion, Ohio, and Jesse A. Fenner, of Cleveland, Ohio, for plaintiff.

Offield, Towle, Graves & Offield, of Chicago, Ill., for defendant.

DAY, District Judge. The complainant, Lucy L. Carter, as assignee of Charles W. Carter, files her bill of complaint against the Burch Plough Works Company and prays for an injunction and accounting*

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

against this defendant company for the infringement of United States letters patent No. 777,714, for a culvert issued December 20, 1904, to C. W. Carter.

The claim which it is alleged is infringed by the device manufactured by the defendant company is the first claim of the patent, and reads:

"A culvert section adapted to form one-half of a culvert in cross-section, having depending from its horizontal edges a series of separated flanges and a complementary section having projecting upwardly from its horizontal edges complementary interlocking flanges."

The defenses are: First, invalidity of the patent by reason of the condition of the prior art; secondly, that the culvert manufactured by the defendant company does not infringe the patent in suit.

The invention of the patent in suit appears to consist particularly in a special structure of a drainage tube which may be used to constitute the main elements of any culvert structure, or any tube used in a drain or sluiceway. The invention described in the patent consists of two somewhat differing forms, one shown in figures 1, 2, 3 of the drawing, and one in figures 4, 5, and 6 of the drawing.

Claim 1, the claim in controversy, appears to be based upon the invention disclosed in figures 1, 2, and 3. In these figures the flanges identified as *E* and *E'* are disposed along the two sections *AB*, and so arranged as to interfit with each other when the two sections are brought together. These flanges *E* and *E'* extend downwardly, and upwardly, respectively, from the outer face of longitudinal ribs, *bD* and *D'* on the meeting edges of the sections *AB*.

Referring to these flanges, it is stated in lines 88 to 94, on page 1, of the specifications:

"It will be observed also that the flanges *E* and *E'* form a continuous overlap for the horizontal joint between the upper and lower sections and also lock the upper and lower sections against endwise movement unless they are first vertically separated, as shown in figure 2."

Claim 1 of the patent then provides for a culvert section, so made as to consist of two halves which may be placed together in such a manner as to prevent longitudinal and lateral displacement by reason of each cross-section having depending from its horizontal edges a series of separated flanges placed in such a manner as to permit of these flanges interlocking and forming a continuous rib or flange. These flanges interlock in such a manner as to prevent endwise or sidewise movement or displacement of the two sections, and also join one another in such a manner as to form a continuous overlap for the horizontal joint between the upper and lower sections. Advantages which arise from this structure are plain in that the sections are held in position, and also the ingress of dirt, soil, or water to the culvert tube is limited.

It was old in the art to make a drainage tube of two cylindrical sections placed edge to edge, as shown in patent No. 32,079, Hewkumet, April 16, 1861; patent No. 215,947, McMackin, May 27, 1879; patent No. 567,653, Parker, September 15, 1896. The culvert tubes were also constructed prior to this patent in such a manner as to make a culvert

of triangular cross-sections from three longitudinal sides or sections, the meeting edges of which are formed with interlocking lugs, or flanges adapted to prevent relative longitudinal or endwise movement of the several sections.

Such structures are shown in patent No. 694,796, Sicckesteel, March 4, 1902; patent No. 722,396, Beach, March 10, 1903; patent No. 770,-237, Lauridtzen, September 13, 1904.

These various patents disclose that it was old to form a drainage tube composed of two distinct sections or three distinct parts, and it was old to join these various sections together by means of lugs or flanges which had the effect of fitting into or interlocking one with another in such a manner as to prevent lateral or longitudinal displacement.

Such being the state of the art at the time of the patent in suit, claim 1 should be limited to a culvert tube or drain pipe adapted to form a culvert in cross-sections having depending from the horizontal edges of one-half section a series of separated flanges and a complementary section having the same sort of flanges made in such a manner as to interfit or interlock with the other section of the culvert in such a manner as to prevent lateral or longitudinal displacement, and form a continuous ridge or flange by means of these interlocking portions of the two separate parts of the tube.

The culvert manufactured by the defendant company is formed in two longitudinal halves meeting edge to edge when assembled, the upper half having depending from each of its horizontal edges a pair of separate lugs which might be called flanges, and the lower half having projecting upwardly from its horizontal edges complementary interlocking lugs or flanges, co-operating with the lugs of the upper sections to prevent endwise or lateral displacement of the two sections.

In this structure there are but four lugs or flanges on each side of the tube; the two co-operating pairs on each side being so widely separated as not to affect any continuous overlap of the joint between the two sections. Nothing appears in this structure to indicate that these lugs or flanges are so placed as to form a series of separated flanges and thereby form a continuous overlapping flange. The series of flanges and the function performed by such a series of flanges and a continuous overlapping ridge or flange are absent in the defendant's device.

Having given the construction to claim 1 of the complainant's patent which seems fair in consideration of the prior art and of the specifications and reference to the figures in the drawings of the patent, the invention is the narrow one as set forth by the claim as I have before interpreted that claim. That being the situation, the structure manufactured by the defendant company does not infringe the patent of the complainant, and the bill is dismissed.

WILLIAMS v. O'TOOLE.
In re ROCKY GLEN WATER CO.
(Circuit Court of Appeals, Third Circuit. February 16, 1914.)
No. 1768.

INJUNCTION (§ 241*)—RESTRAINING EXECUTION—BOND—REMEDY ON BOND.

Where in a bankruptcy proceeding the court restrained an execution sale of the bankrupt's property on condition that the petitioning creditors file a bond guaranteeing to the execution creditor interest on the liens standing in his name during the time the sale was restrained, and a controversy arose as to interest on liens assigned to the execution creditor, the assignments of which were not recorded until after the sale, the court should have permitted the execution creditor to sue the petitioning creditors and the surety on the bond, instead of determining the controversy under a rule to show cause; since, assuming that the court had power to decide the dispute summarily, such remedy was not exclusive, and a suit would have protected the execution creditor's rights, not only against the petitioning creditors, but also against the surety, and hence an order was improvidently granted making absolute a rule to show cause why the amount admitted to be due by the petitioning creditors should not be accepted in full settlement.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 544–552; Dec. Dig. § 241.*]

Appeal from the District Court of the United States for the Middle District of Pennsylvania; Chas. B. Witmer, Judge.

Bankruptcy proceeding against the Rocky Glen Water Company. A rule to show cause issued on application of M. J. O'Toole was made absolute, and E. S. Williams appeals. Reversed, with directions.

Cole B. Price, Samuel Price, and John H. Price, all of Scranton, Pa., for appellant.

Ralph W. Rymer, of Scranton, Pa., for appellee.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

J. B. McPHERSON, Circuit Judge. This controversy arises out of certain proceedings attending the sale of real estate belonging to the Rocky Glen Water Company. On May 1, 1912, an involuntary petition in bankruptcy was filed against the company; the real estate being then under levy. The sheriff of Lackawanna county had fixed the sale for May 4, and the district court made a temporary order restraining the sale. On June 10, after some further proceedings, the order was continued until October, but on condition—

"* * * that the petitioning creditors in this case pay to E. S. Williams, execution creditor, in cash, such expenses as he was put to in advertising the sale of the property of the Rocky Glen Water Company, for the sale of the same advertised in May, 1912, and on condition that the petitioning creditors file with the court a good and sufficient bond, guaranteeing to Mr. E. S. Williams, for the liens that stand in his name, 6 per cent. interest from the date when the sheriff's sale was stayed in May until the date of the sheriff's sale in October, providing the property is sold then by the sheriff, and no settlement has been reached; and Myron Kasson, E. S. Williams, P. F. Connor, high sheriff of Lackawanna county, are enjoined from proceeding further at this time on any executions that may be in their hands for the sale of the

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

property of the Rocky Glen Water Company; this restraining order to continue until such time as further order may be made by this court."

In compliance with this condition M. J. O'Toole, one of the petitioning creditors, gave bond in $2,000, with the Title Guaranty & Surety Company as security. On October 4 the property was sold by the sheriff, and Williams bought it in. There were at least five liens upon it; of these he was the record owner of two, and Myron Kasson was the apparent owner of the other three. Kasson's liens were prior in time, but he had assigned them to Williams in March, 1912, and Williams had agreed to protect Kasson's interest thereunder. The assignments were not entered of record until October 5, the day after the sale.

O'Toole paid the advertising expenses referred to, but he and Williams could not agree upon the amount of interest that should be paid. The bond required by the restraining order secured the payment of five months' interest to Williams "for the liens that stand in his name"; but the parties took different views about the construction of this phrase, in the light of all the facts surrounding the situation. Williams contended that it was understood to cover the Kasson liens as well as the two that were formally in his own name, while O'Toole insisted that it did not cover the Kasson liens, mainly because the assignments had not been put on record until after the sale. O'Toole admitted liability in the sum of $728.38, while Williams claimed $1,447.91. As they could not agree, O'Toole presented a petition to the District Court, setting out the facts, offering to pay $728.38 into court in full payment, and asking to have the surety discharged from liability on the bond. Thereupon the court granted a rule on Williams to "show cause why he should not accept in full settlement of the bond filed in this case the sum of $728.38, and why the Title Guaranty & Surety Co. of Scranton, Pa., surety on the bond, should not be discharged." Williams protested against the proceeding by rule, "for the reason that he is entitled to a trial by jury in a suit in assumpsit to determine the liability on said bond, of which right he will be deprived if the surety on said bond should be discharged and the liability fixed and determined as prayed for in said petition"; but (having thus saved his rights by protesting) he made answer on the facts. So far as appears by the record, no money was actually paid into court, and the court proceeded upon the assumption that jurisdiction existed (1) to determine the dispute and (2) to determine it on a rule to show cause. A special master was appointed to take testimony and report, and at the first meeting before him Williams objected again to the jurisdiction of the court for the reasons set forth in his answer, and asked leave to submit testimony "subject to that objection, and without waiving any rights under his answer." At the end of the hearing he asked again that the master should find against the jurisdiction, and upon the master's refusal he excepted formally, and presented the same objection once more to the District Court. The report was made in April, 1913, and on June 7 the District Court (without filing an opinion) made the following order:

"After hearing and on due consideration, the exceptions to the special master's report are overruled, and his report confirmed. The rule on E. S. Wil-

liams to show cause why he should not accept in full settlement of the bond filed in this case the sum of $728.38 and the guarantors discharged is made absolute. The respondent, E. S. Williams, to pay the fees of master, stenographer, and clerk."

From this order the appeal now before us was taken, and the lack of jurisdiction in the District Court is specially assigned for error; the appellant insisting upon his right to a jury trial in the state court. All parties are citizens of Pennsylvania, the amount in dispute is less than $3,000, and no federal question is involved.

In deciding this appeal we do not find it necessary to consider the jurisdiction of the district court. In passing the question, we may refer to Russell v. Farley, 105 U. S. 443, 26 L. Ed. 1060, and Meyers v. Block, 120 U. S. 211, 7 Sup. Ct. 525, 30 L. Ed. 642, where the Supreme Court has discussed situations that resemble the present controversy in some respects. In our opinion, however, even if we assume for the purposes of this case that the district court had the power summarily to decide the dispute between Williams and O'Toole, it must certainly be conceded that this power did not offer the exclusive remedy. Undoubtedly Williams might have sued upon the bond—such a suit was brought in Meyers v. Block—and he would thus have protected his rights fully, not only against O'Toole, but also against the surety. The order appealed from did not so protect them, and we think it was improvident and must be disapproved. The learned judge should have allowed suit to be brought on the bond against O'Toole and the surety.

The order of June 7, 1913, is reversed at the costs of the appellee, and the district court is directed to dismiss the petition on which the order was based.

Ex parte DOW.

(District Court, E. D. South Carolina. February 18, 1914.)

ALIENS (§ 61*)—NATURALIZATION—PERSONS ENTITLED—"FREE WHITE PERSON."

The words "free white person," as used in Naturalization Act Cong. March 26, 1790, c. 3, 1 Stat. 103, as amended by Act July 14, 1870, c. 254, 16 Stat. 254, do not mean a person white in color, nor do the words designate racial distinction meaning Caucasian or Indo-European, but are to be construed rather as a geographical term referring to the peoples who were commonly known in the United States as those inhabiting Europe and whose descendants, at the time of the passage of the act of 1790, formed the inhabitants of the United States, excluding Africans, and hence did not include a native of Syria.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 119–122; Dec. Dig. § 61.*]

Application by George Dow for naturalization. Denied. Order affirmed on rehearing in 213 Fed. 355.

SMITH, District Judge. This is an application for naturalization. The applicant is a native of a place called by him Batroun, in Syria in Asia. He has performed all the necessary formalities and would apparently from his intelligence and degree of information of a general character be entitled to naturalization. In color he is darker than the

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

usual person of white European descent, and of that tinged or sallow appearance which usually accompanies persons of descent other than purely European. His mental and other faculties, his information and general knowledge, and his residence in this country would entitle him, as before said, to naturalization, if he is entitled to naturalization under the terms of the act of Congress in that behalf. This matter was discussed by this court in the case of Ex parte Shahid (D. C.) 205 Fed. 812. The personal objections to the admission of Shahid and upon which his rejection was based in that decision do not apply to the present applicant. If rejected he can only be so upon the ground that under the statute by reason of his nativity and descent he is not entitled to be admitted as a citizen of this country, and the point therefore comes up squarely upon the question whether a Syrian of Asiatic birth and descent is entitled to be admitted a citizen. As stated in the case of Ex parte Shahid, this depends upon the construction of the clause in the statute which limits the classes entitled to naturalization, as follows:

"The provisions of this title shall apply to aliens being free white persons, and to aliens of African nativity and to persons of African descent."

The applicant's claim to admission is not upon the ground that he is either an alien of African nativity or a person of African descent. This part of the clause being excluded, his application depends upon whether he is a free white person. Is a Syrian of Asiatic birth a free white person within the meaning of the statute approved March 26, 1790? There have been discussions as to the construction to be given these words, which have treated it somewhat in three aspects:

First. Do the words "free white persons" mean persons white in color? Is the definition to be determined by the colorization of the applicant to be ascertained by ocular inspection by the court? This definition, as determinable in the shape of the definition of color, has been by the great weight of authority under the decisions of the courts in this country rejected, and it has been held that the right of the applicant is not to be determined by the question whether or not upon ocular inspection he may in the opinion of the judge be actually white in color.

Second. The next question is whether the definition is racial; that is, whether the words "white persons" are a racial designation. And that "white" is to be interpreted as meaning Caucasian, so called, or Indo-European. If racial, is any one entitled to be admitted who belongs to a nation that speaks one of the languages spoken by the peoples heretofore denominated Caucasian, whether or not his color be the very reverse of white. This would mean the admission of all the mixed Asiatic races which speak a tongue the descendant of one of the so-called Indo-European tongues, whether that tongue may have been forced upon them or inherited by a very mixed transmission in point of race. The dark colored, in fact, almost black, inhabitants of Ceylon, speak the Sinhalese language, which is one of the dialects of that branch of the ancient Indo-European language known as Sanscrit, and the dark colored inhabitants of the Persian Gulf or Persian Coast speak a tongue which appears to be the descendant of the ancient Iranian.

If racial determination or definition is to be given to the expression as limiting it to the Caucasian races, and the Caucasian race is to be determined philologically by the tongue spoken as Indo-European, then there are a number of European peoples who would be excluded, such as the Magyars, the Finns, the Turks, the Basques, and the Lapps.

The language spoken, although a strong evidence as to the race of the speaker (and apparently the stronger the earlier in the period of the world's history is the point of ascertainment), yet, as is known by modern examples, is not by any means conclusive. The negro occupants of the French West Indies speak a Latin tongue, and the negro occupants of the English West Indies a Saxon tongue, although racially not belonging to either race. History informs us that in many well-known instances the language of the conqueror has been imposed upon the conquered, and conversely the language of the conquered has been accepted by the conqueror, although of a wholly different race. In the case of the Hindu and the modern Persian by reason of the fact that their present speech is a descendant of an Indo-European tongue, they have been classed as "Aryan" or "Caucasian" brothers in the face of the proof historical and ethnological that they represent instances where the conqueror imposed his language upon a subject race into the mass of which eventually the smaller numerical body of conquerors has been submerged.

The modern Egyptian to-day speaks an Arabian language that he has only acquired from his conquerors in comparatively recent times.

To speak of the Asiatic inhabitants of Persia or India as "Aryan" or "Caucasian" is almost as great a contradiction as to call a negro inhabitant of South Africa a Saxon because he speaks English, or an Indian inhabitant of Peru or Mexico a Latin because he speaks Spanish. While there has been a great deal of difference and confusion about this point, owing in great measure to the apparent lack of conception of exactly what is meant by a Caucasian or Indo-European race, the general inclination would be to consider the definition of Caucasian as what is supposed to be meant by white. This, however, is very loose and indefinite, for the meaning of Caucasian as at one time prevalent has been now practically exploded. The meaning of Caucasian as so applied did not exist, generally speaking, at the time of the passage of the act of March 26, 1790, although it did afterwards obtain wide currency during the slavery and antislavery discussions which preceded the year 1860. Such a racial definition is very difficult, to say the least, of enforcement; for, as I have stated above, it is based upon a construction which would exclude some people generally known and termed as white, and include those who have been always considered as not forming a part of the white race. This definition might be termed a racial definition as against the first, which has been referred to as the definition of color.

Third. The next definition may be termed a geographical one. Does the word "white" in the statute refer to the peoples who were then commonly known in this country as the peoples inhabiting Europe and whose descendants at the time of the passage of the act of 1790 formed the inhabitants of the United States, excluding from such considera-

tion the African descendants who were then slaves. If we give to the term "white" this geographical definition, that it means European, that "white" was used in the sense of European, the statute becomes one judicially speaking plain, understandable by the multitude as well as by the learned, and not difficult of enforcement. The words "free white persons" would then mean all the fair complexioned people of European habitancy and descent commonly termed in 1790 the white races. That would appear to be what was intended by the terms of the act of 1790. It intended under the reasoning set out in Ex parte Shahid, supra, to admit to citizenship in this country the people generally known as white; that is to say, the inhabitants of Europe and their descendants. This would include many people who would not come within the definition of Caucasian or Indo-European, but nevertheless it was the general understanding that the inhabitants of Europe who were the parents of the inhabitants of the United States were white people. In the opinion of the court this is the correct and proper construction of the statute. The meaning of free white persons in the statute is free persons of European habitancy or descent, and such, and such alone, are entitled to be admitted to naturalization under the terms of that clause of the statute. This exclusion is no reflection upon the applicant, intellectual, moral, or racial. It simply means that the lawmaking power has not seen fit to admit to citizenship, under the clause mentioned, persons other than of European habitancy or descent. The court has no hesitation in saying that the applicant now before it would apparently be qualified to form a more desirable citizen than very many of those we now have as citizens, whether by birth or naturalization. No race in modern times has shown a higher mentality than the Japanese. To refuse naturalization to an educated Japanese Christian clergyman and accord it to a veneered savage of African descent from the banks of the Congo would appear as illogical as possible, yet the courts of the United States have held the former inadmissible and the statute accords admission to the latter. This refusal is no reflection upon the excluded Japanese. The statute presents what may appear to be the startling discrimination that it forbids the privilege of citizenship to a Chinese or a Japanese descendant of two historic races that have accomplished so much in the constructive intellectual work of the world, and extends the privilege to a member of a savage negro tribe.

The admission of a foreigner to the privilege of citizenship in a country is wholly a matter for the people of that country. They may be as capricious and unreasonable as they see fit about it. It is a voluntary donation to be extended or denied according to the whims of the donor if he shall see fit to allow his action to be controlled by caprice or whim. He has certainly a right to be controlled by his ideas of prudent or wise policy towards himself in making the donation. The present applicant may be a free white person. So also may be an individual Japanese or South Sea Islander. The court does not undertake to say what races of mankind in matter of complexion should or should not be classed as white. There is a vast range in shades of white between the Northern Scandinavian and the Southern Portu-

guese. The only point decided is that the applicant is not that particular free white person to whom the act of Congress has donated the privilege of citizenship in this country with its accompanying duties and responsibilities.

In donating this privilege the people of the United States have seen fit under the description of free white persons to restrict the privilege as extended to such foreigners to persons of European habitancy and European descent. The applicant being an Asiatic does not come within the terms of the statute, and, whatever may be his other qualifications, Congress has not seen fit to endow him with the right to be admitted a citizen of the country.

For the reasons set out in this decree and the decree in Ex parte Shahid, supra, the application of the petitioner is refused.

UNITED STATES v. TADISH et al.

(District Court, D. Arizona. October Term, 1913.)

INDIANS (§ 35*)—INDIAN COUNTRY—INTRODUCTION OF LIQUOR—STATUTES.

Rev. St. §§ 2139, 2140, prohibiting the introduction of intoxicating liquor into Indian country, was intended to prevent such introduction for the purpose of furnishing it to the Indians, and hence proof that a number of hunters passing through an Indian Reservation had intoxicating liquor in their possession, presumably for their own use, and without any evidence that they intended to sell or furnish it to Indians, was insufficient to show the commission of an offense under such sections.

[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 61, 62; Dec. Dig. § 35.*]

Steve Tadish and others were indicted for introducing intoxicating liquor into Indian country, and on the trial moved for a directed verdict. Motion granted.

J. E. Morrison, Dist. Atty., of Phœnix, Ariz., for the United States.
J. L. B. Alexander, of Phœnix, Ariz., for defendants.

SAWTELLE, District Judge. The indictment in this case charges that:

"Steve Tadish, Andrew Sitka, Antonio Plich, Chris Wiech, and Stephen Bovvavich, on or about the 10th day of October, 1913, at the county of Gila, in the said district and within the jurisdiction of said court, did unlawfully, willfully, and feloniously introduce intoxicating liquor, to wit, one gill of whisky, into and upon the Indian country, to wit, into and upon the San Carlos Division of the White Mountain Indian Reservation, in the county of Gila, state and district of Arizona."

The testimony discloses that the same defendants left Globe, Ariz., which is without the Indian Reservation, with the avowed purpose and intention of going on a hunt in the White Mountains, and that the driver was to take them to a cabin near what is called the Government Sawmill, about 100 miles beyond Rice, Ariz., where they were arrested. The parties were traveling in a spring wagon, and stopped on or very

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

near the public road near Rice, to camp, reaching there before daybreak, and stopping for the purpose of rest. The government officers, hearing a noise, went to the camp, where they found some of the defendants asleep in the wagon, and some on the ground near by. When the officers came, they found in the front part of the wagon a half gallon jug of whisky, which had never been opened, and after the arrest of the defendants, on a search of the wagon, they found a pint flask of whisky, on the bottom of the wagon, under the blankets on which some of the defendants were sleeping when they were arrested.

There was no evidence which tended to show that the defendants intended or expected to dispose of the liquor to any of the Indians, or to allow the Indians to get it, or that it was intended for any other purpose than that of consumption by the party while on their hunt.

The evidence shows that the cabin to which the driver was to take the defendants was beyond the confines of the San Carlos Division of the White Mountain Reservation, but leaves the question whether it was on the reservation in doubt. We pass by the question whether the indictment, charging as it does an introduction of the liquor into the *San Carlos Division* of the White Mountain Indian Reservation, is proved by showing that the persons were simply passing through that division of the reservation to a point outside of it, though within another Indian Reservation, or another division thereof (though this question is a material one under the proof in this case), and will consider the case as it would stand if it were admitted that the house or place to which they were bound was clearly shown to be a part of, or within the San Carlos Division of, the reservation.

The question for determination is whether having the liquor in their possession under the circumstances shown is an introduction of liquor into the Indian country within the meaning of sections 2139 and 2140 of the Revised Statutes. These statutes are the modified remains of Act of June 30, 1834, c. 161, 4 Statutes at Large, 729, 732. The title of that act was "To regulate trade and commerce with the Indian tribes and to preserve peace on the frontier." It is plain from this title that the evil to be remedied or provided against was the obtaining of spirituous liquors by the Indians, and there does not appear to be any intention to do more than prevent them from getting it. This view is strengthened by an examination of section 2139 of the Revised Statutes as it appears in the edition of 1878. The side notes show that it was trade in liquor with the Indians that the compiler thought it designed to prevent; and it would seem a fair inference that the introduction there denounced should be that done with the purpose of enabling the Indians to obtain the liquors. This statute has since been amended to include other varieties of liquors and substitutes for same, but the amendments do not affect the act in the matter here under discussion.

It was held in United States v. Carr, 2 Mont. 234, that these laws were not intended "to prohibit the exploration or settlement of the public domain by persons who were citizens of the United States, * * * and might desire to carry with them spirituous liquors for legitimate * * * purposes," and it was held that "if * * *

such a person passes through the Indian country with spirituous liquors in his possession, without any intent to dispose of the same * * * contrary to law, neither the liquor, nor any other species of property accompanying the same, are liable to seizure or forfeiture."

In United States v. Four Bottles Sour Mash Whisky (D. C.) 90 Fed. 720, it was held that a stock of liquors is not introduced into the Indian country by being transported across an Indian Reservation to a place where the owner may lawfully dispose of it, and it is not subject to seizure while in transit, or after arrival at place of destination.

It is evident from these cases that the mere physical presence of a person having liquor in his possession in the Indian country is not enough to constitute the offense denounced by the statute.

There being no evidence that the liquor found in the possession of the defendants was intended to be disposed of to the Indians in any way, or that there was any intent to use the same for any unlawful purpose, how can it be held that the mere possession while the owner was temporarily in the Indian country for a lawful purpose of hunting constitutes such an introduction? It is nowhere made an offense to drink liquors while in the Indian country, and if, as has been repeatedly decided, the owner may lawfully transport his property across the Indian country without violating the statute, if he intends to lawfully dispose of it at destination outside of it, his mere presence with such property, in the absence of any proof tending to show any intention to enable the Indians, or any other person, to get it, cannot constitute the offense denounced by the statute. He certainly has as much legal right to drink his liquor as he has to make any other disposition of it, and it would seem that liquor held in possession for a lawful purpose would not subject its owner to criminal liability, in the absence of some evidence tending to show that he intended to use it unlawfully in the future.

There is absolutely nothing in the evidence or the circumstances surrounding the case which tends to show any intention to dispose of the liquor to the Indians, or any one else, while in the Indian country; and, this being so, the court is of the opinion that the defendants did not introduce liquor into the Indian country within the meaning of the statute, and a verdict of not guilty is directed.

UNITED STATES v. BURDICK et al.

(District Court, S. D. New York. February 27, 1914.)

1. PARDON (§ 3*)—AUTHORITY OF PRESIDENT—CHARGE OR CONVICTION OF OFFENSE.

The President has power to grant a pardon, though the person pardoned has never been charged or convicted of the offense.

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

2. WITNESSES (§ 303*)—PRIVILEGE—PARDON.

Where a witness declined to testify before the grand jury on the ground that his testimony might incriminate him, and the President issued an un-

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

conditional pardon, the witness was thereby deprived of the right to claim the privilege, without reference to whether he accepted the pardon or not.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1049, 1050; Dec. Dig. § 303.*]

Contempt proceedings by the United States against George Burdick and William L. Curtin. Respondents adjudged guilty of contempt, and judgment of fine and imprisonment imposed.

This case comes up upon the presentment of a grand jury for contempt. The respondents, the city editor and a reporter of the New York Tribune, refused to answer questions regarding the sources of their information which was the basis of certain articles in that newspaper regarding customs frauds. They contended that disclosure would tend to incriminate them, and they refused to answer. Later the President issued full pardons to both, covering any possible crime under these sections, which upon tender the respondents refused to accept and persisted thereafter in their refusal. Thereupon the grand jury presented them for contempt.

Frank E. Carstarphen, of New York City, for the United States.
Henry A. Wise, of New York City, for respondents.

HAND, District Judge (after stating the facts as above). There is concededly only one question in the case, which is whether the unaccepted tender of a pardon will toll the privilege against incrimination. This in turn divides into two parts: May the President pardon for a crime of which the individual has not been convicted and which he does not admit? Is acceptance necessary to toll the privilege?

[1] I have no doubt whatever that the President may pardon those who have never been convicted. The English precedents are especially pertinent. U. S. v. Wilson, 7 Pet. 150, 160, 8 L. Ed. 640. Lord Coke, 3 Inst. 233, c. 105, Of Pardons, says expressly that the royal prerogative extended as well before as after "attainder, sentence or conviction." Two pardons of Edward I of indicted, but not yet convicted, men, are given in full on pages 234, 235. Blackstone, vol. 4, c. 26, subd. IV, 4, gives a pardon as a special plea in bar to an indictment, and rather strangely, in view of later practice, observes that they are good "as well after as before conviction." Later, in chapter 27, he notes the advantage to the defendant of pleading a pardon in arrest of judgment, in that it avoided the attainder of felony. Chapter 30 deals with reprieves and pardons and subdivision II, 1, shows clearly that pardons before conviction were valid except in impeachments, where they were, however, valid after conviction.

In this country from the very first, Presidents have exercised not only the power to pardon in specific cases before conviction, but even to grant general amnesties. The instances are collected in an opinion of President Taft, while Solicitor General (Opinions of the Attorney General, vol. 20, p. 339 et seq.). They include amnesties by President Washington in 1795, President Adams in 1800, and President Madison in 1815. President Lincoln's amnesty of 1863 may perhaps be thought to depend upon 12 St. at Large, 592, c. 195, and not to be a precedent, though Chief Justice Chase indicates a contrary notion in U S. v. Klein, 13 Wall. 128, 141, 20 L. Ed. 519. President Johnson

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

proclaimed a general unconditional amnesty to all who had taken part in the Civil War on December 25, 1868, and this was held valid to forgive forfeitures, even as against a subsequent legislative repeal, U. S. v. Klein, supra; Armstrong v. U. S., 13 Wall. 154, 20 L. Ed. 614. President Harrison acted upon the opinion of his Solicitor General, already mentioned, and issued a conditional amnesty to Mormons in 1893, 27 St. at Large, 1058, No. 42.

In Ex parte Garland, 4 Wall. 333, 18 L. Ed. 366, the Supreme Court recognized the effect of a pardon granted by President Johnson to restore General Garland, who had never been convicted, to his status as attorney and counselor of the Supreme Court, though perhaps the discussion was not strictly necessary to the disposition of the case. However, Justice Field's language on page 380 of 4 Wall. (18 L. Ed. 366) is explicit, and the opinion of the minority does not question the propriety of a pardon for offenses without conviction. President Jefferson appears to have issued a pardon to a proposed witness in the trial of Aaron Burr, with a view, as here, to tolling the privilege; but, though the witness refused to accept it, I cannot learn that the question of privilege was raised upon the trial itself. The precedent shows, however, that this practice was used as early as 1807.

[2] It is suggested that a pardon may not issue where the person pardoned has not at least admitted his crime. I need not consider this, because every one agrees, I believe, that if accepted the acceptance is at least admission enough. It is an admission that the grantee thinks it useful to him, which can only be in case he is in possible jeopardy, and hardly leaves him in position thereafter to assert its invalidity for lack of admission. And so there arises the second point in the respondents' position, which is that, as they refused the pardon, they may still maintain the privilege. It is not necessary to assert that the pardon has any effect till accepted. U. S. v. Wilson, 7 Pet. 150, 161, 8 L. Ed. 640; In re De Puy, 3 Ben. 307, Fed. Cas. No. 3,814. I will for this purpose accept the contrary. When, however, the question is of privilege, the witness only needs protection (Brown v. Walker, 161 U. S. 591, 16 Sup. Ct. 644, 40 L. Ed. 819), and he is protected when the means of safety lies at hand. If he obstinately refuses to accept it, it would be preposterous to let him keep on suppressing the truth, on the theory that it might injure him. Legal institutions are built on human needs and are not merely arenas for the exercise of scholastic ingenuity.

There was a suggestion that the privilege might rest upon the jeopardy of some other crime than that pardoned; but, unless the witness is to be the sole judge, there is no basis for that position. In this circuit we have always insisted that the court must see some reasonable ground for the witness' supposed fear, and may inquire so far. Brown v. Walker, supra.

The respondents are adjudged to be in contempt and are each fined $500. They may purge themselves by appearing on notice before the present or any subsequent grand jury and testifying fully as to the sources of their information. If they still persist at that time in refusing to answer, a commitment may issue in addition until they comply.

UNITED STATES v. APPEL.

(District Court, S. D. New York. June, 1913.)

1. CONTEMPT (§ 3*)—WHAT CONSTITUTES—PERSISTENT PERJURY.
A court has power to punish, as a criminal contempt, persistent perjury which blocks the inquiry before it, upon motion made by the district attorney on behalf of the United States.
[Ed. Note.—For other cases, see Contempt, Cent. Dig. § 4; Dec. Dig. § 3.*]

2. WITNESSES (§ 21*)—CONTEMPT—REFUSAL TO TESTIFY.
Where a witness' conduct shows beyond doubt that he is refusing to tell what he knows, or that his testimony is mere transparent sham, he is guilty of contempt.
[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 37–41; Dec. Dig. § 21.*]

3. WITNESSES (§ 21*)—CONTEMPT—EXAMINATION.
Accused withdrew $537.50 on May 14th and $415.06 on the 12th. Being examined on the 19th, he was unable to state what he had done with any part of the money except that he applied part of it to payment of a pay roll, which did not amount to more than $120. He testified that he had played poker during the past week once and had lost a few hundred dollars. When pressed, he was unable to remember whether it was $100 or $500. On being questioned as to his withdrawal of $200 on May 10th, he said that he had spent it but did not remember how, except that perhaps he had played cards with that too. Again his attention was called to a withdrawal of $485 on the 8th, $698 on the 26th, $865 on the 21st, and the proceeds of two notes amounting to $900, but he could not account for the disposition thereof, except that he played it away at cards, though he did not remember when or where. *Held*, that such testimony was a mere sham and constituted a contempt of court.
[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 37–41; Dec. Dig. § 21.*]

Application by the United States to punish Louis Appel for criminal contempt. Granted.

John E. Walker and Stephen Brooks Rosenthal, both of New York City, for the United States.

L. Dorfman, of New York City, for respondent.

HAND, District Judge. [1] The power of the court to treat as a criminal contempt a persistent perjury which blocks the inquiry is settled by authority in this circuit. Re Schulman (C. C. A. 2d Cir.) 23 Am. Bankr. Rep. 809, 177 Fed. 191, 101 C. C. A. 361. It is indeed impossible logically to distinguish between the case of a downright refusal to testify and that of evasion by obvious subterfuge and mere formal compliance.

[2] The rule, I think, ought to be this: If the witness' conduct shows beyond any doubt whatever that he is refusing to tell what he knows, he is in contempt of court. That conduct is, of course, beyond question when he flatly refuses to answer, but it may appear in other ways. A court, like any one else who is in earnest, ought not to be put off by transparent sham, and the mere fact that the witness gives some answer cannot be an absolute test. For instance, it could not be

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

enough for a witness to say that he did not remember where he had slept the night before, if he was sane and sober, or that he could not tell whether he had been married more than a week. If a court is to have any power at all to compel an answer, it must surely have power to compel an answer which is not given to fob off inquiry. Nevertheless, this power must not be used to punish perjury, and the only proper test is whether on its mere face, and without inquiry collaterally, the testimony is not a bona fide effort to answer the questions at all.

[3] The examination took place on May 19th. On May 14th the respondent drew $537.50, on May 12th $415.06, making in all $940 within a week of the date of the examination. He was unable to state what he had done with any part of this except to state that he paid labor with it, and the pay roll by his testimony amounted to $58 a week, or about $120 for two weeks, which was the time during which the roll was unpaid. There remained, therefore, $800. His explanation of this was that he had played poker during the past week once and had lost a few hundred dollars. When pressed he said it was not $800, but he could not remember whether it was $500, $400, $300, or $100. He was next questioned about a withdrawal on May 10th of $200, and said that he spent it, but how he did not remember; that perhaps he played cards with that too. Again his attention was called to a withdrawal of $485 on May 8th. He says he spent this but how he could not say. Again on March 26th he withdrew $698 and said that this was perhaps for cards. He was asked about a withdrawal on March 21st of $865 and said that he gave half of this to his brother and spent the rest on food or on cards. Finally his attention was called to the sale of two notes for $500 each on May 7th, which he sold to a strange man whose name he could not remember; that he got for these notes about $900, and that this also he played away at cards. The commissioner who was present at the taking of the testimony has certified that the witness was intelligent and understood the questions; that he was alert and adroit. The commissioner was impressed with the fact that the testimony as to the gambling losses was false and invented on the spur of the moment. The question, therefore, comes down simply to this: Is the story of his gambling losses so obviously and apparently a mere effort to block the examination that a court must in protection to itself hold that it is false and that he was attempting to prevent any effective examination? One cannot, of course, say that such a story is in all circumstances necessarily an absurd explanation, but the inability of the respondent to give the names of any places but one of these where he had lost any such sum as he stated, and his entire vagueness about matters which were so recent, and which must have impressed themselves upon his memory at the time to a greater extent, leaves no doubt in my mind that he was not stating what he knew, and was attempting to prevent any efficient examination. This, coupled with the impression of the commissioner who heard him testify, seems to me to leave me no alternative, if I am to apply the rule at all, but to hold that he was guilty of a contempt under the circumstances. I will therefore commit him for ten days for the contempt already committed. At the end

of that time he may appear before the commissioner, and see whether he can tell a story which is not so obviously a mere sham. At that time the matter may be brought up again for further consideration.

BIRMINGHAM WATERWORKS CO. v. CITY OF BIRMINGHAM.

(District Court, N. D. Alabama, S. D. January 9, 1913.)

No. 229.

1. COURTS (§ 102*)—FEDERAL COURTS—COMPOSITION—VALIDITY OF MUNICIPAL ORDINANCE—"STATE STATUTE."

An ordinance of a municipality the constitutionality of which is assailed is not a statute of a state within Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1162 [U. S. Comp. St. Supp. 1911, p. 236]) § 266, providing that no interlocutory injunction restraining the enforcement of a state statute shall be granted by any judge of a United States District Court on the ground of unconstitutionality of the statute, unless the application shall be presented to a district judge, and shall be heard by three judges, of whom at least one shall be a Justice of the Supreme Court or Circuit Judge, and the other two may be Circuit or District Judges, etc.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 351, 352; Dec. Dig. § 102.*]

2. COURTS (§ 369*)—FEDERAL COURTS—RULES OF DECISION—DECISION OF STATE COURT.

Where state legislation is assailed in the federal courts as impairing the obligation of contract, the determination by the state courts that there is no contractual right to be impaired is not conclusive on the federal courts, but they will determine for themselves whether contractual rights exist, and whether such rights, if they exist, are impaired by the legislation attacked.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 369.*]

3. COURTS (§ 369*)—FEDERAL COURTS—STATE COURT DECISIONS.

Where state legislation is assailed as violative of the contract clause of the federal Constitution and the state courts have upheld the existence of contract rights, such decisions will be followed in the federal courts.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 369.*]

4. COURTS (§ 365*)—FEDERAL COURTS—RULES OF DECISION—MUNICIPAL CORPORATION—POWERS—STATE DECISIONS.

The charter power of a municipal corporation under the laws of the state creating it is a matter for the determination of the state courts, which determination will be followed in the federal courts, unless the construction conflicts with the proper enforcement of the right guaranteed by the laws of the United States.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 950, 952, 955, 969–971; Dec. Dig. § 365.*]

5. MUNICIPAL CORPORATIONS (§ 226*)—POWERS—WELFARE CLAUSE—CONTRACT FOR WATER.

Where a municipal corporation was authorized to enact ordinances for the good order and welfare of the city, it was authorized to contract with third persons or corporations to furnish water for the city and its inhabitants.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 645–650; Dec. Dig. § 226.*]

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

6. CONSTITUTIONAL LAW (§ 135*)—WATERS AND WATER COURSES (§ 203*)—MUNICIPAL SUPPLY—RATES.

A municipal ordinance, granting the right to a water company to furnish water to the city and its inhabitants, provided a flat rate for domestic consumption in dwellings, etc. only varying with the size of each building, and for all other purposes prescribed a meter rate measured by actual consumption, varying in price with the amount of daily consumption. Another provision "further ordained" that from July 1, 1888, the domestic rate should never exceed the schedule of flat rates specified, and that the company should have the right to charge for water by measurement at rates not exceeding the average rates named below, "measured water to be charged as follows," followed by a schedule of meter rates per thousand gallons consumed and the schedule of annual rents for the meters themselves. *Held*, that such provision was not intended to prescribe maximum rates, but fixed the rates that water company was entitled to charge during the life of the contract, which right was protected by the contract clause of the federal Constitution.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 380–387; Dec. Dig. § 135;* Waters and Water Courses, Cent. Dig. §§ 289–299; Dec. Dig. § 203.*]

7. WATERS AND WATER COURSES (§ 203*) — WATER RATES — REGULATION — POWER.

In the absence of statutory authority at the time a city entered into a contract with a water company to furnish water to the city and its citizens, authorizing the city to regulate rates, the city had no such power.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 289–299; Dec. Dig. § 203.*]

8. WATERS AND WATER COURSES (§ 203*)—MUNICIPAL WATER SUPPLY—CONTRACT—RATES—TERM.

A contract between a city and a waterworks company, fixing absolute rates to be charged by the water company, *held* to authorize the company to charge the rates prescribed for 30 years.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 289–299; Dec. Dig. § 203.*]

9. MUNICIPAL CORPORATIONS (§ 108*)—"GRANT OF FRANCHISE"—ORDINANCE—REFERENDUM.

Where a city had contracted with a water company to furnish water to the city and its citizens at specified rates for 30 years, a subsequent ordinance, modifying the original contract and establishing rates different from those originally specified, constituted a municipal grant of a franchise within a provision of the city's charter requiring such ordinances to be ratified by a vote of the people, and hence, the people having voted adversely thereon, it never became operative.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 108.*]

In Equity. Suit by the Birmingham Waterworks Company against the City of Birmingham. On application for a temporary injunction. Granted.

London & Fitts, of Birmingham, Ala., and Brown, Spurlock & Brown, of Chattanooga, Tenn., for plaintiff.

M. M. Ullman, Romaine Boyd, and George Huddleston, all of Birmingham, Ala., for defendant.

GRUBB, District Judge. This is an application for a temporary injunction to restrain the enforcement of an ordinance of the city of

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

Birmingham fixing the rates to be charged by the plaintiff for water furnished the inhabitants of the defendant for consumption.

[1] A preliminary motion has been made by the city, the effect of which is to request the District Judge to call in two Circuit Judges to hear the case with him, as provided in section 266 of the Judicial Code of the United States. The federal courts have held that an ordinance of a municipality, the constitutionality of which is assailed, is not a statute of a state within the meaning of that section, and that the section does not apply to a bill seeking an injunction to restrain the enforcement of a municipal ordinance for that reason. The motion is denied. Sperry-Hutchinson Co. v. City of Tacoma (C. C.) 190 Fed. 682; Cumberland Telephone Co. v. Memphis (D. C.) 198 Fed. 955.

Coming to the merits, the ordinance of the city is asked to be restrained upon two grounds: First, that the rates fixed in it are so low as to be confiscatory, and that it violates the fourteenth amendment to the federal Constitution for that reason; second, that it impairs the obligation of a contract entered into between the city and the plaintiff on June 2, 1888, and so violates section 10 of article 1 of the federal Constitution.

The first ground was not stressed upon the hearing by plaintiff's counsel, and there was no sufficient presentation of that phase of the case either in the shape of evidence or argument, to justify a ruling upon it, and its decision becomes unnecessary upon this hearing, in view of the disposition made of the application upon the other ground. The second ground is the one chiefly relied upon by the plaintiff. The position of the plaintiff upon it is that it has a valid contract with the city entered into June 2, 1888, authorizing it to charge, for the unexpired part of the 30-year term of the contract, beginning from July 1, 1888, to the inhabitants of the city, certain fixed and absolute rates therein specified for water furnished either for domestic or manufacturing purposes, and that the ordinance complained of has the effect of reducing the contract rates, and so impairs its obligation. The positions of the defendant are that the city at the time of its execution had no charter authority to make a contract establishing water rates for 30 years, that the contract of June 2, 1888, did not have the effect of fixing absolute rates, but only maximum rates, and that it was for no definite period of time so far as it related to rates. The plaintiff also relied upon a subsequent ordinance of the city, designated 97C, to which it had assented, and which was a modification of the original contract of June 2, 1888, and which established rates differing from those of the original contract, as well as from those of the ordinance complained of, and which was the result of a compromise between the parties to the original contract. The defendant's position, with respect to this subsequent ordinance, is that the charter of the city provided that such contract ordinances should be referred to a vote of the people for ratification or rejection before becoming effective; that the ordinance designated 97C was so referred, and acted upon adversely by the people, and so never became effective. The plaintiff's answer is that it is not one of the class of contracts which the law requires to be submitted to the operation of the referendum, and hence the adverse vote

did not affect its validity. If held to be invalid, then the plaintiff resorts to the original contract of June 2, 1888, as being still in force.

The first question for consideration is the power possessed by the city of Birmingham in June, 1888, to make for its inhabitants a contract for a supply of water for a term of 30 years at fixed and absolute rates, during the contract period, such as is that of June 2, 1888, as it is construed by plaintiff.

[2] Where state legislation is assailed in the federal courts, as impairing the obligation of contract in violation of section 10, article 1 of the Constitution of the United States, the determination by the state courts that there is no contractual right to be impaired is not conclusive upon the federal courts. The federal courts determine for themselves whether contractual rights exist and are impaired by the subsequent legislation. A contrary rule would render this provision of the Constitution ineffectual, since it would be in the power of the state courts to render it inapplicable in any case by determination that no contract right existed to be impaired.

[3, 4] However, when the state courts' construction upholds the existence of contract rights, instead of denying them, no such reason exists for not following the state decisions. The charter power of a municipal corporation under the laws of the state creating it is a matter for the state courts to determine, and the federal courts will follow their construction unless it conflicts with proper enforcement of a right under the laws of the United States.

In the case of Vicksburg v. Vicksburg Water Co., 206 U. S. 496–509, 27 Sup. Ct. 762, 766 (51 L. Ed. 1155), the Supreme Court of the United States said in a similar case to this one:

"In the cases generally in this court it will be found that, in determining the matter of contract, the local decisions have been given much weight, and ordinarily followed. As this is a Mississippi contract, and the power was exercised under an act of the Legislature of that state, we naturally look to the decisions of the courts of that state, particularly to such as had given construction to similar charters at the time the contract was made, with a view to determining the extent of the power conferred."

[5] Under this principle, the Alabama decisions reflecting on the power of the city to enter into the contract of June 2, 1888, should be controlling, when they uphold the power of the city to make the contract. The provisions of the charter of the city in force in June, 1888, relied upon by plaintiff in support of the authority of the city to make the contract of June 2, 1888, are the general welfare clause, and the power to make any needful provisions for the supply of the city with water, gas, and gaslights. Section 20, subds. 1, 10, Act 1880–81, p. 480.

In the case of Greenville v. Greenville Water Co., 125 Ala. 625–639, 27 South. 764, 769, the Supreme Court of Alabama said:

"A supply of water for the extinguishment of fires and other ordinary public uses is one of the necessities of a city, and under the general authority (to enact ordinances for the good order and welfare of the city) so granted the defendant had the power to make a proper contract for such supply."

In the case of Weller v. Gadsden, 141 Ala. 642–656, 37 South. 682, 684, the same court said:

"Whatever may be said as to the agreement to pay for hydrants, at a fixed price, for 30 years, * * * it is settled that under a charter, authorizing a city 'to make needful provisions to supply the city with water' * * * its authorities may make such a contract, which will be valid, if not for the whole period, at least for a reasonable length of time. We so expressly decided in the City of Greenville v. Greenville W. W. Co., 125 Ala. 625 [27 South. 764]."

In the case of Mitchell v. Gadsden, 145 Ala. 137–157, 40 South. 350, the same court, of the same contract, said:

"We hold that the city had the power and authority to enter into said contract, and adopt what was said by Judge Tyson in the cause of Weller v. City of Gadsden, 141 Ala. 642, 37 South. 682, in so far as he treats of the validity of the contract and of its several portions. The making of such a contract is not a delegation of a governmental function, but is an exercise of its business or proprietary powers (citing many cases). The charter of the city of Gadsden confers ample powers to authorize the making of this contract (Acts 1882–83, p. 290, § 22). At any rate this is one of the incidental powers of a municipal corporation (1 Dillon on Mun. Corp. [4th Ed.] 146, 443, note 1; Livingston v. Pippin, 31 Ala. 542, 550, 551)."

The text of the latest edition of Dillon (3 Dillon [5th Ed.] § 1302, p. 2130) asserts the principle as follows:

"Authority to a city to construct water or gas works, or to provide water or to light the city streets, whether it be derived from an express grant, or from the general power of the city in respect to police regulations, the preservation of public health and the general welfare, confers upon the municipality authority to contract with an individual or corporation for a supply of water or light. Any power which is sufficient to authorize the city to provide a supply of water or light implies, in the absence of special restriction, the power to make a proper contract with an individual or corporation therefor."

From the authorities cited, it is clear that the charter of an Alabama municipal corporation, containing the usual general welfare provisions, and the power to adopt all needful provisions to obtain a water supply for the city, is sufficient to authorize the city to obtain a water supply by contracting, as well as by municipal ownership and operation, though no specific power to obtain it by contract appears in the charter. This was the condition of defendant's charter in June, 1888, and consequently it had the power under it to obtain a water supply by contract, as well as by its own ownership and operation.

[6] The powers to contract for a supply of water and to fix absolute rates to be charged for it during the term of the contract are however, two different things. The question then arising is whether the defendant city had authority, not only to contract for a supply of water for 30 years, but to contract for fixed rates to be paid for the furnishing of the water by the consumer during the same period of time.

In the case of the city of Bessemer v. Bessemer City Waterworks, 152 Ala. 391–405, 44 South. 663, 666, the Supreme Court of Alabama said:

"In the latter category falls the contract we have in hand, and the insistence that the city, even though authorized by the Legislature to bind itself by an irrevocable contract not to regulate water rates, cannot do so, because the power to regulate rates is a continuing legislative power—cannot be sustained (citing many cases)."

In the same case (152 Ala. 407, 44 South. 667), the court said:

"This is but another way of stating the rule that the power of municipal corporations is measured by the legislative grant, and they can exercise such

powers only as are expressly granted, or are necessarily implied from the powers expressly conferred. 1 Dillon (2d Ed.) § 55. With the rule as stated in view, we must determine whether or not the city, under its charter, had the authority contended for by the company and denied by the city, to wit, the authority to contract for rates at which water should be supplied to its citizens for a definite period, and, of consequence, to suspend its charter power in respect to the regulation of rates during such fixed periods. Confessedly the city by the charter is expressly authorized to make all needful provisions *by contract* for a supply of water for itself and *its citizens*, and, in view of section 228 of the Constitution, no objection can be taken to the time period prescribed in the ordinance." (Which was, as in this case, 30 years.)

After discussion, the court concluded (152 Ala. 411–412, 44 South. 668, 669):

"We cannot see that the power to fix rates given in the same section of the charter should be held to be an inhibition on the city's power to contract rates, if such power to contract can be necessarily implied from the power to contract for the supply of water; and our conclusion is that the right of the city to fix maximum rates, if not expressly given, arises by necessary implication from the language in which the charter power to contract is clothed."

The language of the charter of the city of Bessemer, conferring on it power with relation to water supply is:

"The mayor and aldermen of the city of Bessemer shall have full and ample power, jurisdiction and authority * * * to make, erect and repair public wells, cisterns, and establish fire plugs and hydrants, and to make all needful provisions by contract, ownership of waterworks, or otherwise, for the supply of the city and citizens thereof with water." 152 Ala. 398, 44 South. 664.

It differs from the language of the defendant's charter, conferring the same power, only in that the words "by contract, ownership of waterworks or otherwise," after the words, "to make any needful provisions," and the words, "and the citizens thereof," after the words, "for the supply of the city" do not appear in the charter of the defendant. In view of the repeated decisions of the Alabama Supreme Court that power to contract a supply of water is implied from the power conferred "to make all needful provisions for the supply of the city with water," though the method by contract is not expressed therein, it is clear there is no difference in legal effect between the two charters by reason of the omission of those words from that of defendant. In spite of the omission, defendant had the charter power to contract for its water supply as much as did the city of Bessemer. In the former charter the power is held to arise by necessary implication; in the latter, it was expressly set out. So the omission of the words, "and the citizens thereof," from defendant's charter does not make it differ in legal effect from that of the city of Bessemer.

A supply of water for a city includes a supply for the consumption of its citizens, as well as that for municipal purposes exclusively. In the case of Livingston v. Pippin, 31 Ala. 542, 550, 551, the Alabama Supreme Court said:

"The intendant and council of the town of Livingston have the ordinary public powers which are conferred on municipal corporations. The express grants of power are copied in the opening of this opinion. Nothing is more important, as a sanitary and police regulation, than an abundant supply of water. Its uses are too well known to require notice here. We hold that the

corporate authorities had the power, as such, to procure water on the public square of the town of Livingston."

In the case of Bessemer v. Waterworks, the Alabama Supreme Court held that a municipal corporation, with express or necessarily implied legislative authority to contract for a supply of water, could fix absolute and continuing rates for the contract period which it could not afterwards alter without the consent of the water company, the function being proprietary and not governmental. In the Bessemer charter power to so contract was expressed. In defendant's the Alabama Supreme Court has held it to be implied. As the charter powers of the defendant are therefore legally identical with those of the city of Bessemer, with relation to contracting for a water supply for the city, it follows that as the Supreme Court of Alabama has held that the city of Bessemer had the charter power to contract with a water company for fixed and absolute rates for a period of 30 years, the defendant had the like power under its charter, if the Alabama decision is followed. The decisions of the courts of that state with reference to the charter powers of a municipal corporation created by it should be controlling on this court.

The practical construction given the charter by the public and the parties concerned leads to the same conclusion. While it was in force, the Legislature in 1885 (Laws 1884–85, p. 415) incorporated the plaintiff by special act, for the purpose of contracting to supply the defendant city with water. Contracts of the same nature had been previously made under like authority with one Daniels and with the Elyton Land Company. These contracts all provided, not only for the supply of water needed by the city for its own purposes, but for the necessary supply for its citizens. The contract of June 2, 1888, has been repeatedly before and construed by the courts of Alabama, including its court of last resort. It has been thus impliedly recognized by them and the litigants as a valid contract. No question has ever been raised during a period of 25 years, as to the authority of the defendant to execute the contract. Both parties to it and the citizens have, for that length of time, regarded it as a legally executed agreement, observed it and acted upon it as such. The plaintiff has expended large sums since it was executed upon the faith of this recognition of its validity. Upon the one occasion upon which its binding force was assailed for any reason, it was not upon the ground of want of authority in defendant to execute it, but solely because the period of its duration was claimed to be too uncertain to admit of its enforcement. The chancery court determined that question against the city, and no higher court was called upon to pass upon it. This history of the contract from its inception and of the litigation regarding it, if resort can be had to it for that purpose, affords persuasive evidence of the practical construction given the charter by the Legislature, by the city and its citizens, and by the plaintiff during a period of 25 years. To now determine that a contract that has been publicly recognized as valid, and acted upon as subsisting during all that period never had any legal existence, would have an unsettling effect that would be unfortunate in the administration of the law, and one that is to be avoided unless de-

manded by imperative rules of construction. No such necessity exists. The federal decisions sustain the conclusion reached. Among them are the following: Omaha Water Co. v. City of Omaha, 147 Fed. 1, 77 C. C. A. 267, 12 L. R. A. (N. S.) 736, 8 Ann. Cas. 614; Vicksburg v. Vicksburg Water Co., 206 U. S. 496, 27 Sup. Ct. 762, 51 L. Ed. 1155; Detroit v. Detroit Citizens' Ry. Co., 184 U. S. 368, 22 Sup. Ct. 410, 46 L. Ed. 592.

The power of the city of Birmingham in June, 1888, to make a contract with plaintiff, and to fix absolute rates during its existence, being established, the question then arises whether the defendant has in fact made a contract with plaintiff which fixes absolute water rates, and, if so, whether as to that feature of it, it has so definite a duration as to be enforceable.

The contract of June 2, 1888, provides for the payment of rates by consumers upon two bases. For domestic consumption, what is called a flat rate is employed for dwellings, closets, and bathtubs only, varying with the number of rooms, baths, etc., in each dwelling. For all other purposes a meter rate, measured by actual consumption, is employed, varying in price with the amount of daily consumption. Section 12 of the contract fixes the rates. Its language is, "Be it further ordained—that from the first day of July, 1888, the domestic rates for water furnished under this contract to the citizens of Birmingham shall never exceed the following rates viz. [setting out the schedule of flat rates]"; again, "The company shall have the right to charge for water by measurement at rates not exceeding the average rates named below. Measured water will be charged as follows." Here follows the schedule of meter rates per thousand gallons consumed, and the schedule of annual rents for the meters themselves.

The language of the contract, so far as it relates to flat rates, is fully as consistent with the intention to establish maximum rates as it is to establish absolute rates; and is as much a prohibition upon the water company to exceed during the term of the contract the schedule of flat rates, as it is an authority conferred upon it to charge such flat rates. If it was a limitation upon the water company only, then its effect was only to fix maximum rates, and it was open to the city, during the term of the contract, and without impairing its obligation, to fix rates lower than the maximum, provided they were reasonable and not confiscatory. This is defendant's contention as to the proper construction of the contract, and, looking alone to the language fixing the flat rates, it is a persuasive one. The plaintiff's contention is that the effect of the clauses, relating both to flat rates and meter rates is to fix absolute rates, not to be deviated from without its consent by the city during the life of the contract. As between these differing constructions, the solution of the question depends.

Supporting the defendant's contention are the cases of Georgia R. R. Co. v. Smith, 128 U. S. 174, 9 Sup. Ct. 47, 32 L. Ed. 377; Knoxville Water Co. v. Knoxville, 189 U. S. 434, 23 Sup. Ct. 531, 47 L. Ed. 887; Cedar Rapids Gas Co. v. Cedar Rapids, 223 U. S. 655, 32 Sup. Ct. 389, 56 L. Ed. 594; and State ex rel. Ferguson v. Birmingham Waterworks Co., 164 Ala. 586, 51 South. 354, 27 L. R. A. (N. S.) 674, 137 Am. St. Rep. 69, 20 Ann. Cas. 951. Supporting plaintiff's

contention are the cases of Bessemer v. Waterworks, 152 Ala. 391, 44 South. 663; Vicksburg v. Vicksburg Water Co., 206 U. S. 496, 27 Sup. Ct. 762, 51 L. Ed. 1155; Cleveland v. Cleveland City Ry. Co., 194 U. S. 517, 24 Sup. Ct. 756, 48 L. Ed. 1102; Detroit v. Detroit Citizens' Ry. Co., 184 U. S. 368, 22 Sup. Ct. 410, 46 L. Ed. 592; and Omaha Water Co. v. Omaha, 147 Fed. 1, 77 C. C. A. 267, 12 L. R. A. (N. S.) 736, 8 Ann. Cas. 614. The inquiry is whether this case comes within the former or latter line of cases.

In the case of Knoxville Water Co. v. Knoxville, supra, a case in which the contract was construed to fix maximum and not absolute rates, the Supreme Court said, after having reached that conclusion, on page 437 of 189 U. S., page 532 of 23 Sup. Ct. (47 L. Ed. 887):

"We do not mean that under other circumstances words which on their face only express a limit might not embody a contract more extensive than their literal meaning. Detroit v. Detroit Citizens' Street Ry. Co., 184 U. S. 368 [22 Sup. Ct. 410, 46 L. Ed. 592]."

It thus appears that the language employed, while persuasive, is not conclusive. It may bear either one of the two constructions according to circumstances. The intention of the parties is to be arrived at not alone from the language of the particular clause fixing the rates, but from the entire contract, from the place the rate clause occupied in the contract with relation to the imposition of obligations on the respective parties, from the situation of the parties to the contract, and the circumstances surrounding them at the time it was executed.

Distinguishing the Knoxville Case from the Detroit Case, the Supreme Court said in the Knoxville Case:

"But in that case the rate was fixed by an ordinance which was the language of the city; the ordinance was under a statute which declared that the rates should be established by agreement between the city and the railway company, and neither statute nor ordinance reserved a power to the city to alter rates."

The language of the clause fixing rates in the Knoxville Case was "said company will supply private consumers with water at a rate not to exceed five cents per 100 gallons." 189 U. S. page 436, 23 Sup. Ct. 531, 47 L. Ed. 887. That of the clause fixing rates in the ordinance in the Detroit Case was "the rate of fare for any distance shall not exceed five cents in any one car, or any one route named in this ordinance, except where cars or carriages shall be chartered for specific purposes." 184 U. S. 375, 22 Sup. Ct. 413, 46 L. Ed. 592. The language of the ordinance in this case is "that from the first day of July, 1888, the domestic rates for water furnished under this contract to the citizens of Birmingham shall never exceed the following rates."

The language of the clause in the case at bar is that of the city, as it was in the Detroit Case. The clauses imposing duties upon the respective parties are intermingled in the contract under construction. The first nine impose duties on the water company. Sections 10, 11, 14, and 15 confer rights on the water company. Section 13 is neutral, imposing reciprocal rights and duties. Any significance that is to be deduced from the position of the clause in the contract ordinance in

the case at bar would seem to be in favor of the same construction reached by the Supreme Court in the Detroit Case.

The other distinguishing fact stated by the court in the Knoxville Case was the reservation of a power to the municipal corporation by the law of its creation to regulate rates, and the absence of a reservation to alter rates in either statute or ordinance in the Detroit Case. Of this the court said (189 U. S. 437, 23 Sup. Ct. 532, 47 L. Ed. 887):

"The ordinance was under a statute which declared that the rates should be established by agreement between the city and the railway company, and neither statute nor ordinance reserved a power to the city to alter rates. In the present case it seems to us impossible to suppose that any power to contract which the city may have had was intended to be exercised in such a way as to displace the municipal power expressly reserved or given by the general law under which the water company was created. It would require stronger words than those used here to raise the question whether, under the statute in force, the city could do it if it tried."

In the Detroit Case, 184 U. S. 385, 22 Sup. Ct. 417, 46 L. Ed. 592, the court said:

"It is plain that the Legislature regarded the fixing of the rate of fare over these street railways as a subject for agreement between the parties, and not as an exercise of a governmental function of a legislative character by the city authorities under a delegated power from the Legislature. It was made a matter of agreement by the express command of the Legislature."

And the court said:

"Coming to a consideration of the effect of the language of the ordinance, we think it amounted to a contract as to rates of fares."

Referring to the case of City Ry. Co. v. Citizens' St. Ry. Co., 166 U. S. 557, 17 Sup. Ct. 653, 41 L. Ed. 1114, the court further said (184 U. S. 387, 22 Sup. Ct. 418, 46 L. Ed. 592):

"Although in that case there was no provision in the statute directing that the rates of fare should be established by agreement, yet nevertheless it was held that the language used amounted to an agreement upon the subject-matter which could not be altered during its continuance by either party."

Of the language of the ordinance the court then said (184 U. S. 389, 22 Sup. Ct. 418, 46 L. Ed. 592):

"Nor does the language of the ordinance, which provides that the rate of fare for one passenger shall not be more than five cents, give any right to the city to reduce it below the rate of five cents established by the company. It is a contract which gives the company the right to charge a rate of fare up to the sum of five cents for a single passenger, and leaves no power with the city to reduce it without the consent of the company."

Coming to the instant case, the pertinent inquiry is whether the parties to the contract of June 2, 1888, contemplated a reservation to the city of the right to reduce rates by regulation below the schedules set out in the contract. There was no such express reservation in the ordinance itself. If it exists at all, it must be because section 12 is construed to fix maximum rates only, which is the question at issue. Nor does it appear that the city had at that time any power to regulate the rates of the public service corporations under its then charter. In the absence of charter power to regulate, the express or implied reservation of a general power to regulate in the ordinance would have

been unavailing to the city. The absence of the power in the city to fix rates by regulation would indicate the intention of the contracting parties, in view of the want of such power, that rates should be fixed by agreement; it being the only feasible way that they could be legally fixed in that event. It is not necessary that the Legislature should have expressly directed that method by agreement. When it appears that there was no other available way, and the Legislature did in fact authorize, both impliedly in its own charter and expressly in that of the plaintiff, a water supply to be procured by the city by agreement, the legislative intention that the rates should be fixed by agreement will be implied. The regulation of the rates of public service corporations, other than common carriers, had not attained the prevalence in 1888 that it since has. The customary way to fix rates then was by contract, rather than by regulation. This, and the absence of charter power in the city to regulate at the time the contract was made, are persuasive of the intent of the parties to the contract of June 2, 1888, that the rates should be fixed by agreement and not by regulation. A municipal corporation has no power of regulation, independent of statutory authority. In re Pryor, 55 Kan. 724, 41 Pac. 958, 29 L. R. A. 398, 49 Am. St. Rep. 280; Gas Co. v. State, 135 Ind. 49, 34 N. E. 702, 21 L. R. A. 734; St. Louis v. Telephone Co., 96 Mo. 623, 10 S. W. 197, 2 L. R. A. 278, 9 Am. St. Rep. 370.

In the case of Cedar Rapids Gas Co. v. Cedar Rapids, 223 U. S. 655–667, 32 Sup. Ct. 389, 390 (56 L. Ed. 594), the court said:

"We are of opinion that there was no contract on the part of the city that the price should be kept high enough to allow a discount for prompt payment. The general power reserved to regulate rates was limited only by the fourteenth amendment. The words relied upon by the plaintiff express its promise in consideration of the privileges granted, not a promise by the city. Knoxville Water Co. v. Knoxville, 189 U. S. 434, 437 [23 Sup. Ct. 531, 47 L. Ed. 887]. It is true that the ordinance was drawn as a contract, to be accepted, and it was accepted, by the plaintiff; it contained reciprocal undertakings, the one in question being that of the plaintiff, as we have said, and it was subject to the power retained by the city to regulate rates. That power, it was expressly provided by the Iowa statute, was not to be abridged by ordinance, resolution, or contract. Code 1897, § 725, Acts 22d Gen. Assem. (1888) c. 16."

The ordinance in this case is to be distinguished from that construed in the case cited in two respects. The pertinent language of the ordinance in this case is not unmistakably that of a promise on the part of the water company. It is, at least, equally consistent with the idea that it imports a promise on the part of the city. Again, and more important, in the Cedar Rapids Case the court said, "It is admitted that under the laws of Iowa the rate could be changed by the city," i. e., in the absence of a binding contract; and, again, "And it [the contract ordinance] was subject to the power retained by the city to regulate rates. That power, it was expressly provided by the Iowa statute, was not to be abridged by ordinance, resolution, or contract." Not only was the power to regulate expressly conferred, but its abridgment prohibited. In the case at bar, no power was retained in the ordinance by the city to regulate water rates, and no such power con-

ferred upon the city by its charter. In this controlling fact this case differs from the one cited.

In the case of Cleveland v. Cleveland City Ry. Co., 194 U. S. 517–536, 24 Sup. Ct. 756, 763 (48 L. Ed. 1102), the Supreme Court said, referring to the following language of the ordinance, "that for a single fare from any point to any point on the line or branches of the consolidated road no greater charge than 5 cents shall be collected":

"In reason the conclusion that contracts are engendered would seem to result from the fact that the provisions as to the rates of fare were fixed in ordinances for a stated time, and no reservation was made of a right to alter; that by those ordinances existing rights of the corporation were surrendered, benefits were conferred upon the public, and obligations were imposed upon the corporation to continue these benefits during the stipulated time. When, in addition, we consider the specific reference to limitations of time which the ordinances contained, * * * we can see no escape from the conclusion that the ordinances were intended to be agreements binding upon both parties definitely fixing the rates of fare which might be thereafter charged. Taking all the circumstances above referred to into account, the case before us clearly falls within the rule, as to the binding character of agreements respecting rates, applied in Detroit v. Detroit Citizens' Ry. Co., 184 U. S. 368 [22 Sup. Ct. 410, 46 L. Ed. 592], and approvingly referred to in Knoxville Water Co. v. Knoxville, 189 U. S. 434–437 [23 Sup. Ct. 531, 47 L. Ed. 887]."

In the case of Vicksburg v. Vicksburg Water Co., 206 U. S. 496–509, 27 Sup. Ct. 762, 766 (51 L. Ed. 1155), the Supreme Court thus quoted approvingly the language of the Supreme Court of Mississippi, and reached the conclusion, as did that court, that an ordinance couched in language appropriate for a maximum rate "put the rate beyond legislative or municipal alteration to the prejudice of the other contracting party":

"We decline to follow the decision in Griffin v. Goldsboro Water Co., 122 N. C. 206, 30 S. E. 319, 41 L. R. A. 240, in holding that while a water company which accepts an ordinance by which a maximum rate is fixed is bound, and cannot exceed the same, because of its contract, yet such rates are not binding upon consumers, who have a right to litigate against unreasonable charges."

In the case of Omaha Water Co. v. Omaha, 147 Fed. 1–13, 77 C. C. A. 267, 279 (12 L. R. A. [N. S.] 736, 8 Ann. Cas. 614), the Circuit Court of Appeals for the Eighth Circuit, construing similar language to that here involved in an ordinance of the city of Omaha, said:

"Did the city make such a contract? The stipulation concerning these rates is not embodied in the agreement for hydrant rentals which followed the ordinance of 1880. But the city required the contractor, as a qualification to receive the contract, to accept the terms and conditions of the ordinance, and an accepted ordinance is a contract. The ordinance was an offer by the city of the terms and regulations under which it would enter into a contract for the construction and operation of the waterworks. The city prepared and passed the ordinance. All its terms and words were the language of the city. It was enacted under a statute which empowered the city to agree upon the water rates. It prescribed specific rates for the use of water by private consumers, and provided that the water company should furnish water to them at such rates as should be agreed upon between the water company and the consumers, not exceeding those specified in the ordinance. The concession is readily made that the acceptance of this ordinance constituted a contract by the water company to furnish the water to private consumers at prices not exceeding those named in the ordinance. The contention is that it left the city free to reduce them. If so, the contract permitted the city to retain the

power to withdraw from the water company all the substantial benefits of its undertaking, for a reduction of the rates to private consumers would diminish the most substantial part of its revenue, and might ruin the company. It cannot be that either the city or Locke intended to make an agreement of this nature, for such a transaction would be contrary to the ordinary course of action of rational men under similar circumstances. The chief object of the city in the procurement of this contract was a supply of water. The great desideratum of the contractor was remunerative rates from private consumers. The presumption is that the contract secured both, for both parties consented to it. Nor is it doubtful that this was its effect when its terms are fairly read."

In the case of Georgia R. R. Co. v. Smith, 128 U. S. 174, at page 181, 9 Sup. Ct. 47, at page 49 (32 L. Ed. 377) the rate clause was found in the legislative charter of a railroad company, as a condition to the exercise by it of the exclusive rights of transportation over its lines. Its effect was to grant that right so long as certain rates were not exceeded. Of it the Supreme Court said:

"If considered as a condition to the enjoyment of the exclusive right designated, then the section only provides that, so long as the maximum rate specified is not exceeded, the company or its lessee shall have the exclusive right to carry passengers and merchandise over its roads. It contains no stipulation, nor is any implied, as to any future action of the Legislature. If the exclusive right remain undisturbed, there can be no just ground of complaint that other limitations than those expressed are placed upon the charges authorized. It would require much clearer language than this to justify us in holding that, notwithstanding any altered conditions of the country in the future, the Legislature had, in 1833, contracted that the company might, for all time, charge rates for transportation of persons and property over its line up to the limits there designated."

Distinguishing this case from the Detroit Case, 184 U. S. 388, 22 Sup. Ct. 418, 46 L. Ed. 592, the Supreme Court, in the latter case, said:

"And it was not thought that in the exercise of the merely governmental function of creating a charter and incorporating the Banking & Railroad Company the Legislature had in regard to this particular matter of rates surrendered the right to alter the maximum charges. The language used was regarded as a mere delegation of authority by the Legislature to the company to make those charges till the authority was altered or withdrawn. In other words, the language did not constitute a contract or agreement between the parties, the Legislature and the railroad company. In the case at bar * * * the rates are fixed under the provision of a statute which declares they shall be so fixed by agreement between the parties. * * * It may very well be that the language used by a Legislature in conferring authority upon a company to fix certain charges for fare might not be regarded as amounting to a contract, when the same language used by the parties in fixing rates under a legislative authority and direction to agree upon them would be regarded as forming a contract because the statute provided specially for that mode of determining them."

The same features that distinguish the Smith Case from the Detroit Case prevent it from ruling this case.

In the case of Bessemer v. Bessemer Waterworks Co., 152 Ala. 391, 44 South. 663, the Supreme Court of Alabama expressly held that an ordinance, the language of which was appropriate to fix maximum rates only, was a contract giving the water company the right to maintain such maximum rates as against a subsequent ordinance reducing them without its assent, without proof that the reduced rates were confiscatory. It is true that the specific language of the ordinance is not set

out in the opinion, but it is quite clear from the language of the court, and its reference to the Omaha Case quoted from, that it was of substantially like effect to that of the ordinance in this case. The language of the Bessemer municipal charter contained a provision that the rates at which water was furnished should be reasonable, thus conferring on Bessemer a right of regulation which Birmingham did not have under its charter at the time the contract of June 2, 1888, was executed. So that the facts of the Bessemer Case are not as strong as are those of this case.

Nor can it properly be said that the case of State ex rel. Ferguson v. Birmingham Waterworks Co., 164 Ala. 586, at page 590, 51 South. 354, at page 355 (27 L. R. A. [N. S.] 674, 137 Am. St. Rep. 69, 20 Ann. Cas. 951), conflicts with the Bessemer Case in this respect. It is true the Justice who wrote the opinion in that case said:

"The maximum rates provided for in the ordinance contract in the instant case were fixed for the protection of the public against the exaction of unreasonable charges. * * * There is no indication of a legislative purpose to declare that the maximum should also be the minimum rates. Nor does any reason suggest itself why the water company may not establish a uniform rate less than the maximum fixed by the ordinance contract, or a rate less than reasonable, if such a thing be imaginable."

The question in that case did not concern the forced reduction of rates, but related solely to discrimination and the right of the water company to voluntarily reduce rates below the maximum to one patron without reducing them to all. The court held that the water company could voluntarily make a lower rate than the maximum to one patron, and could not thereby be forced to accord the same rate to its other patrons. It is clear that the question as to whether the supposed maximum rates were absolute rates, or whether they bound the company only, and as to whether the city could reduce the contract rates, by showing that lower rates were reasonable, to such lower and reasonable rates in spite of the ordinance, was not involved, and if anything was said bearing upon that, it was dictum. The only germane inquiry in that case related to the right of the water company to make a voluntary reduction from the contract rates to some patrons only, and to discriminate between patrons by so doing. If the language of the Bessemer ordinance was in substance the same as that of the contract of June 2, 1888, as appears to be true from the report of the Bessemer Case, that case is controlling, as against the dictum in the Ferguson Case, and should be departed from with reluctance by a federal court in construing a contract which is based on local legislation in the shape of a municipal ordinance.

The contract of June 2, 1888, prescribed two classes of rates, the flat rates for dwellings and their accessories and the meter rates for other purposes. The language of the flat rate clause has been stated. As to meter rates, the contract says:

"The company shall have the right to charge for water by measurement at rates not exceeding the average rates named below. Measured water will be charged as follows."

The city concedes that this is language sufficient to establish absolute rates as distinguished from what are usually termed "maximum rates."

No reason appears for providing as to the flat rates merely a maximum, when the charges provided in the contract for measured water are on a basis of absolute rates. The Supreme Court of Alabama has held that all water furnished, except for dwellings, water-closets, and bathtubs, is to be furnished by meter rates, and meter rates consequently apply to all water used for other purposes, even that for other domestic purposes and in the smallest quantities. Smith v. Birmingham Waterworks Co., 104 Ala. 315–323, 16 South. 123; Birmingham Waterworks Co. v. Birmingham (Ala.) 42 South. 10. As there seems to be no valid reason for putting flat and meter rates on different basis, as the meter rates are conceded to be absolute and not merely maximum, and as the language as to flat rates is susceptible of either of two constructions, the legitimate conclusion is that the flat rates are also absolute rates.

[7] Taking into consideration the state of development of rate regulation when the contract of 1888 was made, the absence of statutory authority at that time to regulate rates, the then prevalence of the method of fixing rates by agreement rather than by regulation, and the conceded fact that meter rates were so fixed in the contract, I think the parties, at the time the contract was entered into, intended by it to fix absolute rates as to both classes. It has been so treated since its execution by the parties. As late as 1898, when the right of the water company to the contract rates was questioned by the city in the Jefferson county chancery court, it was upon the ground that the 30-year term did not apply to the rate provision, and not that the rate clause fixed maximum rates only. The parties to the contract at the time of its execution, and during all the intervening time, evidently understood that the rates fixed were absolute rather than maximum, since, though the purpose to avoid the contract rates has long existed on the part of the city and its citizens, it has, for the first time, so recently, been sought to be accomplished upon this ground.

[8] If the contract of June 2, 1888, fixed absolute rates, did it do so for a fixed period of 30 years? This was the question presented in the case of Birmingham Waterworks Co. v. Mayor and Aldermen of Birmingham, decided in the Jefferson county chancery court in January, 1899, adversely to the contention of the city that there was no definite duration for the rate fixing clause. Section 14 is the only section of the contract which prescribes a specific period for its operation. That section provides that the city shall be obliged to use and pay for hydrants for a period of 30 years. However, there are other sections which imply the existence of a contract period without specifying its duration. Such are section 11, which contains the words, "during the existence of this contract"; section 18, which exempts the water company from liability from interruption of service from unavoidable accident, unnecessary unless the service was contracted to be provided for a definite term; section 19, which authorizes the purchase of the plant by the city "at the expiration of this contract," which in itself implies a definite duration for the contract; and section 22, which provides that the license tax against plaintiff shall remain the same "during the existence of the contract above named." In the case of Mayor & Aldermen of Birmingham v. Birmingham Waterworks Co.,

139 Ala. 531, 36 South. 614, 101 Am. St. Rep. 49, the opinion states that it was stipulated by the parties that the city had power to contract for a supply of water when it made the contract of June 2, 1888, and that upon the faith of it the water company expended a large amount of money in building a waterworks system; that the only question presented was whether section 22 of the contract was valid; that section 14 of the contract provided that "the term of the contract was for thirty years." The city questioned the validity of section 22 only because it contended that it was not competent for the city to barter away its future taxing power for a term of 30 years, and not because the contract had no fixed duration except as to the obligation of the city to pay for hydrants. The Supreme Court decided the case adversely to the water company only upon this ground. If the only term of the contract to which the 30-year period applied was the obligation to pay for hydrants, this would have been a complete answer to the contention of the water company that its license could not be raised by the city during the period of the contract—30 years. It was only upon the assumption that the 30-year period applied to section 22 of the contract that there could have arisen any occasion for the decision of the question involved in the litigation. The city, the water company, and the court certainly regarded the 30-year term as applying to the section providing the constant license. The city also acquiesced in the adverse ruling of the chancellor in the case in the chancery court upon this very question, to the extent at least of not causing it to be reviewed in the court of last resort. The decisions of many other cases in the Supreme Court of Alabama, involving the contract, can only be reconciled upon the idea that the parties and the court regarded other provisions than the obligation to pay for hydrants as being subject to the contract period of 30 years, since otherwise the questions decided in those cases would have been abstract, in view of the unenforceability of the contract because of the uncertainty of its duration. The conduct of the parties and the history of the litigation arising out of the contract should settle all doubt as to the duration of its provisions, if any existed.

[9] Having reached the conclusion that the city had power to and did enter into the contract of June 2, 1888, and that, properly construed, its effect was to fix absolute and not merely maximum rates, and to fix them for the contract period of 30 years, the remaining question is whether the ordinance 97C of the present city commission, assented to by the water company, had been substituted for the original contract. This depends upon whether it was subject to the referendum provided for by section 8 of the act of the Legislature of Alabama approved March 31, 1911, under which the present municipal government of the defendant is established.

The people rejected the ordinance when referred to them, and if the referendum provided by section 8 of the act applied to the ordinance, it was thereby abrogated. That section provides that "no grant of any franchise or lease or right of user, or any other right in, under, along, through, or over the streets, public highways, thoroughfares, or public property of any city" shall be made, nor shall any such rights of

any kind whatsoever be conferred upon any person, firm, or corporation except in the method prescribed, which includes a reference to the vote of the citizens. It also provides:

"Nor shall any extension or enlargement of any such rights or power previously granted be made or given except in the manner and subject to all the conditions herein provided for as to the original grant of same."

It is under the authority of the latter clause that the city referred the ordinance 97C to the vote of the people. The water company contends that the ordinance neither granted, enlarged, nor extended its rights in or to the use of the public streets or highways, and that it was not therefore subject to the referendum or affected by its result.

It must be conceded that the ordinance did not grant to the plaintiff any rights in the streets. Its rights to use the streets had been previously conferred, and the later ordinance at most only affected the terms upon which they were to be thereafter used by the water company. The city contends that the effect of the ordinance was to enlarge the rights of the plaintiff to use the streets, in that it permitted them to collect on the meter basis for all water furnished for all purposes, whereas before it could collect on that basis only for water not consumed in dwellings, water-closets, and bathtubs. (Smith v. Birmingham Waterworks Co., 104 Ala. 315, 16 South. 123); and that this was a valuable privilege; and that the charges for water supplied through the pipes in the streets to the citizens was an inseparable part of the franchise granted the plaintiff by the city. It would be a narrow view of section 8 that would confine its operation to ordinances granting rights to the physical occupancy and use of the streets, or to such as enlarged such rights of physical occupancy and user. Municipal grants of franchises invariably contain clauses providing the consideration moving to the city from the grantee, and provisions for the remuneration of the grantee for the service agreed to be furnished by it to the citizens through the facilities made possible by the franchise. Each of these elements is an essential part of the grant, as much so as is the consideration for a conveyance of property an element of a deed. It is clear that a franchise to use the streets could be destroyed by a municipal ordinance, without actually taking away the right of user conferred on the grantee, by merely reducing the remuneration for the service being performed by it below the cost of performance. Such an ordinance would be restrictive of the previous grant. On the other hand and for the same reason, an ordinance which increases the remuneration for the service performed, but does not change the right to physically occupy the streets, must constitute an enlargement of the original grant.

The purpose of section 8 was to prevent the granting of franchises in terms onerous to the city or its inhabitants until the inhabitants were afforded an opportunity of ratifying or rejecting the proposed grant. If the narrow construction contended for by the plaintiff were given the section, it would be ineffectual to remedy the mischief. It would be possible for the municipal government to grant a franchise upon adequate compensation agreed to be paid to it, and upon reasonable terms,

for the service to be rendered its inhabitants under it, and, after the expiration of the 30 days in which the steps for a referendum are required by section 8 to be taken, to modify the grant so far only as concerned the compensation to be paid the city by the grantee for it, or the terms upon which the service was to be furnished the inhabitants under it, by making it more onerous to the city or its inhabitants, or both, without subjecting the modified agreement to the possibility of a referendum—if, as plaintiff contends, the modification be construed not to extend or enlarge the previous grant. The time would have elapsed for a referendum of the original grant, and the modification of it would not be of a nature to permit of a referendum. All opportunity for the people to reject the modified agreement would be denied by such a construction.

The plaintiff also contends that the ordinance 97C is less advantageous to it than the original contract of June 2, 1888, and hence cannot be considered to enlarge its rights as conferred by the original agreement. The question of benefit to the plaintiff under the new ordinance is a disputed one. If there is room for doubt as to the relative advantage the plaintiff may obtain from its provisions, it is not for the court to substitute its judgment for that of the city upon this question. The purpose of the referendum is to permit the people to determine this question for themselves, even as against the judgment of the city commission to whom its determination is entrusted primarily.

The plaintiff also contends that its franchise to use the streets came from the state and not from the city, and consequently the city could not, by its ordinances, grant any rights to use the streets, citing the case of Louisville v. Cumberland Telephone Co., 224 U. S. 649, 32 Sup. Ct. 572, 56 L. Ed. 934. It is true that the city, even though its consent was originally necessary to the grant, could not withdraw its assent, when once given, without the consent of the plaintiff to the withdrawal. It does not follow that if the governing body of the city and the plaintiff mutually agree on a modification of the original franchise, it is not competent for the Legislature in advance to provide that such modified agreement shall become effective only when ratified by a vote of the people; the effect of the rejection of the modified agreement being merely to leave the original franchise unimpaired and as it was granted by the state.

The franchise to use the streets, the consideration for it moving from the grantee to the grantor, and the terms upon which the inhabitants are to have the right to avail of the service agreed to be furnished by the grantee, are all essential and inseparable elements of the grant, and any modification of any terms of the original grant in these respects, which may make the exercise of the franchise more valuable to the grantee or more onerous to the city or its citizens, is an enlargement of the original grant to the use of the streets within the meaning of section 8, and subjects the modified agreement to the referendum therein provided for. The result is that the original contract of June 2, 1888, is still subsisting, and fixes the rates during its term, as provided in its schedules, for all purposes.

The application for the temporary injunction is granted, as prayed

for in the bill, upon plaintiff's executing a bond payable and conditioned according to law in the sum of $5,000, with sufficient sureties to be approved by the clerk of this court.

CENTRAL TRUST CO. OF NEW YORK v. WHEELING & L. E. R. CO. et al.

NATIONAL CAR WHEEL CO. v. SAME.

(District Court, N. D. Ohio, E. D. at Cleveland. January 5, 1914.)

No. 25.

1. RAILROADS (§ 165*)—MORTGAGES—VALIDITY.
   A mortgage executed by a railroad company to secure bonds which were pledged as collateral to notes the proceeds of which were needed and used in conducting its business *held* valid, as against the company, although it was at the time dominated by another company which owned a majority of its stock and also as against mortgagees of the latter company to whom the stock was pledged.
   [Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 510½–515; Dec. Dig. § 165.*]

2. RAILROADS (§ 165*)—PLEDGE OF BONDS—LEGALITY—OHIO STATUTE.
   Rev. St. Ohio, § 3290 (Gen. Code Ohio, § 8797), which provides that the directors of a railroad company "may sell, negotiate, mortgage or pledge its own bonds or notes at such rates and for such prices, not less than 75 cents on the dollar, as in their opinion will best advance the interests of the company," imposes a limitation on the directors with respect to the price or amount for which bonds may be sold or pledged, and a pledge of such bonds to secure an indebtedness of less than 75 per cent. of the par value of the bonds is illegal as to the excess.
   [Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 510½–515; Dec. Dig. § 165.*]

3. RAILROADS (§ 139*)—LIENS—TRAFFIC CONTRACTS.
   Contracts between railroad companies for interchange of business on a stated division of joint tariffs do not create a lien on the property or earnings of either company, but are merely personal obligations.
   [Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 440–442; Dec. Dig. § 139.*]

4. RAILROADS (§ 137*)—TRAFFIC CONTRACTS—VALIDITY.
   A traffic and trackage contract between three railroad companies to be in force for 20 years set aside at suit of the receiver of one of the companies as inequitable and unfair to such company, which was at the time it was made controlled by directors who were also directors of the other companies.
   [Ed. Note.—For other cases, see Railroads, Cent. Dig. § 435; Dec. Dig. § 137.*]

5. RAILROADS (§ 169*)—TRAFFIC CONTRACTS—ENFORCEMENT BY MORTGAGEE.
   A mortgagee of a railroad company has no greater right than the company itself to enforce an illegal traffic contract made prior to the execution of the mortgage.
   [Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 536–548; Dec. Dig. § 169.*]

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

6. RAILROADS (§ 208*)—INSOLVENCY AND RECEIVERS—INVALID TRAFFIC CONTRACT—ACCOUNTING.

The right of the receiver of an insolvent railroad company to an accounting for sums paid or due to other companies under a traffic contract set aside as invalid considered.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 685–691; Dec. Dig. § 208.*]

In Equity. Suit by the Central Trust Company of New York against the Wheeling & Lake Erie Railroad Company and others, consolidated with suit of the National Car Wheel Company against the same defendants. Final hearing on original and cross-bills.

Hoyt, Dustin, Kelley, McKeehan & Andrews, of Cleveland, Ohio (James H. Hoyt, Hermon A. Kelley, and William B. Stewart, all of Cleveland, Ohio, of counsel), for complainant.

Squire, Sanders & Dempsey, of Cleveland, Ohio (Andrew Squire, William B. Sanders, and Robert F. Denison, all of Cleveland, Ohio, of counsel), for defendant Wheeling & L. E. R. Co.

Frank H. Ginn, Robert M. Calfee, and Joseph G. Fogg, all of Cleveland, Ohio, for cross-complainant Duncan.

Guggenheimer, Untermyer & Marshall, of New York City (Louis Marshall, of New York City, of counsel), for defendants Wabash-Pittsburgh Terminal Ry. Co. and its receivers.

Alexander & Green, of New York City (W. W. Green, of New York City, of counsel), for defendant Bankers' Trust Co. of New York.

Byrne & Cutcheon, of New York City (Franklin W. M. Cutcheon and W. R. Begg, both of New York City, of counsel), for defendant New York Trust Co.

John Quinn, of New York City, for defendant Equitable Trust Co. of New York.

Smith & Beckwith, of Toledo, Ohio, (Alex L. Smith, of Toledo, Ohio, of counsel), for defendants Wabash Railroad Co. and its receivers.

Holmes, Rogers & Carpenter, of New York City (Delevan A. Holmes, of New York City, of counsel), for cross-petitioners and interveners.

DAY, District Judge. In the year 1901 and for some time prior thereto, the Wheeling & Lake Erie Railroad Company owned and operated a steam railroad, extending from Toledo, easterly across Ohio, to Wheeling, W. Va.; also a line of railroad extending from Cleveland to Zanesville; and also had a branch line to Huron on Lake Erie, several other branch lines, and a belt line in Cleveland. At Toledo, connection was had by means of Belt lines with the line of the Wabash Railroad Company, which company operated extensive lines of railroad in the Middle West, and branches running to St. Louis, Chicago, and Toledo. Throughout this memorandum, the Wheeling & Lake Erie Railroad Company will be referred to as the "Wheeling," the Wabash-Pittsburgh Terminal Railway Company will be referred

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

to as the "Terminal," and the Wabash Railroad Company will be referred to as the "Wabash."

Prior to 1901, there had been no community of interest between the Wheeling and the Wabash, but early in that year a plan was devised to give the Wabash an entrance into Pittsburgh. Under date of February 1, 1901, the Pittsburgh-Toledo Syndicate was formed by written agreement. Louis Fitzgerald, president of the Mercantile Trust Company of New York, George J. Gould, a director of the Wabash, and Joseph Ramsey, Jr., vice president and general manager of the Wabash, were designated as syndicate managers. Later others were added to this managing board. The object of this syndicate was the building of a line of railroad into Pittsburgh to connect with the Wabash from the Wheeling, for the purpose of giving the Wabash an entrance into Pittsburgh. To accomplish this main purpose, at first $15,000,000, which was presently increased to $20,000,000, were subscribed. Immediately after the organization of the syndicate, the syndicate managers who had previously conferred with Andrew Carnegie, and received assurance of an extensive traffic in the steel business, entered into a contract with the Union Railroad Company and the Carnegie Steel Company, at Pittsburgh, whereby the syndicate managers, in consideration of receiving certain traffic, agreed to do all that was necessary to secure or lease such lines of railroad as would be required to make a continuous connection with these two small railroads in the vicinity of Pittsburgh, to Toledo, and thence from Toledo with the Wabash, and to arrange a close traffic contract, or alliance, with the Wabash or secure trackage rights over the tracks of the Wabash to Chicago, or both.

Within a few days after this agreement, Mr. Gould proceeded to acquire a large interest in the stock of the Wheeling. The syndicate managers later acquired or constructed several small railroads near Pittsburgh, which on May 7, 1904, they consolidated into the Terminal. The stock of the Wheeling acquired by Mr. Gould for the syndicate enabled the syndicate in May, 1901, to reorganize the board of directors of the Wheeling and its executive committee, to elect Mr. Ramsey president of the Wheeling, and name a finance committee of three, including Mr. Gould and Mr. Ramsey. Thereafter, the New York offices of the Wheeling were transferred to the New York offices of the Wabash, and Mr. Ramsey's office as president of the Wheeling was moved to St. Louis, where was also his office as president of the Wabash. The syndicate also acquired all of the stock of the West Side Belt Line, a small railroad in the vicinity of Pittsburgh, by purchase of the stock of the Pittsburgh Terminal & Railroad Coal Company.

On October 10, 1902, the Wabash, the Wheeling, and the Pittsburgh, Carnegie & Western Railroad Company, one of the constituents of the Terminal Company entered into the so-called traffic and trackage contract, which plays an important part in this litigation. This contract was authorized by the Wheeling directors on May 1, 1901. The board at this time consisted of Mr. Gould, Mr. Ramsey, and two other men at that time directors of the Wabash, certain other directors who were

connected with the Pittsburgh-Toledo Syndicate, and certain other directors who might be termed "dummy directors," as that term is now well understood. This contract was prepared by the general counsel of the Wabash, and Mr. Ramsey, and authorized by the Wabash directors on August 8, 1901, after the approval of Mr. Gould had been secured.

The agreement recited, among other things:

"Whereas, the first party (the Wabash) owns, controls and operates certain lines of railroad, extending from Toledo in the state of Ohio, to the cities of East St. Louis and Chicago in the state of Illinois, and other western points, and a line extending from East St. Louis in the state of Illinois, via Detroit to Buffalo, with various branch lines; and

"Whereas, the second party (the Wheeling) owns, controls and operates connecting lines of railway in the state of Ohio, extending from the city of Toledo to the cities of Wheeling and Steubenville and a road extending from Cleveland to Zanesville in said state, with various branches; and

"Whereas, the said third party (Pittsburgh, Carnegie & Western Railroad Company) proposes to build, and is now constructing a line of railroad extending in a westerly direction from the city of Pittsburgh in the state of Pennsylvania, through West Virginia and Ohio to a connection with the main line of the railroad of the second party, in the state of Ohio; and

"Whereas, the said first party has no line of its own extending eastwardly from Toledo, through Ohio, West Virginia and Western Pennsylvania (all lines of railway in that territory except the Wheeling and Lake Erie Railroad being under control and operated by railway companies competitive with said first party), and said first party is therefore unable to secure the amount of freight and passenger traffic to or from said territory which it is desirous of securing; and

"Whereas, the said second party has no line of its own west of Toledo, and is desirous of friendly connection with lines extending to Chicago, East St. Louis and the West, and also desires the construction of a railroad from a point on its main line in Ohio, to Pittsburgh; and

"Whereas, the third party is ready and willing to construct said extension and secure the necessary freight and passenger terminals in said city of Pittsburgh, and operate its said railroad in close and friendly alliance with said first and second parties, provided said first and second parties will enter into the friendly traffic and trackage relations hereinafter set forth and provided for, and which said third party believes will justify it in expending the large sums of money necessary to construct such extension and furnish such terminals in the city of Pittsburgh."

Section 3 of article 2, also shows that the contract was for the purpose of aiding in the construction of the Terminal Company line; it reading as follows:

"Sec. 3. In consideration of the great cost of the lines of said third party into Pittsburgh and its heavy expenditures and outlays of money for terminals and terminal expenses in said city, and as an inducement to said third party to construct its road and make such expenditures, the parties of the first and second parts hereby agree that, in fixing said schedule of percentages, said third party shall have and be allowed an arbitrary mileage of not less than one hundred miles (instead of its actual mileage of about sixty-five miles) on all freight traffic passing over its road between Pittsburgh and a connection with the tracks of the second party excepting on such traffic as originates on the line of the party of the third part and terminates on the line of the second party within one hundred miles of Pittsburgh, on which traffic it shall receive an arbitrary allowance of ten cents per ton as compensation for originating such traffic, and in addition thereto, it shall receive its agreed percentage of the balance of the earnings."

The contract was to continue in force for 20 years from the date of commencement of business. This agreement, in addition to its authorization by the stockholders and directors of the Wabash, was approved by the directors of the Wheeling on December 20, 1901, and on February 14, 1902, at a meeting of the Wheeling board of directors, consisting of 12 members, including four members of the Wabash board, three members connected with the syndicate, and five directors, none of which five directors owned any beneficial interest in the stock of the Wheeling, the contract was approved, and such of the directors as were also on the board of directors of the Wabash were excused from voting. The annual meeting of the stockholders of the Wheeling was held on May 7, 1902. A notice dated April 15, 1902, was issued, and stated, among other things:

"And for the purpose of submitting to the stockholders for their approval or disapproval a certain traffic and trackage contract, which has already been approved by the board of directors."

Article 4 of the regulations of the Wheeling at the time of the stockholders' meeting provided:

"The secretary shall give notice of the time and place of all annual or special meetings to the stockholders by mailing at least ten days before such meeting, postage prepaid, a written or printed notice addressed to each stockholder at his or her last known address, and by giving such other notice as may be required by law."

At this stockholders' meeting, Mr. Ramsey and three others holding proxies were present. Mr. Blickensderfer, who was general manager of the Wheeling at this time, and apparently a disinterested witness, testified that at about the time of this meeting he remarked to Mr. Ramsey that the proposed contract was unfair to the Wheeling, and that the Wheeling was being asked to carry too much of the burden of the Terminal, and that Mr. Ramsey replied, "It was all in the family, and didn't make any difference that he could see." This was denied by Mr. Ramsey.

At the time of the making of this contract, the Pittsburgh, Carnegie & Western Railroad Company had no physical possession which could be termed a railroad. After this contract, the syndicate proceeded to build the Terminal property at a great expense. The syndicate subscribers would not accept the Terminal bonds, and accordingly, in order to finance the Terminal, the so-called supplemental traffic and trackage contract of May 10, 1904, was executed.

Under date of April 13, 1904, the syndicate addressed a communication to the Wabash and to the Wheeling, which referred to the consolidation of the properties of the Wabash, the Wheeling, and of the Terminal. This communication stated that the syndicate would transfer to the Terminal all the stock of the Wheeling owned by the syndicate, which was a majority, and that of the Terminal Company's first mortgage 55-year 5 per cent. gold bonds of a total authorized issue of $50,000,000; the Wabash was to purchase $6,600,000 par value of these bonds, for $6,000,000, and the Wabash was to deliver to the syndicate $10,000,000 par value of Wabash stock, to execute a supplemental agreement and receive $10,000,000 par value of the capital

stock of the Terminal Company. This was approved by the Wabash directors on April 14, 1904, and by the Wheeling directors on April 18, 1904, which directorage was practically the same as that of December 20, 1901.

It does not appear that any copy of the proposition was recorded, but it does appear that the proposition was referred to the executive committee with full power to act. The proposition was submitted to the stockholders and directors of the Terminal Company and approved May 11, 1904. The annual meeting of the Wheeling stockholders was held May 4, 1904, in pursuance of a notice dated April 4, 1904, which stated that the purpose of the meeting was "for the purpose of electing directors of said company, also to ratify the purchase of the properties or the securities representing the properties of the Pittsburgh, Lisbon & Western Railroad Company and of the Lake Erie, Youngstown & Southern Railway Company, and for the transaction of such other business as may be brought before the said meeting." This so-called supplemental traffic and trackage contract provided, among other things, for an extension of the original traffic and trackage contract, so as to make its duration fifty years.

The contract provided, among other things, as follows:

"Section 1. It is agreed that the gross revenue of the parties of the first and second parts derived east of Chicago and St. Louis, from all classes of traffic interchanged by said parties with the party of the third part or passing over the road of the party of the third part, and the gross revenue of the party of the third part derived from all classes of traffic interchanged by said party with the parties of the first or second parts or passing over the road of the party of the third part and delivered to the roads of the parties of the first or second parts, or either of them, shall, when ascertained be divided as follows:

"Sec. 2. The gross revenue of each party hereto from the traffic aforesaid shall be ascertained and determined in the manner provided in said traffic and trackage contract of October 10, 1902, and there shall then be allowed and paid by the parties of the first and second parts, to the party of the third part, out of gross revenues of the said parties of the first and second parts derived from such interchanged traffic, in addition to the revenue of said party of the third part as so ascertained, additional sums, to be determined from time to time as hereinafter provided, which shall in no event exceed in amount twenty-five per cent. of the gross revenue derived by the parties of the first and second parts from said traffic, and the total amount of said additional payments shall never exceed a sum which, when taken together with the net earnings and revenue of the party of the third part, will be equal to the interest upon all of the first and second mortgage bonds then outstanding of the party of the third part issued under and secured by its first and second mortgages dated May 10, 1904. The amount of said additional payments to be made by the parties of the first and second parts as herein provided shall be prorated as between said parties upon the basis of their respective gross revenue derived as aforesaid from said traffic."

The offer which has been referred to was accepted by the Terminal Company, and, in order to enable it to perform its part of the agreement, its capital stock was increased from $4,000,000 to $10,000,000. It issued its bonds in conformity to the proposition, and executed two mortgages, both dated May 10, 1904; the first to the Mercantile Trust Company, to secure an authorized issue of $50,000,000 at 4 per cent. 5-year gold bonds, the second to the Equitable Trust Company to secure an authorized issue of $20,000,000 of second mortgage 4 per

cent. 5-year gold bonds. Both of these mortgages conveyed to the respective trustees the railroad of the Terminal Company and pledged the shares of the Wheeling Company held by the Terminal Company, and the mortgages also conveyed, among other things:

"Any and all leaseholds, leases, rights under leases or contracts, trackage agreements or operating arrangements, covenants and agreements, terms or parts of terms, including all the rights of the railway company under a certain traffic and trackage contract dated October 10, 1902, and executed by the Wabash Railroad Company, the Wheeling & Lake Erie Railroad Company, and the Pittsburgh, Carnegie & Western Railroad Company (of which last-named company the railway company, party hereto of the first part, is the successor), and under a certain contract bearing even date herewith supplemental to said traffic and trackage contract (counterpart originals of which original and supplemental contracts have been deposited with the trustee hereunder)."

Section 5 of article 3 of the first mortgage of the Wabash-Pittsburgh Company covenants:

"That it will not voluntarily create, or suffer to be created, any debt, lien or charge which would be prior to the lien of these presents upon any property which shall have become subject to this indenture or any part thereof, or upon the income thereof."

Section 6 of article 3 of the second mortgage contained language to the same effect.

Section 5 of article 3 of the first mortgage provides:

"If any company, all of whose bonds and outstanding capital stock (less the number of shares necessary to qualify directors) shall be subject to this indenture, shall voluntarily create or suffer to be created any additional lien or charge upon its property or income, or shall create or shall suffer to be created any additional indebtedness other than indebtedness to the railway company (the Wabash-Pittsburgh Terminal) or indebtedness for the current expenses of such company, then the railway company (the Wabash-Pittsburgh Terminal) will at once acquire such lien, charge or indebtedness and cause the same to be vested in the trustee or will cause the same to be paid or discharged."

Section 8 of article 3 of the first mortgage provides:

"Except as in this indenture expressly authorized, the railway company (the Wabash-Pittsburgh Terminal) will not by its affirmative vote or consent, or by abstaining from voting, sanction or permit any increase of the capital stock of any company, all of whose outstanding capital stock (less the number of shares necessary to qualify directors) now is or hereafter shall be subject to this indenture, or the creation of any indebtedness of any such company (except current accounts growing out of operation) or the issue or the guaranty of any bonds by any such company, or the creation of any mortgage or other lien upon the railroad or property of any such company unless effective provision be made that such indebtedness and the evidences thereof and such bonds issued or guaranteed and such mortgage or other lien and all such additional stock, shall forthwith, upon the issue or creation thereof, be transferred to the trustee, by it to be held subject to all the trusts of this indenture; and all such additional stocks shall be fully paid and non-assessable."

Section 2 of article 4 of the first mortgage gives the Wabash-Pittsburgh Terminal:

'The right to vote upon all shares of stock pledged hereunder for any and all purposes not inconsistent with the provisions and purposes of this indenture, and with the same force and effect as though such pledge had not been made, but subject to the restrictions and agreements herein contained."

In offering the bonds issued under these mortgages for sale, the bankers issued literature, asserting that the bonds were secured by the original and supplemental traffic and trackage contracts. Operation under these contracts referred to as the traffic and trackage contracts was begun July, 1904. There was no interchange of traffic, however, under this contract, until October, 1904. On August 1, 1905, the Wheeling executed and delivered to the Central Trust Company of New York, as trustee, a general mortgage covering all of its property, as well as the traffic and trackage contracts, to secure the issuing of $35,000,000 of general mortgage bonds, dated August 1, 1905, maturing August 1, 1955, bearing interest at 5 per cent. $12,000,000 par value of these bonds were to be used as provided in subsection "a," § 2, of article 2 of the mortgage, which provided:

"$12,000,000 par value of the bonds mentioned in this section shall immediately upon the execution and delivery of this indenture or as soon thereafter as may be required by the railroad company be authenticated by the trustee and delivered to the trustee of a certain trust agreement bearing even date herewith, executed by the railroad company to the New York Trust Company as trustee, to be held by said trustee, subject to all the terms and provisions of said trust agreement, and, upon the payment of all of the notes issued under said trust agreement and the satisfaction of the same, said bonds, or so many thereof as shall then remain in the hands of said trustee, together with any moneys then remaining in its hands, the railroad company agrees to deliver and pay over or cause to be delivered and paid over to the trustee of this indenture, and shall thereafter be authenticated and delivered or paid out by it only for some one or more of the purposes and subject to the restrictions set forth and declared in subdivision B of this section."

The Wheeling, as of August 1, 1905, entered into with the New York Trust Company a certain trust agreement, which trust agreement was for the purpose of authorizing the issuance and securing the payment of $8,000,000 par value of 3-year 5 per cent. gold notes of the Wheeling dated August 1, 1905.

The property pledged by the trust agreement is as follows:

"(1) Twelve million dollars ($12,000,000) par value of general mortgage fifty-year four per cent. gold bonds out of an authorized issue of thirty-five million dollars ($35,000,000) par value thereof, said bonds being dated and bearing interest from August 1, 1905, and being issued under and secured by a certain mortgage or deed of trust dated August 1, 1905, to the Central Trust Company of New York as trustee."

Also:

"(2) All of the right, title and interest of the railroad company in and to any and all rolling stock and equipment purchased or acquired by the use of said gold notes or their proceeds, including the following described rolling stock and equipment, which was leased and demised by the New York Trust Company by lease dated August 15, 1905, and filed for record in the office of the Secretary of State of Ohio on the 19th day of August, 1905.

"Fifty (50) Consolidation Locomotives Nos. 2101 to 2150, inc.

"Six (6) Six-wheel Switching Locomotives Nos. 2201 to 2206, inc.

"Six (6) Atlantic Type Passenger Locomotives Nos. 2001 to 2006, inc.

"Two thousand (2,000) 80,000 pounds capacity Gondola Cars Nos. 44,000 to 44,999 inc., and from 47,000 to 47,999 inc."

The execution of the note agreement and the general mortgage, and the execution of the general mortgage bonds, and their pledge under the note agreement, the execution and issuance of the three-year notes,

were authorized by the directors and stockholders of the Wheeling, and were voted for by the Terminal Company, which was the owner of the majority of the stock of the Wheeling. The Wheeling executed its note agreement, its three-year notes, its general mortgage, and general mortgage bonds, pledged the $12,000,000 of general mortgage bonds with the trustee, under the note agreement, and sold and delivered all of its three-year notes in the city of New York. The notes and bonds and interest thereon were all payable at New York City. The $8,000,000 of three-year notes were sold by the Wheeling to the Wabash at 95 and accrued interest, for the aggregate sum of $7,692,222.22. The money thus realized was used for the purposes of the Wheeling road.

It appears that the whole transaction was arranged and carried out at the instance of and with the co-operation of the officers and directors of the Terminal Company, several of whom were also officers and directors of the Wabash. The $8,000,000 of three-year notes having been sold to the Wabash Company, that company placed its guaranty upon them, and sold them to purchasers for value, not parties to this litigation, by whom they were held, until August 1, 1908, when they were to become due. On that date, and subsequent thereto, Kuhn-Loeb & Co. and Blair & Co., and their associates, pursuant to a written agreement entered into by them with the Wabash Company, and pursuant to an offer so to do, published on July 31 and August 1, 1908, purchased all of the $8,000,000 notes at the price of the face value and accrued interest; all with the exception of $917,000 were purchased on August 1st.

The agreement under which these notes were purchased provided, among other things, that they should be purchased for the account of the Wabash and should be retained and held by the two firms of bankers mentioned, until the bankers' advances should be repaid or the notes themselves should be taken over by the bankers, in consideration of the cancellation of their claims. The Wabash having defaulted in the performance of its obligations, under the agreement with the bankers, the notes were brought in by the bankers for substantially the amount of their claims under their contract with the Wabash. The amount paid by them to the original noteholders was approximately $8,200,000, and the bid by them for the collateral and satisfied by its transfer was approximately $9,700,000. At the time the notes were issued, and the mortgage executed, the Wheeling was in need of funds, and it seems quite plain from the record that the money derived from the proceeds of these notes was paid to the Wheeling and used by it for its corporate uses and purposes.

The agreement between the Wabash and the bankers was made in July, 1908, after the Wheeling had gone into the hands of a receiver, in the preceding month of June.

At the time the bankers purchased the notes, it does not appear that the Wabash was insolvent. In December, 1911, the Wabash went into the hands of receivers, by reason of its insolvency. On August 6, 1913, the Bankers foreclosed the rights which the Wabash claimed to have in the notes, themselves purchasing the notes and coupons.

Prior to these transactions, on August 13, 1908, the Wabash made demand on the Wheeling and its receiver, for the payment of the notes and interest, and on September 15, 1908, the Wabash caused the Central Trust Company to proceed to foreclose the general mortgage.

It might be stated that in addition to these general facts that in March, 1907, the Wabash leased to the Wheeling 2,000 gondola cars, 30 consolidated locomotives, and 8 switch engines. The rentals accruing under this lease up to the time of the Wheeling receivership amounted to about $543,650, upon which the Wheeling has paid $60,000 in cash, and the Wabash is asserting a claim for $474,650 under this equipment lease.

There are other facts which are pertinent in reference to certain of the cross-bills, but which need only be considered briefly as the various issues are referred to.

This suit had its commencement in June, 1908, when the National Car Wheel Company filed a bill of complaint in this court against the Wheeling, urging its insolvency, and praying for the appointment of a receiver. On the same day, the Wheeling filed an answer, admitting the allegations of the bill, and a receiver was appointed.

On September 15, 1908, the Central Trust Company filed a bill for the foreclosure of a general mortgage, and the same receiver was appointed in this suit, which was consolidated with the National Car Wheel Company suit.

Thereafter, the New York Trust Company, as trustee, the Mercantile Trust Company, since merged into the Bankers' Trust Company, the Equitable Trust Company, the receivers of the Wabash-Pittsburgh Terminal Railway Company, and the Wabash Railroad Company became parties. Later, the receiver of the Wheeling & Lake Erie Railroad Company filed a cross-bill, as did E. E. Carpenter et al. The pleadings are voluminous, and it will be impracticable to analyze them or set out in detail the testimony offered at the hearing.

I have carefully considered the record, and will endeavor briefly to outline the various issues raised by the pleadings without trying to discuss them to any great extent, nor to cite any authorities, other than those that are essential for the purpose of indicating in an informal way the conclusions reached.

The bill of the Central Trust Company alleges default in payment of the principal and interest on the notes, and in payment of the interest on the bonds, and prays a determination of the amount due, to the trustee, and the payment either directly or out of the proceeds of the sale of property, subject to the mortgage which it seeks to have foreclosed.

The New York Trust Company prays a decree of payment and in default thereof the sale of the $12,000,000 mortgage bonds and equipment covered by the trust agreement, and the application of the proceeds to the payment of the principal and interest on the notes.

The receiver claims that the mortgage was executed under the domination of the Wabash; that part of the rolling stock bought with some of the money derived from the note sale was afterwards diverted to the Terminal and the Wabash; and that under the provisions of

section 3290 of the Revised Statutes of Ohio (the same section being section 8797 of the Ohio General Code) the bonds were issued and pledged in violation of the Ohio Laws, and are accordingly invalid and unenforceable.

Carpenter et al. claim priority over the general mortgage, on certain equitable rights which will later be discussed.

The receivers of the Terminal Company claim that the Wheeling had no authority to execute the mortgage or notes, and that they were pledged illegally by reason of section 3290 of the Ohio Statutes, and assert certain rights as a stockholder of the Wheeling, which rights, it is urged, were violated by the execution of the general mortgage and the pledging of the bonds, and also assert rights under the traffic and trackage contracts which it is claimed were violated by the giving of the general mortgage.

The Mercantile Trust Company and the Equitable Trust Company claim that the security pledged to them and covered by their mortgages will be damaged if the general mortgage is upheld, and the security which it is claimed will be damaged is: First, 51 per cent. of the stock of the Wheeling & Lake Erie Railroad Company which was owned by the Terminal Company; second, the traffic and trackage contracts which, it is claimed, were mortgaged by the Terminal Company to the two trust companies, the mortgage covering which contracts it is asserted had a priority in this property over the general mortgage of the Wheeling.

[1] It is not important whether the Wheeling was dominated by the Wabash or by the syndicate, in so far as the transactions related to the issuance of the notes and bonds under the mortgage is concerned. The proceedings in reference to the issuance of the notes and the mortgage do not appear to have been actuated by any fraud or evil purpose. The money raised by the note sale was paid to the Wheeling, accepted by it, and expended by it for its corporate uses and purposes, and this money was received at a time when the Wheeling was very much in need of funds. If the rolling stock purchased with the proceeds of this note sale were afterwards misused, and diverted, that objection cannot be raised as against the notes and mortgages after the payment of this money. It does not appear from the record that any part of the money derived from the loan went to any other source than the Wheeling.

[2] It is urged that the corporate act of the Wheeling in issuing the $12,000,000 of bonds under the general mortgage was in contravention of the terms of section 3290 of the Ohio Revised Statutes (section 8797 of the General Code), and that accordingly the bonds are void.

This section of the Ohio law provided:

"The directors of the company may sell, negotiate, mortgage, or pledge its own bonds or notes, as well as notes, bonds, scrip, or certificates for the payment of money or property which the company receives as donations, or in payment of subscriptions to the capital stock, or for other dues of the company, at such times and in such places, either within or without the state, and at such rates and for such prices, not less than seventy-five cents on the dollar, as, in their opinion will best advance its interests. If such notes or bonds

are thus sold at a discount, without fraud, the sale shall be as valid in every respect, and the securities as binding as for the respective amounts thereof, as if they were sold at their par value."

In argument and in briefs, the history of this section is developed in careful detail and much time and space has been given to its construction. This section has received some consideration in the federal courts of this jurisdiction, in Toledo, St. Louis & Kansas City Railway Co. v. Continental Trust Co., 95 Fed. 497, 36 C. C. A. 155; the same case at an earlier hearing also reported in (C. C.) 86 Fed. 929; and Continental Trust Co. v. Toledo, St. Louis & Kansas City Railway Co. (C. C.) 82 Fed. 642, pages 658 and 659; Metropolitan Trust Co. v. Columbus, Sandusky & Hocking Railroad Co. (C. C.) 93 Fed. 702; Metropolitan Trust Co. v. Railroad Equipment Co., 108 Fed. 913, 48 C. C. A. 135.

From an examination of these authorities, and of the other cases cited by counsel, I reach the conclusion that section 3290 of the Ohio Statutes is a limitation upon corporate power, in reference to the amount to which bonds can be issued, and, giving the statute all of the force to which it is entitled, it plainly provides that 75 per cent. is the minimum at which bonds can be sold or pledged, and, under the peculiar facts and equities of this case, the bonds in excess of the 75 per cent. limit are not legally pledged, and the pledging of bonds is only valid to the par value of $10,133,333.33.

Inasmuch as a priority is claimed by the receivers of the Wabash-Pittsburgh Terminal, by the Mercantile Trust Company, and the Equitable Trust Company, which is based largely upon the pledging or mortgaging of the traffic and trackage contracts, the effect of these contracts requires consideration at this time.

[3] The orginal traffic and trackage contract of October 10, 1902, which provides for an interchange of freight traffic on joint tariffs, for joint train service and reciprocal trackage rights, and the supplemental traffic and trackage contract of May 10, 1904, created no lien upon the property or earnings of the Wheeling, but were merely personal obligations. An examination of the authorities clearly establishes this proposition. It is unnecessary to discuss all of the objections raised to the validity and fairness of these contracts. I am not impressed with the arguments that these objections to these contracts come too late, by reason of either laches or the bar of the Ohio statute of limitations. The delay or nonaction of the receiver did not operate to the damage of anyone, nor did it induce anyone to change his or its position. The statute of limitations, in view of the existing equitable nature of these proceedings, has no application.

[4] It is quite plain that the provisions of the original traffic and trackage contract were not advantageous to the Wheeling, but, on the contrary, it was inequitable and unfair to this company, and this is shown by the provisions regarding the arbitrary charges to be made and the division of the sums derived from the freight rates. Also the control of the situation under this contract, as clearly appears from a mere reading of the contract.

The supplemental contract only extended the original contract from a 20-year to a 50-year period, and provided for the payment to the

Terminal of an amount not to exceed 25 per cent. of the gross revenue derived from the interchanged freight. This 25 per cent. payment has not been justified in the record by any consideration of railroad practice or of fair dealing. Without going into detail, or giving any special consideration to section 8984 of the General Code of Ohio (formerly section 3369 of the Ohio Revised Statutes), it is sufficient to say that all of the proceedings whereby these contracts were authorized and adopted by the Wheeling directors and stockholders lacked the statutory exactness and solemnity which should characterize proceedings of this important nature.

It follows quite naturally from a careful consideration of the evidence that these contracts were never executed for the benefit of the Wheeling.

[5] In the ambitious effort to perfect a railroad system, the gentlemen interested in the Wabash and in the Pittsburgh-Toledo Syndicate for some reason or other gave little or no attention to the rights of the Wheeling. The trustees of the Terminal mortgages have no greater rights than the Terminal to the benefits under these contracts, and a contrary doctrine cannot be, and I am convinced was not, seriously urged. Both of these contracts were for the main purpose of affording aid to the Terminal, and in entering into these contracts the provisions of section 3300 of the Revised Statutes of Ohio were not followed. All of these informalities in the execution of these contracts add to the impression that they were unfair and unjust to the Wheeling, and accordingly they will be set aside and canceled, as prayed for in the cross-bill of the receiver.

Concerning the 51 per cent. of the stock of the Wheeling, owned by the Terminal, I cannot see that any rights of the Terminal or the trust companies under the Terminal mortgages, were in any way destroyed, or prejudiced by the general mortgage. In voting the 51 per cent. of stock for the general mortgage, the pressing need of the Wheeling must be considered, and, as I have earlier indicated in this memorandum, the execution of this mortgage loan and trust agreement, involving the $8,000,000 note transaction, was essential to the welfare and existence of the Wheeling. The provisions of the Terminal mortgages are not such as to prevent the Terminal Company voting its Wheeling stock in favor of the Wheeling general mortgage.

The relief asked for by the receivers of the Terminal, the Mercantile Trust Company, and the Equitable Trust Company, relating to the priority of the rights asserted in their respective bills, must be denied.

After considering the objections raised to the note issue, the trust agreement, the issuance of the $12,000,000 bonds, the execution of the general mortgage, and the pledging of the notes, I am of the opinion that the contentions of the New York Trust Company and the Central Trust Company are well made, and inasmuch as these parties in urging the validity of these notes and the bonds and this mortgage expressed their willingness that a lien upon the railroad property for the amount of their notes, with interest, will afford the relief they ask for, the final order or decree in providing for a foreclosure can take care of the situation in so far as the notes and bonds are con-

cerned by providing that only so much of the bonds shall be sold, or only so much of the lien shall be asserted, as will insure the payment of the amount of the notes with interest.

[6] The receiver of the Wheeling in his cross-bill asks that the traffic and trackage contracts be declared void, and canceled, and for other relief in reference to these contracts including a prayer that an accounting be had for all sums paid by the Wheeling and for all losses and damages accruing to the Wheeling by reason of the operation of these contracts. These damages or losses are claimed under several different classes. It is asked that an accounting be had for the gains prevented as well as the losses sustained. The alleged losses and gains prevented are based largely on the testimony of Mr. Worthington, a railroad operator of the highest reputation and experience, and also on the testimony of various railroad accountants and experts. The damages claimed involve losses in actual operation, and damages arising from the fact that the Wheeling diverted its cars, engines, and shipping facilities to the Wabash instead of to its own more profitable business. These claims of damages consist specifically of the three items: Amounts paid in cash, and notes to the Terminal on account of the 25 per cent. gross revenue provision in the supplemental contract.

Counsel for the Wabash admit that under this contract the sum of $660,672.72 accrued; that the amount actually paid was $578,198.69, leaving $84,274.10 unpaid; and that $300,000 of the $578,198.69 was paid by a $300,000 note given by the Wheeling to the Terminal and later indorsed by the Terminal to the Wabash, and now held by the receivers of the Wabash.

Second. Losses in actual operation under the contracts.

Under this head, it is claimed that the receipts of the interchanged traffic was the amount less than the cost of performing the service, amounting to $736,163.40, also damages arising from the handling of unprofitable terminal traffic in place of tonnage originating on the Wheeling lines, amounting in all under the operation of the traffic and trackage contracts to $1,751,541.52.

Aside from the amounts paid under the 25 per cent. guaranty, I am unable to say that the balance of the damages claimed are reasonably certain. Furthermore, from the very nature of the transaction, the damages are not capable of that degree of ascertainment which the law requires. The figures from which these damages are claimed and the source from which their origin is traced have been discussed in argument and in the briefs with the greatest possible care and analysis; but, in view of their uncertain and speculative character, the damages being of such a nature that fair men, in their judgment, could not say that they resulted from the operations complained of, it would be unjust to assess them when they are so doubtful. The receiver of the Wheeling also asks that he may be permitted to set up the sums found due the Wheeling as against: First, the $300,000 note, dated May 20, 1907, given to the Terminal in payment of the 25 per cent. guaranty; second, the claim of the Wabash filed against the Wheeling for rentals, ties, and so forth, amounting to a sum greater than $500,000;

third, all other sums for which claims have been filed against the Wheeling by the Terminal Company for sums due under the supplemental contract; fourth, all claims against the Wheeling by the Terminal and its subsidiaries; fifth, the $8,000,000 of notes.

The new equity rules recently promulgated by the Supreme Court in simplifying procedure in equity recognized the doctrine of equitable set-off, where the claim set off is in the nature of a counterclaim, arising out of the same transaction. This doctrine is also well recognized by the federal decisions cited by counsel.

On this branch of the case, the claim of the receiver for the amount paid under the 25 per cent. guaranty clause of the supplemental contract will be allowed and this can be set off as against the $300,000 note and the other items mentioned, with the exception of the $8,000,000 note issue. No set-off can be asserted as against this item.

Carpenter et al. prosecuted an independent suit against the receiver, and obtained a favorable decree. They ask in this suit that the order of the court in the independent suit finding the prior lien bonds in the sum of $200,000 a valid obligation of the Wheeling be carried out by the receiver in preference to all other claims except the receiver's certificates. They also ask that the 4 per cent. bonds discussed and described in the decree in the former suit be declared to have a priority over the $8,000,000 three-year note issue in this case. I am of the opinion that the $200,000 prior lien obligations are not entitled to any priority of payment, after having considered all of the evidence carefully.

It is only fair to all parties to this record that this claim should be paid the same as the claims of any general creditor of the Wheeling. This observation applies with equal force to the contention made by Carpenter et al. on behalf of the 4 per cent. mortgage bonds of the Pittsburgh-Wheeling & Lake Erie Railroad Company, should it be necessary to assert them as a claim against the Wheeling. Carpenter and his associates also assert an alleged unlawful diversion of the funds of the coal company for taxes and improvements. This claim is not supported by competent evidence, and the items embraced in this claim must be disallowed as a claim against the Wheeling or its receiver.

In addition to the issues raised by the pleadings which have been under consideration, there are various claims pending before a special master which can be disposed of and made an element of a final decree.

Considering the entire record, it is quite apparent that the regretable situation resulting in the insolvency of these three railroad companies had its inception in the ambitious minds of the originators of the syndicate, who, in hope of material personal gain, considered corporate entities as mere forms to be used for their own advancement. It also appears that, as the syndicate plans progressed, the Wabash was selected as the dominant corporation; the Terminal owned by the Wabash as the corporation to be aided and assisted, and the Wheeling as the giver of aid and the link of mutual benefit to the two other companies.

Regardless of the corporate domination of the Wabash, the Wabash as a corporation had the knowledge and did the things which as a corporation made it responsible for the results of its transactions. There was such real domination by the Wabash as the law contemplates. This is apparent from the various contracts made between these companies, the management of these companies, and the operation of the railroad business of the respective companies.

In view of the many issues presented, it is not practicable to indicate in this memorandum an exact form of decree which should be entered. Counsel may prepare a draft of a decree containing the conclusions indicated and submit it for consideration.

It should not be forgotten that the Wheeling property is a valuable one, and that every effort should be exhausted to secure a decree which will best conserve the interests of all concerned.

In the formal preparation of the decree, the prayers of the various bills and cross-bills can be referred to, and provisions inserted in the decree which will provide for a disposition of the various issues raised in the manner indicated in this memorandum.

ADLER GOLDMAN COMMISSION CO. et al. v. WILLIAMS et al.

(District Court, W. D. Arkansas, E. D. March 9, 1914.)

1. ABATEMENT AND REVIVAL (§ 17*)—ANOTHER ACTION PENDING—TIME AND MANNER OF PLEADING.

The pendency of another action for the same relief cannot be raised by a motion to dismiss the bill, which, under Equity Rule 29, takes the place of a demurrer, but must be set up in the answer; a motion to dismiss only reaching matters appearing on the face of the bill.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 123–136; Dec. Dig. § 17.*]

2. ABATEMENT AND REVIVAL (§ 12*)—ANOTHER ACTION PENDING—ACTIONS IN STATE AND UNITED STATES COURTS.

An action in a United States District Court does not abate because of the pendency of an action for the same relief in a state court.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 87–91, 94, 95, 98; Dec. Dig. § 12.*]

3. COURTS (§ 276*)—UNITED STATES COURTS—DISTRICT IN WHICH TO SUE—OBJECTIONS—WAIVER.

In a suit in a United States District Court between citizens of different states to set aside alleged fraudulent conveyances, defendants waived their objections to the bringing of the suit in a district in which none of the parties resided, by moving to dismiss not only on that ground, but also for insufficiency of the bill, since the diversity of citizenship gave some United States court jurisdiction, and the defendant by pleading to the merits in effect appeared generally and waived all special privileges in respect to the particular court in which the action was brought.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 815; Dec. Dig. § 276.*]

4. FRAUDULENT CONVEYANCES (§ 241*)—ACTIONS TO SET ASIDE—NECESSITY OF JUDGMENT.

While as a general rule a creditor's bill to set aside a fraudulent conveyance can be maintained only by one who has reduced his claim to

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

judgment and had execution issued thereon and returned unsatisfied, since the debtor is entitled to a trial by jury as to the correctness of plaintiff's demand, and the remedy at law must have been exhausted and the existence of a lien on the property or interest therein by contract or judgment is required, where it was admitted, by a motion to dismiss, that plaintiff's demand was valid; that the debtor was wholly insolvent, and had no property anywhere subject to execution, and had left the state in which the land fraudulently conveyed was situated—plaintiffs' failure to reduce his demand to judgment did not defeat his right to sue, since a jury trial is unnecessary where the demand is admitted, the recovery of judgment is dispensed with where it is improper or impossible or would be useless, a judgment in another state would be no better than no judgment as a condition precedent to such suit, and, moreover, a judgment is not a lien on realty fraudulently conveyed; it being the filing of the creditor's bill which creates the lien.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 694, 696–726; Dec. Dig. § 241.*]

Suit by the Adler Goldman Commission Company and another against F. S. Williams and others. On motion to dismiss the bill. Motion overruled.

This is a bill to set aside certain conveyances of real estate made by the defendant F S. Williams to his codefendants, one of whom is his wife and the other his stepson, alleged to have been made for the purpose of defrauding the plaintiffs, his creditors. The material allegations in the bill are that plaintiffs are corporations created by and existing under the laws of the state of Missouri, and that the defendants are citizens of the state of South Carolina; that in 1911 the defendant F. S. Williams was indebted to each of the plaintiffs in sums exceeding $3,000, exclusive of interest and costs, as evidenced by his promissory notes; that to secure the payment of the indebtedness due the commission company the defendant pledged certain shares of stock of the fertilizer company, the value of which is not more than one-half of the indebtedness due the commission company; that the only property which defendant owned at that time, in addition to the stock pledged, was the lands sought to be reached by this bill; that on October 8, 1911, without any consideration, and for the purpose of defrauding these plaintiffs, he conveyed to his wife, the defendant Viola Williams, 742.67 acres of land lying in Clark county, Ark., and on August 25, 1913, he conveyed to the defendant Smith, his stepson, certain property lying in the city of Argenta, Ark., all of which property is situated within the jurisdictional limits of this court; that the defendant F. S. Williams had no other property whatever; that he does not reside in the state of Arkansas, and cannot be served with process here. The prayer of the bill is that the plaintiffs have judgment against the defendant F. S. Williams for the sums due them, that the conveyances to his codefendants be set aside and the lands be subjected to the payment of plaintiffs' demands, and that the pledged stock be sold and the proceeds applied to the payment of their claims. The defendant filed a motion to dismiss, setting up three grounds in support thereof: (1) That similar actions to attain the same object have been instituted by the plaintiffs in courts of Arkansas and are now pending. (2) That it appears from the face of the bill that although there is a diversity of citizenship between the plaintiffs and defendants, neither of them are residents of the state of Arkansas or of this district. (3) That plaintiffs not having reduced their demands to judgment and execution issued, which was returned unsatisfied, a court of equity has no jurisdiction.

Rose, Hemingway, Cantrell & Loughborough, of Little Rock, Ark., for plaintiffs.

Harry H. Myers and O. D. Longstreth, both of Little Rock, Ark., for defendants.

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

TRIEBER, District Judge (after stating the facts as above). [1, 2] The first ground set up in the motion to dismiss must be overruled, as the fact that another action is pending in a court of this state cannot be properly raised by a motion to dismiss. By Equity Rule 29 (198 Fed. xxvi, 115 C. C. A. xxvi) the motion to dismiss takes the place of a demurrer under the former rules, and the rule governing demurrers applies; that only matters appearing on the face of the bill can be reached by a motion to dismiss. Under the old rules these facts would be raised by a plea in abatement, and to sustain it would require evidence. Special pleas of abatement are now abolished by Equity Rule 29, but may be set up in the answer. In any event the plea would be bad. This court had that question before it a short time ago in Falls City Construction Co. v. Monroe County (D. C.) 208 Fed. 482, and it is unnecessary to repeat the reasons why such a plea is not good.

[3] The second ground of the motion to dismiss, that neither parties are residents of this district, raises a very nice question as to whether a creditor's bill may be maintained in a national court when there is a diversity of citizenship, but neither of the parties reside in the district where the suit is brought, although the property sought to be reached by the bill is realty lying in that district. But this question cannot be determined in this cause now, as it has been authoritatively settled that when a party demurs, not only to the jurisdiction of the court, but also pleads to the merits of the bill, such a motion is equivalent to a general appearance, and waives, not only all defects in the service, but all special privileges of defendant in respect to the particular court in which the action is brought. As there is a diversity of citizenship, which gives some national court jurisdiction, this ground must be overruled. In re Moore, 209 U. S. 490, 28 Sup. Ct. 585, 706, 52 L. Ed. 904, 14 Ann. Cas. 1164; Western Loan & Trust Co. v. Butte & Boston Mining Co., 210 U. S. 368, 372, 28 Sup. Ct. 720, 52 L. Ed. 1101. The defendants in their motion to dismiss not only question the jurisdiction of this court, but also attack the sufficiency of the bill, and for this reason have waived their privilege of being sued in this court, if such privilege existed.

[4] This leaves for determination the main question whether, upon the facts stated in the bill, a creditor's bill can be maintained when the demand has not been reduced to a judgment, an execution issued and returned unsatisfied. Section 3313 of Kirby's Digest of the Statutes of Arkansas provides:

"In suits to set aside fraudulent conveyances, and to obtain equitable garnishments, it shall not be necessary for the plaintiffs to obtain judgment at law in order to prove insolvency, but in such case insolvency may be proved by any competent testimony, so that only one suit shall be necessary in order to obtain the proper relief."

In Scott v. Neeley, 140 U. S. 106, 11 Sup. Ct. 712, 35 L. Ed. 358, and Cates v. Allen, 149 U. S. 451, 13 Sup. Ct. 883, 37 L. Ed. 804, involving a similar statute of the state of Mississippi, it was held that a suit under such a statute by a simple contract creditor could not be maintained in the courts of the United States, although it might be in the courts of that state. In view of the conclusions reached it is un-

necessary for the court to determine whether these cases have been modified or overruled by Cowley v. R. R. Co., 159 U. S. 569, 16 Sup. Ct. 127, 40 L. Ed. 263, as was intimated in Darragh v. H. Wetter Mfg. Co., 78 Fed. 7, 23 C. C. A. 609. The general rule prevailing in the national courts, as well as in courts of equity generally, is well established that, to maintain a creditor's bill to set aside a fraudulent conveyance, the creditor must have reduced his claim to judgment, have an execution issued upon the judgment and returned unsatisfied. The reasons upon which this rule is based, as enunciated by the different courts which have passed upon that question, are: (1) A debtor is entitled to a trial by jury for the purpose of determining the correctness of the demand, and there can be no jury trial in a court of equity; (2) to justify the interposition of a court of equity, the remedy at law must have been exhausted, and that can be shown by proof that a judgment had been obtained, an execution issued thereon, and returned nulla bona; (3) the existence of a lien upon the property, or interest in the property, created either by contract or by a judgment which is a lien.

As to the right of a trial by jury to have the validity of the demand determined, it is sufficient to say that the justice of the demands is not questioned. The motion to dismiss admits them. That being the case, there is nothing to submit to a jury, and equity never requires a useless thing to be done. A creditor need not reduce his claim to judgment where the correctness of the claim is admitted or not denied. D. A. Thompkins Co. v. Catawba Mills (C. C.) 82 Fed. 780; Nieters v. Brockman, 11 Mo. App. 600; Cohen v. Morriss, 70 Ga. 313.

As to the second ground the courts have established several exceptions to the general rule. One of them is that when it is shown that it is impossible or impracticable to obtain a judgment, another if a judgment has been secured, there is no property which can be subjected to an execution. Still another exception is when the property has been fraudulently conveyed by the debtor, then the remedy at law is wholly inadequate, and a resort to equity may be had. Thus, it has been held that the issuance of an execution is not a necessary prerequisite to a creditor's bill when it appears that a debtor has no property which is subject to an execution at law and the issuance of the execution would be of no practical utility. Sage v. Memphis & Little Rock R. R. Co., 125 U. S. 361, 8 Sup. Ct. 887, 31 L. Ed. 694; Johnson v. Powers, 139 U. S. 156, 11 Sup. Ct. 525, 35 L. Ed. 112; Talley v. Curtain, 54 Fed. 4, 4 C. C. A. 177; Schofield v. Ute Coal & Coke Co., 92 Fed. 269, 34 C. C. A. 334; Lazarus Jewelry Co. v. Steinhardt, 112 Fed. 614, 50 C. C. A. 393.

As stated in Sage v. R. R. Co., supra:

"When the suing out of an execution would be an idle ceremony, causing useless expense and being of no real benefit to the plaintiff, it is unnecessary."

The courts almost universally recognize the rule that where the recovery of a judgment at law is impracticable or impossible, it is not an indispensable requisite to a creditor's bill. Kennedy v. Creswell, 101 U. S. 641, 645, 25 L. Ed. 1075; Case v. Beauregard, 101 U. S. 688, 690, 25 L. Ed. 1004; Mellen v. Moline Iron Works, 131 U. S. 352, 9 Sup. Ct. 781, 33 L. Ed. 178; National Tube Works v. Ballou, 146 U.

S. 517, 523, 13 Sup. Ct. 165, 36 L. Ed. 1070; Wyman v. Wallace, 201 U. S. 230, 26 Sup. Ct. 495, 50 L. Ed. 738; Hibernia Insurance Co. v. St. Louis & New Orleans Trans. Co. (C. C.) 10 Fed. 596; Consolidated Tank Line Co. v. Kansas City Varnish Co. (C. C.) 45 Fed. 7; Guaranty Title & Trust Co. v. Pearlman (D. C.) 144 Fed. 550.

In Case v. Beauregard, supra, the court said:

"It is no doubt generally true that a creditor's bill to subject his debtor's interests in property to the payment of the debt must show that all remedy at law had been exhausted. And generally, it must be averred that judgment has been * * * issued, and that it has been returned nulla bona. The reason is that until such a showing is made, it does not appear, in most cases, that resort to a court of equity is necessary, or, in other words, that the creditor is remediless at law. In some cases, also, such an averment is necessary to show that the creditor has a lien upon the property he seeks to subject to the payment of his demand. The rule is a familiar one that a court of equity will not entertain a case for relief where the complainant has an adequate legal remedy. The complaining party must therefore, show that he had done all that he could do at law to obtain his rights. But, after all, the judgment and fruitless execution are only evidence that his legal remedies have been exhausted, or that he is without a remedy at law. They are not the only possible means of proof. The necessity of resort to a court of equity may be made otherwise to appear. Accordingly the rule, though general, is not without many exceptions. Neither law nor equity required a meaningless form. 'Bona, sed impossibilia non cogit lex.' It has been decided that where it appears by the bill that the debtor is insolvent, and that the issuing of an execution would be of no practical utility, the issue of an execution is not a necessary prerequisite to equitable interference" (citing authorities).

In Kennedy v. Creswell, supra, it was said:

"The authorities are abundant and well settled that a creditor of a deceased person has a right to go into a court of equity for a discovery of assets and the payment of his debt. When there, he will not be turned back to a court of law to establish the validity of his claim."

This rule has been recognized by the highest courts of most of the states.

In addition to the case from the state courts cited in that case, the following are a few of the many which recognize the same rule: Skilton v. Codington, 185 N. Y. 80, 77 N. E. 790, 113 Am. St. Rep. 885; Greenway v. Thomas, 14 Ill. 271; Austin v. Morris, 23 S. C. 393; Earle v. Grove, 92 Mich. 285, 52 N. W. 615; Albany, etc., Co. v. Southern Agr. Works, 76 Ga. 135, 2 Am. St. Rep. 26; Mill Co. v. Kampe, 38 Mo. App. 234.

In Skilton v. Codington, the court said:

"The rule that a creditor must first recover a judgment is simply one of procedure, and does not effect the right."

Nonresidence of the debtor is another exception which has been almost universally recognized; the reason being that he cannot be served with process upon which a personal judgment can be obtained. Scott v. McMillen, 1 Litt. (Ky.) 302, 311, 13 Am. Dec. 239; Quarl v. Abbett, 102 Ind. 233, 1 N. E. 476, 52 Am. Rep. 662; Peay v. Morrison, 10 Grat. (Va.) 149; Pope v. Solomons, 36 Ga. 541; McKeldin v. Gouldy, 91 Tenn. 677, 20 S. W. 231; Taylor v. Branscombe, 74 Iowa, 534, 38 N. W. 400; Bank v. Paine, 13 R. I. 592; Humphreys v. Atlantic Milling Co., 98 Mo. 542, 10 S. W. 140; Overmire v. Ha-

worth, 48 Minn. 372, 51 N. W. 121, 31 Am. St. Rep. 660; Rule v. Omega Stove Co., 64 Minn. 326, 67 N. W. 60; Droop v. Ridenour, 9 App. D. C. 95, 104; Supplee Hdw. Co. v. Driggs, 13 App. D. C. 272. Some of these cases were against corporations and in some of the opinions expressions are found that the assets of an insolvent corporation are a trust fund for the benefit of its creditors, and therefore may be reached in equity without a judgment at law and an unsatisfied execution. But in Swan Land & Cattle Co. v. Frank, 148 U. S. 603, 609, 13 Sup. Ct. 691, 37 L. Ed. 577, and Hollins v. Brierfield Coal & Iron Co., 150 U. S. 371, 379, 14 Sup. Ct. 127, 37 L. Ed. 1113, it was expressly held that the same rule governs creditors' bills against corporations as against individuals. To like effect are Streight v. Junk, 59 Fed. 321, 8 C. C. A. 137; Adee v. Bigler, 81 N. Y. 349; McKee v. City Garbage Co., 140 Mich. 497, 103 N. W. 906; Atlas Natl. Bank v. John Moran Packing Co., 138 Mo. 59, 39 S. W. 71; Ready v. Smith, 170 Mo. 163, 70 S. W. 484.

It is only when a court of equity has taken charge of the property of an insolvent corporation that it becomes a trust fund. The bill charges, and the motion to dismiss admits, that the defendant debtor is wholly insolvent, and has no property anywhere subject to execution, having transferred it to his codefendants for the purpose of defrauding plaintiffs; that he has left this state so that there can be no service of process on him in an action at law, which would enable plaintiffs to obtain a personal judgment against him in the state of Arkansas, where the property sought to be subjected to the payment of the plaintiffs' claims is situated, and which is all the property he owns and can be thus subjected. Then, how can the plaintiffs obtain a remedy at law which is at all adequate? It is true a personal judgment can be recovered against him in the courts of South Carolina where he resides, but, as he has no property there subject to execution, it would not enable plaintiffs to obtain any relief. He could no more maintain a creditor's bill on a judgment of a court of another state, than if he had no judgment. National Tube Works v. Ballou, supra. It was there held:

"Where it was sought by equitable process to reach an equitable interest of a debtor, the bill, unless otherwise provided by statute, must set forth a judgment in the jurisdiction where the suit in equity is brought, the issuing of an execution thereon, and its return unsatisfied, or must" by the allegations, show "that it is impossible to obtain such a judgment in any court within such jurisdiction."

To the same effect are Claflin v. McDermott (C. C.) 12 Fed. 375; United States v. Ingate (C. C.) 48 Fed. 251; Union Trust Co. v. Boker (C. C.) 89 Fed. 6.

The allegations in the bill bring this case clearly within these exceptions. No personal judgment can be obtained against the defendant Williams in any court of this state where the property is situated as he cannot be served with process in this state. As to the necessity of a lien, if created by a judgment, it is sufficient to say that the legal title to these lands having been conveyed by him to his codefendants, it is the settled rule of the court of the United States, and the courts of the state of Arkansas, that a judgment is not a lien on realty which

has been fraudulently conveyed. It is only the filing of the creditor's bill which creates the lien. Luhrs v. Hancock, 181 U. S. 567, 573, 21 Sup. Ct. 726, 45 L. Ed. 1005; Miller v. Sherry, 2 Wall. 237, 17 L. Ed. 827; Freedman's Savings & Trust Co. v. Earle, 110 U. S. 710, 4 Sup. Ct. 226, 28 L. Ed. 301; In re Estes (D. C.) 3 Fed. 134; Neal v. Foster (C. C.) 36 Fed. 29, affirmed 144 U. S. 585, 12 Sup. Ct. 759, 36 L. Ed. 552; Doster v. Manistee National Bank, 67 Ark. 325, 55 S. W. 137, 48 L. R. A. 334, 77 Am. St. Rep. 116; Longino v. Ball-Warren Commission Co., 84 Ark. 521, 106 S. W. 682; Boyd v. Arnold, 103 Ark. 105, 146 S. W. 118. In Luhrs v. Hancock the court quotes with approval from and adopts the opinion in Re Estes, saying:

"The rule and the reason for it are admirably expressed by Judge Deady in Re Estes [D. C.] 3 Fed. 134"

—and then quotes the following:

"In my opinion, the lien of a judgment which is limited by law to the property of or belonging to the judgment debtor at the time of the docketing does not, nor cannot without doing violence to this language, be held to extend to property previously conveyed by the debtor to another by deed valid and binding between the parties. A conveyance in fraud of creditors, although declared by the statute to be void as to them, is nevertheless valid as between the parties and their representatives, and passes all of the estate of the grantor to the grantee; and a bona fide purchaser from such grantee takes such estate even against the creditors of the fraudulent grantor, purged of the anterior fraud that affected the title. Such a conveyance is not, as has been sometimes supposed, 'utterly void,' but it is only so in a qualified sense. Practically it is only voidable, and that at the instance of creditors proceeding in the mode prescribed by law, and even then not as against a bona fide purchaser. The operation of a lien of a judgment, being limited by statute to the property then belonging to the judgment debtor, is not a mode prescribed by which a debtor may attack a conveyance fraudulent as to himself, or assert any right as such against the grantor therein. This lien is constructive in its character, and is not the result of a levy or any other act directed against this specific property. It is the creature of the statute, and cannot have effect beyond it."

And it has been held by high authority that when the property is not subject to execution, no judgment is necessary. Phœnix Ins. Co. v. Abbott, 127 Mass. 558; Sandford v. Wright, 164 Mass. 85, 41 N. E. 120.

The motion to dismiss is overruled.

UNITED STATES v. MUNDAY et al.

(District Court, W. D. Washington, N. D. January 26, 1914.)

No. 1921.

1. INDICTMENT AND INFORMATION (§ 17*)—WHAT CONSTITUTES.

An "indictment" is a criminal charge returned under the solemnity of an oath by a grand jury, charging a person with a violation of law.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 89, 92; Dec. Dig. § 17.*

For other definitions, see Words and Phrases, vol. 4, pp. 3551–3555.]

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

2. INDICTMENT AND INFORMATION (§ 159*)—AMENDMENT.

There is no statutory authority for the amendment of an indictment returned by a federal grand jury.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 505–514; Dec. Dig. § 159.*]

8. INDICTMENT AND INFORMATION (§ 159*)—ALLEGATIONS—"ABANDONMENT"—"AMENDMENT."

On trial of an indictment for conspiracy to defraud the United States by illegally obtaining title to coal land in Alaska, the government in open court "abandoned for all time" the charge in the indictment of the foreign or alien character of the certain corporation alleged to have entered the land, whereupon the court sustained an objection to the indictment, and the case was appealed to the Supreme Court, where the order was reversed. *Held*, that since the word "abandon" means a giving up, total desertion, absolute relinquishment, and an "abandonment" is the relinquishment of a right, the giving up of something to which one is entitled, while "amendment" means a change or modification to better an allegation by removing that which is erroneous, corrupt, or superfluous, or by substituting something in the place of what is removed, the abandonment of such allegation did not constitute an amendment, nor a material alteration of the indictment by elimination, so as to invalidate it, but changed the proof to be offered (citing 1 Words and Phrases, 4, 369).

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 505–514; Dec. Dig. § 159.*

For other definitions, see Words and Phrases, vol. 1, pp. 4–13; vol. 8, p. 7559; vol. 1, pp. 368–370; vol. 8, pp. 7573, 7574.]

Charles F. Munday and another were indicted for conspiracy to defraud the United States by illegally obtaining title to 40 contiguous tracts of coal land in the District of Alaska, aggregating 6,087 acres collectively, known as the Stracey Group, and averred to be of the value of $10,000,000. On objection to indictment. Overruled.

See, also, 222 U. S. 175, 32 Sup. Ct. 53, 56 L. Ed. 149; 186 Fed. 375.

After opening statements of counsel had been made to the jury and a witness called on behalf of the government, the defendants interposed the following objection:

"Mr. Dorr: If your honor please, at this time the defendants Charles F. Munday and Archie W. Shiels, and each of them, do now object to the introduction of any evidence by or on behalf of the United States, and do move the court to direct the jury now impaneled to return a verdict in favor of the said defendants, upon the following grounds: It affirmatively appears from the record in this cause that at the instance of counsel for the United States, and with the consent of the court, the indictment as returned by the grand jury has been materially altered by the elimination of a portion of the body of the charging part thereof, to wit, the charge in the indictment of the foreign or alien character of the Pacific Coal & Oil Company as an element of the crime sought to be charged in the indictment, the effect of which was to destroy the indictment, and there is no indictment of any grand jury now before this court in this case.

"This motion is based upon the constitutional rights of said defendants, and each of them, to be held to answer only to the indictment by presentment of the grand jury, as guaranteed by the fifth amendment to the Constitution of the United States and as interpreted by the Supreme Court of the United States."

Bert D. Townsend, Asst. Atty. Gen., and Clay Allen, U. S. Dist. Attorney, of Seattle, Wash.

Dorr & Hadley, Tucker & Hyland and Walter S. Fulton, all of Seattle, Wash., for defendants.

NETERER, District Judge (orally). This objection I think must be overruled.

[1, 2] An "indictment" is a criminal charge returned under the solemnity of an oath by a grand jury charging a person with a violation of law. There is no act of Congress authorizing amendments to an indictment. The fifth amendment to the Constitution provides that no person shall be prosecuted for an offense, for an infamous crime, except upon indictment.

[3] When this case was first called for trial several years ago, and the government had made its opening statement to the jury and introduced a witness, the defense objected to the introduction of any evidence on the ground that the indictment is insufficient to support a verdict adverse to the defendants. Judge Hanford in an elaborate opinion overruled the objection on the ground that the Pacific Coal & Oil Company was a foreign corporation, and hence not entitled to enter coal land, and therefore the indictment was good. Thereupon a stipulation was entered into, and, using the language of Judge Hanford:

"After the presentment by the court of its decision and ruling on objection to the introduction of evidence as indicated in the foregoing opinion, in order to facilitate a review of the decision by the Supreme Court, the trial was terminated, pursuant to a stipulation by and between counsel for the government and counsel for the several defendants, by the following proceedings: 'The government does now and here abandon for all time the charge in the indictment of the foreign or alien character of the Pacific Coal & Oil Company, as an element of the crime sought to be charged in the indictment.' "

The objection was then renewed and sustained. The cause then went to the Supreme Court of the United States on a writ of error, and the same record that is now before this court, and the decision was reversed and the indictment returned here for trial.

Objection is now made to the reception of any evidence, on the ground that the indictment is insufficient, and likewise that the indictment as returned by the grand jury has been materially altered by the elimination of a portion of the body of the charging part thereof, to wit, the charge in the indictment of the foreign or alien character of the Pacific Coal & Oil Company as an element of the crime sought to be charged in the indictment, the effect of which was to destroy the indictment, and there is no indictment of any grand jury now before this court in this case; and this violates the constitutional rights of the defendants under the fifth amendment to the Constitution. The abandonment on the part of the government of the foreign or alien character of the Pacific Coal & Oil Company, charged in the indictment, it is alleged, operates as an amendment, and so emasculates the indictment as to destroy its vitality.

I am satisfied that what was done at the time was not considered by any of the parties as an amendment of the indictment. If it had been considered as an amendment and its vitality thereby destroyed, the

defendants would not have responded to the writ of error in the way they did, nor would the proceedings have been taken in this case after judgment of dismissal by Judge Hanford that the record discloses. This entire record was before the Supreme Court. The court has read this same record. It is said, on argument, that the question was not raised by counsel for the defendants, that the court's attention was not called to the point now raised. It suffices to say that the same question that is now raised was raised by the record itself. A mere reading of the record discloses the condition of it, and the Supreme Court would not have entered a judgment which would not be supported by an indictment. The motion to quash was made after the government announced its abandonment, so that the same condition existed prior to this case leaving this court upon the writ of error to the Supreme Court as exists now. 222 U. S. 175, 32 Sup. Ct. 53, 56 L. Ed. 149. The Supreme Court, in my judgment, when this matter was suggested to it from a reading of the record, concluded immediately that the indictment had never been amended and that what was done at the former trial did not emasculate the indictment so as to destroy its vitality. There is no act of the government's attorneys or order of the court, which changes the dot of an "i" or the cross of a "t" in the indictment. It is before this court just as it came from the grand jury. The announcement by the government that it abandons the foreign or alien character of the Pacific Coal & Oil Company as an element of the crime does not take from the indictment any words, phrases, or sentences. There is no change. There is no correction made or authorized, nor is any directed by the court's order.

The Standard Dictionary says, "abandonment" means "to give up," "to desert," "to quit." Webster's Unabridged Dictionary says, "Abandonment" means "to give up absolutely," "to forsake entirely," "to renounce utterly," "to desert," "to quit," "to surrender."

"The word 'abandon' means a giving up, a total desertion, an absolute relinquishment." 1 Words and Phrases, 4.

"'Abandonment' is the relinquishment of a right; the giving up of something to which one is entitled." 1 Words and Phrases, 4; Dikes v. Miller, 24 Tex. 417.

The Standard Dictionary says "amendment" means "to change, by a freeing from faults, to correct, to reform." Webster's Unabridged Dictionary says:

"To change or modify in any way for the better (a) by simply removing what is erroneous, corrupt or superfluous, faulty and the like; (b) by substituting something else in the place of what is removed."

Bouvier's Law Dictionary says:

"The change of something proposed in a bill or what is law."

"The amendment of a pleading implies an improvement of it, the making of the pleading better as a pleading, the making good of that which before was defective in its form or statement, or in making better the issues presented between the same parties." 1 Words and Phrases, 369; Billings v. Baker, 6 Abb. Prac. (N. Y.) 213, 216.

It is clear to me that to "amend" means much more than "abandonment." It means to abandon a position and to carry the intention into

effect by a change in the indictment so as to conform to the changed position. An amendment has operation as from the beginning and relates back to the inception of the action, while abandonment simply pertains to the future. Suppose a person would execute a promissory note with various conditions and provisions, and the holder of the promissory note would strike out some part of the note, or change it in some way. Its vitality is immediately destroyed. And so with an indictment, where a change is made. Neither would be the instrument of the maker, and it could not be enforced against the maker of the note or the defendants in the indictment. But suppose the holder of the promissory note should institute an action and there were some provisions in the note that he did not care to insist on, and the holder announced in open court, "I waive absolutely and forever abandon any claim with relation to certain of the conditions." That would not change the note nor deprive it of its validity. So in this case the abandonment of some of the recitations in the indictment does not change the indictment, but it changes the proof which is offered.

The effect of an abandonment can only have operation as, what is known in law, as a nolle prosequi, and this is amply sustained by the decisions. Jennings v. Commonwealth, 105 Mass. 586; Commonwealth v. Powers, 109 Mass. 353; Commonwealth v. Tuck, 20 Pick. (Mass.) 356; State v. McPherson, 9 Iowa, 53; Mills v State, 52 Ind. 187; 12 Cyc. 376. All of the authorities which are obtained, bearing upon that relation, sustain the view expressed.

I have endeavored to approach the issue that is now presented from every possible viewpoint, and to apply to it every legal principle that is involved and known to me, and all of the suggestions that have been made by counsel upon the argument, and the conclusion is always the same. In my opinion the conclusion is supported by law and sound reason, common sense and good conscience.

You may note an exception for each of the defendants.

NOTE.—On trial before a jury, both defendants were acquitted.

THE KUNKLE BROS.

(District Court, N. D. Ohio, E. D. January 16, 1914.)

No. 2469.

1. TOWAGE (§ 15*)—ACTION FOR BREACH OF CONTRACT—BURDEN OF PROOF.

A contract to tow does not impose either an obligation to insure or the liability of a common carrier, but requires only that the service shall be performed with that degree of caution and skill which prudent navigators usually employed in similar cases, and the burden of showing a breach by negligence or unskillful performance to the injury of the tow rests upon the party alleging it.

[Ed. Note.—For other cases, see Towage, Cent. Dig. §§ 30–38; Dec. Dig. § 15.*]

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

2. TOWAGE (§ 11*)—INJURY TO TOW—LIABILITY OF TUG.

Where a tug and tow jointly participate in the control and management of the tow, each party is responsible for his own negligence, resulting in injury to the tow.

[Ed. Note.—For other cases, see Towage, Cent. Dig. §§ 11–23; Dec. Dig. § 11.*]

3. TOWAGE (§ 11*)—INJURY TO TOW—LIABILITY OF TUG.

An injury to a steamer by striking against a pierhead while being towed by the stern into the mouth of a river, in a customary manner at night, *held* not due to any fault of the tug, but to the fault and inattention of the mate of the steamer, who was stationed at the stern as a lookout, and who, if he had observed the swing toward the pier and had caused the starting of the engines forward, could readily have stopped the steamer.

[Ed. Note.—For other cases, see Towage, Cent. Dig. §§ 11–23; Dec. Dig. § 11.*]

In Admiralty. Suit by the Cuyahoga Steamship Company, as owner of the steamship Sheldon Parks, against the tug Kunkle Bros. Decree for respondent.

Goulder, Holding & Masten, of Cleveland, Ohio, for libelant.

Hoyt, Dustin, Kelley, McKeehan & Andrews, of Cleveland, Ohio, for respondent.

DAY, District Judge. The Sheldon Parks is a bulk freighter 532 feet in length, 56 feet beam. The tug Kunkle Bros. is a harbor tug 70 feet in length and 19 feet beam. The entrance to Lorain harbor is protected by breakwaters; the breakwaters are marked at their outer ends by pierheads, located 500 feet apart, and 1,800 feet outside of the pierheads marking the outer entrance to the river. The entrance to the river is marked by concrete piers, the general direction of which extends northwest and southeast. The piers are parallel and are 300 feet apart.

The Parks arrived off Lorain at about 4:30 p. m. of the day of the accident, and blew for a tug to take her into the harbor. At about 6:30 p. m. the tug was seen coming out. The Parks' engines were started ahead, and the vessel straightened to make the entrance to the breakwater gap. The tug then came alongside of the Parks; the master of the tug then notified the captain of the steamer that the steamer was to load coal at No. 1 car dump, and ordered the Parks to go under the west breakwater and let go her anchor, and that the tug would then take the steamer in stern first, with her anchor down. The Parks went under the breakwater, and when about parallel with the west breakwater, and about 300 feet off of it, let go her anchor. The night was clear; there was no sea; and a light wind was blowing from the west. After the Parks let go her anchor, the stern line was given to the tug from the steamer, in order that the steamer might be towed in stern first to the coal dock. After taking the stern line, the tug pulled the steamer around, until the steamer was in line with the pier, and heading stern first directly into the mouth of the river. Thereupon the tug began pulling directly astern, and the steamer began to back her engines, in answer to a signal from the tug. As soon as the steamer did this, her stern be-

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

gan to sag to leeward, and the tug pulled her back in line with the piers. A few minutes later, while the steamer was still heading into the mouth of the river, the tug again signaled her to back, and the Parks again reversed, and again her stern sagged to leeward, so that the operation of swinging the steamer back into the line of the river had to be repeated. For a third time the tug endeavored to pull the stern of the steamer in position to go down the river, and this time the steamer, instead of sagging to leeward, as she had done each of the times before, her stern swung to port. The tug then signaled the steamer to stop backing, and at the same time stopped her own headway; then the tug repeated the signal to stop backing and signaled to go ahead and work strong. The steamer answered these signals, but it was then too late, and her rudder struck on the lighthouse foundation at the outer end of the westerly pier.

The libel charges that the tug so negligently performed the towing service that she brought the steamer's stern under the west pierhead, and notwithstanding that the steamer worked full speed ahead, with her helm hard astarboard, the tug failed to keep her in the proper channel, but by and through her inattention, incompetency, and negligent management, the tug caused the steamer to get out of the regular channel and her stern to collide with the pierhead, damaging her stern and breaking her propeller wheel.

The tug contends that the Parks was at fault in that those in charge of her were incompetent, in that she negligently mismanaged her engines, in that she failed to have a proper lookout aft, in that she failed to heed and promptly answer the signals of the tug, in that she failed to properly work her engines in accordance with the signals of the tug, and in that she failed timely to work her engines ahead before striking the pier.

It is apparent from the record that during these various maneuvers the sternway of the steamer was very slow, and also that after the steamer was in position, and during the entire time when there could have been any danger of collision with the west pier, the tug was towing off to eastward at an angle of from 40 to 45 degrees.

The captain of the Parks was familiar with the harbor at Lorain. The method of taking the Parks into port stern first, dragging her bow anchor, was usual and proper. There was no special agreement or instruction which varied or altered the respective duties ordinarily resting upon a single tug and tow jointly participating in the enterprise of towing the steamer into port. This is made plain by the testimony of Capt. Montgomery of the Parks.

The officers of the Parks regulated the number of anchors she was to have down, determined the place at which the anchor was let go, regulated the length of the anchor chain; and, while the tug gave some signals to back or go ahead on the steamer's engine, it was the steamer's officers who regulated the rate of speed at which the engines were worked. The steamer's officers also had complete control of the rudder of the Parks.

[1] An engagement to tow does not impose either an obligation to insure or the liability of common carriers. The burden is always upon

him who alleges the breach of such a contract to show either that there has been no attempt at performance or that there has been negligence or unskillfulness to his injury in the performance. Unlike the case of common carriers, damage sustained by the tow does not ordinarily raise a presumption that the tug has been in fault. The contract requires no more than that he who undertakes to tow shall carry out his undertaking with that degree of caution and skill which prudent navigators usually employ in similar cases. The J. P. Donaldson, 167 U. S. 599, 603, 17 Sup. Ct. 951, 42 L. Ed. 292; The Webb, 14 Wall. 406, 414, 20 L. Ed. 774; The Burlington, 137 U. S. 386, 391, 11 Sup. Ct. 138, 34 L. Ed. 731; The L. P. Dayton, 120 U. S. 337, 351, 7 Sup. Ct. 568, 30 L. Ed. 669.

[2] It is plain that preceding the accident, and at the time of the accident, the officers and crews of both vessels jointly participated in their control and management. In such a case each party is responsible for his own negligence. If, by the negligence of the tug, the tow is drawn off her course, the tug is responsible. If, by the negligence of the vessel, she sheers out of her course, she is alone liable. It is a case where both participate in the movements of the tow and both are concerned in its direction. The Frank Moffat, Fed. Cas. No. 5,060.

[3] It is significant that the captain of the Parks testified that the tug got the Parks into a position that was all right for making the pier. Neither he nor any member of his crew makes any criticism of the tug's navigation beyond the fact that the collision itself did occur. It is claimed by the crew of the Parks that for an interval of some 20 to 25 minutes the engines of the Parks were not working. That this interval preceded the striking of the Parks against the pier.

As the steamer's stern on the first two attempts had gone to leeward, the tug might properly have desired to get her stern to windward, so as to be able to pull the steamer's stern, in order to get her headed into the harbor.

At the time that the position was reached outside of the west pier, the steamer's stern was still, according to the Parks' witnesses, from 130 to 500 feet from the pier. The sternway of the steamer could only be checked or stopped by the engines of the steamer herself. The tug could only pull astern, or to one side or the other. Her pulling could give the steamer sternway but could not check it. There is no claim, however, that the tug did give the steamer any excessive sternway. It appears that, immediately preceding the collision, the tug was pulling off to starboard at an angle of some 45 degrees, and doing all it could to bring the Parks' stern properly into the harbor entrance. As the stern of the Parks approached the west pier, the second officer of the Parks was stationed aft, in a position where he could at all times see the west pier, the lighthouse on the end of the pier, and accurately judge the distance between the Parks and the pier. Of all the persons concerned in this maneuver he was in the best position to accurately locate the position of the pier and of the course of the steamer as she approached the harbor entrance. It is significant that he was not called upon to testify. Nor is his absence in any manner explained or accounted for, either in the record or the argument of counsel. It is also very plain from the record that this officer, stationed aft on the

Parks, did not maintain a proper lookout. The second mate of the Parks was at fault in failing to see and anticipate the danger and use the means at his disposal to avoid it. The sternway of the steamer was slow, and it would only have taken a few turns of her propeller to have stopped it. The chief engineer of the steamer admits that the Parks' engines were worked ahead only 10 or 15 seconds before the collision, so it matters not whether the steamer promptly obeyed the signal of the tug to go ahead, or whether it did not, in view of the fact of the plain lack of diligence and skill on behalf of the second officer of the Parks.

I am not impressed with the contention that the tug could have done more than she did do to prevent the striking of the Parks. All of the probabilities of the case, coupled with the fact that the second mate was not called upon to testify, indicate that this accident happened by reason of this second mate's inattention to duty.

Accordingly the libel will be dismissed.

SHEELER v. ALEXANDER et al.

(District Court, N. D. Ohio, E. D. October 3, 1913.)

(No. 132.)

1. COURTS (§ 353*)—PROCEDURE—PETITION FOR REHEARING.
   The procedure for a rehearing after an interlocutory decree in an infringement suit, on the ground of newly discovered evidence, under the new equity rules (198 Fed. xix; 115 C. C. A. xix), may properly be by petition.
   [Ed. Note.—For other cases, see Courts, Cent. Dig. § 933; Dec. Dig. § 353.*]

2. EQUITY (§ 392*)—REHEARING—NEWLY DISCOVERED EVIDENCE.
   To entitle a defendant to a rehearing on the ground of newly discovered evidence it must be shown: (1) That he exercised due and reasonable diligence before the hearing to procure the evidence sought to be introduced; and (2) that the new evidence is material in determining the issues raised by the pleadings and is probably true, and on such questions counter affidavits may be received.
   [Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 834–851; Dec. Dig. § 392.*]

3. EQUITY (§ 392*)—PETITION FOR REHEARING—PROCEDURE.
   A petition for rehearing after an interlocutory decree in an equity suit from which no appeal has been taken, on the ground of newly discovered evidence, should set forth the evidence as far as possible, and in any event should be accompanied by affidavits setting it out fully, and an order to show cause should then be served on the adverse party. If the application is granted the petitioner should then file a supplemental bill or answer, as the case may be.
   [Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 834–851; Dec. Dig. § 392.*]

In Equity. Suit by Harvey Sheeler against G. W. Alexander and Orion Alexander, partners as G. W. Alexander & Son, and the Lake Shore Sawmill & Lumber Company. On motion by complainant to

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

strike defendant's petition for rehearing from the files. Motion overruled.

Wing, Myler & Turney, of Cleveland, Ohio, for plaintiff.

Reed, Russell & Eichelberger, Carpenter, Young & Stocker, and Hull & Smith, all of Cleveland, Ohio, for defendants.

DAY, District Judge. The defendants have filed a petition for a rehearing, praying in part that the decree for infringement against them be set aside, pending the hearing.

This petition for a rehearing is sworn to, and is accompanied by affidavits setting forth certain newly discovered evidences relied upon by the defendants.

[1] To this petition for a rehearing the complainant has filed a motion to strike the petition from the files, for the reason that the petition is not in accordance with the rules of practice in equity, on the ground that there is newly discovered evidence; and, inasmuch as the petitioner asks that the decree be set aside instead of praying for leave to file a bill of review, or a bill in the nature of a bill of review, the motion raises the question whether or not the proper procedure has been taken in the filing of this petition for a rehearing, in view of the adoption of the new equity rule by the Supreme Court of the United States. Equity rule 69 provides:

"Every petition for a rehearing shall contain the special matter or cause on which such rehearing is applied for, shall be signed by counsel and the facts therein stated, if not apparent on the record, shall be verified by the oath of the party or by some other person."

Rule 18 (198 Fed. xxiii, 115 C. C. A. xxiii) provides:

"Unless otherwise prescribed by statute or these rules the technical forms of pleading in equity are abolished."

And rule 19 (198 Fed. xxiii, 115 C. C. A. xxiii) provides, in part:

"The court, at every stage of the proceeding, must disregard any error or defect in the proceedings which does not affect the substantial rights of the parties."

Rule 34 (198 Fed. xxviii, 115 C. C. A. xxviii) provides for the filing of supplemental pleadings in the cause.

Rule 46 (198 Fed. xxxi, 115 C. C. A. xxxi) provides in part:

"In all trials in equity the testimony of witnesses shall be taken orally in open court, except otherwise provided by statute or these rules."

It would seem to be the spirit of these new equity rules that they were drawn by the Supreme Court with the intent of leaving the judge free to adjust matters in the interests of substantial justice, as he sees it, unhampered by precedent and by technical definitions and distinctions. So the important question to decide is as to the fairest and best method of raising the questions to be decided on a petition for a rehearing.

It is apparent that the present petition for a rehearing is based largely on the ground of newly discovered evidence. That such a proceeding is a proper one is recognized by the courts. The contention raised by counsel for the complainant is supported by the case of

Baker v. Whiting, 1 Story, 218, Fed. Cas. No. 786. In this case a petition was presented by the defendant after an interlocutory decree asking for a rehearing and for leave to introduce newly discovered evidence in the cause. The court, after a full investigation of the equity practice of England and the United States, which existed at that time, held that, where a rehearing is sought on the ground of newly discovered evidence, after an interlocutory decree, the court might grant the rehearing upon the filing of a supplemental bill, if the evidence was of such a nature or character as to entitle the party to relief, upon a bill of review, after the enrollment of a final decree, or on a supplemental bill in the nature of a bill of review, where there had been no enrollment, but not otherwise.

A like petition was later filed in Jenkins v. Eldredge, 3 Story, 299, Fed. Cas. No. 7,267, in which the court said:

"The present application, if maintainable at all, should properly, in its prayer, be for leave to file a supplemental bill, to bring forward the new evidence, and for a rehearing of the cause at the time when the supplemental bill should also be ready for a hearing."

This practice is recognized as the correct practice in Gillette v. Bates Refrigerating Co. (C. C.) 12 Fed. 108; Deitsch v. Staub, 115 Fed. 309, 317, 53 C. C. A. 137; Foster's Federal Practice (3d Ed.) § 352, p. 783; Walker on Patents (4th Ed.) § 647, p. 501; Daniell's Chancery Practice, 1537.

[2] It is well established that in order to entitle the defendant to a rehearing two questions are principally involved: First. Have they shown that they exercised due and reasonable diligence before the hearing in procuring the evidence now sought to be introduced? Pittsburgh Reduction Co. v. Cowles Co. (C. C.) 64 Fed. 125; Moneyweight Scale Co. v. Toledo, 199 Fed. 905, 118 C. C. A. 235; Australian Knitting Co. v. Wright's Health Underwear, 121 Fed. 1017, 56 C. C. A. 678. Secondly. That the new evidence sought to be introduced is material in determining the issues raised by the pleadings, and is probably true. Section 647, Walker on Patents; Munson v. New York (C. C.) 11 Fed. 72; New York Sugar Co. v. American Co. (C. C.) 35 Fed. 212; Bates on Fed. Procedure, vol. 2; section 683, Foster's Fed. Practice (3d Ed.) § 352.

Inasmuch as the petition for a rehearing is not an ex parte proceeding, counter affidavits may be received by the court in order that the court may be fully advised as to whether or not due diligence was indulged in by the petitioning party, and whether or not the evidence sought to be introduced was material. Walker on Patents, § 647; Simpkins, A Federal Suit in Equity, p. 623; Blandy v. Griffith, Fed. Cas. No. 1,530; Albany Steam Trap Co. v. Felthousen (C. C.) 26 Fed. 318; Celluloid Mfg. Co. v. American Zylonite Co. (C. C.) 27 Fed. 750; Munson v. New York (C. C.) 11 Fed. 72; New York Sugar Co. v. American Co. (C. C.) 35 Fed. 212.

[3] While the cases are not fully in accord as to the proper procedure to be followed when an application is made for a rehearing on account of newly discovered evidence, it is apparent from the decisions that if a decree has been entered in the lower courts, and an ap-

peal has been taken therefrom to the Circuit Court of Appeals, so that the Appellate Court has jurisdiction, the proper proceeding is for the petitioner to file a petition duly verified and addressed to the Appellate Court, and praying for leave to file in the lower court a supplemental bill in the nature of a bill of review. In re Gamewell, 73 Fed. 908, 20 C. C. A. 111; Westinghouse Co. v. Stanley, 138 Fed. 823, 71 C. C. A. 189; Bliss v. Reed, 106 Fed. 318, 45 C. C. A. 304; Boston Railway Co. v. Bemis Co., 98 Fed. 121, 38 C. C. A. 661.

In the case of Willimantic Linen Co. v. Clark Thread Co. (C. C.) 24 Fed. 799, the court held:

"The court has power to open the same and allow a new defense on motion, and without the formality of a bill of review."

In this case there was an interlocutory decree and no final decree. The court further stated that any such an—

"application * * * for a rehearing, on the ground of newly discovered evidence * * * must be supported by the same sort of proof as the court requires in order to give party relief upon a bill of review, or a supplemental bill in the nature of a bill of review, after a final decree."

Inasmuch as rehearings are granted only upon such grounds as would authorize a new trial in an action at law, that is, for newly discovered evidence, or errors of law apparent upon the record, it would seem to be a proper course of procedure in the filing of a petition for a rehearing where only an interlocutory decree has been entered, and there has been no appeal taken to the Circuit Court of Appeals, for the party seeking a rehearing to file its petition with the clerk of the court, and if he relies upon newly discovered evidence, he should set forth this evidence in the bill as far as possible in the petition for rehearing, and, in any event, in affidavits filed with the petition for rehearing and accompanying it. After filing this petition for a rehearing and the affidavits, he should then obtain an order upon the adverse party to show cause at some later date why his prayer for a rehearing should not be granted. The adverse party may then answer the petition for a rehearing, and upon the petition and answer the application may be heard. If the application for a rehearing is granted, then the petitioning party would be required to file either a supplemental bill or answer, as the case might be, in order that the hearing might be had on the original bill and answer and on the supplemental pleadings.

The petition for a rehearing which is sought to be stricken from the files seems to fully and fairly comply with this requirement, and the accompanying affidavits to fully set forth the evidence relied upon.

The motion to strike from the files will accordingly be overruled.

UNITED STATES v. GRONICH.

(District Court, W. D. Washington, S. D. February 24, 1914.)

No. 7.

1. COURTS (§ 271*)—NATURALIZATION—CERTIFICATE—CANCELLATION—JURISDICTION—"RESIDE."

Judicial Code (March 3, 1911, c. 231, 36 Stat. 1101 [U. S. Comp. St. Supp. 1911, p. 150]) § 51, provides that with certain exceptions no person shall be arrested in one district for trial in another in any civil action before a district court, and with certain exceptions that no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where jurisdiction is founded only on diversity of citizenship, suit shall be brought only in the district of the residence of either plaintiff or defendant. Section 52 declares that when a state contains more than one district, every suit not of a local nature, in the district court, against a single defendant, inhabitant of such state, must be brought in the district where he resides. Act June 29, 1906, c. 3592, § 15, 34 Stat. 601 (U. S. Comp. St. Supp. 1911, p. 537) provides for the institution of proceedings to cancel citizenship certificates fraudulently or illegally procured to be brought in the district of citizen's last residence. *Held*, that the word "reside" as used in section 15, whether requiring a domicile or mere abode, contemplates at least a choice on the part of the naturalized citizen, to wit, a voluntary sojourning on his part; and hence a federal court of a district in which a naturalized citizen was incarcerated in a federal penitentiary, other than that in which he had previously resided, had no jurisdiction to cancel his certificate of naturalization.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 810; Dec. Dig. § 271.*

For other definitions, see Words and Phrases, vol. 7, pp. 6147–6150; vol. 8, p. 7787.]

2. COURTS (§ 270*)—FEDERAL COURTS—"INHABITANT"—"RESIDENT"—"CITIZEN."

The words "inhabitant," "resident," and "citizen," as used in Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1101 [U. S. Comp. St. Supp. 1911, p. 150]) §§ 51, 52, specifying the federal districts in which suits may be instituted in federal courts, contemplate the same condition, and all include the idea of domicile.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 810; Dec. Dig. § 270.*

For other definitions, see Words and Phrases, vol. 4, pp. 3594–3604; vol. 8, p. 7687; vol. 7, pp. 6161–6166; vol. 8, p. 7788; vol. 2, pp. 1164–1174; vol. 8, pp. 7602, 7603.]

In Equity. Petition by the United States against Jake Gronich, to set aside and cancel a certificate of citizenship. Dismissed.

Clay Allen, U. S. Atty., of Seattle, Wash., and George P. Fishburne, Asst. U. S. Atty., of Tacoma, Wash.

B. W. Coiner and Grant A. Dentler, both of Tacoma, Wash., for respondent.

CUSHMAN, District Judge. The United States petitions that the order of the probate court of the state of Ohio, for Mahoning county, made October 29, 1904, admitting respondent to citizenship, be va-

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

cated, and the certificate of citizenship issued therefrom be canceled. The petitioner alleges, as a ground therefor, that said order and certificates were secured by respondent through fraud. The respondent appears specially and objects to the court's exercising jurisdiction on the ground that he is not a resident or citizen of the Western district of Washington. The petitioner demurs generally to the plea to the jurisdiction. No question is made, upon either side, concerning the procedure, but both seek a determination upon the merits of the objection.

Respondent's plea discloses that, prior to July 15, 1912, he became domiciled in, and a permanent resident of, the city of Portland, in the state and district of Oregon, which domicile and residence he has never voluntarily relinquished or abandoned; that since said date he has been forcibly, and against his will, confined in the United States penitentiary in the Western district of Washington. While so confined, the process in this suit was served upon him in such prison. Upon the hearing it was admitted that respondent was sentenced to be imprisoned for the term of five years.

[1] Section 51 of the Judicial Code provides:

"Except as provided in the five succeeding sections, no person shall be arrested in one district for trial in another, in any civil action before a district court; and, except as provided in the six succeeding sections, no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

Section 52 in part provides:

"When a state contains more than one district, every suit not of a local nature, in the district court thereof, against a single defendant, inhabitant of such state, must be brought in the district where he resides. * * *"

Section 15 of the act of June 29, 1906 (1909 Supp. Fed. Stat. Ann. p. 373), in part, provides:

"That it shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court having jurisdiction to naturalize aliens in the judicial district in which the naturalized citizen may reside at the time of bringing the suit, for the purpose of setting aside and canceling the certificate of citizenship on the ground of fraud or on the ground that such certificate of citizenship was illegally procured. In any such proceedings the party holding the certificate of citizenship alleged to have been fraudulently or illegally procured shall have sixty days personal notice in which to make answer to the petition of the United States; and if the holder of such certificate be absent from the United States or from the district in which he last had his residence, such notice shall be given by publication in the manner provided for the service of summons by publication or upon absentees by the laws of the state or the place where such suit is brought. If any alien who shall have secured a certificate of citizenship under the provisions of this act shall, within five years after the issuance of such certificate, return to the country of his nativity, or go to any other foreign country, and take permanent residence therein, it shall be considered prima facie evidence of a lack of intention on the part of such alien to become a permanent citizen of the United States at the time of filing his application for citizenship, and, in the absence of countervailing evidence, it shall be sufficient in the proper proceeding to

authorize the cancellation of his certificate of citizenship as fraudulent, and the diplomatic and consular officers of the United States in foreign countries shall from time to time, through the Department of State, furnish the Department of Justice with the names of those within their respective jurisdictions who have such certificates of citizenship and who have taken permanent residence in the country of their nativity, or in any other foreign country, and such statements, duly certified, shall be admissible in evidence in all courts in proceedings to cancel certificates of citizenship."

No intention is shown by the latter section to make a different provision, as to the place of trial, than that made by sections 51 and 52, or that the word "reside," in section 15, was used to designate any different condition than when it is used in section 52, or when the word "inhabitant" is used in section 51.

Contrasting the expression "may reside at the time of bringing the suit" with "permanent citizen" and "permanent residence," all occurring in section 15, it is argued that, in using the first expression, something more fleeting and ephermeral is contemplated than by the use of the word "inhabitant" in section 51, or "resident" in section 52. The argument is not convincing. In the first place, no reason appears for making any such distinction. Further, from an examination of section 15 it would seem that the provision authorizing cancellation proceedings "in the judicial district in which the naturalized citizen may reside at the time of bringing suit" was inserted in order to expressly adopt for this special proceeding the general rule, made by section 51, in order to plainly show that it was not required or contemplated that the suit for cancellation should be brought in the court where the alien had been naturalized, and from which jurisdiction he might have removed, thus showing that the convenience of the defendant was more considered than comity for the court which naturalized him.

The provision fixing the venue at the residence of the naturalized citizen may have, also, been inserted to make clear the avoidance of the rule laid down in Re Hohorst, 150 U. S. 653, 14 Sup. Ct. 221, 37 L. Ed. 1211, and since its rendition, followed in many cases, to the effect that the general statute (section 51, supra), providing that suit shall not be brought in any other district than that whereof defendant is a resident, does not apply to suits in exclusive federal jurisdiction.

[2] "Inhabitant," "resident," and "citizen" contemplate the same condition in these acts, and all include the idea of "domicile." The reason for the use of the word "citizen," as applied to the state, and "resident" and "inhabitant," as applied to the judicial district, being plainly pointed out in Shaw v. Quincy Min. Co., 145 U. S. 444, 12 Sup. Ct. 935, 36 L. Ed. 768; In re Hohorst, 150 U. S. 653, 14 Sup. Ct. 221, 37 L. Ed. 1211, supra; Galveston, etc., Ry. Co. v. Gonzales, 151 U. S. 496, 14 Sup. Ct. 401, 38 L. Ed. 248 (both majority and dissenting opinions). But, whether the word "reside," as used in section 15, be taken to require a domicile, or merely an abode, it contemplates choice upon the part of the naturalized citizen, a voluntary sojourning upon his part, and can in no sense be held to apply to an imprisoned convict, who is incarcerated wholly without his consent, or choice. Am. Surety Co. v. Cosgrove, 40 Misc. Rep. 262, 81 N. Y. Supp. 945, 946; Grant v. Dalliber, 11 Conn. 234.

It being apparent that the provision in section 15—for bringing suit where a naturalized alien resides at the time of bringing the suit—is for his convenience, it is clear that it would be more for the advantage of the prisoner that such a cause should be tried at his domicile, where, presumably, his friends and witnesses reside, than within the jurisdiction of his incarceration, where he would, in such a case as the present, imprisoned away from his domicile, be presumed to be among strangers. Defendant is held in this jurisdiction by process of the court, not by reason of, but against his will. No good reason would therefore appear—even in the absence of a statute—to except such a person from the general rule applicable to litigants, coming within a court's jurisdiction, exempting them from civil suit, while within such jurisdiction in answer to the court's process. Kaufman v. Garner (C. C.) 173 Fed. 550; U. S. v. Bridgman, 24 Fed. Cas. page 1230, No. 14,645; 32 Cyc. 494.

At times in the past it has been decided, under the poor laws, that incarceration in prisons or insane asylums would form an interruption of that continuity of residence requisite to the confined person's acquisition of a legal settlement by residence in a poor district (30 Cyc. 1094 [B] & [C]); but the contention never appears to have been made that such incarceration would deprive the detained person of the settlement or residence he had theretofore gained, much less force upon and give him a settlement or residence in the jurisdiction where imprisoned.

An order of dismissal will be entered.

In re BABJAK.

(District Court, W. D. Pennsylvania. February 18, 1914.)

No. 10,253.

TIME (§ 9*)—EXCLUSION OF LAST DAY.

Naturalization Law (Act June 29, 1906, c. 3592, 34 Stat. 596 [U. S. Comp. St. Supp. 1911, p. 529]) § 4, provides that, not less than two, nor more than seven, years after an alien has made his declaration of intention, he shall make and file a petition in writing for naturalization. *Held* that the day of the date of the declaration should be excluded in computing the seven-year period, and hence a petition for naturalization filed on the seventh anniversary of that date was in time.

[Ed. Note.—For other cases, see Time, Cent. Dig. §§ 11-32; Dec. Dig. § 9.*]

Application of Janos Babjak for citizenship. Objection to petition overruled.

W. M. Ragsdale, Chief Naturalization Examiner, of Pittsburgh, Pa., for the United States.

ORR, District Judge. The question raised in this case is whether or not this court can issue a certificate of naturalization to the peti-

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

tioner because his petition was filed on October 6, 1913, and is supported by a declaration of intention made October 6, 1906. The naturalization examiner suggests that more than seven years elapsed between the filing of the declaration of intention and the filing of the petition for naturalization, and that therefore, under the second paragraph of section 4 of the Naturalization Law of June 29, 1906, this court is without jurisdiction to entertain the petition. The material part of that paragraph is as follows:

"Not less than two years nor more than seven years after he has made such declaration of intention he shall make and file, in duplicate, a petition in writing"

—being the petition for naturalization. The court has before it, therefore, the question as to the computation of time in view of the provisions and purposes of the act of Congress.

An examination of numerous decisions relating to computations of time leads to a conclusion that there is no fixed rule. In Griffith et al. v. Bogert et al., 59 U. S. 158, 163 (15 L. Ed. 307), Mr. Justice Grier, in delivering the opinion considering the subject, uses this language:

"It would be tedious and unprofitable to attempt a review of the very numerous modern decisions, or to lay down any rules applicable to all cases. Every case must depend on its own circumstances. Where the construction of the language of a statute is doubtful, courts will always prefer that which will confirm rather than destroy any bona fide transaction or title. The intention and policy of the enactment should be sought for and carried out. Courts should never indulge in nice grammatical criticism of prepositions or conjunctions, in order to destroy rights honestly acquired."

That language is approved by the Supreme Court speaking by the learned Chief Justice Fuller in Taylor v. Brown, 147 U. S. 640, 645, 13 Sup. Ct. 549, 37 L. Ed. 313. The learned Chief Justice uses this language (147 U. S. page 644, 13 Sup. Ct. 549, 551 [37 L. Ed. 313]):

"While it is desirable that there should be a fixed and certain rule upon this subject, it must be conceded that the rule which excludes the terminus a quo is not absolute, but that it may be included when necessary to give effect to the obvious intention."

Turning to the Naturalization Act, we find that it is intended by Congress to confer upon aliens who are eligible the great privilege of citizenship. The steps to be taken by the alien are to be taken in the courts. His declaration is to be made before a clerk of the court; his petition is to be presented to the court; his petition is to be supported by proper testimony; and judicial action is necessary to complete the act of naturalization. The various steps in the proceeding are prescribed for the benefit of the applicant. There is a grant to him of a privilege. Two years after he has declared his intention of becoming a citizen, he has a right to present his petition for citizenship. If he believes that the five years within which he may present his petition will not expire until the seventh anniversary of his making his declaration of intention—in other words, that the seven years prescribed by the act will not expire until after the seventh anniversary of the

time of making his formal declaration—should the court by a grammatical criticism destroy his privilege?

Taking the words, "not less than two years," and the words, "nor more than seven years," in conjunction with the word "after," we see at once that there must be a different method of computation adopted. We find the statement made by Mr. Justice Story in Arnold v. United States, 13 U. S. (9 Cranch) 104, 119 (3 L. Ed. 671) that "it is a general rule that where the computation is to be made from an act done, the day on which the act is done is to be included." He was considering an act of Congress which provided for certain duties "from and after the passage of this act." Other cases could be cited to the same effect construing acts of Congress where similar language has been used. There is no reason why Congress did not intend by the language "not less than two years" to include the date in which the declaration of intention was made. At that time the first step to acquire the privilege granted by Congress has been taken, and we feel that in this respect it is in the interest of justice, and within the intent of Congress, that the terminus a quo with respect to the period of two years should be included, and therefore the petition may be filed on the second anniversary at the earliest. If, however, the terminus a quo is to be included in computing the period of seven years, then the seven years would elapse the day before the seventh anniversary, and a petition filed on the seventh anniversary would be too late because more than seven years would have elapsed. The distinction should be made between the computation of the time within which a right may begin and the computation of the time within which a right shall end. The method of arriving at the computation is to be in the interest of the person affected by it. The United States is the interested party in legislation with respect to duties, and therefore it is well that the terminus a quo should be included.

In Griffith v. Bogert, supra, there was under consideration a law of Missouri which allowed lands of a deceased debtor to be sold under execution, but prohibited it from being done until after the expiration of 15 months from the date of the administration upon his estate. Letters of administration were dated on the 1st of November, 1819, and a sale took place on the 1st of May, 1821. It was held that the sale was valid. There the terminus a quo was included. That was the earliest date at which the right to sell arose.

In Taylor v. Brown, supra, there was under consideration a section of the act forbidding the alienation of public lands acquired by an Indian, which provided that lands so acquired should remain inalienable for a period of five years from the date the patent issued therefor. The patent was issued June 15, 1880. The deed was made and recorded June 15, 1885. The court sustained the deed and included the terminus a quo.

Taking up the limitation as to when the right to file the petition would expire, we are constrained to believe that the terminus a quo should be excluded.

In re Martin (D. C.) 4 Fed. 208, Judge Acheson had under consideration the computation of time in the consideration of the mechan-

ic's lien law of Pennsylvania, which provided for a lien for six months after the work shall be completed, but further provided that:

"Such lien shall not continue longer than the said period of six months, unless a claim be filed as aforesaid, at or before the expiration of the same period."

He held that where the last work had been done on October 5, 1874, and the claim filed April 5, 1875, that the lien was not lost. He uses the following language:

"This construction of the mechanic's lien law is in accord with all the later authorities upon the vexed question of the computation of time. Cromelien v. Brink, 29 Pa. 524. Thus it was decided in Green's Appeal, 6 Watts & S. [Pa.] 327, that under the act of the twenty-sixth of March, 1827, the five years from the day of the entry of a judgment within which it must be revived by scire facias are exclusive of the day on which the judgment was entered. And in Menges v. Frick, 73 Pa. 137 [13 Am. Rep. 731], it was held that where a debt was due October 6, 1862, suit brought October 6, 1868, was in time to escape the bar of the statute of limitations. 'Time is to be computed excluding the day on which the act is done from which the count is made' is the rule as expressed in Brisben v. Wilson, 60 Pa. 452."

While there is no fixed rule for the inclusion or exclusion of the terminus a quo in the computation of time, there does seem to be the view that the dies quo shall be either included or excluded, as the case may be, in order to preserve some right which otherwise would be destroyed. Applying this rule to the case before us, we believe that the day of the date of the declaration should be excluded in computing the seven years, and that, inasmuch as the petition was filed upon the seventh anniversary of that date, it should be received by the court.

THE ATLANTIC CITY.

(District Court, D. Maryland. January 30, 1914.)

SHIPPING (§ 84*)—LIABILITY OF VESSEL FOR INJURY TO STEVEDORE—DEFECTIVE APPLIANCE.

Libelant, while working as a longshoreman in unloading a vessel, was injured by the breaking of a rope sling used to hoist bags of nitrate from the hold, which caused the load to fall on libelant. The sling was furnished by the ship, and the evidence tended to show that the rope was new and of sufficient size and strength, if sound, but, when produced in court by respondent, there was an obvious defect near where it broke, and there was no evidence that it had been inspected or that it was not defective at the place where it broke. *Held* that, in the absence of such evidence, the ship was liable for the injury.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 342, 349–351; Dec. Dig. § 84.*]

In Admiralty. Suit by William L. Evans against the steamship Atlantic City. Decree for libelant.

Arthur D. Foster and Daniel B. Chambers, both of Baltimore, Md., for libelant.

Harry N. Abercrombie and Jacob France, both of Baltimore, Md, for respondent.

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

ROSE, District Judge. While the libelant was employed as longshoreman, he received the injuries for which in this case he sues. He was helping to unload a cargo of nitrate. He was working in the hold. The nitrate was in bags. Each bag and its contents weighed about 200 pounds. The longshoremen placed eight of these bags on a rope sling spread out on the floor of the hold under the hatch. The rope ends of the slings were then hooked over the falls. At a signal the sling and its contents were hoisted by steam power controlled by the winchman. There is no dispute as to the immediate cause of the accident. A rope of the sling broke while a load was going up. It and the eight bags in it fell on the libelant. The sling was furnished by the ship. The unloading of the nitrate had begun about 1 p. m. on the day preceding the accident. The libelant and the gang to which he belonged were on that day, which was April 18th, working in No. 4 hatch. On the morning of the 19th they were transferred to the bunker hatch. A number of them have been examined as witnesses for the libelant. They agree that they took with them to the bunker hatch the same slings which they had been using at No. 4. These slings appeared to them to have been new when, on the 18th, they were first put in use. They all thought that the rope of which the slings were made was smaller than those who had had previous experience in such work thought was usual.

The libelant himself had never been employed where slings were used. Although a man of mature years, he had worked as a stevedore for only six months. It so happened that he had always previously been employed in vessels and on cargoes in which another method of discharge had been used. The mate of the ship had been examined by deposition. He had testified that, when the longshoremen's gang had moved to the bunker hatch, he had been asked for more slings. He at once ordered new rope. When it arrived, the boatswain made the needed slings. They were put in use at 9 o'clock of the morning of the accident. It happened about ten minutes before noon. If he was accurate in this respect, the sling which broke had been in use about three hours. Immediately after the accident, according to his account, he went down into the hold. The stevedores said he did not go but sent a sailor. In any event, the sling at once was taken into his possession. What he identified as this sling was produced in court. Libelant's witnesses all say that it was made of larger rope than the one which was actually used and which in fact broke. Most of them seem to think that the difference in size was not great. The witnesses for the ship prove that it was usual to use for the purpose either 2¾ or 3 inch rope; that such rope was strong enough to hoist with safety several times as much weight as was put on the sling in question. The sling produced by the mate was of 3-inch rope. On the 18th of April the ship had bought a quantity of such rope. Upon its production in court it appeared that the rope in the sling which the mate said was the one which broke had, at a point some 18 inches or 2 feet from that at which it had broken, another visible defect in it. The ship's husband was himself the experienced officer of a stevedoring company. He thought the defect looked as if it had been in the rope since it was made. The foreman of stevedores, also a witness for the ship, thought

it might have been caused by use. He, however, thought that to cause it would have required longer use than the mate said the rope had had. Other witnesses for the ship were of the opinion that the defect might conceivably have been caused by particular kinds of hard usage if the rope had been subject to such usage. There was no evidence that it had been. There was no testimony that the rope, before being put in use, had been inspected. The boatswain who had made up the slings was not produced as a witness. The ship had furnished the rope. If it was defective, the ship was liable unless the defect was latent and not discoverable on reasonable inspection. If it had been free from patent defect, it would have been easy for the ship to prove it. At the close of the testimony, I intimated an opinion to that effect. The advocates for the ship asked for an adjournment to the end that they might endeavor to locate the boatswain and put him on the stand. The accident had taken place more than nine months before. Where he was at the time of the trial was not stated, and doubtless was not at the moment known to the ship's proctors. Nothing was said as to how long it would take to get him. Moreover, the issue had become too important and his recollection of the circumstances in all probability too vague to make a statement from him on the subject now of much value. I declined, therefore, to postpone the case for the purpose of hunting him up. On request of the ship's proctors I did grant a two days' postponement for the purpose of having the plaintiff examined by a medical man of their selection; the libelant having already offered at the trial his own medical testimony. At the examination of the surgeon produced by the ship, its proctors requested a further postponement to permit them to have the rope examined by experts in order that they might take their testimony as to the probable cause of the defect in it. They had had the rope in their possession or under their control ever since the accident. The question whether the rope was in proper condition when furnished was always a vital issue in the case. It did not seem reasonable or fair to the libelant to further postpone the trial for this purpose.

If the libelant's witnesses are right that an unusually small rope was used, that circumstance would have explained the accident and would have made the ship liable. I think they probably are wrong and that the rope produced by the mate was that actually used. It ought not to have broken if it had been well made, and, according to all the defendant's witnesses, could not. As produced in court, it appeared to be defective. This defect would have been obvious to any one who had made such an inspection of the rope, as the ship was bound to make before putting it in use. It must therefore be held liable.

Libelant says he is about 42 or 45. He appears to be older. His leg was broken at a point near the knee joint. A piece of the broken bone has never reunited itself. His leg has been shortened by an inch. He can use it, but it is very doubtful whether he will ever be able to do any hard manual labor again.

I think an allowance of $2,500 should be made.

STRATTON v. HUGHES.

(District Court, D. New Jersey. March 6, 1914.)

PROCESS (§ 120*)—ATTENDANCE TO TESTIFY—NATURE OF PROCEEDING—SERVICE OF CIVIL PROCESS—PROTECTION.

P. L. N. J. 1906, c. 113, p. 177, and certain supplementary and amendatory acts in addition to regulating the use of road and highways by motor vehicles, constitutes the Commissioner of the Department of Motor Vehicles a magistrate to determine and hear complaints, and empowers him to enforce his findings by suspending touring privileges, revoking licenses, and by fine or imprisonment, according to the particular violation. *Held*, that a hearing before the commissioner was judicial in character and purpose, and hence a citizen of another state, having come into New Jersey to testify before the commissioner on such hearing, was not subject to service of civil process while so in attendance, nor during a reasonable period for coming and going.

[Ed. Note.—For other cases, see Process, Cent. Dig. § 150; Dec. Dig. § 120.*]

At Law. Action by Howard V. Stratton against David N. Hughes. On motion to set aside service of process. Granted.

Harold B. Wells, of Bordentown, for plaintiff.

Gaskill & Gaskill, of Camden, N. J., for defendant.

RELLSTAB, District Judge. The service of the summons in this case was made on the defendant, a resident of Pennsylvania, while he was in this district attending a hearing before the Commissioner of Motor Vehicles of the Department of State of New Jersey, based on a complaint made against him by the plaintiff in this case, charging him with improper driving of an automobile upon the highways in this state. Upon receiving such complaint, the commissioner caused to be served upon the defendant, by mail, a notice to appear before him in Trenton on a certain day. The record shows that the defendant did not appear on that day, but that the plaintiff did, accompanied by counsel and the United States marshal of this district, that the cause was continued to the 5th day of November, 1913, at which time both the defendant and the plaintiff appeared, the latter again accompanied by counsel and the United States marshal, and that a full hearing upon such complaint was had. It was at this hearing that the challenged service was made.

The defendant was amenable to the state statute, entitled:

"An act defining motor vehicles and providing for the registration of the same and the licensing of the drivers thereof; fixing rules regulating the use and speed of motor vehicles; fixing the amount of license and registration fees; prescribing and regulating process and the service thereof and proceedings for the violation of the provisions of the act and penalties for said violations," approved April 12, 1906 (P. L. N. J. 1906, c. 113, p. 177)

—and the several acts supplementary thereto and amendatory thereof, which, in addition to regulating the use of the roads and highways by motor vehicles, constitutes the commissioner a magistrate to hear and determine complaints of violations of such acts, and

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

empowers him to enforce his finding by suspending touring privileges, revoking licenses, and by fine or imprisonment, according to the particular violation found. That the commissioner was acting within such statutory powers in citing the defendant to appear before him, and in proceeding to a hearing and final determination of the said complaint, is not disputed. The defendant's appearance before the commissioner, in response to this summons, was not his right only, but his duty, and the hearing that ensued was judicial in its character and purpose. It is in the interest of the administration of justice, whether it is being conducted before a tribunal having extended, or one having limited, judicial powers, that the person who comes from another state in response to a summons from such a tribunal, whether as a witness or party, be held immune from service of civil process while he is in attendance upon such tribunal, and for a reasonable time in coming and going. 32 Cyc. 492. In Roschynialski v. Hale (D. C.) 201 Fed. 1017, 1018, the reason for such rule is stated thus:

"It is to secure to them the right to give testimony and assistance in the trial of an action, unhindered by exposure to suits by reason of their presence upon the court. The rule is founded in public policy, and is for the benefit of the court, as well as of the parties."

And, in Mulhearn v. Press Publishing Co., 53 N. J. Law, 153, 21 Atl. 186, 11 L. R. A. 101, it was said:

"The reason which underlies the privilege of witnesses is that no one may be deterred from attending the place of trial and delivering his testimony by reason of a liability to be sued in a foreign or distant jurisdiction. * * *

"The immunity extends to every person who in good faith attends as a witness any place where testimony is to be taken according to the practice of the courts to be used in establishing the rights of a party in any judicial proceeding."

The rule should be as comprehensive in its application as the reason for its existence. Not the name, but the function, of the tribunal controls. If it is charged with the duty of enforcing the law, investigating complaints of alleged violations, empowered to summon parties and witnesses, and to hear and determine the issues raised by such complaints, it is a court within the reason and spirit of the rule, and therefore within its meaning. This rule has been held broad enough to include witnesses before commissions issued by a court (Mulhearn v. Press Publishing Co., 53 N. J. Law, 153, 21 Atl. 186, 11 L. R. A. 101), referees in bankruptcy (Morrow v. U. H. Dudley & Co. [D. C.] 144 Fed. 441), in summary dispossession proceedings under a landlord and tenant statute (Richardson v. Smith, 74 N. J. Law, 111, 65 Atl. 162), a party conferring with counsel pending an argument of a demurrer (Kinne v. Lant, 68 Fed. 436), witnesses coming into a state for the purpose of giving depositions before a notary, whether in pursuance of an order of the court or an agreement of counsel (Roschynialski v. Hale [D. C.] 201 Fed. 1017), and also witnesses before a legislative committee (32 Cyc. 493); and no good reason appears why it should not include the defendant while he attended such hearing. The commissioner had all the powers of a court of justice necessary to hear and determine the particular issue then before him, and the

defendant, as a party thereto, was immune from service of civil process while attending such proceeding.

The attendance of the United States marshal before the commissioner, on both of the days referred to, is cited as indicating that the proceedings were instituted for the purpose of getting the defendant in this district, that such service might be had. It is not necessary, however, to give consideration to this contention, as the defendant's right to immunity from this service is justified by the reasons given.

The motion to set aside the service is allowed.

In re CENTI.

(District Court, W. D. Tennessee, W. D. January 20, 1914.)

No. 101.

ALIENS (§ 62*)—NATURALIZATION—DISQUALIFICATION.

An alien who for 12 or 15 years habitually violated the election laws by voting, with knowledge that he was not qualified, was not attached to the principles of the Constitution and well disposed to the good order and happiness of the United States, within Act June 29, 1906, c. 3592, § 4, subsec. 4, 34 Stat. 596 (U. S. Comp. St. Supp. 1911, p. 529), requiring proof that an applicant for citizenship has resided continuously within the United States for at least five years, and within the state or territory for at least one year, during which time he has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness thereof, and hence naturalization would be denied.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 123–125; Dec. Dig. § 62.*]

Petition by Bartolomeo Centi for naturalization. Petition denied.

Yandell Haun, Asst. U. S. Atty., for the United States.

McCALL, District Judge. On May 12, 1910, Bartolomeo Centi, an alien, filed in this court his declaration of intention to be naturalized. The case came on to be and was heard January 10, 1914. The applicant met all the necessary requirements to be naturalized, except by his own testimony he showed that he had been exercising the right of franchise for some 12 or 15 years. That he had voted regularly in national, state, and county elections held in Haywood county, Tenn., with the knowledge, for several years, that he was not a qualified voter, and had no right to vote. Finally, his vote was challenged, and thereupon he made this application for naturalization.

Section 4, subsec. 4, of an act to provide for a uniform rule for the naturalization of aliens, etc., approved June 29, 1906, provides that:

"It shall be made to appear to the satisfaction of the court admitting any alien to citizenship that immediately preceding the date of his application he has resided continuously within the United States five years at least, and within the state or territory where such court is at the time held one year at least, and that during that time he has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same."

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

Thus it is that an alien applying for citizenship in the United States must, among other things, make it appear to the satisfaction of the court before which his application is pending that, during the time he is required to reside in the United States before being naturalized, "he has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same."

The question is: Does the evidence, in substance stated above, meet the requirement of the law? I am unable to bring my mind to the conclusion that an alien, who is shown by his own testimony to have been an habitual violator of the election law, is attached to the principles of the Constitution of the United States, and is well disposed to the good order and happiness of the same. Without naturalization an alien can exercise and enjoy all the privileges and blessings of a citizen except the franchise and the right to hold office. It cannot be truthfully said that one is well disposed to the good order and happiness of a government whose laws he habitually and knowingly violates. Voting and holding office are amongst the very highest and most sacred rights exercised by the citizen, and, if an alien shall exercise such rights knowing that he is not entitled so to do, it would seem that he is not attached to the principles of this government, in the sense that I understand the term is used in the statute.

Not only so, but if an alien disregards the laws of the government of which he seeks to be made a citizen, and tramples them under his feet, before he is naturalized, what evidence is there that he will not continue in the same course after naturalization?

Unhappily too great a percentage of those who are citizens by right entertain very little respect for the law, and certainly this number should not be increased by admitting aliens to citizenship who are shown to have been habitual violators of the laws of the country during their five years of probation. In the very nature of things such a new-made citizen could entertain but slight respect for the laws and institutions of his adopted country. The alien who seeks the privileges and blessings which citizenship in this country brings should make it appear to the court not only that he believes in our form of government, but that during his five years of probation he has made his conduct substantially conform to its laws, as well.

Entertaining these views, under the evidence in this case, I am constrained to deny the application of Bartolomeo Centi for naturalization.

WELLES et al. v. PORTUGUESE-AMERICAN BANK OF SAN FRANCISCO.

(Circuit Court of Appeals, Ninth Circuit. March 9, 1914.)

No. 2273.

1. MECHANICS' LIENS (§ 113*)—SUBCONTRACTORS' RIGHTS—NOTICE TO OWNER—NATURE OF REMEDY.

Code Civ. Proc. Cal. § 1184, provides that a subcontractor may give to the reputed owner a written notice that he has performed labor or furnished material, or both, to the contractor, and, such notice being given, it shall be the duty of the person who contracted with the contractor to withhold sufficient money to answer the claim and any lien that may be filed thereafter, etc. *Held*, that the remedy so provided was disconnected from and additional to the subcontractor's right to a lien on the structure; the notice operating as an assignment pro tanto of that which is due or to become due the contractors, which amount is sequestered as though under garnishment.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 148; Dec. Dig. § 113.*]

2. MECHANICS' LIENS (§ 114*)—SUBCONTRACTORS—NOTICE TO OWNER—EFFECT.

Notice by a subcontractor to the owner to withhold money due the contractor to pay the claim of the subcontractor, as authorized by Code Civ. Proc. Cal. § 1184, does not affect claims that have previously become due and have been transferred by the contractor for value.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 149; Dec. Dig. § 114.*]

3. MUNICIPAL CORPORATIONS (§ 1001*) — CLAIMS — PRESENTATION — CHARTER PROVISIONS—APPLICATION.

City Charter of San Francisco, art. 2, c. 1, § 19, provides that all demands payable out of the treasury must be approved by the board of supervisors before they can be approved by the auditor, or paid by the treasurer, and that all demands for more than $200 shall be presented also to the mayor for his approval, and all resolutions directing the payment of money other than salaries or wages amounting to $500 shall be published, etc. *Held*, that such provisions had no application to payments due under a contract with the board of public works for the construction of a public improvement.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 2173; Dec. Dig. § 1001.*]

4. MUNICIPAL CORPORATIONS (§ 373*)—PUBLIC IMPROVEMENTS—CONTRACTS—PROGRESS PAYMENTS.

Where a contract for the construction of a sewer for a municipal corporation provided that the contractor should not either legally or equitably assign any of the money payable under the contract or his claim thereto, without the consent of the board of public works, a progress payment under the contract was not assignable without such consent as against the rights of a subcontractor to sequester the same by notice to the city, as authorized by Code Civ. Proc. Cal. § 1184.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 913; Dec. Dig. § 373.*]

Appeal from the District Court of the United States for the First Division of the Northern District of California; Frank S. Dietrich, Judge.

Suit by Paul I. Welles against the Portuguese-American Bank of San Francisco, the Metropolis Construction Company, the Auditor of

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

the City and County of San Francisco, and John Daniel, the bankrupt's trustee, to enforce a subcontractor's lien on money due to the construction company by the city as a fourth progress payment on the price of the construction of a sewer. Judgment for the bank, and complainant, Welles, and the construction company's trustee in bankruptcy appeal. Reversed and remanded with directions to enter a decree for complainant Welles.

The controversy herein concerns a fund of $6,830.85, which became payable as the fourth progress payment to the Metropolis Construction Company, for work in constructing a sewer under a contract with the board of public works of the city and county of San Francisco. On or before December 5, 1910, the construction company made a claim for that sum as due under its contract. On December 5th the board of public works by resolution approved the claim. On the same day the construction company presented to the appellee a certified copy of the resolution, together with two other such resolutions of dates prior thereto, approving claims aggregating about $38,000, also a paper addressed to the city auditor, of date December 5, 1910, notifying him that the appellee was authorized and empowered to draw warrants in favor of the construction company for the payments on the contract. The appellee thereupon loaned to the construction company $35,000. The claim for the fourth progress payment was not approved by the board of supervisors or the mayor until January 3 and 4, 1911, nor did that board or the mayor receive notice of the order of the construction company on the auditor or of the rights of the appellee thereunder until December 19, 1910. In the meantime, on December 12th and 16th, the appellant Welles, who was a subcontractor on the sewer work, gave a notice to the auditor, to the board of public works, and to the board of supervisors, to withhold from the construction company the fourth progress payment of $6,830.85 under the provisions of section 1184 of the Code of Civil Procedure. On December 17, 1910, the appellee notified the auditor, the board of public works, and the supervisors that it claimed an assignment from the construction company of the fourth progress payment. On December 19, 1910, a petition in bankruptcy was filed against the construction company, and on January 5, 1911, it was adjudged a bankrupt. On January 26, 1911, the appellee began an action in the superior court of the state of California against the auditor to recover the money in controversy.

On April 18, 1911, Welles began the present suit in equity against the appellee, the bankrupt, the auditor, and the trustee in bankruptcy. Thereupon an order was made requiring the defendants in this suit to show cause why the auditor should not pay the money to the trustee to abide the result of the suit, and to show cause why the appellee should not be enjoined from prosecuting its action. The auditor and the appellee made return to the order. On July 11, 1911, the cause was referred to a referee to hear testimony and find facts on the order to show cause. On October 14, 1911, the referee made his report finding the facts, and no objections having been taken thereto the report was confirmed on December 12, 1911, and an order was made enjoining the appellee from prosecuting its action in the state court, and directing the auditor to pay the $6,830.85 to the trustee in bankruptcy to abide the result of the suit. In the meantime, on October 6, 1911, the bankrupt filed its answer to the bill of complaint. On December 26, 1911, the cause was referred to the referee on final hearing to hear testimony and proof and find facts upon the issues arising on the pleadings. On March 8, 1912, the referee filed a brief report to the effect that his former findings as confirmed were res adjudicata. To that report the appellee filed exceptions. On April 15, 1912, the exceptions were sustained, and the cause was again referred to the referee to ascertain and report the facts and his conclusions of law on the testimony taken and on file. On July 16th he reported his findings of fact, finding that the fourth progress payment was assigned to the appellee and that the right of the appellee to receive the same was not affected by the notices to withhold made by the appellant Welles. This report was subsequently confirmed. From the decree thereon rendered the present appeal is taken.

A. F. Morrison, P. F. Dunne, W. I. Brobeck, Gavin McNab, B. M. Aikins, and Milton J. Green, all of San Francisco, Cal., for appellant Daniel.

C. A. S. Frost, of San Francisco, Cal., for appellant Welles.

George A. Knight, Charles J. Heggerty, James B. Feehan, Joseph W. Beretta, all of San Francisco, Cal., for appellee.

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

GILBERT, Circuit Judge (after stating the facts as above). [1] The appellant Welles contends that he is entitled to priority by virtue of his notice to withhold, which was given under section 1184 of the Code of Civil Procedure. That section provides, in substance, that a subcontractor may at any time give to the reputed owner a written notice that he has performed labor or furnished material, or both, to the contractor, which notice shall contain, among other things, the amount and value of that which has been furnished by the subcontractor, and that upon such notice being given it shall be the duty of the person who contracted with the contractor to withhold from the contractor "sufficient money due or that may become due to such contractor or other person to answer such claim and any lien that may be filed thereafter for record under this chapter, including counsel fees not exceeding $100 in each case, besides reasonable costs provided for in this chapter." The remedy thus provided for is disconnected from and additional to the remedy by lien upon the structure, and it has been held that it should be regarded with favor by the courts (Bates v. Santa Barbara County, 90 Cal. 543, 27 Pac. 438), that the notice operates as an assignment pro tanto of that which is due or to become due to the originl contractor, and that that amount is sequestered as though under garnishment (Hampton v. Christensen, 148 Cal. 729, 84 Pac. 200).

[2] But the notice to withhold does not affect claims that have previously become due and have been transferred for value by the contractor. Newport Wharf & Lumber Co. v. Drew, 125 Cal. 585, 58 Pac. 187. In the case last cited the court said:

"The contractor cannot prevent the effect of this notice as to any payments that may mature after it is given, but its effect upon payments that have matured before it is given, but which have not been made, is to be determined by the rights of the contractor in reference to them. If he is still entitled to demand their payment from the owner, such payment is intercepted by the notice; but, if he has already assigned them to a third party, the notice will be inoperative to prevent their payment to such party."

And referring to the contract under consideration in that case, the court said:

"The contract provided that the work should be done to the satisfaction of the board of trustees, and the contractors were not entitled to demand payment of the amount of the estimate until after such approval and acceptance. Their approval of the estimate and direction for its payment implied their satisfaction with the work without any formal declaration to that effect. Upon such approval and direction the obligation of the state which had been created in favor of the contractors by the trustees became complete, and the

right of the contractors to immediate payment became vested in them and was subject to their disposition. The provision in the contract for payment of the contract price in Comptroller's warrants on the State Treasurer did not affect this power of disposition, or right to immediate payment, or suspend its exercise until such warrants should be obtained."

[3] It is urged that the fourth progress payment in the present case was not due, and that the demand of the construction company therefor did not mature by virtue of the resolution of the board of public works, that there still remained to be obtained the approval of the board of supervisors and of the mayor. Reference is made to the city charter then in force (article 2, c. 1, § 19), which provides that all demands payable out of the treasury must be first approved by the board of supervisors before they can be approved by the auditor or paid by the treasurer, and that all demands for more than $200 shall be presented also to the mayor for his approval, and that all resolutions directing the payment of money other than salaries or wages when the amount exceeds $500 shall be published for five successive days, Sundays and legal holidays excepted, in the official newspaper. The contract in this case, however, was not made directly with the city. It was made between the construction company and the board of public works under authority granted to that board by the charter. That board was given therefore the power to decide that the conditions of the contract had been fulfilled and to approve claims for work done thereunder and to direct the payment of the same. The provision of that charter in regard to approval by the supervisors and mayor was a general precautionary measure prescribed as to all payments of money by the city, and it was intended only for the greater protection of the city. It had not the effect to vest in that board or the mayor authority to determine whether contracts had been complied with or whether payments had become due thereunder in cases where such power had been expressly delegated to the board of public works. The provision for the approval of the board of supervisors and the mayor, as related to the present case, stands upon the same plane as the contractual provision which was under review in Newport Wharf & Lumber Co. v. Drew, providing for the payment of the contract price in comptroller's warrants to be drawn on the state treasurer.

[4] If therefore the appellee was on December 5, 1910, the assignee in good faith for value, of the fourth progress payment, its equities are superior to those of the appellant Welles. But it is urged that it was not such an assignee, that the contract in express terms provided that without the consent of the board of public works the contractor "shall not either legally or equitably assign any of the moneys payable under this contract or his claim thereto," and that the board neither knew nor assented to the assignment. The question arises whether this provision of the contract makes void the assignment which was made to the appellee.

"A contract to pay money may doubtless be assigned by the person to whom the money is payable, if there is nothing in the terms of the contract which manifests the intention of the parties to it that it shall not be assignable." Delaware County v. Diebold Safe Co., 133 U. S. 473, 488, 10 Sup. Ct. 399, 404 (33 L. Ed. 674).

In Devlin v. Mayor, etc., of New York, 63 N. Y. 8, Judge Allen said:

"Parties may, in terms, prohibit the assignment of any contract and declare that neither personal representatives nor assignees shall succeed to any rights in virtue of it, or be bound by its obligations."

The appellee cites cases to the proposition that a provision whether contained in the instrument itself, or expressed in a statute, forbidding the assignment of the contract, or of any interest therein, does not stand in the way of a transfer of the moneys which have become due or are to become due the contractor thereunder. Mueller v. Northwestern University, 195 Ill. 236, 63 N. E. 110, 88 Am. St. Rep. 194; Lowry v. City of Duluth, 94 Minn. 95, 101 N. W. 1059; Norton v. Whitehead, 84 Cal. 263, 24 Pac. 154, 18 Am. St. Rep. 172. Those decisions are based upon the proposition that the thing assigned is not the precise thing which is forbidden to be assigned. They are not directly applicable to the contract under consideration here, for the reason that here the prohibition is not against the assignment of the contract, but against the assignment of the moneys payable thereunder without the consent of the board of public works. Cases are cited also which hold that, where the contract prohibits assignment, an assignment for security is not within the prohibition. Fortunato v. Patten, 147 N. Y. 277, 41 N. E. 572; Crouse v. Mitchell, 130 Mich. 347, 90 N. W. 32, 97 Am. St. Rep. 479; Butler v. Rockwell, 14 Colo. 125, 23 Pac. 462. Those cases are not in point for the reason that here the prohibition is against both the legal and the equitable assignment of the moneys.

It is contended further that such a provision against assignment is intended for the benefit of the city alone, and that no one else can complain of its breach. Fortunato v. Patten, 147 N. Y. 277, 41 N. E. 572, is cited as a case in which it was so held. But in Burck v. Taylor, 152 U. S. 635, 14 Sup. Ct. 696, 38 L. Ed. 578, where a contract with a state for the erection of a public building was made unassignable by express stipulation, it was held that an attempted transfer of an interest in the contract without the state's consent was ineffectual further than to give a right of action against the contractor for a measure of the profits. It is argued, however, that that case is to be distinguished from the case at bar in that there was an absolute covenant on the part of the contractor in that case that the contract should not be assigned in whole or in part without the consent of the state. But the contract in the present case having been assented to in all its terms by the contractor is as binding upon him as if his obligations had been affirmatively expressed in a covenant to abide by the same. In Burck v. Taylor, the court said of the provision against assignment:

"It may be conceded that, primarily, it was a provision intended, although not expressed, for the benefit of the state, and to protect it from interference by other parties in the performance of the contract, to secure the constant and sole service of a contractor with whom the state was willing to deal, and to relieve itself from the annoyance of claims springing up during or after the completion of the contract in favor of parties of whose interest in the contract it had no previous knowledge, and to the acquisition of whose interests it had not consented. Concede all this, and yet it remains true that

it was a stipulation which was one of the terms of the contract and binding upon the contractor, and equally binding upon all who dealt with him."

We see no reason why this provision of the contract under consideration shall not be given the meaning and effect which its words import. It plainly stipulates against the assignment of the payments. There must have been substantial grounds for embodying such a provision in the contract. We may assume that one of the purposes, and probably the principal purpose thereof, was to protect subcontractors in their equitable rights to the unpaid funds in the hands of the city in case notice should be given under section 1184, and to afford such subcontractors better opportunity to secure payment for that which they might contribute to the work which was under construction, as well as on behalf of the city to avoid the possible complications and litigation that might attend the transfer to another of the payments accruing under the contract. In a similar case the Supreme Court of Nebraska said:

"But it is needless for us to speculate on the motives for the city's action. It is enough for us to know—whatever its reasons may have been—that it has, in plain language, stipulated against an assignment of the contract. * * * To hold that it covers some, but not all, of the rights and obligations arising out of the contract, would be, it seems to us, an inexcusable perversion of its terms." City of Omaha v. Standard Oil Co., 55 Neb. 337, 75 N. W. 859.

And again in Murphy v. City of Plattsmouth, 78 Neb. 163, 110 N. W. 749, that court held that, where a contract with a city for a public improvement expressly provides that it shall not be assigned, such provision is enforceable, and an assignee thereof cannot recover the money due thereunder, or any part thereof. In 20 Am. & Eng. Enc. of Law, 1156, it is said:

"It is frequently provided by charter or statute, or the contract itself, that a contract with a municipality shall not be assigned without the consent of the city, and such a provision is valid and operative according to its terms" —citing Deffenbaugh v. Foster, 40 Ind. 382; Suburban Electric Light Co. v. Hempstead, 38 App. Div. 355, 56 N. Y. Supp. 443.

In the first of the cases so cited it was held that, where a contract for street improvement contained a provision that the contract should not be assigned without the consent of the common council, no one besides the contractor can maintain an action thereon in the absence of the common council's consent. The second case is of similar import.

The decree is reversed, and the cause is remanded, with instructions to enter a decree for the appellant Welles.

NORFOLK & W. RY. CO. v. HAUSER.

(Circuit Court of Appeals, Fourth Circuit. March 11, 1913. Rehearing Denied June 11, 1913. Application for Writ of Certiorari Denied by Supreme Court November 11, 1913.)

No. 1,136.

1. MASTER AND SERVANT (§ 265*)—INJURIES TO EMPLOYÉ—BURDEN OF PROOF.
   In an action for damages for negligence, brought by an employé or party as to whom the rule of res ipsa loquitur does not apply, the burden is primarily on plaintiff to establish the negligence charged, which cannot be inferred merely from the fact of injury.
   [Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 877-908, 955; Dec. Dig. § 265.*]
2. TRIAL (§ 141*)—QUESTIONS OF LAW OR FACT—DIRECTION OF VERDICT.
   It is the duty of the trial judge to direct a verdict at the close of the evidence, whenever it is wholly undisputed or but a single inference can be drawn therefrom by reasonable men, so that the court in the exercise of a sound judicial discretion would be compelled to set aside a verdict returned in opposition thereto.
   [Ed. Note.—For other cases, see Trial, Cent. Dig. § 336; Dec. Dig. § 141.*]
3. NEGLIGENCE (§ 136*)—QUESTIONS OF LAW OR FACT—SUBMISSION OF CASE TO JURY.
   The test to be applied in determining whether it is the duty of the court to submit a question of negligence to the jury is not how the preponderance of the testimony may be in the court's opinion, but whether the evidence is sufficient to sustain an inference by the jury, since, if different inferences may fairly be drawn from the evidence by reasonable men, the jury, and not the judge, should be permitted to draw that inference.
   [Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 277-353; Dec. Dig. § 136.*]
4. EVIDENCE (§ 595*)—WEIGHT—INFERENCES.
   While a jury may not guess or conjecture as to possible explanations to account for a result, when such conjecture or explanation is not supported by any reasonable inference from the testimony in the case, yet when the cause of the occurrence cannot be shown by positive testimony, the jury may draw inferences from circumstances contemporaneous with or surrounding the occurrence; the only question being whether such circumstances afford any reasonable ground on which a jury in the exercise of its functions can draw an inference.
   [Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2444, 2445; Dec. Dig. § 595.*]
5. NEGLIGENCE (§ 136*)—TRIAL—QUESTION FOR COURT OR JURY.
   An action for negligent injury is not to be lightly taken from the jury, since ordinarily negligence is so far a question of fact as to be properly submitted to and determined by the jury as the triers of the facts.
   [Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 277-353; Dec. Dig. § 136.*]
6. TRIAL (§ 18*)—TRIAL JUDGE—DUTY.
   A trial judge is primarily responsible for the just outcome of a trial.
   [Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 37, 42½; Dec. Dig. § 18.*]

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

7. APPEAL AND ERROR (§ 927*)—PEREMPTORY INSTRUCTION—DENIAL—REVIEW.
Action of the trial judge in declining to give a peremptory instruction for a verdict one way or another will not be reversed on appeal, unless clearly improper.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2912, 2917, 3748, 3758, 4024; Dec. Dig. § 927.*]

8. MASTER AND SERVANT (§ 286*)—INJURY—EVIDENCE—QUESTION FOR JURY.
In an action for death of an engineer, caused by the squeezing of his engine between another engine, much larger in size, in front and a loaded coal train in the rear, evidence *held* to authorize submission to the jury of the question of the railroad company's negligence in placing decedent's small engine in such position.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010–1050; Dec. Dig. § 286.*]

Dayton, District Judge, dissenting.

In Error to the District Court of the United States for the Western District of North Carolina, at Greensboro; James E. Boyd, Judge.

Action by Cora E. Hauser, as administratrix of Robert A. Hauser, deceased, against the Norfolk & Western Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

J. C. Buxton, of Winston-Salem, N. C. (Watson, Buxton & Watson, of Winston-Salem, N. C., Theodore W. Reath and F. Markoe Rivinus, both of Philadelphia, Pa., on the brief), for plaintiff in error.

Lindsay Patterson and E. B. Jones, both of Winston-Salem, N. C. (Jones & Patterson, of Winston-Salem, N. C., on the brief), for defendant in error.

Before PRITCHARD, Circuit Judge, and DAYTON and SMITH, District Judges.

SMITH, District Judge. The defendant in error brought an action at law for damages against the plaintiff in error on the 14th of February, 1908, for injuries claimed to have been inflicted by the plaintiff in error's negligence on the 20th of March, 1907. The deceased, Robert A. Hauser, was employed as an engineer by the Norfolk & Western Railway Company. On the 23d day of March, 1907, he was employed to run an engine operating on a train of the railway company running from Portsmouth, Ohio, to Columbus, Ohio. The train as made up was what is called a double header; that is, it consisted of 37 loaded coal cars, and the motive power was furnished by two engines at the head of the train, of which the second engine from the head was being operated by the deceased, Robert A. Hauser. The train was made up and the place of the engine designated by a superior officer of Hauser. At or near Clifford, Ohio, the engineer of the front engine attempted to bring the train to a stop to avoid colliding with the rear of a train in front of him, and applied his air brakes, but according to his statement discovered that the air brakes failed to work, whereupon he reversed his engine, and did all in his power to stop the train. Thereupon the car in the rear of the second engine, being forced forward by the momentum of the train which was endeavored to be stopped, was thrust

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

forward upon the tender of the second engine, mounted upon the trucks and platform of this tender, drove the water tank on the tender loose from its fastenings, pushed it forward on and over the cab of the engine, and thereby inflicted such injuries upon the deceased that he died in consequence. The particular acts of negligence charged in the complaint against the defendant in this case were that the deceased was operating an engine which had no pilot, was much smaller in size than the front engine, was used only for the purposes of a yard or shifting engine, and was old and weak and dilapidated, and not in condition to stand the pressure of the weight of the loaded train upon a sudden stoppage; that it was negligence to place it between the front engine, which was larger and heavier, and the train of loaded cars; and that it was further negligence to place an engine unfitted to stand the squeeze or pressure between a heavy engine, reversed so as to come to a stop, and a train of heavily loaded coal cars, as the possibility of it happening that the train would come to a sudden stop might occur, and in such a case no engine should be placed in that position that could not stand the impact. In other words, the act of negligence alleged may be said to be that the placing between a larger and heavier engine, in good condition and a long train of loaded freight cars, of an engine tender too weak to stand the pressure or impact that might exist consequent upon attempted sudden stoppage of the train, was an act of negligence. The other acts of negligence alleged consist in the charge that it was negligence to place the smaller engine in the rear of a larger engine in running a double header under the circumstances of this case, and, next, that the railway company negligently used old, worn-out, and defective air brakes on the train, so that the train could not be controlled or quickly stopped.

The assignments of error claim that there was no evidence that the second engine, upon which the plaintiff's intestate was killed, was rotten or otherwise defective, nor any evidence that there was any defect in the air appliances; the testimony of the defendant being to the effect that the trouble about the brakes was that some one had turned an angle cock on the second car below the engine on which Hauser was running, so as to let the air out of the main line or pipe for the brakes for all of the cars of the train from that point to the end of the train, and make it impossible for the engineer to apply his brakes, except to the two engines and the first two cars of the train. The evidence as to the insufficient condition of the tender of the second engine to stand the shock of the impact or squeeze between the forward engine and the heavy train behind it was mainly opinion evidence from witnesses who assumed to be competent witnesses, skilled in their vocation, based upon inferences drawn from the occurrence and characteristic incidents of the accident. The testimony showed, as before stated, that when the impact came from the train of loaded cars behind the second engine, the first car of the train mounted upon the trucks and platform of the tender to the second engine, practically demolishing them and completely demolishing the water tank, tearing it from its fastenings, and thrusting it forward, over and on the cab of Hauser's engine, so as to inflict the injuries which caused his death. No dam-

age was done to the front engine and no damage seems to have been done to any of the cars of the train, except to the car which inflicted the injury and destruction to the tender, and which was not much damaged. The only part of the train which seemed to have been much hurt was the tender to this second engine. The wrecked engine and tender was carried away by the railroad company, and therefore the testimony as to its condition must be more or less based upon what can be inferred as results from what occurred, as it would appear to be a matter of impossibility for the defendant in error to prove by actual examination what was the condition of the wrecked engine and tender. That was in the possession of the railway company, and removed from the scene at the time of the accident. The trial judge thought the testimony concerning all the facts which occurred was sufficient to go to the jury, and to support an inference as to the defective condition of the engine and tender as there was testimony to the effect upon which the conclusion of the jury could rest that the wreck could not have resulted unless the engine and tender wrecked had been weak or defective.

The issues in the case for the jury under the pleadings, therefore, would appear to be reduced for the consideration of this court to this: Was the trial judge justified in leaving it to the jury to say, in the first place, whether or not it was negligence on the part of the railroad company to direct one of its employés, an engineer, to operate an engine with its tender in the position the one in question was placed, between a heavier and stronger engine in front and a heavily loaded train of coal cars behind, not sufficiently strong to stand the shock in case of a sudden stoppage as against the heavy engine in front coming to a stop as fast as the engineer can bring it (either by the use of his brakes or reversing his engine) and the impact of the heavily loaded train of cars behind? Should any engine, with human employés thereon, have been put by the company in that position, unless it was capable of standing that squeeze or impact, and if an engine or tender was put in that position, so that if the stop occurred, and it was incapable of standing that impact, was that negligence on the part of the railway company? In the next place, if such was negligence, then was the engine and tender upon which Hauser was required to work an insufficient engine to stand this impact? Unless these were questions to go to the jury, the presiding judge below erred in sending the case to the jury.

The plaintiff in error moved the court below for a peremptory instruction to the jury to find a verdict for the defendant, on the ground that there was no evidence which justified a submission to the jury on any theory which would support a verdict against the defendant. The error alleged practically depends upon what is the rule of law applicable in this court with regard to its supervision of the lower court's action in submitting to or withdrawing from the jury the determination of issues of fact in actions at law for personal damages for negligence. Is it incumbent upon the trial court, in a case in which, upon the consideration of the testimony as a whole, in the opinion of the trial judge a verdict would not be warranted for one side,

to withdraw the case from the jury by a peremptory instruction, and in such case is the trial judge to arrive at his conclusions upon a consideration of the whole testimony, weighing all the circumstances and the conflict and credibility of witnesses? And if this be the rule for the trial court, to what extent is the action of the trial judge in this regard one subject to review and correction by an appellate court in an action at law?

If the rule be as here queried, then it is evident there must be two trials of the facts in every law case: First, in the conclusion to be reached by the trial judge whether the testimony taken as a whole would justify a verdict and for whom. Accordingly as he determines this question he will give a peremptory instruction, a result that would lead perilously near to the conclusion that in an action at law the case should not be submitted to the jury at all, except to find such verdict as the trial judge would himself find. In such case it would follow that, as the action of the trial judge in coming to that conclusion must be construed as the determination of a question of law, his determination will be subject to correction by the appellate court as for the correction of an error of law, and the appellate court will be called upon in all common-law cases to examine into the whole testimony to ascertain if the conclusion arrived at by the lower court from this testimony was correct. It would entail upon the appellate court as strict an examination in this regard of the testimony in a law case as it is required to make in cases of equity or admiralty.

The principles to control in such cases as derived from the decisions of the Supreme Court appear to be as follows:

[1] 1. In cases of actions for damages for negligence brought by an employé or party (other than a passenger or in other cases where the rule res ipsa loquitur may apply) the burden of proof is primarily upon the plaintiff to establish the negligence charged, and it is not enough to show an accident and from that alone infer an injury. Patton v. Texas & Pac. Ry. Co., 179 U. S. 658, 659, 21 Sup. Ct. 275, 45 L. Ed. 361; Waters-Pierce Oil Co. v. Deselms, 212 U. S. 159, 29 Sup. Ct. 270, 53 L. Ed. 453.

[2] 2. At the close of the testimony it is the duty of the trial judge to direct a verdict wherever: (1) The evidence is wholly undisputed; or (2) but one inference could be drawn from the evidence by reasonable men, so as that the court in the exercise of a sound judicial discretion would be compelled to set aside a verdict returned in opposition to it. Patton v. Texas & Pac. Ry. Co., 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361; Marande v. Texas & Pac. Ry. Co., 184 U. S. 173, 22 Sup. Ct. 340, 46 L. Ed. 487.

[3] 3. The test in the second class of cases is not how in the court's opinion the preponderance of the testimony may be, but whether it is adequate to go to the jury; that is, whether the evidence is sufficient upon which a jury might base an inference and if different inferences might fairly be drawn from the evidence by reasonable men, then the jury should be permitted to choose for themselves. Washington Gaslight Co. v. Lansden, 172 U. S. 534, 19 Sup. Ct. 296, 43 L. Ed. 543; Marande v. Texas & Pac. Ry. Co., 184 U. S. 173, 22 Sup. Ct. 340, 46 L. Ed. 487.

[4] 4. The jury is not to guess or conjecture as to possible explanations to account for a result, when such conjecture or explanation is not supported by any reasonable inference from the testimony in the case; but, when the cause of the occurrence cannot be shown by positive testimony, the jury is entitled to draw inferences from the circumstances contemporaneous with or surrounding the occurrence, and the only question is whether they afford any reasonable ground upon which a jury in the exercise of its functions can draw an inference. Marande v. Texas & Pac. Ry. Co., 184 U. S. 173, 22 Sup. Ct. 340, 46 L. Ed. 487; Waters-Pierce Oil Co. v. Deselms, 212 U. S. 159, 29 Sup. Ct. 270, 53 L. Ed. 453.

[5] 5. Cases are not lightly to be taken from the jury. Jurors are the recognized triers of questions of fact, and ordinarily negligence is so far a question of fact as to be properly submitted to and determined by them, and parties are entitled to be secured in the enjoyment of their constitutional right to trial by jury, when the case is one proper to be decided by them as one of fact, and not to be concluded as a matter of law by the court. Patton v. Texas & Pac. Ry. Co., 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361; Marande v. Texas & Pac. Ry. Co., 184 U. S. 173, 22 Sup. Ct. 340, 46 L. Ed. 487.

[6] 6. The trial judge is primarily responsible for the just outcome of a trial. He is not a mere moderator of a town meeting, submitting questions to the jury for determination, nor simply ruling on the admissibility of testimony, but one who stands charged with full responsibility. Patton v. Texas & Pac. Ry. Co., 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361.

[7] 7. The trial judge has the same opportunity that jurors have for seeing the witnesses, for noting all those matters in a trial not capable of record, and hence it is seldom an appellate court reverses the action of a trial court in declining to give a peremptory instruction for a verdict one way or another, and when in the deliberate opinion of the trial judge there is no excuse for a verdict save in favor of one party, and he so rules by instruction to that effect, an appellate court will pay large respect to his judgment. Patton v. Texas & Pac. Ry. Co., 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361.

From these decisions it would appear that the responsibility for determining whether the issue shall be submitted to the jury is largely devolved upon the trial judge. Where he declines to take the case from the jury and refuses a peremptory instruction, the appellate court will seldom interfere. The jury is the proper tribunal to determine a question of fact, and if the trial judge upon the testimony commits the case to the jury, the appellate court will seldom interfere. Where the trial judge grants a peremptory instruction for a verdict, the appellate court will more readily interfere, but even then, in considering the question, will pay large respect to the judgment of the trial judge.

[8] In the case under consideration the trial judge refused a peremptory instruction and sent the case to the jury. The testimony is conflicting. It involves the consideration to a large extent of the credibility of the witnesses. While there was no positive testimony of the defective condition of the small engine and its tender, yet from its age, its small size, the use to which it had been put, and the circumstances

of the destruction of the tender by an impact or squeeze which in the opinion of some of the witnesses a sound engine tender should have withstood, taken all together, form a basis for the inference by a reasonable man which would not be unreasonable that the tender of the small engine was not capable of resisting the strain to which it was subjected, and to which it might be reasonably inferred that an engine operated as it was would be subjected. So, also, the order by his superior officer to Hauser to place his engine in the train in that position at that time was an order he was called upon to obey, and yet, under the circumstances, might it not unreasonably have been inferred to have been negligence on the part of such superior officer and therefore of the company? The question of proximate cause also would properly be for the jury under the circumstances.

The evidence as to tampering with the angle cock by any intruder is very slight and inconclusive, and at the rate the company's engineer testified the train was moving, one to one and a half miles an hour, it would not necessarily appear that the partial obstruction of the brakes was any controlling proximate cause of the injury. These, however, are questions of fact this court is not called upon to decide. It appears that there was testimony sufficient in the case in the opinion of the trial judge to justify his refusing a peremptory instruction and in leaving the matter to the jury.

In view of the reluctance with which, under the decisions of the Supreme Court, an appellate court interferes with the actions of the trial court in remitting to the jury, the natural party to determine it, a quesion of fact on a charge of negligence, and finding no evidence of an abuse of this discretion, and there being testimony adequate to support the verdict, if to the testimony for the plaintiff there be given the benefit of every inference that could reasonably be drawn from it, this court sees no reason for finding error of law in the action of the trial court, and the judgment is accordingly affirmed.

DAYTON, District Judge (dissenting). I cannot concur. It seems to me that the proximate cause of this accident was not the weakness of the engine that intestate was driving, but the failure of the brakes to perform their functions at the time. There is no evidence that these brakes were defective, or that the defendant failed in its duty to properly inspect and keep them in repair. On the contrary, it is undisputed that at the last station passed, four miles in advance of the accident, the brakes were in good working order. Something occurred to render them ineffective while running these four miles between the two stations, something which the company by no ordinary care could foresee or avoid. If these brakes had operated, the train would have been under control, and the extraordinary climbing of the cars upon the tender of the engine under intestate's control would not have occurred. Whatever may be said about the character of this engine, it is certain that it had been sufficient to run under normal conditions with this train more than 30 miles of the journey, and that intestate, a man of mature age and experience as an engineer, had, so far as the evidence discloses, made no protest against its use, nor expressed any fear of driving it under the conditions existing. No one can tell whether a larger and

stronger engine would or would not have withstood the impact of these cars. It could be only matter of conjecture. Certain it is the law requires evidence, and not conjecture, to warrant a jury to find verdicts in cases like this; and, further, it does not require the master to furnish its employé with the best, but only reasonably safe, machinery to operate under normal, and not extraordinary and unforeseen, conditions. Who is to say how large and strong an engine and tender was necessary for use on this occasion? Who can tell whether or not a larger and stronger tender, attached to a larger and heavier engine, would have resisted the impact of these cars? The logical conclusion to be drawn from permitting this judgment to stand for the reasons given by the majority, it seems to me, is that a railroad company will not be warranted in the use on freight trains of any engines other than the largest, heaviest, and strongest known to mechanics.

In Jennings v. Davis, 187 Fed. 703, 109 C. C. A. 451, this court has held, as to "proximate cause," that while ordinarily a question for the jury, where the evidence is uncontroverted, and but one inference *should* be drawn, the question is one of law for the court. The manifest effect of this ruling is that the trial court must be responsible for the determination of what is the proximate cause of the injury. If but one inference should be drawn from the evidence as to it, the twelve men should not be permitted to exercise their judgment and draw another. This ruling should be either overruled or followed.

BALTIMORE & O. R. CO. v. HOSKINSON.

(Circuit Court of Appeals, Fourth Circuit. June 11, 1913.)

No. 1,142.

1. RAILROADS (§ 282*)—CONSTRUCTION—SIDE TRACKS—CLEARANCE.

While a railroad company is required to construct its tracks and siding so as to give reasonable and sufficient clearance between cars on which licensees may be working at the time of trains passing on an adjoining track, such rule does not apply as a matter of law so as to require sufficient clearance for attachments like the arm of a mail car at points along the line other than those where mail cranes are erected, and it is expected that the arm will be extended to catch the sack.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 910–923; Dec. Dig. § 282.*]

2. RAILROADS (§ 282*) — CONSTRUCTION — SIDE TRACKS — CLEARANCE — MAIL CATCHER—QUESTIONS FOR JURY—INSTRUCTIONS.

Where, in an action for death of a licensee in a freight car on a side track by being struck by a projecting mail catcher on the side of a passing mail car, it was for the jury to determine whether the point of the accident was one at which the railroad company should have considered the possibility of the mail arm being raised so as to strike a car on the adjoining track, or whether the striking of the car by such arm was due solely to the negligence of the mail clerk in having it extended at that point, an instruction charging as a matter of law that the action of the mail clerk did not constitute such an unreasonable manipulation of the mail arm as to charge him with primary negligence, but that the primary negligence in the case was the careless construction of the side

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

track so close to the main track as to permit the mail arm to strike a box car placed on the side track, was erroneous.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 910–923; Dec. Dig. § 282.*]

3. RAILROADS (§ 282*)—CONSTRUCTION—INJURIES TO LICENSEES—ACTIONS—INSTRUCTIONS.

In an action for death of a licensee working in a freight car on a side track by being struck by a portion of a mail arm, broken in a collision between the arm and the car on the sidetrack, an instruction that if defendant had constructed its main line and siding in a careful and reasonable way before a contract with the Post Office Department to carry mail had been executed, and the Post Office Department designed the mail crane at the place in question, and it was properly constructed and had been used with safety for years, the fact that there may have been points along the line where an extended mail arm would interfere with freight cars on a siding did not show negligence on defendant's part if ordinary prudence in operating the road did not disclose to the railroad company that there would be danger at that point, and that as a matter of law it could not be expected that main tracks and sidings should be constructed on railroads so that a mail catcher from passing mail cars would never strike a car on the side track, but it was only required that reasonable space should be kept clear in approaching the mail crane from either direction, and if reasonable clearance was provided, and the siding was so far removed from the mail crane as in no reasonable way to cause danger or interference with a car on such siding the railroad company was not negligent, was proper, and was erroneously refused.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 910–923; Dec. Dig. § 282.*]

In Error to the District Court of the United States for the Northern District of West Virginia, at Parkersburg; Alston G. Dayton, Judge.

Action by Richard Hoskinson, as administrator of Alexander Thoburn, deceased, against the Baltimore & Ohio Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

J. W. Vandervort and B. M. Ambler, both of Parkersburg, W. Va. (Van Winkle & Ambler, of Parkersburg, W. Va., on the brief), for plaintiff in error.

James H. Strickling, of Huntington, W. Va. (John Marshall, of Parkersburg, W. Va., on the brief), for defendant in error.

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

SMITH, District Judge. This was an action at law for damages. The plaintiff's decedent was an employé of the Ohio Valley Glass Company. The Ohio Valley Glass Company had at Paden City, in West Virginia, a structure for the manufacture of glass, along which the Baltimore & Ohio Railroad Company had caused a switch or side track to be laid from the main track on the side of and adjacent to the said main track for the purpose of depositing or leaving cars on the side track to be loaded with glass cases or boxes by the glass company for transportation by the railroad company. North of the

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

glass house, say about 500 feet, there was situated a mail post or mail crane for the purpose of permitting the mail bag from Paden City to be placed thereon by the postmaster so as to permit the mail clerk in the mail train passing by raising an arm or catcher to catch the same, and take it into the mail car. On the 16th April, 1908, Alexander Thoburn, the plaintiff's decedent, who was an employé of the glass company, was lawfully engaged in loading and packing glass in a freight car on the side track alongside of the building of the Ohio Valley Glass Company. While so engaged, a mail coach attached to a passing train had the mail arm attached to the apparatus for taking the mail bag off the crane raised by the mail clerk, and in position for that purpose. When so raised, the mail arm being raised whilst the mail coach passed the freight car on the switch or side track, it struck the facing of the door of the freight car, and also the door which was partially open, breaking the mail arm, and striking the said Alexander Thoburn with such force and violence that as the result thereof the said Alexander Thoburn died within a few hours after receiving his injuries. Testimony was offered to show that the engineer had failed to give timely notice by a whistle or signal so as that the mail clerk in the mail car would raise the arm at the proper point when the car passed the mail crane to take the pouch of mail off the crane.

The acts of negligence as to which evidence was offered by the plaintiff were, first, that it was the duty of the railroad company so to construct its side switch or side track that any one lawfully working in a car placed on said side track should be safe and secure while working in said car from any passing train, cars, fixtures, or appliances attached thereto, and that its failure to give sufficient clearance between its main track and the side track so as to allow the mail coach with the mail arm raised to pass without its striking the car upon the side track was negligence. The other act of negligence propounded in the testimony was the failure of the engineer to give timely warning by whistle or otherwise to the mail clerk of his approach to the mail post or crane so that the clerk might raise the mail arm, and catch the pouch while the train was passing the post, and not have it raised after or before it had passed the post so as to be in a position to strike a freight car on the side track at some distance from the mail crane or post.

On the side of the railroad company it was sought to prove that full and timely notice had been given by the engineer, and that the mail crane and the mail arm or catcher had been located by the United States government or under its direction, and constructed in accordance with its requirements; that the crane was quite far enough from the point where the freight car was on the side track to permit the mail clerk to raise the mail arm when passing the mail crane so as to take off the pouch, and then lower it before reaching any car on the side track, and that the accident in this case was due to the carelessness of the mail clerk in raising the mail arm so as to make it project from the side of the mail coach not at the proper point, viz., where it was passing the mail crane, but a wholly unex-

pected and unnecessary point, viz., when it was passing the freight car, and the accident therefore was the result of the negligent use of the mail arm or catcher by the mail clerk. On objection to an instruction asked for by the plaintiff below the court ruled as follows:

"It seems to me very clear that this accident would not have occurred if there had been sufficient clearance between the main track and the side track upon which the box car was standing. As I understand the evidence, the mail car under the control of the mail agent of the United States government was constructed with all of its appliances, including the mail catcher attached to the outside, by the railroad company; that it was owned by the railroad company, and constituted a part of its equipment; thus owned, it being responsible for its construction and its attachment, and it being beyond question that the plaintiff's decedent was lawfully in that box car and was in no wise in fault, that it was the plain duty of the railroad company to adjust its tracks so that the attachments to this mail car could not under any circumstances strike a box car standing on one of its side tracks and cause the death, as in this instance of an innocent party. I cannot regard the action of the railway mail clerk as constituting such unreasonable manipulation of this mail catcher as to charge him with primary negligence in the premises. * * * On the contrary, it seems to me clear that the primary and fundamental negligence in the case was the careless construction of this side track so close as to permit the arm of the catcher to strike a box car placed by the railroad company itself upon the side track. * * * All of these conditions, as well as the one here illustrated, seem to me to enforce clearly the obligation upon the railroad company to so construct its side track that in any exigency an attachment hanging on the outside of the car might not by any fortuitous circumstances be in a position to cause the death or injury of an innocent person in a box car on the side track adjoining, so close as to be capable of being struck by it."

In this we think the learned judge who tried the case erred in practically taking the matter from the jury upon these points under the principles decided in the case of Norfolk & Western Railway Co. v. Hauser, 211 Fed. 567, 128 C. C. A. 167, decided at this term of this court. We do not think it can be said to be matter of law that it is the plain duty of the railroad company to adjust its tracks so that attachments to the mail car which are subject to adjustment and change could not under any circumstances strike a box car standing on one of its side tracks and cause the death of an innocent party.

[1] The railroad is to construct its tracks so as to give reasonable and sufficient clearance between cars standing upon the side track on which an innocent person may be working at the time of trains passing upon an adjoining track, but attachments like the arm of a mail car, which are intended to project only at certain points, cannot be said to be within the rule that requires that sufficient clearance must be given for them when raised for a particular purpose at all points on the entire railroad. There are only certain points at which those mail arms or mail catchers are raised so as to project from the side of the car for the purpose of removing the mail pouch on the crane. At all other points, according to the testimony, this arm is lowered and lies flat along the side of the mail car.

[2] The question under the issues in this case was whether sufficient clearance had been given at the particular point where the injury was inflicted. Was that point one at which the railroad company should have considered the possibility of the mail arm being

raised so as to strike a car on the adjoining track? If it was, then was the railroad company negligent in failing to provide a sufficient clearance? Those were questions under the evidence for the jury. Sufficient clearance for this arm must be given at the point at which it is intended to project, and for such reasonable distance before and arriving at the particular point as in the opinion of the jury are necessary to give sufficient and proper clearance, but it is for the jury to say what that clearance is and we cannot say as a matter of law that the railroad was to so adjust its tracks so that this arm to the mail car could not under any circumstances at any point of its tracks when improperly or negligently raised project and strike a box car upon an adjacent track. The testimony offered by the railroad was for the purpose of establishing that there was quite sufficient clearance at the point where the accident occurred to have permitted the mail car with its attachment to pass it without striking the box car, except for the fact that at that particular point the mail clerk had improperly and negligently raised the mail catcher, so that it protruded to a distance beyond the side of the mail car greater than it should normally be when it was not raised. The question, therefore, was for the jury to say whether or not the mail clerk was solely guilty of negligence on his part in having it so raised at that particular point, or whether the railroad in calculating and allowing for a proper clearance should not have allowed for the possibility of its being raised at that point. We also think he erred in charging that the action of the railway mail clerk could not be regarded as constituting such unreasonable manipulation of this mail catcher as to charge him with primary negligence in the premises. Under the pleadings and the testimony that was one of the very questions at issue, and was a question which should have gone to the jury, as well as the question whether or not the action of the mail clerk in raising the catcher at the point at which he did, in lieu of confining it to the point at which it was to be expected that the mail clerk would take the pouch into the mail car, did not charge the clerk with primary negligence in causing the accident. So, too, it was for the jury to say whether it was primary and fundamental negligence in the case for the railroad to construct its side track so close as to permit the arm of the catcher to strike a box car placed by the railroad company itself upon the adjoining side track. This mail arm was intended to be raised only at certain points; and, as we have indicated, it was for the jury to say whether or not the box car on the side track was by the railroad allowed to be put too near to the point at which this mail arm was to be raised to permit of a proper and sufficient clearance under all and any reasonable circumstances under which the arm might be raised. We do not think that it can be said to be a matter of law that there is any obligation upon the railroad company so to construct a side track that in any exigency an attachment on the outside of the car to be manipulated by a mail clerk or by any employé in a car must never be in a position in which it may strike a box car on the side track adjoining it. These mail arms or catchers are intended to be raised for particular purposes at particular points,

and it is for the jury to say whether under the necessity of raising this mail arm at this point the railroad in this particular case had sufficient clearance to reasonably protect any car upon the side track adjoining its main track so as to free it from any charge of negligence. To say that under any and all circumstances, even at points at which the mail arm is not intended to be raised, and never would under normal circumstances be raised, that the railroad must so construct its tracks that by no possibility the mail arm if raised at such point by a person over whom the railroad has no control in the raising of it, must never strike an adjoining car, is to state a general proposition of law as to what would constitute negligence in a case in which we think the conclusion of negligence was one to be drawn by the jury from the evidence in the case, and the statement therefore was one which as it stood might well be understood by the jury to control them and was therefore erroneous.

[3] Again the court refused the following instruction prayed by the defendant:

"If the jury believe from the evidence that the defendant company had constructed its main line and siding in a careful and reasonable way for the conduct of its business and safety of its employés and passengers, and others properly using said sidings and in the way usual by all railroads, before a contract was made with the Post Office Department to carry mail on its trains, and that the officials of the Post Office Department designated the plans for constructing a mail crane at Paden City, and that it was properly constructed at such place and was used with safety for years, the mere fact that there may have been points along the line where an extended mail arm or catcher from a postal car would interfere with freight or other cars on the siding near the glass house does not show negligence on the part of the defendant if ordinary prudence of said defendant's officials in operating their road did not disclose to them that there would be danger at such point where mail was to be caught—as a matter of law it cannot be expected that main tracks and sidings must be constructed on railroads so that a mail catcher from passing postal cars will never strike a car on such side track, but it is required that reasonable space shall be kept clear in approaching the said mail crane from either direction along the line of said road; and, if reasonable clearance was provided for the siding at Paden City and said siding was so far removed from the mail crane as in no reasonable way to cause danger of interference with a car on such siding and said railroad company were not otherwise negligent, the jury must find for the defendant."

In the view of the court, under the principles heretofore stated, this instruction under the issues and testimony was proper and involved a proper statement of the law applicable to the case and the learned trial judge was in error in refusing it. Taking the charge as a whole and considering these instructions and statements from the court, together with the others given by it, it would appear that upon the points stated the jury was instructed that the testimony as a matter of law established negligence on the part of the railroad company, and that the jury was not itself free to pass upon the questions of negligence as a question of fact.

For these reasons, the judgment below will be reversed, and the case remanded to the District Court of the United States for the Northern District of West Virginia for a new trial.

Reversed.

ALPHA PORTLAND CEMENT CO. v. CURZI.

(Circuit Court of Appeals, Second Circuit. January 13, 1914.)

No. 135.

1. MASTER AND SERVANT (§§ 101, 102, 103*)—INJURIES TO SERVANT—MASTER'S DUTY—SAFE PLACE TO WORK.

While an employer, in the absence of statute, does not insure the employé's safety, the employer is required to exercise such ordinary care and diligence as may be reasonable in view of the work to be performed and the danger incident to the employment, and is under a positive, nondelegable duty to furnish the employé with a reasonably safe place in which to work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 135, 171, 174, 175, 178–184, 192; Dec. Dig. §§ 101, 102, 103.*]

2. MASTER AND SERVANT (§§ 101, 102*)—INJURIES TO SERVANT—SAFE PLACE TO WORK.

Whether a place assigned to a servant in which to work is safe or unsafe may depend in some degree on the work which is to be undertaken, as well as on the age and experience of the servant sent there to undertake it.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 135, 171, 174, 178–184, 192; Dec. Dig. §§ 101, 102.*]

3. MASTER AND SERVANT (§ 153*)—INJURIES TO SERVANT—DANGEROUS PLACE—ACTIONABLE NEGLIGENCE.

Where an employer, with knowledge that a blocked cement conveyor would move by the weight of the buckets as soon as sufficient cement was removed from the boot to release it, and that when that occurred, as it was bound to do in the course of the work of removing the obstruction, the place would be dangerous unless the conveyor was blocked or fastened, and the employer, without requiring the blocking of the conveyor, directed plaintiff, who was a lad of 18 and uninformed of the danger, to enter the place and remove the cement, without warning, and plaintiff was injured by the movement of the conveyor after the material that blocked it had been removed, the employer was guilty of actionable negligence.

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

4. MASTER AND SERVANT (§ 218*)—INJURIES TO SERVANT—ASSUMED RISK.

Where a master, with knowledge that a clogged cement conveyor after unblocked would become dangerous as soon as clogging material had been removed from the pit, directed plaintiff to go into the pit and remove such material without blocking the conveyor or warning plaintiff of the danger, and plaintiff was subsequently injured by the movement of the conveyor on the removing of such material, he did not assume the risk on the theory that the place was safe when he entered it and only became unsafe by his own action in removing the cement.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 601–609; Dec. Dig. § 218.*

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

5. MASTER AND SERVANT (§ 107*)—INJURIES TO SERVANT—SAFE PLACE—MAINTENANCE.

A master is not only bound to furnish a servant with a reasonably safe place in which to work, but is also required to keep the place safe, ex-

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

cept as the conditions may be changed by the very work which the servant is required to do or by his manner of doing it.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 199–202, 212, 254, 255; Dec. Dig. § 107.*]

6. MASTER AND SERVANT (§ 107*)—INJURIES TO SERVANT—DANGEROUS PLACE.

Where plaintiff was injured by the sudden movement of an unblocked conveyor as he removed certain clogging material from the bottom thereof, and defendant knew, or ought to have known, that as soon as the clogging material was removed the conveyor would move of its own weight and render plaintiff's position dangerous, plaintiff did not sustain his injury from a danger which was necessarily inherent from the work, nor was such injury reasonably probable, and hence the rule that, where a place is originally safe and becomes unsafe only as the work progresses and in consequence of the manner in which it is done, the master is ordinarily not responsible, was inapplicable.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 199–202, 212, 254, 255; Dec. Dig. § 107.*]

7. MASTER AND SERVANT (§ 226*) — INJURIES TO SERVANT — ASSUMED RISK — MASTER'S NEGLIGENCE.

A servant, as a matter of law, does not assume risks which arise from the employer's omissions of duty, exposing the servant to unnecessary and needless danger, which he, because of inexperience, does not know or comprehend.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 659–667; Dec. Dig. § 226.*]

8. MASTER AND SERVANT (§ 281*)—INJURIES TO SERVANT—DANGEROUS PLACE—AGE—INSTRUCTIONS.

Where an inexperienced employé, 18 years of age, was injured by the sudden movement of an unblocked cement conveyor as he removed certain clogging material from the base thereof, the court properly refused to charge that plaintiff's age was not a factor to be considered by the jury, and charged instead that age was a factor to be considered along with other factors in the case, and, while a youth of 17 might be more mature and competent than another man of 25, there was no necessary inference, but it was simply a fact to be considered by the jury with all the other facts of the case.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 987–996; Dec. Dig. § 281.*]

9. MASTER AND SERVANT (§§ 101, 102*)—INJURIES TO SERVANT—LACK OF JUDGMENT—NOTICE.

One who employs minors must take notice of their lack of judgment and exercise greater care toward and for them than is required by law to be exercised toward and for adults.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 135, 171, 174, 178–184, 192; Dec. Dig. §§ 101, 102.*]

10. MASTER AND SERVANT (§ 130*)—INJURIES TO SERVANT—MINOR EMPLOYÉS.

Where a minor is employed in a business, the danger of which he is unable, by reason of his immature judgment, to comprehend, and is injured, the employer is liable.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 264, 266, 276; Dec. Dig. § 130.*]

11. MASTER AND SERVANT (§ 149*) — INJURIES TO SERVANT — INEXPERIENCED SERVANT—DANGEROUS WORK.

Where an employer knows that the servant is inexperienced or not of an age to appreciate the danger incident to the work which he is directed

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

to perform, the employer is liable to the servant for injuries received by him while executing an order which the employer knows, or should know, involves danger.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 291–295; Dec. Dig. § 149.*]

12. MASTER AND SERVANT (§§ 150, 151*) — INJURIES TO SERVANT — DUTY TO WARN.

A master is under a nondelegable duty to warn and instruct a servant as to defects and dangers of which the master knows, or ought in the exercise of reasonable care and diligence to know, and of which the servant has no knowledge.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 297–302, 305–307; Dec. Dig. §§ 150, 151.*]

13. APPEAL AND ERROR (§ 1004*)—SCOPE OF REVIEW—EXCESSIVE VERDICT.

An objection that the verdict in a personal injury action is excessive cannot be reviewed on a writ of error to the Circuit Court of Appeals.

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

14. APPEAL AND ERROR (§ 1015*)—WRIT OF ERROR—SCOPE OF REVIEW—ERRORS OF JURY.

In the federal court supposed errors of the jury can only be corrected by a motion for a new trial, the decision of which by the trial judge is final and cannot be reviewed on a writ of error on which the court is limited to the determination of questions of law arising on the record.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860–3876; Dec. Dig. § 1015.*]

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

Action by Guiseppe Curzi, an infant, by Raffaele Grilli, his guardian ad litem, against the Alpha Portland Cement Company. Judgment for plaintiff, and defendant brings error. Affirmed.

This was an action brought to recover from an employer for an injury suffered by his employé.

The plaintiff at the time of the injury complained of was 18 years of age and was in the employment of the defendant in a cement mill owned and operated by the latter at Martin's Creek in Pennsylvania. There was installed in the mill as a part of the plant a vertical conveyor, lift or hoisting machine, consisting of an endless chain with metallic pan-shaped shelves attached thereto and used for the purpose of hoisting dry cement from one level to another. This vertical conveyor or lift, between 50 and 60 feet high, was inclosed in a shaft, and the shaft had become partially filled at the bottom with dry cement so that the lift could not be operated without removing the cement. The defendant's superintendent directed the plaintiff to enter the shaft at the bottom for the purpose of removing the cement. While he was at work in this place removing the cement by means of a shovel and bucket, he received the injury for which the action was brought.

The lift consisted of two endless chains running over sprocket wheels at the top of the shaft and under other sprocket wheels at the bottom of the shaft. At the time of the accident the lift had not been fastened to make it secure. The lift, as the plaintiff stood on it or climbed on it, started and carried him up to the top of the shaft, and his right arm passed between the conveyor chain and one of the wheels on which the chain turned, and was crushed and had to be amputated. The jury awarded him $10,000.

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

Everett, Clark & Benedict of New York City (Edward Grenville Benedict and Louis H. Porter, both of New York City, of counsel), for plaintiff in error.

Hobart S. Bird, of New York City, for defendant in error.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). This is a common-law action brought by an employé who was set to work in a place alleged to have been unsafe. The plaintiff, a minor and inexperienced, was without knowledge of machinery. No warning of the danger to which he was exposed was given; neither were any instructions issued. He was ordered to clean out the bottom of the elevator shaft and remove the cement which had accumulated in it.

The elevator had not been connected with the other machinery in the mill. The weight of the cement and the buckets on the back side of the chain being from 20,000 to 29,000 pounds in excess of the weight on the opposite side of the endless chain, the elevator, not having been connected with the machinery, was bound to move and the endless chain revolve to a state of equilibrium unless blocked or fastened, as soon as the cement in the boot was sufficiently removed to release it. It was the custom in such cases to chain the elevator or block it by means of beams or bars before sending men down into the shaft on such an errand as the plaintiff was ordered to perform. No such precaution was taken in this case, and, when the plaintiff had sufficiently removed the cement from the boot to release the chain, it began to move and the plaintiff was caught in it and the accident followed.

[1] In Smith v. Baker [1891] A. C. 325, at page 362, Lord Herschell said in the House of Lords:

"It is quite clear that the contract between employer and employed involves on the part of the former the duty of taking reasonable care to provide proper appliances, and to maintain them in a proper condition, and so to carry on his operations as not to subject those employed by him to unnecessary risk."

And in Williams v. Birmingham Battery & Metal Co., L. R. 2 Q. B. Div. 338, 345, Romer, L. J., said that:

The authorities "appear to me to establish the following propositions as to the liability at the common law of an employer of labour. If the employment is of a dangerous nature, a duty lies on the employer to use all reasonable precautions for the protection of the servant. If by reason of breach of that duty a servant suffers injury, the employer is prima facie liable."

In the United States, also, it is established beyond controversy that at common law it is the positive duty of the employer to furnish his employé with a reasonably safe place in which to work. Armour v. Hahn, 111 U. S. 313, 4 Sup. Ct. 433, 28 L. Ed. 440; Welle v. Celluloid Co., 175 N. Y. 401, 67 N. E. 609; Rincicotti v. John S. O'Brien Contracting Co., 77 Conn. 617, 60 Atl. 115, 69 L. R. A. 936; Libby v. Banks, 209 Ill. 109, 70 N. E. 599; Foster v. New York, etc., R. Co., 187 Mass. 21, 72 N. E. 331; Finnerty v. Burnham, 205 Pa. 305, 54 Atl. 996; Collins v. Harrison, 25 R. I. 489, 56 Atl. 678, 64 L. R. A. 156; Geno v. Fall Mountain Paper Co., 68 Vt. 568, 35 Atl. 475.

The employer, in the absence of a statute, does not insure the employé's safety, but is required to exercise such ordinary care and diligence as may be reasonable in view of the work to be performed and the dangers incident to the employment. Hough v. Texas, etc., R. Co., 100 U. S. 213, 25 L. Ed. 612; Westinghouse Electric, etc., Co. v. Heimlich, 127 Fed. 92, 62 C. C. A. 92; Glenmont Lumber Co. v. Roy, 126 Fed. 524, 61 C. C. A. 506; Choctaw, etc., R. Co. v. Holloway, 114 Fed. 458, 52 C. C. A. 260; Probst v. Delamater, 100 N. Y. 266, 3 N. E. 184; Thompson v. American Writing Paper Co., 187 Mass. 93, 72 N. E. 343; Burns v. Delaware, etc., Tel., etc., Co., 70 N. J. Law, 745, 59 Atl. 220, 592, 67 L. R. A. 956; 26 Cyc. 1102.

This duty of the employer to furnish a safe place in which to work is a positive obligation resting on him and which he cannot escape by delegating the responsibility to another. Texas, etc., R. Co. v. Barrett, 166 U. S. 617, 17 Sup. Ct. 707, 41 L. Ed. 1136; National Steel Co. v. Lowe, 127 Fed. 311, 62 C. C. A. 229; Kirk v. Sturdy, 187 Mass. 87, 72 N. E. 349; Pursley v. Edge Moor Bridge Works, 168 N. Y. 589, 60 N. E. 1119; Ide v. Fratcher, 194 Ill. 552, 62 N. E. 814; Newton v. Vulcan Iron Works, 199 Pa. 646, 49 Atl. 339.

[2, 3] Whether a place is safe or unsafe may depend in some degree upon the work which is to be undertaken as well as upon the age and experience of the one who is sent there to undertake it. In this case the employer knew or should have known that the conveyor or lift would move by the weight of the buckets as soon as sufficient cement was removed from the boot to release it, and that when that occurred, as it was bound to occur in the course of the work, the place would be dangerous unless the conveyor was blocked or fastened and he failed to block or secure it. And he knew or ought to have known that the young man he had ordered to do this work was without knowledge of machinery or the danger that was involved in the undertaking.

In view of what was to be done in the shaft and of the danger which was involved and would inevitably arise unless the conveyor was secured and because it was not secured, we do not think this court should hold that the plaintiff was furnished a reasonably safe place in which to work. It was an unsafe place, made unsafe by the defendant's own negligence.

[4, 5] The defendant's contention is that its negligence, if it was negligent, may be disregarded because when the plaintiff began his work the conveyor could not move being held by the cement and therefore the place was safe and only became unsafe by the plaintiff's own act in removing the cement and that he assumed the risk of his own acts. But surely it cannot be said that he assumed a risk the danger of which was unexplained to him although it was known to his employer and was in fact due to that employer's own failure to take proper precautions not to expose his servant to a needless and unnecessary risk. The law does not lend countenance to such a theory. It is more reasonable to imply a contract on the part of the master not to invite a servant into unknown dangers than it is to imply one on the part of the servant to run the risk of dangers that he neither knows nor suspects. Cooley on Torts, p. 1109. But if it be conceded that the place in

which the plaintiff was set to work was a reasonably safe place and that the master's duty was fully met at the time the plaintiff began his work, this would not necessarily help the defendant. For it is equally a master's duty to keep the place safe except as the conditions may be changed by the very work which the servant is required to do or by his manner of doing it. Cooley on Torts, p. 1113.

[6] We do not lose sight of the principle that where a place is originally safe and becomes unsafe only as the work progresses and in consequence of the manner in which it is done the master is ordinarily not responsible. Devlin v. Phœnix Iron Co., 182 Pa. 109, 37 Atl. 927; Mullin v. Genesee Electric, etc., Co., 202 N. Y. 275, 95 N. E. 689; Shaw v. New Year Gold Mines Co., 31 Mont. 138, 77 Pac. 515; Richmond Locomotive Works v. Ford, 94 Va. 627, 27 S. E. 509. The defendant's difficulty is that this principle is not applicable to the facts of this case. If a man is employed for example in a quarry to blast rock, and in the course of his blasting is injured by the fall of a rock from the face of a ledge, then the principle the defendant invokes may be applicable. In such a case the injury is not due to the negligence of the man's employer. The danger to which the servant is exposed is the direct result of his own operations and is a danger necessarily incident to the work he is engaged in and is a danger which he appreciates and assumes. See Mielke v. Chicago R. Co., 103 Wis. 1, 79 N. W. 22, 74 Am. St. Rep. 834. And such may be the case where men are injured working in gravel pits and in sand banks where the conditions and surroundings are constantly changing as a direct result of the servant's operations and where the negligence if negligence exists is the negligence of the workman and of his fellow servants, and not of the employer; the danger being a necessary or probable incident of the work. See Swanson v. Lafayette, 134 Ind. 625, 33 N. E. 1033; De Vito v. Crage, 165 N. Y. 378, 59 N. E. 141; Capasso v. Woolfolk, 163 N. Y. 472, 57 N. E. 760; Cisney v. Penn. Sewer Pipe Co., 199 Pa. 519, 49 Atl. 309; Mikolojczak v. North American Chemical Co., 129 Mich. 80, 88 N. W. 75; Perry v. Rogers, 157 N. Y. 251, 51 N. E. 1021. But such cases are clearly distinguishable from the case at bar. And if we were to apply the principle applicable to that class of cases to this case, we should not be administering justice but injustice. In the case under consideration the injury which the plaintiff suffered was not necessarily inherent in the work, neither was it probable.

[7] There was no danger in merely removing cement from the pit except as the danger was created by the defendant's omission to fasten or block the elevator. And as already intimated, it cannot be said as matter of law that a servant assumes risks which arise from an employer's omissions of duty, which omissions expose the servant to unnecessary and needless danger, and danger which the servant because of inexperience neither knew nor comprehended. To say that under the circumstances of this case it was the prosecution of the work which made the place unsafe and created the danger will not do. If the defendant had discharged its duty this accident would not have happened. It was its omission of duty that created the danger.

[8, 9] At the conclusion of the instructions to the jury the court was asked on defendant's behalf to charge as follows:

"The age of the plaintiff is not a factor to be considered by the jury. The plaintiff is not a child and is to be regarded as a full grown man so far as any question in this case is concerned."

The court read the request and then said:

"Age is a factor to be taken into consideration along with all other factors. He was at the time of such age that the question of tender years as a necessary legal proposition does not enter into the case. But his age is to be considered along with all the other facts. A young man 17 might be much more mature and competent than another man of 25; there isn't any necessary inference that I can charge the jury about. It is simply a fact to be taken into consideration with all the other facts."

Whereupon the defendant excepted to the court's refusal to charge as requested. We discover no error prejudicial to the defendant in the court's instruction respecting the plaintiff's age. If the court had gone farther and emphasized in stronger terms the duty of an employer to an inexperienced employé and had directed the attention of the jury to the duty of the employer to warn and instruct such an employé as to the danger incident to the employment, it would have been difficult even then for the defendant to predicate any error upon such an instruction. The courts have held in numerous cases that persons who employ minors must take notice of their lack of judgment and must exercise greater care toward and for them than is required by law to be exercised toward and for adults. O'Connor v. Adams, 120 Mass. 427; Smith v. O'Connor, 48 Pa. 218, 86 Am. Dec. 582; Flynn v. Erie Preserving Co., 12 N. Y. St. Rep. 88; East Saginaw City R. Co. v. Bohn, 27 Mich. 503; Marbury Lumber Co. v. Westbrook, 121 Ala. 179, 25 South. 914; Larson v. Berquist, 34 Kan. 334, 8 Pac. 407, 55 Am. Rep. 249.

[10, 11] In a number of decisions it has been held that if a minor is employed in a business the danger of which he is unable by reason of his immature judgment to comprehend and is injured, the employer is liable. 26 Cyc. 1081 and cases cited. And the courts have held that where the employer knows that an employé is inexperienced or not of an age to appreciate the danger incident to the work which he is directed to perform the employer is liable to the employé for injuries received by him while executing an order which the employer knew or ought to have known involved danger. Northern Pacific Coal Co. v. Richmond, 58 Fed. 756, 7 C. C. A. 485; Johnson v. Richmond, etc., R. Co., 84 Va. 713, 5 S. E. 707; Riley v. West Virginia Central, etc., R. Co., 27 W. Va. 145; Gartside Coal Co. v. Turk, 147 Ill. 120, 35 N. E. 467; 26 Cyc. 1165.

[12] Courts have said that there is a duty upon the employer to warn and instruct his employé as to defects and dangers of which he knows or ought in the exercise of reasonable care and diligence to know and of which the employé has no knowledge. Mather v. Rillston, 156 U. S. 391, 15 Sup. Ct. 464, 39 L. Ed. 464; The Anchoria, 120 Fed. 1017, 56 C. C. A. 452; Orman v. Salvo, 117 Fed. 233, 54 C. C. A. 265; Mercantile Trust Co. v. Pittsburgh, etc., R. Co., 115 Fed. 475, 53 C. C. A. 207; Gates v. State, 128 N. Y. 221, 28 N. E.

373; Knight v. Overman Wheel Co., 174 Mass. 455, 54 N. E. 890; Geller v. Briscoe Mfg. Co., 136 Mich. 330, 99 N. W. 281; Illinois Steel Co. v. Ryska, 200 Ill. 280, 65 N. E. 734; Crane v. Chicago, etc., R. Co., 124 Iowa, 81, 99 N. W. 169; Tompkins v. Marine Engine Co., 70 N. J. Law, 330, 58 Atl. 393.

And they have held that this duty of warning and instructing the employé, like the duty to provide a safe place to work, cannot be delegated; that the employer cannot thus relieve himself of the responsibility which the law imposes on him. Mercantile Trust Co. v. Pittsburgh, etc., R. Co., 115 Fed. 475, 53 C. C. A. 207; Louisville, etc., R. Co. v. Miller, 104 Fed. 124, 43 C. C. A. 436; Grimaldi v. Lane, 177 Mass. 565, 59 N. E. 451; Smith v. Hillside Coal, etc., Co., 186 Pa. 28, 40 Atl. 287; Simone v. Kirk, 173 N. Y. 7, 65 N. E. 739; Addicks v. Christoph, 62 N. J. Law, 786, 43 Atl. 196, 72 Am. St. Rep. 687.

In Judge Cooley's work on Torts, that eminent jurist states that:

"It would be gross injustice, not to say absurdity, to apply in the case of infants the same tests of the master's culpable negligence which are applied in the case of persons of maturity and experience." 2 Cooley on Torts (3d Ed.) p. 1127.

In another place he says:

"The master may also be guilty of actionable negligence in exposing persons to perils in his service which, though open to observation, they by reason of their youth or inexperience do not fully understand and appreciate and in consequence of which they are injured. Such cases occur most frequently in the employment of infants." Id. p. 1126.

The rationale of the doctrine would seem to be that a master is as a prudent man under obligations to regulate his conduct with due reference to the fact that minor servants on the average are less capable of understanding the dangers of their employment as well as less capable of avoiding the dangers which they do understand. It is the fact of immaturity rather than the fact of minority that the master is bound to regard. Labatt on Master & Servant, vol. 1, § 20 (Ed. 1904); Alabama Mineral R. Co. v. Marcus, 115 Ala. 389, 22 South. 135. And see Kentucky C. R. Co. v. Gastineau, 83 Ky. 119; Michael v. Stanley, 75 Md. 464, 23 Atl. 1094.

[13, 14] It is urged that the verdict is excessive, and that we should reverse the judgment because the court below did not set the verdict aside, although it was promptly asked to do so. However the rule in the state courts may be, this court is not at liberty to consider whether this verdict is or is not excessive. In the federal courts the supposed errors of the jury can be corrected in no other way than by a motion for a new trial the decision of which by the trial judge is final and cannot be assigned as error upon appeal. The power of the court on appeal is restricted to the determination of questions of law arising on the record. Lincoln v. Power, 151 U. S. 436, 14 Sup. Ct. 387, 38 L. Ed. 224; Wabash v. McDaniels, 107 U. S. 454, 2 Sup. Ct. 932, 27 L. Ed. 605; N. Y. Lake Erie, etc., R. Co. v. Winter, 143 U. S. 60, 12 Sup. Ct. 356, 36 L. Ed. 71; Wilson v. Everett, 139 U. S. 616, 621, 11 Sup. Ct. 664, 35 L. Ed. 286.

The judgment is affirmed.

ST. LOUIS SOUTHWESTERN RY. CO. v. S. SAMUELS & CO.

(Circuit Court of Appeals, Fifth Circuit. February 17, 1914. Rehearing Denied March 31, 1914.)

No. 2506.

1. COURTS (§ 256*)—INTERSTATE COMMERCE ACT—IMPLIED REPEAL—JUDICIAL CODE—ACTION FOR REPARATION—VENUE.

Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1101 [U. S. Comp. St. Supp. 1911, p. 150]) § 51, provides that, except as otherwise provided, no person shall be arrested in one district for trial in another in any civil action before a district court, and that no suit shall be brought in any district court by any original process or proceeding in any other district than that whereof he is an inhabitant, etc. Section 297, specifically providing for the repeal of certain acts other than Interstate Commerce Act (Act Feb. 4, 1887, c. 104, § 16, 24 Stat. 384 [U. S. Comp. St. 1901, p. 3165], as amended by Act Cong. June 18, 1910, c. 309, § 13, 36 Stat. 554 [U. S. Comp. St. Supp. 1911, p. 1301]), provides that where an interstate carrier refuses to comply with an order of the Interstate Commerce Commission for the payment of money in reparation, suit may be brought on the order in the District Court in which the beneficiary resides, or in which is located the carrier's principal operating office. *Held*, that such provision was not repealed by implication, and hence a suit on a commission's order was properly brought in the district of the beneficiary's residence.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 792; Dec. Dig. § 256.*

Jurisdiction of federal courts of suits under Interstate Commerce Act, see note to Bailey v. Mosher, 11 C. C. A. 318.]

2. COMMERCE (§ 88*)—INTERSTATE COMMERCE COMMISSION—REPORT—REPARATION ORDER—VALIDITY.

The report of the Interstate Commerce Commission on a claim for reparation for excessive charges due to misrouting of a shipment, and order for reparation *held* not contradictory, misleading, or confusing, nor objectionable for uncertainty.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 139, 141; Dec. Dig. § 88.*]

3. COMMERCE (§ 88*)—INTERSTATE COMMERCE—PROCEEDINGS BEFORE COMMISSION—EXTENT OF RELIEF.

Where pending proceedings before the Interstate Commerce Commission for reparation for excessive charges on a specified shipment due to the carrier's misrouting it, because no through rate had been provided over shorter routes, the carriers established a through rate by such shorter routes, it was not necessary that the Commission in granting reparation should enter any order with reference to the through rate so adopted or prohibit the use thereafter of any rate in excess of the one adopted.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 139, 141; Dec. Dig. § 88.*]

4. COMMERCE (§ 98*)—INTERSTATE COMMERCE—RATES—REPARATION ORDER.

Where a reparation order was entered May 1, 1911, and defendant seasonably filed a motion for rehearing, which was not denied until October 9th following, suit not having been brought on the order until after the rehearing was denied, defendant was not prejudiced by the fact that the order required payment on or before January 15, 1911.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 148; Dec. Dig. § 98.*]

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

5. TRIAL (§ 177*)—QUESTIONS OF LAW OR FACT—DIRECTION OF VERDICT—APPLICATION BY BOTH PARTIES.

Where plaintiff sued on a reparation order of the Interstate Commerce Commission, the finding of the Commission that the rate charged plaintiff was unreasonable and the fixing of the excess over the reasonable rate constituted a prima facie case in favor of plaintiff's right to recover the difference, and no evidence to the contrary having been offered, and both parties having moved for a peremptory instruction, the court properly directed a verdict for plaintiff.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 400; Dec. Dig. § 177.*]

In Error to the District Court of the United States for the Southern District of Texas; Waller T. Burns, Judge.

Action by S. Samuels & Co. against the St. Louis Southwestern Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Prior to May, 1909, no shipment of cotton linters had ever moved to Houston, Tex., from points in the state of Arkansas on the line of railroad operated by the plaintiff in error. Shipments of this character generally went to manufacturing points in the Middle West; and there was a small export movement through New Orleans. The line of railroad of plaintiff in error does not run into the state of Texas, therefore not to Houston, which is in the interior. Its published rates, established jointly and in connection with other carriers that did run to Houston, did not at that time provide for shipments of that commodity because there had been in the past no other shipments of it, nor requests for rates on such shipments. It did have established, in connection with other carriers, a rate on linters to New Orleans, La., and the Sunset Central Lines had a cotton rate from New Orleans to Houston, which was represented as a rate on cotton linters.

In May, 1909, defendants in error tendered to plaintiff in error, at the station of England in the state of Arkansas, a shipment of cotton linters, which they desired to have transported to Houston, Tex. Defendants in error requested that they be protected in the through rates. There were two direct routes to Houston from England, one by way of Shreveport, La., thence to Houston over the Houston & Shreveport Railroad Company, and another by way of Tyler, Tex., reached by the St. Louis Southwestern Railway Company of Texas, a connection of plaintiff in error, and thence to Houston over the International & Great Northern Railroad. There was no rate on cotton linters via either of these routes, and the only rate on cotton applicable over either route was for cotton in round bales. On application to the Sunset Central Lines plaintiff in error was informed that the latter had a rate upon which linters might travel from New Orleans to Houston, and the shipment was thereupon routed over those lines. The rate charged and collected for the carriage was 66 cents, being the 48 cent rate as published from England to New Orleans, plus the 18 cent rate of the Sunset Central Lines from New Orleans to Houston. The route via New Orleans is about 300 miles longer than that via Tyler and Shreveport.

On complaint of defendants in error, the Interstate Commerce Commission, on May 1, 1911, entered an order by the terms whereof plaintiff in error was required to pay defendants in error $135.50, with interest from June 24, 1909, on or before July 15, 1911. Plaintiff in error filed with the Commission an application for a rehearing, which was not acted upon until October of that year, when it was overruled. This suit was instituted on January 26, 1912, in the District Court of the United States for the Southern District of Texas, at Houston, by S. Samuels & Co. against the St. Louis, Southwestern Railway Company to reduce to judgment this reparation order of the Interstate Commerce Commission. A supplemental petition was filed by plaintiffs August 24, 1912, alleging the domicile of plaintiff in error to be in the city of St.

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

Louis, Mo. On September 23, 1912, the defendant filed a plea to the jurisdiction, and on March 7, 1913, an original answer, subject to the action of the court on the plea to the jurisdiction, consisting of demurrers, general and special, a general denial, and several special defenses. Hearing of the plea to the jurisdiction having been passed by the court, without prejudice thereto, it was considered with the defendants' demurrers and exceptions on March 7, 1913, whereupon the court overruled the plea and all of the demurrers and exceptions, to which action and ruling the defendant reserved exceptions. All parties thereupon announced ready, the pleadings were read, and the evidence adduced. Before the jury retired the defendants requested a peremptory instruction in its favor, and, subject to the refusal thereof, six special instructions, all of which were refused. The court instructed a verdict in favor of the plaintiffs, which the jury returned on March 7, 1913, and upon which, on the same date, judgment was rendered against defendant in favor of plaintiffs for the amount sued for, $135.50 and interest, and also for an attorney's fee of $50.

Robert H. Kelley, of Houston, Tex., for plaintiff in error.
B. F. Louis, of Houston, Tex., for defendant in error.

Argued before PARDEE and SHELBY, Circuit Judges, and GRUBB, District Judge.

PARDEE, Circuit Judge (after stating the facts as above). The assignments of error are 63 in number, but counsel for plaintiff in error submit some 8 called "main propositions" as relied upon, and we reduce them to 2, to wit: Had the United States Court jurisdiction? And, Was the reparation order of the Interstate Commerce Commission valid?

[1] The District Court had jurisdiction because of the residence in the Southern district of S. Samuels under section 16 of the amended act to regulate commerce approved June 18, 1910, c. 309, 36 Stat. 554, unless the said section was repealed by the Judicial Code of 1912.

Section 51 of the Judicial Code reads as follows:

"Except as provided in the five succeeding sections, no person shall be arrested in one district for trial in another, in any civil action before a district court; and, except as provided in the six succeeding sections, no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant." 36 Stat. 1101.

The five succeeding sections do not cover a case like the present. Section 297 of the Judicial Code specifically repeals certain sections of the Revised Statutes, and certain acts and parts of the acts, and concludes as follows:

"Also all other acts and parts of acts, in so far as they are embraced within and superseded by this act, are hereby repealed; the remaining portions thereof to be and remain in force with the same effect and to the same extent as if this act had not been passed."

Among the parts of the acts repealed are:

"Sections one, two, three, four, five, the first paragraph of section six, and section seventeen of an act entitled 'An act to create a commerce court, and to amend an act entitled "An act to regulate commerce," approved February

fourth, eighteen hundred and eighty-seven, as heretofore amended, and for other purposes,' approved June eighteenth, nineteen hundred and ten."

From which it is seen that Congress particularly considered the said act approved June 18, 1910, for repealing purposes, and as section 16 was not included in the repealed sections, there arises a very strong presumption that other parts of the act were to be left in force. "Inclusio unius est exclusio alterius."

Repeals by implication are not favored. The adjudged cases cited by plaintiff in error settle that; and all of them are to the effect that to hold a law repealed by implication, the intention to repeal must be clear and manifest, and it is clear that an intention to repeal said section 16 in the matter of venue is not manifest.

Section 51 of the Judicial Code deals generally with venue in the District Courts in the cases in which jurisdiction is given by the Code, and it is not to be presumed that it was intended to restrict jurisdiction or affect the venue in other acts of Congress not enumerated, wherein jurisdiction is specially granted and the venue fixed.

Counsel for defendant in error well says in his brief:

"Clearly the Legislature did not intend to cover this legislation upon a particular subject by the enactment of the general law. The real reason which doubtless actuated Congress to confer jurisdiction upon the Circuit Court of the district in which the complainants reside was to provide a means for a shipper to enforce the reparation order for a small amount, as in this case, without having to go 1,000 miles and incur an expense in excess of the amount of the award.

"The legislative body must have known that, in the great majority of cases, orders of reparation would not be for large sums, and that in each instance shippers would start in with a handicap in that the transportation company with its regularly retained corps of attorneys, its free transportation facilities for them, and its witnesses, together with its vast wealth and power, would be able, by declining to pay an order of the Commission, practically to defeat such order, unless the shipper could be brought near enough to a forum where he could enforce such order without being compelled to expend more than the reparation allowed."

The intention of Congress in regard to venue in cases of this kind is shown by the following from the late act of Congress abolishing the Commerce Court, and transferring jurisdiction to the District Court, approved October 22, 1913:

"The venue of any suit hereafter brought to enforce, suspend, or set aside, in whole or in part, any order of the Interstate Commerce Commission shall be in the judicial district wherein is the residence of the party or any of the parties upon whose petition the order was made, except that where the order does not relate to transportation or is not made upon the petition of any party the venue shall be in the district where the matter complained of in the petition before the Commission arises, and except that where the order does not relate either to transportation or to a matter so complained of before the Commission the matter covered by the order shall be deemed to arise in the district where one of the petitioners in court has either its principal office or its principal operating office. In case such transportation relates to a through shipment the term 'destination' shall be construed as meaning final destination of such shipment."

For these reasons we will hold that section 16 of the act of June 18, 1910, was not repealed by the Judicial Code.

This conclusion renders it unnecessary to decide whether because

the injury complained of occurred in 1909, and the order of reparation sued on was issued by the Interstate Commerce Commission in May, 1911, this case comes under the saving clause in section 300 of the Judicial Code, providing as follows:

"All offenses committed, and all penalties, forfeitures, or liabilities incurred prior to the taking effect hereof, under any law embraced in, or repealed by, this act, may be prosecuted and punished, or sued for and recovered, in the district courts, in the same manner and with the same effect as if this act had not been passed"

—and the Judicial Code, though passed in March, 1911, did not go into effect until January 1, 1912.

The reparation order issued by the Interstate Commerce Commission was rendered on a petition by Samuels & Co. against the plaintiff in error herein and several other railroad companies, complaining that the rate collected for transportation of certain cotton linters was excessive and unreasonable, and praying for an order establishing a reasonable through route and joint rate for the carriage of cotton linters from England, Ark., to Houston, Tex., and asking that reparation be awarded. And the Commission, finding that, pending the order, a satisfactory through route and joint rate for cotton linters had been established between the points named passed only upon the reparation to be awarded; and as to that the Commission found and ordered as follows:

"The testimony indicates that the initial carrier held the linters at England three or four weeks. During that time the carrier might have secured permission from the Commission to publish a rate from England to Houston on short notice; or, by holding the linters for a short additional period, it might have published the rate on full statutory notice. And while it was under no legal obligation to adopt the former method, it was certainly its duty to provide a rate via a reasonably direct route as soon as lawful publication thereof could be made. But, assuming that the carrier was willing to take the responsibility of forwarding the shipment via a route over which no rate was published, as it did, we are of opinion that it ought to have sent it over a direct route. Having taken that course, and a reasonable rate having subsequently been established over the route of movement, the carrier would have been in position to apply for permission to make settlement upon basis of the rate so established. The situation is one in which the shipper was helpless. He had directed carriage of his goods by the direct and natural route. The failure to comply with his instructions was due to the fact that the initial carrier had not provided a rate over the direct route, and did not make a reasonable effort to do so.

"We do not find that a rate of 66 cents was unreasonable for a haul via New Orleans, but we are of the opinion that the rate of 46½ cents, subsequently established, would have been a reasonable rate via either of the direct routes, and that the failure of the initial carrier to forward the shipment over a direct route resulted in damage to complainant in an amount measured by the difference between the rate which should have been established and the rate which he was forced to pay. Our conclusion therefore is that the St. Louis Southwestern Railway Company should be required to make reparation to complainant as for a misrouting in the sum of $135.50, with interest from June 24, 1909. An order will be entered accordingly."

"Order.

"This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on

the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof: It is ordered that defendant, St. Louis Southwestern Railway Company, be, and it is hereby, notified and required, on or before the 15th day of July, 1911, to pay unto complainant, S. Samuels & Co., a partnership composed of S. Samuels and H. Samuels, the sum of $135.50, with interest thereon at the rate of 6 per cent. per annum from June 24, 1909, as reparation for an unreasonable rate charged for the transportation of four car loads of cotton linters from England, Ark., to Houston, Tex., which rate so charged has been found by this Commission to have been unreasonable, as more fully and at large appears in and by said report."

The plaintiff in error contends that the report and reparation order are null and void because:

"(a) The order of the Interstate Commerce Commission and the report upon which said order is based and founded are on the face thereof ambiguous, contradictory, misleading, confusing, and uncertain.

"(b) Said report and order show upon their face that the order is not a final order or award, because it does not dispose of all parties and all issues involved.

"(c) The report and order of the Interstate Commerce Commission fail to show upon their face, and there is no evidence, that said order was either accompanied by or founded upon a further order of the Interstate Commerce Commission fixing, prescribing, and establishing for the future a reasonable maximum rate for shipments of cotton linters from England, Ark., to Houston, Tex., to be observed and protected in the future, or fixing, prescribing, or establishing for the future a reasonable route for such shipments to be observed and used in the future, and prohibiting the use, protection, and observance in the future of any rate in excess of the reasonable maximum rate so fixed, or of any route other or less reasonable or longer than the reasonable route so prescribed.

"(d) The reparation order here sued upon was void because it was entered on May 1, 1911, and required the payment of the sum therein specified on or before July 15, 1911; plaintiff in error seasonably filed its motion for a rehearing, which was not acted upon until October 9, 1911; the time limit in the original order was never at any time extended by the Commission, and therefore it was impossible for plaintiff in error to comply with the order when it finally became effective on October 9, 1911."

As to this contention, we conclude:

[2] (a) The report of the Commission and the order based thereon seem to us to be clear and certain, and neither contradictory, misleading, nor confusing.

(b) In the light of the report, finding that the plaintiff in error was the initial carrier and responsible for the routing resulting in the excessive charge and the only defendant liable, we find that the order practically disposes of all parties and issues involved.

[3] (c) As the report shows that pending the hearing a satisfactory joint route and through rate had been established by the carriers, there was no occasion nor requirement that the Commission should enter any further order in regard to such through rate. As to prohibiting the use thereafter of any rate in excess, the law is sufficient for that.

[4] (d) That the reparation order was void because entered on May 1, 1911, and required the payment of the reparation on or before January 15, 1911, for the reason that plaintiff in error had seasonably filed a motion for rehearing which was not acted upon until October 9, 1911, and the original order was never extended, etc., is too technical

to merit much consideration. The rehearing was refused before this suit was brought, and plaintiff in error has not been prejudiced.

[5] The finding of the Commission that the rate charged Samuels & Co. was unreasonable, and fixing the excess over a reasonable rate, is, under the law, prima facie correct, if not conclusive; and, as no evidence to the contrary was offered on the trial, and both parties asked for a peremptory instruction, there was no error in directing a verdict for the plaintiff.

On the whole case, we find no reversible error, and the judgment of the District Court is affirmed, with costs.

J. M. GUFFEY PETROLEUM CO. v. BORISON et al. SAME v. REED et al. (RUMMLER, Intervener). SAME v. REED et al.

(Circuit Court of Appeals, Fifth Circuit. February 3, 1914.)

No. 2430.

1. SALVAGE (§ 24*)—PURPOSE OF REMUNERATION.

Salvage awards should be liberal to encourage prompt, energetic, and daring service in the relief of vessels in peril, but should not be extravagant, and such as to excite greed and promote unreasonable pretensions.

[Ed. Note.—For other cases, see Salvage, Cent. Dig. § 55; Dec. Dig. § 24.*]

2. SALVAGE (§ 38*)—AMOUNT OF COMPENSATION.

That one set of salvors do not prosecute their claims inures to the benefit of the vessel, and not to that of other salvors, who do prosecute their claims.

[Ed. Note.—For other cases, see Salvage, Cent. Dig. §§ 93–102; Dec. Dig. § 38.*]

3. SALVAGE (§ 27*)—AMOUNT OF COMPENSATION—NATURE OF SERVICE.

Salvage services rendered to steel vessels, or in a port where help is plentiful, are not in general entitled to as large compensation as was formerly awarded in case of wooden ships, and where the services were rendered on the high seas where help was scarce.

[Ed. Note.—For other cases, see Salvage, Cent. Dig. §§ 65, 66; Dec. Dig. § 27.*]

4. SALVAGE (§ 27*)—AMOUNT OF COMPENSATION—RESCUE OF OIL TANK VESSEL FROM DANGER OF FIRE.

The steel oil tank barge Shenango, with a cargo of oil in her tanks, was anchored near a wharf in the harbor of Port Arthur, Tex., when another tank vessel exploded, throwing burning oil for some distance, setting fire to a wharf and oil warehouse near the Shenango and also to parts of the superstructure of the barge itself. The tug Captain Sam, which was the property of the owner of the barge, and equipped with fire-fighting apparatus, went to her assistance, and with the help of a fireman and two longshoremen who volunteered and put out the fire, and then, having freed her anchor, with the assistance of libelant's tug Viva, towed the barge to a place of safety. The barge and cargo were worth $180,000, and the tug Viva not to exceed $7,000. The greater part of the service was rendered by the Captain Sam and her crew. These and the individual salvors were exposed to serious danger, but the Viva, which was made fast to the bow of the Sam by a line and was ahead in the towing, was

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

not. *Held*, that an award of about $2,400 to the Viva and her crew, and of $250 each to the volunteer assistants, was as much as was justified.

[Ed. Note.—For other cases, see Salvage, Cent. Dig. §§ 65, 66; Dec. Dig. § 27.*

Salvage awards in federal courts, see note to The Lamington, 30 C. C. A. 280.]

Appeals from the District Court of the United States for the Eastern District of Texas; Gordon Russell, Judge.

Suits in admiralty by Simon Borison and others and by T. S. Reed, trustee, owner of the tug Viva, and others, in which A. Rummler, intervened, against the barge Shenango, and by said Reed and others in personam against the J. M. Guffey Petroleum Company and another. Decree for libelants, and respondents appeal. Reversed.

D. Edward Greer, of Beaumont, Tex., Robinson Leech, of New York City, and W. B. Spencer and Chas. Payne Fenner, both of New Orleans, La., for appellants.

Stuart R. Smith and C. A. Lord, both of Beaumont, Tex., for appellees.

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

PARDEE, Circuit Judge. These are appeals by the owners of the barge Shenango and cargo from three decrees of the District Court awarding salvage for services rendered to the barge and cargo by the tug Viva and three men, Borison, McCann, and Rummler, during a fire at Port Arthur, Tex., June 26, 1911. They were tried and decided together, and have been consolidated for the purposes of this appeal, and have been here heard together.

The salient facts are stated in the findings of fact by the District Judge, which we find in the main, and as far as they go, to be in accordance with the evidence, to wit:

"The above cases were by agreement of counsel tried together, and the evidence introduced by the parties was considered in each case, and therefore I embrace the findings relative to each case in one statement.

"The cases grew out of the salvage of the barge Shenango and its cargo, which were imperiled by a fire in the harbor at Port Arthur, Tex., on the 25th day of June, 1911.

"The first two cases named above were actions in rem against the barge, and the last case is an action in personam against the J. M. Guffey Petroleum Company and the Gulf Refining Company, alleged to be owners of the said cargo. The first case, No. 98, is a libel by Simon Borison and B. F. McCann for salvage services rendered by them to said barge. The second case, No. 99 is a libel by T. S. Reed, trustee, owner of the tug Viva, and of H. M. Fredericksen, its master and its crew against said barge, in which case the individual libelant, A. Rummler, intervened, asking also for salvage for assisting in the rescue of said barge. The last case mentioned above, No. 101, is an action in personam by all of the libelants in the said actions numbered 98 and 99 against the J. M. Guffey Petroleum Company and the Gulf Refining Company as owners of the cargo, to recover the salvage in rescuing said cargo, the allegations being that before the vessel and cargo could be seized under libel, the vessel had left port and discharged its cargo beyond the jurisdiction of this court, and therefore the suit in personam was brought against the owners of the cargo.

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

"Findings of Fact.

"Between 6:30 and 7 o'clock on the morning of the 26th day of June, 1911, the barge Humble, in the turning basin of the harbor at Port Arthur, Tex., from some unexplained cause, exploded, and being laden with a cargo of oil in bulk, the oil was ignited and scattered over the surface of the water and on the sides and decks of nearby vessels. The barge Shenango had just received its cargo of oil, consisting of bulk oil as follows: 1,858 barrels of radium, 5,386 barrels of P. E. Naptha, 6,934 barrels of gasoline, 547 barrels of lusterlite, 12,874 barrels of fuel oil.

"The barge was constructed of steel and was what is known as a tank barge. It is divided into compartments, the compartments numbering 16 in all, and occupying the entire vessel, except for about 40 feet at the bow, and when the vessel was loaded the oil on the sides was under the deck, and the top of the oil was from 2 to 4 feet below the water line. Along the center of the barge, running longitudinally, was a raised structure, about 10 or 12 feet in width, and running the entire length of the oil tanks and communicating with them. This was called the expansion deck. When the barge is loaded, the oil comes up in this expansion deck within a few inches of the top of the same, this small space being left to allow room for the expansion of the oil under varying temperatures, and for the escape of gas. Each compartment communicates separately with this expansion deck, and over each compartment in this expansion deck are fitted valves which, under heavy pressure, will open sufficiently to allow gas to escape.

"The fire thus started by the explosion of the barge Humble rapidly enveloped the wharves, and set fire to the Texas Company's warehouses and storage rooms located along by the side of the Texas Company wharf, and within a short distance of the Shenango, which was tied up to the Guffey Company's wharf near the Texas Company's. The warehouse contained vast quantities of case oils, naptha, gasoline, and kerosene and other petroleum products, which, on taking fire, began to explode; and, in the course of the fire, which continued for several hours, probably about 145,000 cases of these oil products exploded, large quantities of their contents running into the turning basin; and, until the Shenango was removed from without the fire zone by the tugs Captain Sam and Viva, as hereinafter stated, she and her cargo were in great danger of destruction.

"Shortly after the fire broke out, the longshoremen, Borison and McCann, ran a line, by the use of a skiff, from the stern of the Shenango, which had swung somewhat away from the burning wharf across the turning basin, and made it fast to the shore, with the design and intent of preventing the stern of the barge from swinging back to the wharf. Having done this, they went immediately back to the Shenango, where the intervener, Rummler, had been from the time the Captain Sam reached the Shenango, and joined him and the crew of the Captain Sam and other employés and agents of the J. M. Guffey Petroleum Company and of the Gulf Refining Company in putting out the fire which had started on the fore part of the Shenango in her superstructure. These parties, Borison and McCann, took buckets and dipped water from the basin and poured it on the smoldering fires. At one time a loose burning craft in the basin floated very near to the Shenango, and Borison and McCann, one or both, threw water on it and pushed it away with their feet from the sides of the Shenango. The intervener, Rummler, reached the Shenango before Borison and McCann did, and immediately began rendering assistance in putting out the fire and trying to save the barge and cargo. Very soon after the explosion of the barge Humble, and the beginning of the fire, the steamtug Captain Sam, the property of the J. M. Guffey Petroleum Company, which was an ocean-going and powerful tug, specially equipped to fight fire, with steam pump and full equipment of hose, arrived on the scene, and, going up to the Shenango, put a line on her deck and and attempted to pull her out from the burning docks, stern foremost. It was then found that on account of the anchor of the Shenango being down, and, as subsequently ascertained, tangled or caught in some submerged cable, the Sam could not pull out the Shenango. The Sam then went alongside the Shenango, and commenced playing three streams of water from her steam pumps and hose on the fire which had

started in the superstructure of the Shenango in the fore part of the vessel near her bow; and, in a short time, about 20 minutes, succeeded in putting out the fire, except for the smoldering sails and pieces of loose timber lying on the deck. As before stated, libelants, Borison and McCann, did what they could in assisting by dipping water from the basin in buckets and pouring it on the smoldering fire.

"When the fire was practically put out, the crew of the Sam and other employés of the J. M. Guffey Petroleum Company and the Gulf Refining Company tried to raise the anchor of the Shenango; but, as there was no steam on the Shenango to work the winch, they found they were unable to do it. They then tried to turn the drum of the winch so as to pay out the anchor chain in order that they might get to a joint or clevis-like connection in the chain, which are placed about every 15 fathoms, or every 90 feet, in the chain. They found they were unable to turn the drum of the winch at all, and Rummler, Borison, and McCann tried to do so, but failed. Capt. Bliss, of the J. M. Guffey Petroleum Company, then sent for the chief engineer of the Captain Sam, Mr. Roper, and he came on and released the drum of the anchor winch, so that the chain could be paid out, and so that they could arrive at the severable joints. When this was done they all went to work to part the anchor chain. The testimony is conflicting as to just who performed this service of separating the anchor chain. Borison and McCann attempted to cut the chain, but were unable to do so. Finally the pin which holds the clevis in the anchor chain was removed and the chain parted, and the Captain Sam, having already had on the bow, as stated, its line, with the assistance of the tug Viva, as hereinafter stated, easily towed the Shenango away from the fire and out of danger. During this time, which occupied about 45 minutes, the Sam had put her line on the bow of the Shenango and commenced to pull with the intent to tow her out.

"Shortly after the fire broke out, and the Captain Sam went to the rescue of the Shenango, Davis and Lawless, two of the employés of the Gulf Refining Company and the J. M. Guffey Petroleum Company, went in a launch to where the tug Viva was moored, some 1,200 feet down the basin, and some 1,200 or 1,400 feet away from the fire, and made a contract with Capt. Fredericksen, the master of the tug Viva, to go up and give assistance in the hauling or pulling out of the Shenango. According to some of the witnesses the amount to be paid for this service was $100, and according to others it was $500, but the witnesses agree that there was a contract made with Fredericksen, the captain and master of the Viva, to the effect that he would go up and put a line on the bow of the Sam and give a pull to assist her in pulling out the Shenango. When Lawless made the offer to Fredericksen to put a line on the Sam and assist her in pulling out the Shenango, neither Lawless nor Fredericksen knew that the anchor of the Shenango was down and fastened, but the offer was made by Lawless and accepted by Fredericksen under the belief that such was not the condition of the anchor of the Shenango. Immediately after this agreement was made, the tug Viva, in charge of the said Capt. Fredericksen, came up close to where the Sam was alongside the Shenango putting out the fire. According to the preponderance of the testimony Capt. Bliss, who was the marine agent of the J. M. Guffey Petroleum Company, and who was the man in charge in trying to put out the fire and rescue the Shenango, hailed Fredericksen, Bliss not knowing of the contract made by Lawless with Fredericksen, and asked him what he was going to do. Fredericksen replied that he had agreed to go up and give a pull on the Shenango by putting a line on the Sam. Bliss replied that that was all right, but he could not do anything at that time, because the anchor was down, and nothing could be done until the anchor was slipped or the anchor chain cut, except to stand by and wait for a signal. Fredericksen then took the tug Viva back to her former mooring place, and again tied up. A few minutes after this had occurred, the fire having been practically put out on the Shenango, the Captain Sam having put her line on the bow of the Shenango and was pulling on the line, Fredericksen with the Viva came back near the point, with the view of getting around the Shenango and pulling out the barge Dallas, which was also on fire in the same vicinity. When he came back there he put a line on the Sam, and the two

together, that is the Viva and the Sam, began pulling on the Shenango, even before the anchor chain was separated, and succeeded in dragging the anchor a little and thus in moving the vessel perhaps 100 feet. During all this time the parties on the Shenango, including Rummler, Borison, and McCann, were working on the Shenango and endeavoring to part the anchor chain. As before stated, after about 30 or 40 minutes' work they succeeded in doing this, and then the two tugs easily and quickly pulled the Shenango out of danger. The line of the Captain Sam on the bow of the Shenango was about 50 feet long, and the Captain Sam was about 185 feet long; the line which the Viva had on the bow of the Sam was variously stated at from 50 to 100 feet, so that the Viva, when she was pulling with a line on the Sam, was in the neighborhood of 300 feet from the Shenango.

"I find that the work of Borison and McCann, and of Rummler, was valuable, voluntary, and rendered under circumstances requiring great courage.

"I further find that when Fredericksen made his bargain with Lawless and Davis to go up and give a pull on the Sam, he did not know that the anchor of the barge Shenango was down, and that his agreement was made while none of the parties thought that said anchor was down and fastened.

"While the testimony did not show the value of the tug Captain Sam, it did show that she was much larger and a more powerful tug than the Viva, and that she was equipped with fire-fighting devices, and had a larger crew. And I find that the services of the Sam and of her crew were equally as hazardous and dangerous, and required as much courage as that of the crew of the Viva.

"I further find that after the anchor chain was parted the Captain Sam could easily herself, with the assistance of the Viva, have taken the Shenango quickly out of the burning docks, and out of danger. Either vessel, the Sam or the Viva, could have readily taken the Shenango out had the anchor of the Shenango not been down. Still I find that the Viva did render substantial assistance, and performed valuable salvage service.

"This preliminary statement is made, not for the purpose of stating all of the material facts, but with the view of making clear the general nature of the case.

"My specific findings are:

"(1) The barge Shenango and cargo was in a situation of imminent danger of destruction for a period of at least 2½ hours.

"(2) That Borison, McCann and Rummler were exposed to peril of their lives during the said time, and that their services were valuable in facilitating and hastening the rescue of said vessel.

"(3) That the tug Captain Sam was a tug of greater size and power than the tug Viva, and manned by a larger crew, but the value of said tug is not shown, and the same appears from the evidence to be of considerable age. This tug and its officers and crew rendered service of greater value than the tug Viva and its crew; and I find that several individuals in the employ of the Gulf Refining Company rendered services of equal value as the services rendered by the said Borison, McCann, and Rummler, in putting out fires and in releasing the anchor of the Shenango.

"(4) That the tug Viva is a tug of about 140 horse power, and its assistance in towing the barge Shenango was necessary in moving said Shenango up to the point when the anchor was released, when the tug Captain Sam could have thenceforward towed said barge Shenango without assistance.

"(5) That the time occupied by the tug Viva in assisting in the towing of said barge Shenango to a place of safety, was 1 hour and 20 minutes, 1 hour of which was consumed before the anchor was released, and during which time said tug and its crew were exposed to great peril.

"(6) That a contract was made between Fredericksen, the master of the Viva, and Lawless, by which Fredericksen agreed to assist in towing the barge Shenango for the sum of either $100, or $500, but at the time such contract was made, neither Fredericksen nor Lawless knew that the anchor of the Shenango was down and fastened. The offer was made by Lawless, and accepted by Fredericksen, upon the idea that this condition did not exist. Fredericksen learned for the first time when he approachd with the Viva to pull on the Sam what the condition of the anchor of the Shenango was, and

he was then informed by those in charge of the Shenango that he could do no good at that time, and he returned with the Viva to where she had been moored. When he returned the second time to the Sam and was requested to pull on her, the conditions had materially changed. The peril to the Viva and her crew was greater. The fact that the anchor was down required a different effort on the part of the tug Viva, than was supposed to be necessary when the contract was made, and, to make the pull at this second time she approached the Sam, entailed a longer continuance of peril than would have been the case if the conditions had existed as they were supposed to exist at the time the contract was made.

"When Fredericksen went back the second time it was for the purpose of getting out the barge Dallas, and he was then requested to pull on the Sam. He complied with this request, as herein stated, but, in so doing, he was not intending to comply with the contract aforesaid made with Lawless.

"(7) I also find that when Fredericksen returned the second time to the scene of the fire, he intended to undertake the rescue of the barge Dallas, which was a large barge laden with oil, and which he could have rescued alone under conditions entitling him and his crew to salvage, had he not been called to the assistance of the tug Captain Sam, and had he not responded to such call, and, instead of his tug rescuing the barge Dallas alone, the tug Captain Sam was enabled to join with the Viva in rescuing the barge Dallas.

"(8) I find that neither the crew or the owner of the tug Viva were apprised of any arrangement between the master, Fredericksen, and those acting for the Shenango looking to the assistance of the tug Captain Sam in towing out the Shenango.

"(9) I find that no contract existed between the owners or those in charge of the Shenango and the salvors, Borison and McCann, relative to the services rendered to them by said barge.

"(10) I find that the tug Viva was owned by and in the private service of T. S. Reed, as trustee, and was being used in transporting shell, sand, etc., and that its master, H. M. Fredericksen, had no authority to make any character of contracts on behalf of the tug or its owner.

"(11) It was agreed on the trial between the parties, and I so find, that the value of the barge Shenango is $136,000, and that the value of the cargo saved was $45,764."

Supplementing these findings of fact, we find from the evidence that the tug boat Viva was an old boat in 1902, at which time it was purchased by Myrick & Co., for $1,600; since that time it has been repaired and rebuilt as to hull, and machinery except the engines, three times, the last time in 1909. The Viva was sold under orders of court to its present owners before the Shenango fire, and its value is not shown. Estimates were given varying from $4,000 to $10,000, but the best evidence was not produced. From its history and the evidence furnished the value could hardly exceed $7,000. It was only equipped for the towing business, and was not equipped for rendering salvage services with adequate pumps, hose, hawsers, experienced crew, and generally necessary appliances.

The Viva went to the aid of the Shenango after the fire thereon was subdued, if not entirely extinguished, and then did not go nearer than the outside and astern of the Captain Sam, say 300 feet, until after the Shenango was pulled away from the wharf. Outside and astern of the Captain Sam she had a line of 50 to 75 feet to the Captain Sam upon which she pulled, thus aiding the Captain Sam in its work of pulling the Shenango away from the wharf; and, after the Shenango was cleared from the wharf, the Viva assisted the Captain Sam in towing the Shenango a short distance to a place of safety.

In rendering these services the Viva was in no actual peril, except

the possibility of injury in case the Shenango should (notwithstanding the fire was practically out) blow up, scattering fire over 300 feet.

Rummler, a fireman in the employ of the Port Arthur Waterworks, was carried on board the Captain Sam by Bliss, the marine agent of the Guffey Petroleum Company, who mistook him for an employé of that company, and from the Sam, Rummler went aboard the Shenango with the officers and crew of the Sam, and with them rendered service looking to the extinction of the fire. His wages per diem were not proved.

Borison and McCann were longshoremen employed in and about the port, whose wages, when employed, were from $4.50 to $7 per day. McCann was at the dock and had a skiff, and he was employed by Coleman, labor foreman of the Gulf Refining Company, to carry him to the Sam, and Borison seems to have gone along, and both rendered services on the invitation of Coleman.

Some 18 men, members of the crew of the Sam and employés of the Gulf Refining Company, rendered services to the Shenango, some of equal and some of more value than the services rendered by Borison, McCann, and Rummler.

The whole case shows that the Captain Sam rendered the really skillful persistent services to save the Shenango and its cargo, and through its success in that regard made a salvage case within the jurisdiction of the court, and thereto the services of the Viva and of Rummler, Borison and McCann and others were incidental and subsidiary.

The court below found the following conclusions of law:

"I find that the character of services rendered by the salvors was that of salvage service, and that 4 per cent. of the value of the barge and cargo is a proper amount to be awarded to the owner of the tug Viva and to its master and crew, to be apportioned, two-thirds to the owner, T. S. Reed, trustee, and one-third to the master, Fredericksen, and the crew of said tug Viva, to be apportioned among the said master and crew according to the amount of wages received by each of them at the time of the service, the said barge to pay according to its value, and the Gulf Refining Company to pay the balance of such award, and I find that the proper amount to be awarded to each of the salvors, Borison, McCann, and Rummler, is $750, to be apportioned between the barge and the owners of the cargo according to the value of each, the barge and cargo."

And judgment was accordingly rendered, thus awarding to the laborers Rummler, McCann and Borison, as volunteer salvors, more than 100 times their ordinary day wages, and to the Viva and its crew the sum of $7,276.50, an amount more than the probable value of the Viva.

The appellants contend that these allowances are excessive and out of all proportion to the incidental and auxiliary services rendered by the appellees, and are on the wrong theory that the appellees were original salvors in the matter, regardless of the greatly superior services rendered by the Captain Sam and the numerous employés of the oil and refining companies, and as to the Viva that its master and owners are bound by the alleged contract for services made with the agents of the appellants, and its compensation should be limited to the contract price, $100, or at most $500; and, as to Borison, McCann, and

Rummler, that their award should be on the basis of work and labor, and reduced to a reasonable amount, not exceeding $500 for all three.

As to the contract with the Viva, we are disposed to concur with the District Judge in ignoring the same, for the reason the contract claimed is not sufficiently proved as a binding contract; in fact Lawless is not shown to have had authority to make the same, either for the owners of the barge Shenango or for the refining company owner of the cargo; the evidence as to the terms of the contract is confused and conflicting, and, as to the price contracted to be paid the Viva, the same was not fixed and certain, and there was not a meeting of minds of the alleged contracting parties, fixing with certainty the main element of a contract to render salvage services, to wit, the price to be paid.

[1] As to the amounts of the allowances, we are satisfied that under all the facts and circumstances of the case, and in the light of admiralty rules and principles relating to salvage services, they are much too large, and should be reduced. If awards should be made on the same basis to all the parties who rendered services in saving the Shenango and cargo and to the Captain Sam and crew, which unquestionably rendered the bulk of the services, the amount would tend towards confiscation.

In admiralty courts victims of marine disasters, fire, wreck, or other calamity are compelled, under the guise of salvage awards, to pay for services rendered in escaping the danger, not on the principle of a quantum meruit or remuneration pro opere et labore, but as a reward for perilous services voluntarily rendered, and as an inducement to mariners in such dangerous enterprise to save life and property. See The Blackwall, 10 Wall. 1–14, 19 L. Ed. 870.

In The Sonderburg v. Towboat Co.. 3 Woods, 146, Fed. Cas. No. 13,175, Mr. Justice Bradley defines salvage as follows:

"Salvage is a reward for meritorious services in saving property in peril on navigable waters, which might otherwise be destroyed, and is allowed as an encouragement to persons engaged in business on such waters, and others, to bestow their utmost endeavors to save vessels and cargoes in peril."

The same eminent jurist in Murphy v. The Ship Suliote (C. C.) 5 Fed. 99, 102, said with regard to salvage:

"Salvage should be regarded in the light of compensation and reward, and not in the light of prize. The latter is more like a gift of fortune conferred without regard to the loss or sufferings of the owner, who is a public enemy, whilst salvage is the reward granted for saving the property of the unfortunate, and should not exceed what is necessary to insure the most prompt, energetic, and daring effort of those who have it in their power to furnish aid and succor. Anything beyond that would be foreign to the principles and purposes of salvage; anything short of it would not secure its objects. The courts should be liberal, but not extravagant; otherwise that which is intended as an encouragement to rescue property from destruction may become a temptation to subject it to peril."

In The J. Emory Owen (D. C.) 128 Fed. 996, Judge Seaman well says:

"While the value of the property saved enters into determination of the value of the salvage service, as an essential element, and the maritime law intends encouragement of gallantry and adventure in the relief of distressed

vessels, it is not the policy of that law to grant awards which tend to excite greed or promote unreasonable pretensions on the part of salvors, nor to disregard in any measure the interests of the owner of the rescued property."

[2] Nonprosecution of their claim by one set of salvors inures to the benefit of the owners of the vessel, and not to that of other salvors who do prosecute their claim. The Blackwall, supra.

[3] Since the advent of iron and steel vessels operated by steam there has been a decided tendency by the courts to qualify the grades of salvage services, and to reduce the amounts of awards to salvors from the standard of former days of wooden sailing vessels, when generally the salvage services were rendered on the real high seas, and on sparsely settled shores, where help was scarce and assistance, when rendered, was at a sacrifice of time, and more or less risk to person and property.

This tendency to modify is shown in The Blackwall and The Suliote, supra, where, as in the instant case, the services were rendered at wharves in thickly settled ports where mechanical and other help were not only plentiful, but were ready and prepared to render services, and large rewards at the expense of suffering owners were not necessary to encourage assistance to vessels in distress. See The New York (D. C.) 34 Fed. 922; The Holland (D. C.) 44 Fed. 362; The Kaaterskill (D. C.) 48 Fed. 701; The Boyne (D. C.) 98 Fed. 444; The Kaiser Wilhelm Der Grosse (D. C.) 106 Fed. 963; The Priscilla (D. C.) 153 Fed. 476; The Indian, 159 Fed. 20, 86 C. C. A. 210; The Jefferson (D. C.) 181 Fed. 416; The Maryland (D. C.) 190 Fed. 641.

[4] Viewed in the light of all the circumstances exhibited in this record, our conclusion is that one-third of the allowances made by the District Court will be large and liberal compensation to the appellee salvors now in court for salvage services rendered the Shenango and cargo. This will give to Rummler, Borison, and McCann $250 each for a few hours' individual services, and to the tug Viva and its crew $2,423.18 for about two hours' services in the line of the Viva's regular employment. We think this amount of award fully meets all possible purposes contemplated by the law, and that a larger amount would be unwarranted judicial liberality. Unless the appellees are to be rewarded beyond their own merit and because of the misfortune of the owners of the Shenango and cargo, they can have no reason to complain.

The decrees of the District Court in all three causes are reversed, and the said causes are remanded, with instructions to enter decrees in favor of the libelants and intervener, respectively, in accordance with the views herein expressed, and for all costs of the District Court.

SAMSON CORDAGE WORKS v. PURITAN CORDAGE MILLS (two cases).

(Circuit Court of Appeals, Sixth Circuit. January 13, 1914.)

Nos. 2358, 2359.

1. TRADE-MARKS AND TRADE-NAMES (§ 17*) — VALIDITY — USE OF COLORED STRANDS IN SASH CORD.

The marking of sash cord in the manufacture with a series of spots arranged spirally about the circumference, each shaped in the form of a lozenge, the spots being made in the ordinary process of machine braiding of sash cord by combining one colored strand with eleven undyed strands, the result being that the colored strand appears and disappears from time to time causing the appearance at regular intervals of colored spots somewhat irregular in shape, but more or less rhomboidal in form, and traceable in a spiral path about the surface of the cord, not restricted to any particular color, does not constitute a valid trade-mark.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 20; Dec. Dig. § 17.*]

2. TRADE-MARKS AND TRADE-NAMES (§§ 71, 75*)—SUIT FOR UNFAIR COMPETITION.

The existence of a valid trade-mark is not essential to a right of action for unfair competition in which the essence of the wrong consists in the palming off of the merchandise of one person for that of another, and the use of the mark of another which is invalid as a trade-mark will not support a suit for unfair competition unless it is used in such a way as to constitute a fraud on purchasers.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 82, 86; Dec. Dig. §§ 71, 75.*]

3. TRADE-MARKS AND TRADE-NAMES (§ 79*)—SUIT FOR UNFAIR COMPETITION.

A suit for infringement of trade-mark differs from one for unfair competition in that in the former the wrongful intent is presumed from the fact of infringement, while in the latter it must be proved, although an inference of such intent may be justified from the inevitable consequences of the act complained of.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 89, 90; Dec. Dig. § 79.*]

4. EQUITY (§ 148*)—MULTIFARIOUSNESS—SUITS FOR INFRINGEMENT AND FOR UNFAIR COMPETITION.

Where diverse citizenship exists between the parties and the requisite amount is involved to give a federal court jurisdiction, a cause of action for infringement of a trade-mark and one for unfair competition may be joined in one suit.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 341–367; Dec. Dig. § 148.*]

5. TRADE-MARKS AND TRADE-NAMES (§ 70*)—UNFAIR COMPETITION—GROUNDS FOR RELIEF.

The protection against unfair competition is not limited to such imitation or conduct as would deceive a cautious and discriminating purchaser, but extends to such as would be likely to mislead the ordinary or usual buyer, including the ultimate consumer.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 81; Dec. Dig. § 70.*]

6. TRADE-MARKS AND TRADE-NAMES (§ 95*)—SUIT FOR UNFAIR COMPETITION—PRELIMINARY INJUNCTION.

The showing *held* sufficient to entitle a complainant to a preliminary injunction against unfair competition by defendant by marking its make

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

of sash cord to resemble that of complainant to such an extent as to tend to mislead purchasers.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 108; Dec. Dig. § 95.*

Imitation or simulation of trade-mark or trade-name as unfair competition, see note to John H. Rice & Co. v. Redlick Mfg. Co., 122 C. C. A. 447.]

Appeal from the District Court of the United States for the Western District of Kentucky; Walter Evans, Judge.

Suits in equity by the Samson Cordage Works against the Puritan Cordage Mills. Complainant appeals from decree for defendant in first case, and order denying preliminary injunction in second case. Decree (194 Fed. 573) affirmed, and order (197 Fed. 205) reversed.

Geo. O. G. Coale and F. P. Fish, both of Boston, Mass., and McDermott & Ray and Coale & Hayes, all of Louisville, Ky., for appellant.

Helm & Helm, of Louisville, Ky., for appellee.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

KNAPPEN, Circuit Judge. Complainant, a cordage manufacturer, filed its bill (in No. 2358) for infringement of an alleged trademark upon a high-grade sash cord of its manufacture. The mark was alleged to consist in "a series of spots arranged spirally about the circumference of the cord, each shaped in the form of a lozenge." The spots were in fact made in the ordinary method of machine braiding of sash cord, by combining one colored strand with eleven undyed strands; the result being that in the regular and normal process of manufacture the colored strand appeared and disappeared from time to time, resulting in the appearance at regular intervals of spots somewhat irregular in shape but more or less rhomboidal in form, and traceable in a spiral path about the surface of the cord. Complainant used any one of several different colors, employing blue in about one-fifth of its product. The defendant braided its cord in the same normal and mechanical way, using, however, two blue strands (in place of a single colored strand), together with ten undyed strands; the result being that the spots on defendant's cord, being the width of two strands, are twice as wide as those on complainant's cord, and are not actually lozenge-shaped or rhomboidal—the space, moreover, between defendant's spots being the width of but one uncolored strand, or half the space between complainant's spots, the color on defendant's cord being characterized by it as presenting a broken and almost continuous spiral, and so distinguished (as well as by shape) from the spots on complainant's cord. Defendant answered, denying that complainant had a valid trade-mark, and asserting noninfringement and good-faith selection of its mark. A motion for temporary injunction, based on showing by affidavits and counter affidavits, was denied. 193 Fed. 274. Complainant then asked to amend its bill so as to allege unfair competition in trade. This request was denied, on the ground that

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

the amendment, if permitted, would either substitute a suit for unfair trade for the then pending suit of trade-mark infringement, or would result in a suit seeking relief upon two separate, distinct, and apparently contradictory causes of action, viz., "one upon a trade-mark, another which, in effect, disavows the trade-mark altogether." The case was then submitted for final hearing upon the affidavits filed. The bill was dismissed, upon the ground, stated in the opinion, that "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 basis of a trade-mark." 194 Fed. 574.

Meanwhile, after denial of the motion to amend the bill in No. 2358, a bill was filed (in No. 2359) to restrain alleged unfair competition, on the ground that complainant's mark by long use had become associated in the mind of the public with and distinctly represented complainant's manufacture, and that defendant by its imitation of complainant's distinctive spots upon the cord, and by its advertisements and dealings, was seeking to palm off its goods as those of complainant. In this bill no mention is made of the shape of the spots constituting the alleged mark. An application for temporary injunction, heard on showing and countershowing by affidavit, was denied, upon the grounds: First, that the right to employ the colored spots was not exclusively appropriable by complainant, and that it was not unfair for defendant to do what it had a legal and moral right to do; second, that defendant was not shown to have palmed off its goods as those of complainant; and, third, that if the court had any discretion in the matter of granting a temporary injunction, it should be exercised against the motion, because of complainant's election in the former case to sue for the establishment of its trade-mark. Appeal was taken from the dismissal of the bill in the trade-mark suit and from the denial of temporary injunction in the suit for unfair competition.

[1] 1. *The trade-mark.* Complainant registered its trade-mark in the United States Patent Office in 1894. It does not rely on this registration, but stands upon an alleged common-law mark consisting of the spots made and arranged as stated. The question of first importance is whether this mark is validly open to complainant's exclusive adoption, as representing goods of its manufacture. Broadly stated, complainant was at liberty to affix to its product any distinctive symbol or device, not previously appropriated, which would distinguish it from articles of the same general nature manufactured or sold by others. Amoskeag v. Trainer, 101 U. S. 51, 25 L. Ed. 993. On the other hand, a mark must be something distinct from the thing marked. That is to say, the thing itself cannot be a trade-mark of itself; although it is no objection to the validity of an otherwise good mark that it is impressed upon or inherent in the article manufactured, as in the case of a watermark upon paper, a word or symbol blown into a glass bottle or jar, or an arbitrary mark on the head of a horseshoe nail. Capewell Horse Nail Co. v. Mooney (C. C.) 167 Fed. 575; s. c., 172 Fed. 826, 97 C. C. A. 248. Again, no valid trade-mark can be acquired in the use of a color not connected with some distinctive symbol or

design. Leschen Rope Co. v. Broderick, 201 U. S. 166, 171, 26 Sup. Ct. 425, 50 L. Ed. 710; J. A. Scriven Co. v. Morris (C. C.) 154 Fed. 914, 918; Newcomer & Lewis v. Scriven Co. (C. C. A. 6th Cir.) 168 Fed. 621, 623, 94 C. C. A. 77; Diamond Match Co. v. Saginaw Match Co. (C. C. A. 6th Cir.) 142 Fed. 727, 729, 74 C. C. A. 59; Mumm v. Kirk (C. C.) 40 Fed. 589. As said by Mr. Justice Brown in Leschen Rope Co. v. Broderick, supra, 201 U. S. at page 171, 26 Sup. Ct. at page 426, 50 L. Ed. 710:

"Whether mere color can constitute a valid trade-mark may admit of doubt. Doubtless it may, if it be impressed in a particular design, as a circle, square, triangle, a cross, or a star. *But the authorities do not go farther than this.*" (Italics ours.)

And as said by the present Mr. Justice Lurton, speaking for this court in Newcomer & Lewis v. Scriven Co., supra, 168 Fed. at page 623, 94 C. C. A. at page 79:

"Color, except in connection with some definite, arbitrary design, such as when impressed upon a circle, star, cross, or other figure, or employed in definite association with some characteristics which serve to distinguish the article as made or sold by a particular person, is not the subject of monopoly as a trade-mark."

The owner of a valid trade-mark, otherwise distinctive, may, however, be protected against appropriation by a rival dealer through mere change in color. Leschen Rope Co. v. Broderick, supra, 201 U. S. at page 172, 26 Sup. Ct. 425, 50 L. Ed. 710; A. Leschen, etc., Co. v. Broderick, 36 App. D. C. 451, 455.

The pivotal question is whether the colored spots, as made and as appearing upon the surface of the cord, constitute a distinctive symbol or design appropriable as a trade-mark. It appears that it is common for manufacturers of various kinds of twisted and braided cords, including hat cords, bell cords, fish lines, wrapping twine, and coverings of electric wires, to use colored strands, usually for ornament merely; in some cases (especially wire coverings) as a mark of origin. Complainant claims to be the only manufacturer of braided sash cord which has adopted a colored strand for the mere purpose of showing origin of manufacture. Of course, the mere fact that the mark adds to the appearance of the article does not detract from the validity of the mark. Capewell Horse Nail Co. v. Mooney, supra. The precise question presented has been the subject of few decisions squarely in point. In Dodge Mfg. Co. v. Sewell & Day Cordage Co. (C. C.) 142 Fed. 288, it was held by Judge Lowell that a rope manufacturer, who adopted a blue thread twisted into one of the strands of its rope as a trade-mark, was not entitled to restrain another manufacturer from using a thread of a different color. The question of the validity of complainant's mark, as confined to the particular color used, was expressly passed without decision. In A. Leschen & Sons Rope Co. v. Macomber & Whyte Rope Co. (C. C.) 142 Fed. 289, a trade-mark consisting of "a red or other distinctively colored streak applied to or woven in a wire rope" was held by Judge Kohlsaat invalid, not only because there could be no valid trade-mark in color alone, but for the further reason that it contained no distinctive design, but attempted

to monopolize the right to use any streak of any color, however produced in or applied to a wire rope. In A. Leschen & Sons Rope Co. v. Broderick & Bascom Rope Co., 134 Fed. 571, 572, 67 C. C. A. 418, it was held by the Circuit Court of Appeals of the Eighth Circuit, speaking through Judge Amidon, that "a mark which consists simply in a colored strand in a wire rope, but is not restricted to any particular color," cannot be sustained as a valid trade-mark. It was said that in such case "it is the color which constitutes the mark, and not its configuration, and a right to vary the color indefinitely would destroy that distinctive character which must inhere in a valid trade-mark." The Supreme Court, in affirming the case upon the ground that a trade-mark for wire rope of a red or other distinctively colored streak applied to or woven in the rope is too broad and too indefinite, found it unnecessary to decide the broad propositions asserted by the Circuit Court of Appeals to which we have referred. 201 U. S. at page 172, 26 Sup. Ct. 425, 50 L. Ed. 710. In A. Leschen & Sons Rope Co. v. Broderick, supra—which was an appeal from a dismissal by the Patent Office of opposition to an application for registration of trade-mark—the Court of Appeals of the District of Columbia (36 App. D. C. page 456) expressly left undecided the question whether a mark consisting of a stripe of uniform width spirally disposed around the surface of wire rope may constitute a valid trade-mark.

In considering whether complainant's "spots" are distinctive in form and arrangement, and such as may be adopted as a mark of origin, or whether in ultimate analysis it is color rather than distinctive configuration that constitutes the mark, the fact that in the normal mechanical braiding of the cord with a colored strand "spots" are bound to appear "spirally," in whatever form the exposed portion of the strand takes, seems pertinent, as does the fact that the spots do not naturally indicate origin of manufacture, either as being arbitrary marks or otherwise; but prima facie suggest only ornamental dressing. While there is a difference in form between the spot created by the braiding of a colored strand in a sash cord and the form taken by a section of the colored strand or thread appearing from time to time on the surface of a twisted rope, the difference appears to us to be not in principle but in degree. How, apart from its color, can the exposed, though broken, surface of a braided strand be said to be a distinctive design, when the product of all manufacturers normally presents precisely the same feature and the same design; for (to apply the expressions of Mr. Justice Lurton in Newcomer & Lewis v. Scriven Co., which we have quoted above) the color thus is not impressed upon an "arbitrary design," nor is it employed in association with "characteristics which serve to distinguish the article as made and sold by" complainant. In the absence of controlling authority to the contrary, we are constrained to agree with the views expressed by the Circuit Court of Appeals of the Eighth Circuit. This, we think, results in a denial of the validity of complainant's trade-mark. It is true that in the rope cases stress was laid upon the fact that the use of a colored strand is the only practicable way of marking rope, while it appears here that one manufacturer of sash cord stamps his name upon every foot of his product.

But this distinction does not impress us as controlling, for the parties seem to agree that a mark upon sash cord, to be effective, should be substantially permanent in character; and there may be danger that a mark applied upon the surface of the cord would be subject to a wearing off by use, and thus fail in one of the suggested purposes of a permanent mark, viz., to enable the user, when replacing the cord after years of use, to identify it by reference to its inherent marks; and, on the other hand, the use of a colored strand in a wire rope, being unusual, would be more distinctive, and so more naturally suggestive of origin, than a colored spot in a braided cord of a general type not infrequently so ornamented. The fact that the spot would be covered when the cord is in use cuts little figure. Complainant's alleged mark, if infringed by that of defendant, occupies the field as against all colored marks effected by the use not only of one braided strand, but even of two in a twelve strand cord, and whether so arranged as that the segments appear upon the surface two together or twice as close to each other. We think this result would give complainant an unwarranted monopoly, and that the District Court rightly dismissed the bill in the trade-mark case.

[2, 3] 2. *Unfair competition.* The existence of a valid trade-mark is not essential to a right of action for unfair competition (Elgin Watch Co. v. Illinois Watch Co., 179 U. S. 665, 674, 21 Sup. Ct. 270, 45 L. Ed. 365; Wolf Bros. & Co. v. Hamilton-Brown Shoe Co. [C. C. A. 8th Cir.] 165 Fed. 413, 415, 91 C. C. A. 363), in which action the essence of the wrong consists in the palming off of the merchandise of one person for that of another (Elgin Watch Co. v. Illinois Watch Co., supra; Standard Paint Co. v. Trinidad Asphalt Co., 220 U. S. 446, 461, 31 Sup. Ct. 456, 55 L. Ed. 536; Rathbone, Sard & Co. v. Champion Steel Range Co. [C. C. A. 6th Cir.] 189 Fed. 26, 33, 110 C. C. A. 596, 37 L. R. A. [N. S.] 258). Unless such palming off is shown, the action fails. Coats v. Merrick Thread Co., 149 U. S. 562, 573, 13 Sup. Ct. 966, 37 L. Ed. 847; Howe Scale Co. v. Wyckoff, 198 U. S. 118, 140, 25 Sup. Ct. 609, 49 L. Ed. 972. And so unfair competition cannot be predicated alone on the use of another's mark which is invalid as a trade-mark because not appropriable as such; that is to say, when not used in such way as to amount to a fraud upon the public. Paint Co. v. Asphalt Co., supra. An important respect in which the action for infringement of trade-mark differs from that for unfair competition is that in the former the wrongful intent is presumed from the fact of infringement, while in the latter recovery can be had only on proof of wrongful intent in fact, although an inference of such intent may be justified "from the inevitable consequences of the act complained of." Elgin Watch Co. Case, supra, 179 U. S. at page 674, 21 Sup. Ct. at page 270, 45 L. Ed. 365.

[4] The diverse citizenship of the parties, in connection with the amount involved, gave the District Court jurisdiction over the suit for unfair competition, as well as the action for infringement of the claimed common-law trade-mark. Paint Co. v. Asphalt Co., supra, 220 U. S. at page 456, 31 Sup. Ct. 456, 55 L. Ed. 536. There is no inconsistency between the two actions. Both pertain to the same broad

subject of unfair competition. Merriam v. Saalfield (C. C. A. 6th Cir.) 198 Fed. 369, 372, 117 C. C. A. 245. Nor is there any objection, on either principle or authority, to the joining of the two causes of action in one suit; on the contrary, such joinder is usually to be preferred as preventing an unnecessary suit. G. Heileman Brewing Co. v. Independent Brewing Co. (C. C. A. 9th Cir.) 191 Fed. 489, 492, 112 C. C. A. 133. Several cases in the Supreme Court and in this court illustrating the practice of such joinder are cited in the margin.[1] It follows that complainant's insistence upon prosecuting its trade-mark suit and the latter's pendency on appeal in this court were not grounds for denying a temporary injunction in the suit for unfair competition.

There remains the question whether the District Court properly exercised its discretion in denying injunction upon the meritorious ground that a case of unfair competition was not made out. There was testimony that the form and arrangement of complainant's "spots" had by long use become associated in the public mind as representing complainant's manufacture, and that defendant's mark so far resembled complainant's as that the former's cord could easily be mistaken for that of the latter and sold as such, especially if the label had been removed and the goods were not shown side by side. And the district judge in his opinion (193 Fed. p. 275) denying a temporary injunction in the trade-mark case, spoke of defendant's cord as a "spotted cord, which, in a general way, by an ordinary person, might be taken to be complainant's fabric, if it were not closely examined." The record amply supports this conclusion.

There was also testimony tending to show that the labels were not always on the "hanks" even when sold by the piece, being liable to destruction by wear, and, of course, subject to purposeful removal; and that sales of less than full pieces were sometimes made to persons other than dealers and architects; also, that purchases had been made (apparently in preparation for suit) tending to show that some dealers were selling defendant's cord as "spot cord," which is complainant's trade-name; also, that an architect, as well as a contractor, had been misled by its appearance into passing defendant's cord for "spot cord," which had been specified; also, testimony from which an intent to get the benefit of the reputation of complainant's cord might be inferred from correspondence and advertising. This testimony tended prima facie to make a case of unfair competition. Defendant replied by counterproofs and explanations tending, among other things, to show nonliability to confusion on the part of the ordinary purchaser between the two marks, and asserting an absence of intent to mislead or confuse, and an attempt to adopt a mark which should not conflict with that of any other manufacturer.

The district judge seems to have based his conclusion that the charge of unfair competition in fact was not established largely on the differ-

[1] Coats v. Merrick Thread Co., supra; Paint Co. v. Asphalt Co., supra; Newcomer & Lewis v. Scriven Co., supra; Dietz v. Horton Mfg. Co., 170 Fed. 865, 96 C. C. A. 41; Edward Hilker Mop Co. v. U. S. Mop Co., 191 Fed. 613, 112 C. C. A. 176; Gaines v. Turner-Looker Co., 204 Fed. 553, 123 C. C. A. 79.

ence between labels, including the supposed nonlikelihood that their use would permit any but a grossly careless person to be deceived, and a finding of good faith on defendant's part with respect to the use and intended preservation of the labels, at the same time expressing the view that defendant was "under no obligation to complainant to put on labels of any sort." Defendant's wrappers do clearly distinguish its product from complainant's; and if the cord were sold only in wrappers, and to observing dealers or customers, there could be little danger of misleading, in the absence of actual fraud on the part of dealers; for which fraud, unless participated in or encouraged by defendant, it would not be responsible, provided it had done its legal duty in distinguishing its own product from that of complainant. Rathbone, Sard & Co. v. Champion Steel Range Co., supra, 189 Fed. at page 33, 110 C. C. A. 596, 37 L. R. A. (N. S.) 258.

[5] However, the protection against unfair competition is not limited to such imitation or conduct as would deceive a cautious and discriminating purchaser, but includes such as would be likely to mislead the ordinary or usual buyer; and the liability of the ultimate consumer to be misled must be reckoned with. Edward Hilker Mop Co. v. U. S. Mop Co., supra; Coco-Cola Co. v. Gay-Ola Co. (C. C. A. 6th Cir.) 200 Fed. 720, 723, 119 C. C. A. 164; Gaines v. Turner-Looker Co., supra, 204 Fed. at page 556, 123 C. C. A. 79. And if the marking of defendant's cord was such that it was likely, by the ordinary purchaser, to be taken for complainant's cord, if not closely examined, the failure to use distinguishing labels would normally be evidence of an intent to mislead. In such case a burden would rest upon defendant to see to it that purchasers are not likely to be deceived by confusion between the two marks; and, if defendant's product cannot be so dressed or put out as substantially to assure such result, defendant should not be allowed to use the mark in question. Coca-Cola Co. v. Gay-Ola Co., supra, 200 Fed. at pages 274, 275, 119 C. C. A. 164.

[6] It is clear that upon the record presented the granting of preliminary injunction would have been well within the court's discretion. The important question is whether its denial was clearly an improvident exercise of discretion; for the general rule governing the review of orders either granting or denying preliminary injunction (as held by numerous cases in this court, some of which are cited in the margin [2]) is that the order should not be disturbed unless it clearly appears that the court below has exercised its discretion upon a wholly erroneous conception of pertinent facts or law. We think the court did intend to decide that defendant was not shown in fact to have intended, and that its conduct in so manufacturing and putting out its cord did not in fact tend, to pass off its product as that of complainant; and, if so, the mere fact that other and untenable grounds of denial were stated would not justify reversal. But the conclusion stated was

[2] Duplex Printing Press Co. v. Campbell Printing Press & M. Co., 69 Fed. 250, 252, 16 C. C. A. 220; Shelbyville v. Glover, 184 Fed. 234, 238, 106 C. C. A. 376; Grand Rapids v. Warren Bros. Co., 196 Fed. 892, 894, 896, 116 C. C. A. 454; Acme Acetylene Co. v. Commercial Acetylene Co., 192 Fed. 321, 323, 112 C. C. A. 573; Louisville & N. Ry. Co. v. Western Union Telegraph Co. (C. C. A.) 207 Fed. 1, 4.

reached while the court was apparently laboring under the misapprehension of law that there could be no unfairness in defendant's use of the colored spots because of its supposed unqualified right to such use (for the reason that they were not subject to complainant's exclusive appropriation), and that defendant was under no obligation to use labels of any kind; and this misapprehension would, we think, naturally affect the ultimate conclusion of fact reached. We therefore think we are called upon to exercise our own judicial discretion with respect to the issuing of injunction.

Taking into account the evidence presented and its tendency, we are constrained to the view that injunction should issue restraining defendant generally (pending final hearing upon the merits) from making, marketing, or advertising sash cord in any way tending to mislead the public into believing that the cord made or sold by it is complainant's product. Inasmuch, however, as the greater part of defendant's stock now on hand has presumably been manufactured since the denial of injunction below, and so, in a sense, under the implied approval of the District Court, and having in mind that on this application for temporary injunction we balance considerations of convenience and inconvenience, rather than finally determine the rights of the parties, we think defendant should be permitted to sell, as now marked and labeled, its stock on hand at the date of filing this opinion, on giving satisfactory bond to account for such profits and damages resulting from the sale of that stock as complainant may ultimately be found entitled to. Otherwise, and as to stock not on hand when this opinion is filed, the manufacture and sale of defendant's cord, as now marked, should be specifically enjoined, unless it shall be so put out as effectively and permanently to distinguish it from complainant's product. There now occurs to us no practicable way in which, with its present markings, it can be so dressed or put out as to secure the result stated. We do not, however, definitely decide that there is no practicable way of so securing such result. It may be considered by the District Court, as may also the question whether injunction bond should be required of complainant; and, if so, the amount thereof, together with any and all other questions of detail which may arise upon settlement of the order of injunction below. Of course, we have not attempted to determine what modification, open to defendant, of the form of its present mark upon the cord, would sufficiently distinguish the latter from complainant's product.

The order of denial in No. 2359 is reversed, with costs, and the case remanded to the District Court with directions to issue temporary injunction in accordance with the views expressed in this opinion. The final decree in No. 2358 is affirmed, with costs.

H. E. WINTERTON GUM CO. v. AUTOSALES GUM & CHOCOLATE CO.

(Circuit Court of Appeals, Sixth Circuit. February 4, 1914.)

No. 2535.

1. TRADE-MARKS AND TRADE-NAMES (§ 70*)—UNLAWFUL COMPETITION—COMPETING GOODS—DISTINCTIVE DRESS.

Complainant and its predecessors manufactured and sold gum cut in disks called "Violet Chips" and "Mint Chips," put up in enameled round tin boxes, the violet in violet colored boxes and the mint in green. The lettering on both was in white with the words "Colgan's Violet Chips—The Gum That's Round." This gum was largely sold in the south and southwest and was put up in pasteboard cartons colored to correspond with the boxes and prominently marked on the cover which was provided to be left open, with the same lettering. In 1912 defendant began putting out a round gum called "Winterton's Satsuma Chips," adopting a box of the precise shape, size, and form of that used by complainant, using a light blue and red color, respectively, and the words "Winterton's Satsuma Chips—A Dainty Box for the Purse," in white in the same positions on the box as complainant's legend. Defendant's gum was sold in competition with complainant's at a less price to the retailer, and after objection, and shortly before suit brought, defendant changed the name of its gum from "Chips" to "Wafers" and adopted different colors for the boxes and cartons, which were otherwise practically the same. *Held*, that defendant was guilty of unlawful competition in the dress of its gum considering the prior trade, and complainant was entitled to an injunction restraining defendant from using boxes or containers which might be of sufficient similarity to mislead the ordinary purchaser and also from using the words "Satsuma Wafers."

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 81; Dec. Dig. § 70.*]

2. TRADE-MARKS AND TRADE-NAMES (§ 70*)—UNLAWFUL COMPETITION—DISTINCTIVE DRESS.

A manufacturer of goods may obtain a monopoly in the right to use a distinctive dress for boxes and cartons containing the goods which have become known to the public by advertising as characterizing the manufacturer's product, which monopoly will be protected against unlawful competition.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 81; Dec. Dig. § 70.*

Imitation or simulation of trade-mark or trade-name as unfair competition, see note to John H. Rice & Co. v. Redlich Mfg. Co., 122 C. C. A. 447.]

3. TRADE-MARKS AND TRADE-NAMES (§ 70*)—DISTINCTIVE WORDS—USE.

While the word "Chips" as applied to disks of chewing gum is a descriptive word which may not be exclusively appropriated by a manufacturer, yet, having been appropriated, a competitor may not use the word as describing its goods in connection with other words, and such a form of dress as will mislead the public to believe that its chips are complainant's product.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 81; Dec. Dig. § 70.*]

4. TRADE-MARKS AND TRADE-NAMES (§ 70*)—UNLAWFUL COMPETITION—DRESS OF GOODS—COLOR.

Color may be one of the elements making up a dress of goods entitled to protection against unlawful competition.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 81; Dec. Dig. § 70.*]

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

5. TRADE-MARKS AND TRADE-NAMES (§ 70*)—UNLAWFUL COMPETITION—RIGHT TO RELIEVE—ULTIMATE PURCHASER.

In order to obtain relief against unlawful competition, it is not necessary that the imitation be such as to mislead the careful and discriminating purchaser, but it is enough if it is calculated to mislead the ordinary and casual buyer.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 81; Dec. Dig. § 70.*]

6. TRADE-MARKS AND TRADE-NAMES (§ 89*)—UNLAWFUL COMPETITION—FRAUD.

While a manufacturer is not responsible for the fraud of a retailer of his goods, the manufacturer is guilty of unlawful competition if he so dresses his goods as to represent the goods of another and assists the retailer in palming off his goods as those of the competitor.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 99; Dec. Dig. § 89.*]

7. APPEAL AND ERROR (§§ 728, 760*)—ASSIGNMENTS OF ERROR—REVIEW.

Where assignments of error as to the admission of evidence did not quote the substance of the evidence as required by Court of Appeals Rule No. 11 (202 Fed. viii, 118 C. C. A. x), and appellant's brief does not refer to the pages of the record where the action complained of was to be found as required by rule No. 20, subd. 2 (202 Fed. xiv, 118 C. C. A. xvi), and contained no argument in support thereof, the assignments would not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3010-3012, 3095; Dec. Dig. §§ 728, 760.*]

Appeal from the District Court of the United States for the Western District of Tennessee; John E. McCall, Judge.

Suit by the Autosales Gum & Chocolate Company against the H. E. Winterton Gum Company. Decree for complainant, and defendant appeals. Affirmed.

Elias Gates, of Memphis, Tenn. (Lehman, Gates & Martin, of Memphis, Tenn., of counsel), for appellant.

A. A. Thomas, of New York City, for appellee.

Before KNAPPEN and DENISON, Circuit Judges, and DAY, District Judge.

KNAPPEN, Circuit Judge. This is an appeal from an interlocutory decree awarding injunction and accounting in a suit for unfair competition.

[1] The important facts are these: In 1897 the Colgan Gum Company began manufacturing paper-wrapped chewing gum. In 1908 it began making a brand of gum in the form of thin disks or chips; its first variety being violet-flavored and called "Violet Chips," its second variety (put out in 1909) being mint-flavored and called "Mint Chips." The company adopted in 1908 a distinctive package in the form of a round, enameled, and lithographed tin box, about $^{11}/_{16}$ inches deep and with a cover about 1½ inches in diameter, containing 10 disks, and retailing at 5 cents. The Violet Chips were contained in violet-colored boxes and the Mint Chips in boxes colored green. The lettering upon both boxes was white. Upon the covers of the boxes containing Violet Chips were the words "Colgan's Violet Chips—The Gum That's Round"; the latter four words being in the form of a circle on the

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

margin of the lower half of the cover-top. The Mint Chip boxes had the same legend, using, however, the word "Mint" instead of "Violet." There was other printing upon the bottom of the boxes and on the rim of the cover. The Colgan Company was not the first to manufacture gum in the form of disks, but it was the first to put out "round gum" in round tin boxes, and at the time its manufacture began it was the only manufacturer of round gum. The Faultless Chemical Company had for a few years put out what it called "Chips," its package being a rectangular pasteboard box; at least one form of its advertisement carrying the legend, "The gum that's round." The Faultless Company ceased manufacturing gum as early as 1900, and its round-gum cutting machines were in 1907 sold to the Colgan Company, in preparation for its manufacture of round gum. One Primley manufactured a round gum from about 1893 to 1896, when he ceased. His disk was of considerably larger diameter than Colgan's, and was packed in gold-colored pasteboard boxes and called "Primley's Goldbox Gum." The Faultless Company and Primley seem to have been the only ones manufacturing round gum previous to Colgan's taking up that form. The Colgan Company sold out its business to complainant (appellee) May 15, 1911, and the latter has continuously sold (among other gums) the Violet and Mint Chips of the same diameter and form, in precisely the same kind of a package, and lettered in precisely the same way, except as respects certain details on the bottom of the box not material here—latterly putting 7 disks in a box.

From 1908 until approximately June, 1911, the Colgan Gum Company expended in advertising Colgan's "Chips" about $250,000, by means of magazine and newspaper advertisements, billboards, window displays, hangers, counter display stands, sample distribution, and otherwise; and complainant, from May 15, 1911, to March 31, 1913, expended in advertising the same product, in ways similar to those employed by the Colgan Company, more than $180,000. The advertising matter of both complainant and Colgan generally contained prominent pictorial representations of the boxes or containers, or both. From the time they were put on the market until January 1913 the sales of Colgan's Violet and Mint Chips have amounted to about $1,750,000. The counter display stands put out by the Colgan Company and complainant were of enameled metal, consisting of five upright compartments, each adapted to hold four boxes of chips; the stand containing, among other lettering, the words "Colgan's Chips" prominently displayed, together with the words "The Gum That's Round," printed in color on a white circular surface, the character "5c" being in the center of the circle. Colgan's Chips were delivered to the retailer in distinctive pasteboard cartons, each holding 20 boxes, the cartons being colored to correspond with the boxes they contained, and being prominently marked on the cover (which was provided to be left open) "Colgan's Mint Chips" (or Violet Chips, as the case might be) "The Gum That's Round"; the lettering throughout on the cartons being white and having conspicuously displayed on each side and each end of the carton the words "The Gum That's Round," contained within a circle, in connection with the words "Mint Chips" or "Violet

Chips," the circle on the ends of the cartons being between the two words forming the name of the Chips. The principal sales of Mint Chips and Violet Chips (both of Colgan and complainant) were in the south and southwest parts of the United States, and in some sections largely to Negroes, Italians, and French. Customers were in the habit of calling for and ordering these chips by the names "round gum," "tin box gum," or "tin gum."

About the middle of the year 1912 defendant began putting out a round gum, which it called "Winterton's Satsuma Chips." It adopted a box of the precise shape, size, and form of that used by Colgan and complainant, even to the slight depression in the cover of the box, which left more or less of a rim on the upper surface; defendant's box contained from 7 to 11 chips. Defendant also enameled its boxes, using two different colors, a light blue and red, respectively; the gum, however, contained in the different colored boxes being apparently the same, including flavor. Defendant also lettered its boxes in white, the inscription upon the top of the box being "Winterton's Satsuma (Trade-Mark) Chips. A dainty box for the purse"; the word "Chips" being printed in a distinctive style similar to that word as printed upon complainant's Violet Chip boxes, and the words "A dainty box for the purse" occupying the same position as complainant's legend "The Gum That's Round." Defendant likewise packed its "Chips" for the use of the retailer in pasteboard cartons, the blank being apparently cut from the same pattern as complainant's, even to the ears attached to the cover for the purpose of holding it up when the box is open. Defendant's cartons thus contained the same number of boxes as did complainant's, and were likewise colored to correspond with the color of the enameled tin boxes contained therein, and likewise had a circle in white prominently displayed on the cover, the sides, and ends of its cartons, in the same relation to the words "Satsuma Chips" as complainant's circle occupied toward the words "Violet Chips" or "Mint Chips"; the legend within defendant's circle being "Satsuma—That Regular Make," so arranged that the word "That" is prominently and alone in the exact center of the circle, as is the word "That's" in the circle of complainant and Colgan.

Defendant has spent comparatively little in advertising its product in question, its total outlay for all advertising purposes, including free gum, being from $6,000 to $8,000. It has done no pictorial advertising, and but little in trade journals or other periodicals. Its goods have been sold through traveling salesmen in the territory occupied by complainant, and apparently in large part upon the strength of the popularity of complainant's chips. Since the advent of defendant's chips, complainant's sales have been appreciably affected in some localities; and a part of this interference seems fairly traceable to the competition of defendant, whose boxes being of the same size and shape, and at a distance of a few feet presenting the same general appearance as those of complainant (although actually differing in color and otherwise), could be, and in some instances are shown to have been, put in and sold from complainant's display standards and jars, mixed with boxes of complainant's chips. The fact that de-

fendant's chips were sold to the retailer at a lower price than complainant's, although sold to the consumer at the same price, would naturally offer temptation to the retailer to confuse the two manufactures.

After suit was threatened, and during the last days of November, 1912, defendant formally discontinued the use of its cartons and containers, as well as the name "Satsuma Chips," protesting, however, that such discontinuance was only temporary; and about six weeks later, and shortly after this suit was begun, began putting out the same product and in the same style of package, except that the name was changed from "Chips" to "Wafers," the words "A dainty box for the purse," formerly printed on the cover, being omitted; and the position and style of type in the word "Wafers" differing from the position and type of the word "Chips" in the former label. The colors adopted were a shade of tan and a slightly different shade of blue. An amended and supplemental bill was filed to meet the new situation. The decree enjoined defendant specifically from manufacturing and putting out chewing gum in round packages of the shape, style, and appearance of either defendant's "Satsuma Chips" or "Satsuma Wafers" boxes, as well as in defendant's pasteboard cartons; and generally from manufacturing and putting out chewing gum in colored round metal packages or pasteboard boxes, or under labels, substantially identical with or like complainant's boxes, packages, and labels, or such as are calculated to deceive purchasers or consumers. Defendant does not assign error upon the specific enjoining of the use of its "Satsuma Chips" boxes and cartons, but does complain that it is adjudged guilty of unfair competition and of the general features of the injunction, as well as the specific enjoining of the use of "Satsuma Wafers" boxes and packages.

[2] We think the court rightly found unfair competition, and rightly enjoined the use of defendant's "Satsuma Chips" boxes and containers, despite defendant's disclaimer of intention to resume the use of that label. The injunction properly extended to the use of any boxes, containers, or labels likely to mislead the public by creating confusion between the two manufactures. The question whether complainant can acquire, broadly speaking, a monopoly of the right to use a round, tin, lithographed box is not here involved; the decree need not rest upon the theory of such monopoly. The dress of complainant's boxes and cartons, taking all their features into account, is, in our opinion, distinctive; and this distinctive dress has become known to the public as characterizing complainant's product. This dress is therefore entitled to protection against unfair competition. Paris Medicine Co. v. W. H. Hill Co. (C. C. A. 6th Cir.) 102 Fed. 148, 42 C. C. A. 227; Wm. Wrigley, Jr., & Co. v. Grove Co. (C. C. A. 2d Cir.) 183 Fed. 99, 101, 105 C. C. A. 391; Moxie Co. v. Daoust (C. C. A. 1st Cir.) 206 Fed. 434, 124 C. C. A. 316; Samson Cordage Works v. Puritan Cordage Mills, 211 Fed. 603, decided by this court January 6, 1914.

[3] It is true that the word "Chips" is a descriptive term, and (unless it has acquired a secondary meaning, which we are not called up-

on to decide) could not be exclusively appropriated. But while defendant had the right to use the word as describing its goods, it had not the right to so use it in connection with other words and form of dress as to induce the public to believe that its "Chips" are complainant's product. Wm. Wrigley, Jr., & Co. v. Grove Co., supra, 183 Fed. at page 101, 105 C. C. A. 391. The rule in trade-mark cases, that color, except in connection with some definite, arbitrary design, cannot be the subject of exclusive appropriation (Leschen Rope Co. v. Broderick, 201 U. S. 166, 171, 26 Sup. Ct. 425, 50 L. Ed. 710; Samson Cordage Works v. Puritan Cordage Mills, supra, and cases there cited), has little application here; where the pivotal question, so far as it affects that feature, is the existence or nonexistence of deceptive similarity.

[4] That color may be one of the elements making up a dress entitled to protection is clear. Coca-Cola Co. v. Gay-Ola Co. (C. C. A. 6th Cir.) 200 Fed. 720, 724, 119 C. C. A. 164. We are unable to resist the conclusion not only that the dress of defendant's "Satsuma Chips" boxes and cartons inevitably tends to confuse defendant's "Chips" with complainant's product, having in mind the conditions under which the two products are sold, but that the dress employed by defendant was adopted with the intent thereby to profit from the popularity of complainant's product and the latter's good will. It is true that the differences in coloring and lettering are such that the careful and discriminating purchaser, able and willing to read and seeing the two products side by side, need not be misled into accepting defendant's product for that of complainant; but the record suggests that not all of complainant's customers are able to read English at least, that the conspicuous characteristic in the minds of many purchasers is the round gum in the tin box, and that a casual observation of the differences in coloring and lettering of complainant's boxes would not suggest to the ordinary purchaser the distinction between the two products.

[5] It need scarcely be said that it is the ultimate purchaser whose deception is to be guarded against; that the imitation need not be such as to mislead the careful and discriminating purchaser. It is enough that it misleads the ordinary and casual buyer. Coca-Cola Co. v. Gay-Ola Co., supra, 200 Fed. at page 723, 119 C. C. A. 164; Cordage Works v. Cordage Mills, supra, and cases there cited.

[6] It is urged that defendant is not responsible for the fraud of the retailer; and this is true where such fraud is not encouraged by the defendant, and where the latter has done its legal duty in distinguishing its product from that of its competitor. Rathbone, Sard & Co. v. Champion Steel Range Co. (C. C. A. 6th Cir.) 189 Fed. 26, 33, 110 C. C. A. 596, 37 L. R. A. (N. S.) 258. But in our opinion defendant has not brought itself within this limitation.

Whether defendant's "Satsuma Wafers" boxes and cartons unfairly compete presents a somewhat different question, but we think different only in degree. If the consideration of these boxes and cartons could be dissociated from the previous use of and experience with defendant's "Satsuma Chips" boxes and containers, we might hesitate to find sufficient misleading similarity to justify a conclusion of unfair

competition. But this dissociation cannot properly be made; defendant seems to have gained a foothold with the trade through the use of its "Satsuma Chips" boxes and containers; presumably the latter were still kept in stock to some extent by some dealers at the time Satsuma Wafers were put out; and, in view of the history we have stated, we are impressed that the differences between "Satsuma Wafers" and "Satsuma Chips" boxes are not such as sufficiently to distinguish the former from complainant's "Chips" to prevent the misleading of the ordinary buyer. In many cases the use of the manufacturer's name is sufficient to prevent confusion, but there is no hard and fast rule to this effect. Gaines v. Turner-Looker Co. (C. C. A. 6th Cir.) 204 Fed. 553, 556, 123 C. C. A. 79. The question of deceptive similarity is, after all, one of fact, to be determined in each case upon its own peculiar incidents.[1]

[7] The record contains several assignments of error addressed to the overruling of objections and to the reading of portions of depositions of certain witnesses. These assignments are not discussed in appellant's brief, beyond the statement that they "are submitted for the consideration of the court on the reasons assigned in the objections to the evidence and without further argument on our part." They are not discussed in appellee's brief. We nowhere find any reference to the pages of the record where the action complained of is to be found, as is required by subdivision 2 of Rule 20 of this court (202 Fed. xiv, 118 C. C. A. xvi); nor is the substance of the admitted evidence quoted in the assignments, as required by our rule No. 11 (202 Fed. viii, 118 C. C. A. x). We should not be called upon to search the record for this purpose, and so cannot consider the assignments. Chicago Gt. Western Ry. Co. v. Egan (C. C. A. 8th Cir.) 159 Fed. 40, 46, 86 C. C. A. 230.

The judgment of the District Court is affirmed, with costs.

[1] Note.—Defendant's corporate name was printed on the bottom and on the cover rim of its Satsuma Chips box, on the side only (below the cover rim) of its Satsuma Wafers box, and on the top of its cartons; in each case in less conspicuous position and type than its trade-name.

In re YORKVILLE COAL CO.

In re TARRULLI et al.

(Circuit Court of Appeals, Second Circuit. January 13, 1914.)

No. 132.

1. BANKRUPTCY (§ 293*) — PROPERTY BELONGING TO STATE — RECOVERY — ADVERSE CLAIMS—SUMMARY PROCEEDINGS.
In summary proceedings in bankruptcy by a trustee against third persons to recover property claimed adversely, the bankruptcy court has jurisdiction to determine whether the claim asserted is merely colorable, but may not, against claimants' objection, pass on the truthfulness of the witnesses and the weight of the testimony as affecting the merits of the claim.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 411, 417; Dec. Dig. § 293.*]

2. BANKRUPTCY (§ 293*)—ADVERSE CLAIMS—DETERMINATION—JURISDICTION.
Where a bankrupt's trustee sought to recover possession of certain wagons which were not in the bankrupt's possession when the petition was filed, but which several days before had been sold by the bankrupt's president to claimants, and their claim of title pursuant to such sale was supported by their sworn testimony that the wagons were purchased, paid for, and delivered to them, such testimony showed the existence of an adverse claim which was not merely colorable, however unsustainable on the merits, and hence was not determinable in summary proceedings in bankruptcy over claimants' protest.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 411, 417; Dec. Dig. § 293.*]

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

In the matter of bankruptcy proceedings of the Yorkville Coal Company. Petition by Joseph Tarrulli and another to revise an order directing the delivery of certain wagons by petitioners to the trustee. Order reversed.

An involuntary petition in bankruptcy was filed against the Yorkville Coal Company on December 21, 1912, and George E. Leonard was appointed receiver and subsequently trustee. An order of adjudication was entered on January 7, 1913. The trustee, about March 3, 1913, moved that the petitioners herein, Tarrulli and Sandquist, should be required to show cause why they should not be required to turn over to the trustee certain wagons which it was alleged belonged to the bankrupt. A hearing was had before a special master. The petitioners, before any evidence was taken, while evidence was being taken and at the conclusion of the evidence, contended that the special master had not any jurisdiction and that it was not in his power to go any further than to see whether there was any basis for an adverse claim. Their objection was overruled, and they took an exception. The special master recommended that an order be issued requiring the petitioners to turn the wagons over to the trustee, and that they should be required to pay the costs and disbursements of the proceeding. Such an order was made by the District Court.

Peter Klein, of New York City, for appellants.

Abraham Brill, of New York City, for trustee.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

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

ROGERS, Circuit Judge (after stating the facts as above). [1] The question which comes before this court is whether a bankruptcy court in a summary proceeding to determine whether an adverse claim existed in fact at the time of the filing of a petition in bankruptcy or was simply "colorable," has a right to pass upon the truthfulness of the witnesses and the weight of the testimony and thus determine the merits of the claim.

The property involved consists of three wagons which the trustee claims as the property of the bankrupt which claim is denied by the petitioners, who assert an adverse title.

[2] It appears from the facts disclosed in the record that the wagons which the trustee seeks to recover were not in the bankrupt's possession on December 21, 1912, when the petition in bankruptcy was filed. On that day, and on several days prior, the wagons were in the possession of Sandquist. Tarrulli's claim, as the record shows, is based upon a sale which he alleges was made of the wagons to him by Benedetto, the president of the bankrupt corporation, which sale, it is alleged, also took place prior to the day when the petition in bankruptcy was filed. This claim is supported by the sworn testimony of both Tarrulli and Benedetto. There is sworn testimony to the effect that the property was paid for by Tarrulli and delivery was made under the contract. The testimony shows, therefore, an adverse claim, and as the facts upon which it rests are stated under oath as having occurred prior to the date when the petition in bankruptcy was filed, the basis for the adverse claim existed at the time of the filing of the petition. The purpose of the preliminary investigation is to find out whether there are any facts which might form a basis of an adverse claim so as to send it to trial in a plenary suit. When the inquiry discloses such facts the purpose of the preliminary investigation is accomplished, and the inquiry should then have been brought to a close. In this preliminary investigation in the bankruptcy court there is no right to try the claim upon the merits, to weigh testimony against testimony, and to find certain testimony to be true and certain testimony not to be true. That would be to deny the parties the right to a trial before a jury.

The special master in this proceeding seems to have understood that he had the right to weigh testimony against testimony and to pass upon the credibility of the witnesses, and the conclusion he came to was that the claim made by Tarrulli and supported by the testimony of Benedetto that a sale had taken place was untrue, and was an afterthought originated after the filing of the petition in bankruptcy and in order to defeat the trustee's right to the property. He so reported to the District Court, and recommended that an order be entered requiring Tarrulli and Sandquist to turn the wagons over to the trustee, and that they should pay the costs and disbursements of the proceeding. In the District Court the same course was pursued. The court weighed the evidence and tried the case on the merits. The court below in its opinion found in favor of the trustee and against the claimants, saying:

"It is true that the testimony is three to one against the trustee, but numbers count for very little. In the first place, Benedetto's story is not borne

out by the books. Moreover, the general earmarks of the transaction are so suspicious."

We think the court below fell into error through its misapprehension of the decision of the Supreme Court in Mueller v. Nugent, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405. In that case the court held that the bankruptcy court had jurisdiction in a summary proceeding to ascertain whether there was any basis for an adverse claim actually existing at the time of the filing of the petition, or whether the claim was merely "colorable." The court below evidently thought that, in order to determine whether the claim asserted by Tarrulli and Sandquist was colorable, it had the right to determine whether the claim was a fraudulent one, based on false testimony and not worthy of credence. This certainly was not the meaning of the Supreme Court. The court said that the bankruptcy court acts within its jurisdiction in a summary proceeding in entering into an inquiry to find whether there is any basis in fact in support of a party's contention that he is an adverse claimant. It is to find out whether the claim is merely colorable, or whether it is "real, even though fraudulent and voidable." And if the claim is real, even though it may be fraudulent and voidable, the court must decline to finally adjudicate on the merits. An adverse claim, in other words, does not fall short of being *real* because the court thinks it is founded on false testimony and is fraudulent and voidable. It should be noted that in the Nugent Case no adverse claim to the cash in question was made by the respondent at any time until after the decision of the District Court, when he asked to amend his pleading by asserting that he held the money not as the agent of the bankrupt but adversely to him. Leave to amend was refused, a disposition of the matter which the Supreme Court held to be within the discretion of the District Judge at that stage of the case and not reviewable. The Supreme Court, moreover, said of the proposed amendment that it—

"did not even then set forth what money he had received, and how and when it came to his hands, or the circumstances under which he claimed to hold it adversely, but put forward simply a conclusion of law."

The case at bar is materially different. The claim of Tarrulli and Sandquist in this proceeding is a real adverse claim. That it may be found ultimately to be fraudulent and voidable is not at all material at this stage of the proceedings. The basis of an adverse claim is disclosed by the testimony when it is of such a nature that, if submitted in a court and no evidence is offered in contradiction, it would be sufficient to support a judgment in favor of the claimant. A claim is not adverse if it consists merely in a refusal to turn over property to the trustee, but it is not prevented from being adverse because it is based on false testimony, or originates in a fraudulent transaction. When the bankruptcy court undertakes to pass upon the question as to the truth or falsity of the testimony on which the claim rests, it usurps a jurisdiction which it does not possess, and it assumes to pass on the merits.

In Re Tarbox (D. C.) 185 Fed. 985, the court says:

"Plainly the trustee cannot enlarge the referee's jurisdiction merely by alleging that the claim under which the property is held has not merits or is fraudulent, or by calling it 'merely colorable,' when no other reasons appear for so describing it than its alleged want of merit or fraudulent character."

And in Re Blum, 202 Fed. 883, 121 C. C. A. 241, the court said:

"The term 'colorable,'" as used with reference to adverse claims, means "merely that if a respondent sets up as facts, and not as conclusions of law, matters which, if true, would constitute a statement of an adverse claim, then the claim would be adverse and not colorable, and not within the jurisdiction of the referee."

The bankruptcy court in a summary proceeding may inquire whether a claim is not merely asserted (colorable), but whether there are facts which, if true, would be the basis for a legal claim. Whether the facts are true or fraudulent or false or fictitious, it cannot determine without the claimant's consent. It is the claimant's right to have the truth of the testimony and the merits of the claim determined, if he so prefers, in a plenary suit.

The order is reversed, with costs to the petitioners appellants.

NEW YORK LUBRICATING OIL CO. v. PUSEY.

(Circuit Court of Appeals, Second Circuit. January 13, 1914.)

No. 90.

1. NEGLIGENCE (§ 136*)—ACTIONS FOR INJURIES—QUESTIONS FOR JURY.

In an action for injuries to an employé of a seller of oil, who went upon the buyer's tank for the purpose of measuring the oil before and after delivery, and fell by reason of the insecure fastening of a manhole cover, evidence *held* to make a question for the jury as to his negligence.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 277–353; Dec. Dig. § 136.*]

2. NEGLIGENCE (§ 32*)—CONDITION OF PREMISES—CARE REQUIRED AS TO INVITEES.

An employé of a seller of oil, which was being pumped from its barge directly into the buyer's tank, who, as was customary, went upon the tank in company with the buyer's representative to measure the oil through a manhole before and after delivery, was not a trespasser, or even a licensee, but was there by invitation implied by law, where one enters on the premises of another to carry out a purpose which is to the common advantage or to the common interest of the owner and himself, and it was the duty of the owner to exercise ordinary care and prudence to keep the premises in a safe and suitable condition so that he would not be exposed unnecessarily or unreasonably to danger.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 42–44; Dec. Dig. § 32.*]

3. NEGLIGENCE (§ 32*)—CONDITION OF PREMISES—CARE REQUIRED AS TO INVITEES.

An employé of a seller of oil which was being pumped into the buyer's tank went upon the tank in company with the buyer's representative to measure the oil through a manhole before and after delivery. There was a manhole in the roof about six inches from the edge of the tank,

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

and directly in front of the ladder, the cover of which was insecurely fastened. The buyer's representative, having been frequently on the tank, reached across the cover and took hold of the flange in climbing on to the roof, but the seller's employé, not knowing that the cover was insecurely fastened, took hold of the handle of the cover and fell when the cover came off. *Held*, that the implied invitation to such employé was not, as claimed, an invitation to take hold of the manhole by the flange or collar only, and not by the handle of the cover.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 42–44; Dec. Dig. § 32.*]

4. NEGLIGENCE (§ 65*)—LIABILITY—CONTRIBUTORY NEGLIGENCE.
A person injured through another's negligence cannot recover if his own negligence contributed to the injury, and his negligence may be of a negative character, such as lack of vigilance, but to defeat a recovery it must amount to a want of ordinary care, as the law does not require him to exercise extraordinary care or the utmost possible caution.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 83, 94; Dec. Dig. § 65.*]

5. NEGLIGENCE (§ 67*)—LIABILITY—CONTRIBUTORY NEGLIGENCE.
A person has a right to presume that every other person will perform his duty, and, in the absence of reasonable ground to think otherwise, it is not negligence to assume that one is not exposed to danger which can come only from another's negligence.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 90, 91; Dec. Dig. § 67.*]

6. NEGLIGENCE (§ 136*)—ACTIONS—QUESTION FOR JURY.
If at the close of plaintiff's case there is evidence upon which the jury might find for plaintiff, defendant's negligence should be submitted to the jury even though the great preponderance of the testimony is with defendant, as there are few questions within the range of judicial inquiry which are regarded as more peculiarly and exclusively within the province of a jury than those of negligence.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 277–353; Dec. Dig. § 136.*]

7. NEGLIGENCE (§ 136*)—ACTIONS—QUESTION FOR JURY.
Where the facts are such that there is room for difference of opinion between reasonable men as to whether or not negligence should be inferred, the right to draw the inference is for the jury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 277–353; Dec. Dig. § 136.*]

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

Action by Edward Pusey against the New York Lubricating Oil Company. Judgment for plaintiff, and defendant brings error. Affirmed.

William Butler, of New York City (Lowen E. Ginn, of New York City, of counsel), for plaintiff in error.

King & Booth, of New York City (Frederick P. King, of New York City, Albert D. MacDade, of Chester, Pa., and Frederick J. Moses, of New York City, of counsel), for defendant in error.

Before COXE, WARD and ROGERS, Circuit Judges.

ROGERS, Circuit Judge. This action was brought to recover damages for personal injuries arising out of the alleged negligence

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

of the defendant. A verdict was returned in favor of the plaintiff and against the defendant for $10,000, and judgment was entered for $10,105.35, damages and costs.

[1] The plaintiff was a deck hand employed by the Pure Oil Company on one of its barges—loaded with oil in bulk. The oil, which had been sold to the defendant, was being pumped from the barge directly into one of defendant's tanks. In all such transactions the custom is to have the contents of the tank gauged before and after delivery by representatives of the buying and selling companies who go to the top of the tank, measure the depth of oil through a manhole, agree upon the gaugings and exchange signed memoranda of their measurements. The defendant, who had had previous experience and had done gauging before, was designated by the captain of the barge to make the gaugings for the Pure Oil Company, and one O'Brien was designated by the defendant to make the gaugings on its behalf. The tank was cylindrical in shape, 30 feet high and about 20 feet across. The only means of reaching its top was by a series of handholds forming a ladder up the side of the tank. The top step was 16½ inches below the edge of the tank. The roof was conical and sloped down from the center to the circumference. There was a manhole on the roof about six inches from the edge of the tank and directly in front of the ladder. The manhole cover weighed about 25 pounds. In the middle of the manhole cover was a handle in the form of a low arch. The cover was intended to be fastened down by four bolts. On the day of the accident, and for several years before, there was but one bolt in the cover. O'Brien, the defendant's gauger, had frequently been on the tank to gauge, and knew that there was but one bolt in the slots. The plaintiff had never done any gauging on this particular tank, and had never seen a manhole cover fastened with bolts on a sloping roof tank. The usual construction of sloping roof tanks includes a manhole cover fastened to the roof by a hinge. The plaintiff was not informed that the cover was insecure. O'Brien preceded the plaintiff up the ladder. He reached across the manhole cover and took hold of the flange and thus climbed safely to the roof. Then plaintiff mounted the ladder, and as he reached the top saw the cover right in front of him and took hold of the handle to pull himself over the edge. It came off in his hand, and he fell to the ground and was injured. The bones of his leg were driven down through the ankle bone and came out and produced a very bad injury. He was operated on several times in an effort to save the foot. The physicians on both sides agreed that the foot would have to be amputated.

The court below charged the jury that it was one of the duties which any employer of men is under to furnish a reasonably safe place for his own workmen to work in, and that, if in the course of his workmen's employment, some outsider is invited upon the premises to take part in the work which is being done by his own workmen, then the same employer is bound to exercise ordinary care and prudence in seeing that the place where the party is invited to work is in a reasonably safe condition. He also informed the jury that it was for them to say whether the defendant had furnished a reasonably safe

place for his own workmen and for the people who were invited to come there and get up onto the top of that tank, and that if they found that the plaintiff's own negligence contributed to his injury, he could not recover.

[2] In considering whether there was error in the charge, it becomes important to inquire whether the defendant owed any duty to the plaintiff. If the court can say as a matter of law that no duty was owing from the defendant, the judgment must be reversed. The plaintiff was not a trespasser, but was rightfully upon the property. The defendant invited the plaintiff's employer to enter on the premises with such of its servants as might be necessary to fill the oil tank with the oil which he had purchased, and, acting under the orders of his employer, the plaintiff entered. An invitation is implied by the law where one enters on the premises to carry out a purpose which is to the common advantage or to the common interest of the owner and himself, as in the case of one going on property on business of the owner. Heskell v. Auburn, Q. H. & P. Co., 209 N. Y. 86, 91, 102 N. E. 540; Dixon v. Swift, 98 Me. 207, 56 Atl. 761; Norris v. Nawn Contracting Co., 206 Mass. 58, 91 N. E. 886, 31 L. R. A. (N. S.) 623, 19 Ann. Cas. 424; Plummer v. Dill, 156 Mass. 426, 31 N. E. 128, 32 Am. St. Rep. 463; Purtell v. Philadelphia & R. Coal Co., 256 Ill. 110, 99 N. E. 899, 43 L. R. A. (N. S.) 193, Ann. Cas. 1913E, 335. The law is clearly established that the owner of premises who induces another to come upon it by invitation, express or implied, owes to him the duty of exercising ordinary care and prudence to keep the premises in a safe and suitable condition so that he will not be exposed unnecessarily or unreasonably to danger. Barrett v. Lake Ontario Beach Improvement Co., 174 N. Y. 310, 66 N. E. 968, 61 L. R. A. 829; Wright v. Perry, 188 Mass. 268, 74 N. E. 328; Smith v. Jackson, 70 N. J. Law, 183, 56 Atl. 118; Crogan v. Schiele, 53 Conn. 186, 1 Atl. 899, 5 Atl. 673, 55 Am. Rep. 88; Lauritsen v. American Bridge Co., 87 Minn. 518, 92 N. W. 475. In Holmes v. N. E. Ry. Co., L. R. 4 Exch. 254, a workman going into the private grounds of a railroad company to assist in unloading coal was allowed to recover damages for an injury sustained by the insecurity of a flagged path in the yard. He was not a mere licensee; being there, as the court said, in a transaction of common interest, he was entitled to require that the defendant's premises should be in a reasonably secure condition. The case was affirmed in L. R. 6 Exch. 123.

In his work on Torts (3d Ed.) p. 1259, Judge Cooley states the rule as follows:

"When one expressly or by implication invites others to come upon his premises, whether for business or for any other purpose, it is his duty to be reasonably sure that he is not inviting them into danger, and to that end he must exercise ordinary care and prudence to render the premises reasonably safe for the visit."

It is only those parts of the premises where the person invited is expected to be that the owner is required to keep in a reasonably safe condition. Cowen v. Kirby, 180 Mass. 504, 62 N. E. 968; Phillips v. Library Co., 55 N. J. Law, 315, 27 Atl. 478; League v. Stradley, 68

S. C. 515, 47 S. E. 975. But at the time the plaintiff was injured he was in that part of the premises where he was invited to go. It is impossible, therefore, to conclude either that the plaintiff was at the time of the accident a mere trespasser or even a licensee. He was there upon invitation, and that imposed upon the owner an obligation to have the premises reasonably safe. It may be conceded that he was not under obligation to have the premises in an absolutely safe condition. Distilleries Co. v. Hair, 103 Ky. 196, 44 S. W. 658. He was merely required to exercise ordinary care to keep the premises, or that portion which the plaintiff was invited to enter, in a safe condition. Odell v. Solomon, 99 N. Y. 635, 1 N. E. 408; Marsh v. Minneapolis Brewing Co., 92 Minn. 182, 99 N. W. 630; Sesler v. Rolfe Coal, etc., Co., 51 W. Va. 318, 41 S. E. 216.

[3] The invitation which the defendant extended to the plaintiff was to go to the roof of the tank by means of the ladder, and when he got to the top to take hold upon what he might there find to help him to get upon the roof. To say that the invitation was to take hold of the manhole by the flange or collar, and not by the handle of the manhole cover which directly faced him, seems almost a quibble, and certainly is a proposition to which we cannot give our assent. No court has a right to say that the plaintiff was as a matter of law guilty of negligence when he grasped the handle of the cover in order to get upon the roof. Neither can the court say as matter of law that the premises were in a safe condition, and that a manhole cover, intended to be fastened to the roof by four bolts, was in a safe condition when secured by only one bolt. Neither can we say as a matter of law that the plaintiff was bound to look and see whether the bolts were in place or not. The plaintiff testified that from his position when he took hold of the manhole he could not see whether it was bolted or not.

[4] It is conceded that the fact that the defendant may have been at fault in not having the premises safe does not necessarily entitle the person injured to recover. The plaintiff cannot recover if his own negligence contributed to the injury. And his contributory negligence may be of a negative character, such as lack of vigilance. But the plaintiff's negligence, to defeat his action, must amount to a want of ordinary care, as the law imposes on every person the duty of using ordinary care for his own protection. The law does not require him to exercise extraordinary care or the utmost possible caution, but only ordinary and reasonable care. Graham v. Pennsylvania Co., 139 Pa. 149, 21 Atl. 151, 12 L. R. A. 293; Beers v. Housatonic R. Co., 19 Conn. 566; Louisville, etc., R. Co. v. Schmidt, 81 Ind. 264; Gulf, etc., R. Co., v. Shieder, 88 Tex. 152, 30 S. W. 902, 28 L. R. A. 538; Parvis v. Philadelphia, etc., R. Co., 8 Houst. (Del.) 436, 17 Atl. 702; Chicago, etc., R. Co. v. Bailey, 66 Kan. 115, 71 Pac. 246.

[5] But it is necessary in this connection not to overlook the general rule that every person has a right to presume that every other person will perform his duty, and that, in the absence of reasonable ground to think otherwise, it is not negligence for one to assume that he is not exposed to danger which can come to him only from violation of the duty which the other owed to him. Failure to anticipate the

defendant's negligence does not amount to contributory negligence. Dixon v. Pluns, 98 Cal. 384, 33 Pac. 268, 20 L. R. A. 698, 35 Am. St. Rep. 180; Mahan v. Everett, 50 La. Ann. 1162, 23 South. 883; Hyde v. Gay, 120 Mass. 589; Smith v. Jackson, 70 N. J. Law, 183, 56 Atl. 118; Newson v. New York Central R. R. Co., 29 N. Y. 383; Knight v. Goodyear's India Rubber Glove Mfg. Co., 38 Conn. 438, 9 Am. Rep. 406; Kansas City-Leavenworth R. R. Co. v. Langley, 70 Kan. 453, 78 Pac. 858.

[6, 7] The rule is that if at the close of the plaintiff's case there is evidence upon which the jury might find for the plaintiff, the question as to the defendant's negligence should be submitted to the jury. Baulec v. New York, etc., R. R. Co., 59 N. Y. 356; Walton v. Ackerman, 49 N. J. Law, 234, 10 Atl. 709; Hewett v. Woman's Hospital Aid Association, 73 N. H. 556, 64 Atl. 190, 7 L. R. A. (N. S.) 496; Powers v. Pere Marquette R. R. Co., 143 Mich. 379, 106 N. W. 1117; Springs v. South Bound R. R. Co., 46 S. C. 104, 24 S. E. 166. In Rauch v. Smedley, 208 Pa. 175, 57 Atl. 359, the court held that where the testimony offered by the plaintiff makes out a prima facie case, the question is for the jury, notwithstanding the great preponderance of testimony is with defendant. And where the facts are such that there is room for difference of opinion between reasonable men as to whether or not negligence should be inferred, the right to draw the inference is for the jury. Foster v. New York, etc., R. R. Co., 187 Mass. 21, 72 N. E. 331; Holmes v. Birmingham Southern R. R. Co., 140 Ala. 208, 37 South. 338; Chicago City R. Co. v. Robinson, 127 Ill. 9, 18 N. E. 772, 4 L. R. A. 126, 11 Am. St. Rep. 87; Indianapolis St. R. Co. v. Marschke, 166 Ind. 490, 77 N. E. 945; Lamb v. Missouri Pacific R. Co., 147 Mo. 171, 48 S. W. 659, 51 S. W. 81; Whitcher v. Boston, etc., R. Co., 70 N. H. 242, 46 Atl. 740; Newark Pass. R. Co. v. Block, 55 N. J. Law, 605, 27 Atl. 1067, 22 L. R. A. 374; Hays v. Miller, 70 N. Y. 112.

As the law does not require that the plaintiff should have exercised more than such care as ordinarily prudent persons would have exercised under similar circumstances to avoid danger, and as he was only required to exercise that degree of care which could reasonably be expected from one in his situation, we discover no error in the court's submitting the question to the jury.

There are few questions within the whole range of judicial inquiry which are regarded as more peculiarly and exclusively within the province of a jury than those of negligence. As said by the New York Court of Appeals:

"The wisdom of the time-honored rule of the common law which refers questions of fact to the jurors, and questions of law to the judge, is not more conspicuous in any class of civil cases, than in those which involve questions of negligence." Willis v. Long Island R. Co., 34 N. Y. 670, 679.

In a case which involved the question of the exercise of due care on the part of a child injured on a railroad turntable, the Supreme Court of the United States in Railroad v. Stout, 17 Wall. 657, 664 (21 L. Ed. 745) said:

"It is this class of cases and those akin to it that the law commits to the decision of a jury. Twelve men of the average of the community, comprising

men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer; these sit together, consult, apply their separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion. This average judgment thus given it is the great effort of the law to obtain. It is assumed that twelve men know more of the common affairs of life than does one man, that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge."

We think no error was committed. The court was justified in submitting the case to the jury.

The judgment is affirmed.

UNITED STATES ex rel. BAUDER v. UHL et al.

(Circuit Court of Appeals, Second Circuit. January 13, 1914.)

No. 177.

1. ALIENS (§ 53*)—DEPORTATION—GROUNDS—ENTRY IN VIOLATION OF LAW.
Under section 2 of the Immigration Act of Feb. 20, 1907, c. 1134, 34 Stat. 898, as amended by Act March 26, 1910, c. 128, § 1, 36 Stat. 263 (U. S. Comp. St. Supp. 1911, p. 500), and Act March 4, 1913, c. 141, 37 Stat. 737, providing for the exclusion of aliens who procure or attempt to bring in women for any immoral purpose, and section 20, which provides that any alien entering the United States in violation of law shall upon the warrant of the Secretary of Labor be deported at any time within three years, where an alien was excluded after a finding by a Board of Special Inquiry confirmed by the Secretary of Labor that he was attempting to bring in a woman for an immoral purpose, and thereafter returned to the United States and was duly admitted without such finding having been reversed, his entry was in violation of law and he could be deported.
[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 112; Dec. Dig. § 53.*]

2. ALIENS (§ 53*)—DEPORTATION—"ALIEN."
An alien does not cease to be an alien by declaring his intention to become a citizen and taking out his "first papers," but remains such until naturalization is complete, within section 20 of the Immigration Act of Feb. 20, 1907, c. 1134, 34 Stat. 904 (U. S. Comp. St. Supp. 1911, p. 511), authorizing the deportation of aliens within three years.
[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 112; Dec. Dig. § 53.*
For other definitions, see Words and Phrases, vol. 1, pp. 302–306; vol. 8, p. 7571.]

3. ALIENS (§ 53*)—DEPORTATION—TIME FOR PROCEEDING.
Under Immigration Act Feb. 20, 1907, c. 1134, § 20, 34 Stat. 904 (U. S. Comp. St. Supp. 1911, p. 511), authorizing the deportation at any time within three years of any alien entering the United States in violation of law, where an alien was excluded for attempting to bring in a woman for an immoral purpose and thereafter returned to the United States and was admitted and subsequently made a business trip abroad, he could be deported within three years from the time of his return from such trip.
[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 112; Dec. Dig. § 53.*]

4. ALIENS (§ 54*)—DEPORTATION—REVIEW OF DEPARTMENTAL DECISION.
Under such section a departmental warrant of deportation cannot be rightfully issued without some evidence to support it; but, if there is a

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

proper hearing and any evidence to sustain the charge, the decision of the Secretary of Labor as to the weight of the proof must be accepted by the courts as conclusive.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 112; Dec. Dig. § 54.*]

5. ALIENS (§ 46*)—DEPORTATION—GROUNDS.

Under such section intended concubinage is a ground of exclusion, though not a crime under the laws of the United States, the laws of the particular state, or the laws of the country from which the aliens come.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 105; Dec. Dig. § 46.*]

6. ALIENS (§ 54*)—DEPORTATION—WARRANT OF ARREST.

The warrant of arrest for the deportation of an alien need not have the formality and particularity of an indictment, but must give the alien sufficient information of the acts relied on to bring him within the excluded classes to enable him to offer testimony in refutation at the hearing.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 112; Dec. Dig. § 54.*]

7. ALIENS (§ 54*)—DEPORTATION—WARRANT OF ARREST.

Irregularities in the order of arrest do not affect the status of an alien held upon a warrant of deportation after a fair hearing, nor does the fact that the warrant of deportation is based in part upon a charge not stated in the warrant of arrest.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 112; Dec. Dig. § 54.*]

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

Habeas corpus by the United States, on relation of Hans Bauder, against Byron H. Uhl, Acting Commissioner of Immigration at the Port of New York, and others. From an order dismissing the writ, the relator appeals. Affirmed.

McLaughlin, Russell, Coe & Sprague, of New York City (Rufus W. Sprague, Jr., and Charles B. Alling, both of New York City, of counsel), for appellant.

H. Snowden Marshall, U. S. Atty., of New York City, and Kenneth M. Spence, Asst. U. S. Atty., of New York City.

Before COXE, WARD, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge. This is an inquiry concerning the proposed deportation of the relator under the Immigration Act of February 20, 1907, as amended by the acts of March 26, 1910, and March 4, 1913. The case comes here on an appeal from an order dismissing a writ of habeas corpus. The relator is a citizen of Switzerland who has for some time had his domicile in the city of Chicago.

[1] Section 2 of the act provides that certain specified classes of aliens shall be excluded from admission into the United States. Among the excluded classes are "persons who procure or attempt to bring in prostitutes or women or girls for the purpose of prostitution or for any other immoral purpose."

It appears that in June, 1910, the relator attempted to enter the United States, but was detained by the immigration officials at Ellis

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

Island and a hearing was had before a Board of Special Inquiry, which board made a finding that he was attempting to bring a woman into the country for an immoral purpose and he and the woman were ordered deported. The order was carried into effect. After his deportation the relator almost immediately returned under his right name to the United States arriving at New York on July 12, 1910, on the Kronprinzessin Cecilie of the North German Lloyd Line, and was duly admitted. In 1911 he made a business trip abroad returning again under his own name and without any disguise in August, coming in at the Port of New York as a first class passenger on the Kaiserin Augusta Victoria. In the early part of the year 1913 the Immigration Inspector at Chicago in a letter to the Commissioner General at Washington suggested his deportation. About that time the Swiss government was trying to have the relator extradited for alleged fraudulent sales of mining stock in Switzerland. The extradition proceeding failed, the United States Commissioner at the close of a hearing lasting several weeks found that the charges were not supported by the evidence and that there was no probable cause shown that a crime had been committed. The extradition proceeding having failed the immigration authorities caused the arrest of the relator on a warrant of the Department of Labor dated March 7, 1913, but not acted on until the middle of July when the arrest was made and relator was brought from Chicago to New York for deportation. Thereupon a writ of habeas corpus was issued by the United States District Court for the Southern District of New York to review the deportation order. On September 30th an order was entered dismissing the writ and was taken to this court.

Section 20 of the act provides:

"That any alien who shall enter the United States in violation of law, and such as become public charges from causes existing prior to landing, shall, upon the warrant of the Secretary of Commerce and Labor, be taken into custody and deported to the country whence he came at any time within three years," etc.

Section 21 provides:

"That in case the Secretary of Commerce and Labor shall be satisfied that an alien has been found in the United States in violation of this act, or that an alien is subject to deportation under the provisions of this act or of any law of the United States, he shall cause such alien within the period of three years after landing or entry therein to be taken into custody and returned to the country whence he came" etc.

It thus appears that what the government is now attempting is not the exclusion but the deportation of the relator under section 20 of the act. And in order that the government may have the right to deport him he must have entered the United States "in violation of law." The government alleges that he entered in violation of law because at the time he was admitted he belonged to one of the excluded classes under section 2, as his admission in June, 1910, had been refused under the finding of the Board of Special Inquiry confirmed by the Secretary of Labor that he was attempting at that time to bring in a woman for an immoral purpose. The relator contends that the statute is not to be construed to mean that a person who has once been refused admission because at the time under a disability imposed by the stat-

ute is forever thereafter to be regarded as belonging to the excluded classes so that if at any subsequent time he enters the country he is to be held to have entered in violation of law and to be subject to the penalties of the act. It is said that such a construction of the act would lead to absurd results. That if a person was once refused admission on the ground of pauperism and subsequently became a wealthy man he could not enter the country except in violation of law. That might possibly depend upon the course he pursued, and upon whether a subsequent investigation duly made disclosed the fact that he was at the time of his second application entitled to admission. We do not need to consider that question until it arises. In the case at bar the relator allowed the original finding to stand unreversed so that each time he subsequently came into the country we must hold that he entered in violation of law.

[2] The relator took out his "first papers" for naturalization in September, 1911. That was after the date of his last arrival in this country which was in August of the same year. But it was prior to the issuance of the warrant for his arrest, which occurred as already stated, in July, 1913. The date of the "first papers" is, however, entirely immaterial. The act relates to the deportation of "aliens" and there is no question but that the relator was an "alien" when these proceedings were instituted. A declaration of intention to become a citizen does not make the alien a citizen. An alien remains such until naturalization is complete. Frick v. Lewis, 195 Fed. 693, 697, 116 C. C. A. 493; In re Moses (C. C.) 83 Fed. 995; Minneapolis v. Reum, 56 Fed. 576, 6 C. C. A. 31; Berry v. Hull, 6 N. M. 643, 30 Pac. 936.

[3] The relator claims that the proceedings for his deportation were not undertaken within the statutory period. He contends that the time within which he should have been deported, if properly subject to deportation, expired July 12, 1913, since his first entry after his exclusion was on July 12, 1910. The warrant of arrest was not served upon him within that period. This claim is not wholly devoid of support in the adjudicated cases. In Redfern v. Halpert, 186 Fed. 150, 108 C. C. A. 262, the Fifth circuit held that the three-year period begins to run from the date of the alien's first entrance into the country. A similar ruling was made in the Ninth circuit in United States v. Nakashima, 160 Fed. 842, 87 C. C. A. 646. We are not able to concur in this interpretation of the statute. It is contrary to our understanding of it as appears in our decision of Taylor v. United States, 152 Fed. 1, 81 C. C. A. 197, and in Ex parte Hoffman, 179 Fed. 839, 103 C. C. A. 327. While the case of Taylor v. United States, supra, was reversed by the Supreme Court in 207 U. S. 120, 28 Sup. Ct. 53, 52 L. Ed. 130, it has never been understood as having been reversed on that point. And the trend of the decisions is in accord with the view this court took in the cases above mentioned. Frick v. Lewis, 195 Fed. 693, 698, 116 C. C. A. 493. Prentis v. Stathakos, 192 Fed. 469, 112 C. C. A. 607; United States v. Williams (D. C.) 187 Fed. 470; United States v. Sprung, 187 Fed. 903, 905, 906, 110 C. C. A. 37; Sibray v. United States, 185 Fed. 401, 107 C. C. A. 483. The weight of authority therefore supports the proposition that the statutory period begins to run only from

the date of the last entry. In the case at bar the relator's last entry was made in August, 1911, so that his arrest was clearly within the statutory period. This makes it necessary to inquire into the validity of the warrant for the deportation of the relator which has been issued by the Secretary of Labor.

[4] In Bates & Gould Co. v. Payne, 194 U. S. 106, 109, 24 Sup. Ct. 595, 597 (48 L. Ed. 894), Mr. Justice Brown said:

"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.' "

In that case an order of the Postmaster General was under review on appeal in an equity case. In the case at bar we have an order of the Secretary of Commerce and Labor, and the question comes up in a habeas corpus proceeding. But the principle is the same in both cases. We must, however, understand that the rule stated by Mr. Justice Brown presupposes that there was some evidence to support the finding. In the case at bar there must have been a hearing and some proof to support the charge contained in the warrant that the relator attempted to bring into the United States a woman or girl for an immoral purpose, to wit, concubinage. Without some evidence to support the charge, the Department of Commerce and Labor cannot rightfully issue its warrant of deportation and this court can order the discharge of the relator. If, however, there has been a proper hearing and there is any evidence to sustain the charge, this court has no right to consider the weight of the proof but must accept the decision of the Secretary of Labor as conclusive. See Frick v. Lewis, 195 Fed. 693, 116 C. C. A. 493. The exercise of the discretion of the Secretary of Labor, so far as it is authorized by law, is not subject to review in the courts. Sibray v. United States ex rel. Kupples, 185 Fed. 401, 107 C. C. A. 483. In United States v. Williams, 200 Fed. 538, 541, 118 C. C. A. 632, 635, we said:

"We think that some evidence must be presented to justify a judgment of deportation and that conclusions of law must have some facts upon which to rest. * * * The findings of these officials are practically conclusive upon questions of fact."

[5] The minutes of the hearing in June, 1910, before the Board of Special Inquiry appear in the record in this proceeding. The minutes of the hearing had on July 17, 1913, before the United States Immigration Inspector at Chicago are also in the record. All the testimony has been examined by us in order to determine whether there is evidence to support the proceeding. The warrant issued by the Secretary of Labor on March 7, 1913, states that:

"The said alien is a member of the excluded classes in that he has been convicted for or admits having committed a felony or other crime or misdemeanor involving moral turpitude prior to his entry into the United States."

There is nothing in the record which sustains this allegation. Illicit relations between unmarried persons have not been made a crime by the laws of the United States. And there is nothing in the record to show that such relations have been made a crime under the law of

Switzerland where the relations took place years before. Neither is there anything in the laws of the state of New York which makes such relations a crime. But the Supreme Court has held that intended concubinage is a ground of exclusion. United States v. Bitty, 208 U. S. 393, 28 Sup. Ct. 396, 52 L. Ed. 543. The record shows that both the relator and the woman admitted that improper relations had existed between them at times in Switzerland, and that both denied that they had any immoral purpose in view in entering the United States. But notwithstanding their denials we think the testimony adduced was of such a nature as might lead to the belief that their relations were not in accord with their declarations. As long as there was some evidence to support the finding of the immigration officials, we cannot say that the order of deportation was invalid, even though we might regard the testimony as not sufficiently convincing. It is not within our province to weigh the evidence. The duty to do that is with the immigration officials and the Secretary of Labor, and the responsibility rests solely upon them, their decision being final if there is any evidence whatever to support it.

[6, 7] The relator asserts that the warrant of arrest is defective and that he is entitled to take advantage of the defect at this time as he did not have a fair hearing. It is not necessary that a warrant of arrest should have the formality and particularity of an indictment, although it is necessary that the alien should have sufficient information of the acts relied on to bring him within the excluded classes to enable him to offer testimony in refutation at the hearing directed to be had by the warrant of arrest. But this court held in United States v. Williams, supra, that irregularities in the order of arrest do not affect the status of an alien held upon a warrant of deportation after a fair hearing. And in other cases it has been held that the fact that a warrant of deportation is based in part upon a charge not stated in the warrant of arrest, is not an objection when the alien has had a fair hearing on the charge. Siniscalchi v. Thomas, 195 Fed. 701, 115 C. C. A. 501, and cases cited.

We think that, as there has been a fair hearing and some evidence to support the conclusion reached by the immigration officials, we have no discretion and must affirm the order dismissing the writ.

The order is affirmed.

DETROIT, M. & T. S. L. RY. v. KIMBALL.

(Circuit Court of Appeals, Sixth Circuit. January 6, 1914.)

No. 2394.

1. APPEAL AND ERROR (§ 1005*)—JURISDICTION OF FEDERAL COURTS—CITIZENSHIP OF PLAINTIFF—DETERMINATION.

Where a federal court submitted to a special jury the question of the citizenship of a plaintiff as bearing on the question of jurisdiction, and impliedly approved its finding by overruling a motion to dismiss for want of jurisdiction, an appellate court cannot reverse the judgment on that ground, unless clearly satisfied that the finding was wrong; and, where

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

the facts shown might have supported a finding either way, the place of legal residence is largely a question of plaintiff's actual intent.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860–3876, 3948–3950; Dec. Dig. § 1005.*]

2. JURY (§ 136*)—PEREMPTORY CHALLENGES—FEDERAL COURTS.

The provision of Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1166 [U. S. Comp. St. Supp. 1911, p. 241]) § 287, that "in all other cases (except those of felony) civil and criminal each party shall be entitled to three peremptory challenges" fixes definitely the number of such challenges allowable in a federal court, and excludes the operation of a state statute on the subject.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 607–618; Dec. Dig. § 136.*]

3. JURY (§ 126*)—CHALLENGE FOR CAUSE—DISCRETION OF COURT.

Where a juror was at first excused on a peremptory challenge, but before he left the room was recalled and the challenge overruled, it was within the discretion of the court to overrule a challenge for cause, based on the prejudice which would be caused in the juror's mind by the peremptory challenge.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 555; Dec. Dig. § 126.*]

4. EVIDENCE (§ 545*)—COMPETENCY—OPINION OF PHYSICIAN.

The testimony of a physician *held* to show a sufficient basis for the admission of his opinion as an expert as to the extent of an injury received by a plaintiff.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2360–2362; Dec. Dig. § 545.*]

5. DAMAGES (§ 173*)—PERSONAL INJURY—EVIDENCE.

On the question of damages from loss of earning capacity caused by an injury to a plaintiff, who was engaged in a gainful occupation, evidence of actual absence from business, of time spent in a hospital, and lost through other illness caused by the injury, is proper to be considered.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 490–492, 501; Dec. Dig. § 173.*]

In Error to the District Court of the United States for the Western Division of the Northern District of Ohio; John W. Killits, Judge.

Action at law by Bertha G. Kimball against the Detroit, Monroe & Toledo Short Line Railway. Judgment for plaintiff, and defendant brings error. Affirmed.

See, also, 189 Fed. 409.

Mrs. Kimball, who was the plaintiff below, alleged serious physical injury suffered in a collision while she was a passenger on a railroad of the plaintiff in error, a Michigan corporation. Claiming residence and citizenship in Ohio, Mrs. Kimball brought this action in the United States District Court, at Toledo, and eventually recovered the judgment to reverse which this writ of error is brought.

One of the defenses set up in the answer was that Mrs. Kimball was, in truth, a citizen of Michigan, and not of Ohio, and hence the jurisdiction of the court was denied. The District Court held a preliminary inquiry on this subject, and submitted the issue to a jury, which found that she was a citizen of Ohio. It is not entirely clear whether this verdict was treated as controlling or as advisory merely, but, upon motion that the case be dismissed for lack of jurisdiction notwithstanding the verdict of the jury, the District Judge filed an opinion indicating that he thought the verdict was right under the testimony, and he denied the motion. A special bill of exceptions,

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

showing the proceedings on this trial of the question of citizenship, was settled and preserved. At a later term, the case came on for trial on the merits. This trial was mainly directed to the question of damages, since the facts of the collision and Mrs. Kimball's status as a passenger were not in dispute. However, she was cross-examined at length as to her citizenship, and on that subject a showing was made which was not identical with that which developed on the preliminary trial.

The errors alleged are: (1) In instructions to the jury on the citizenship trial, and in not dismissing the case, on the final hearing, for lack of jurisdiction; (2) in overruling a challenge to a juror; (3) in rulings admitting and excluding testimony; (4) in refusing defendant's requests for special charges, and in the charge as given.

King, Tracy, Chapman & Welles, of Toledo, Ohio, for plaintiff in error.

G. B. Keppel, of Toledo, Ohio, for defendant in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

DENISON, Circuit Judge (after stating the facts as above). [1] 1. The criticism as to instructing the jury on the preliminary trial is that the court said Mrs. Kimball's testimony, referring to her intention to keep her "home" in Toledo, might properly be considered as intended to refer to her citizenship status. This was clearly not beyond the proper function of the trial judge in assisting the jury.

As to the merits of the citizenship question, the assignments of error present only the proposition that it was the imperative duty of the court to dismiss the case for lack of jurisdiction. Upon the final trial, this issue was not submitted to the jury, nor was any request made for such submission. The record, therefore, contains a finding by a jury, and (if the question was really in the end one for the court) implies a finding by the court that Mrs. Kimball was a citizen of Ohio. In this state of the record, the judgment cannot be overturned on this ground, unless we are clearly satisfied that the finding is wrong. See Note 1.[1] The evidence here does not require that conclusion. Mrs. Kimball had, for some years before the accident, maintained a summer boarding house at Mt. Clemens, Mich., and each season had closed up the house and spent part of the year in Cleveland, generally with her mother. She testified that, after the accident and before suit brought, she had determined to give up the Mt. Clemens enterprise and to make her permanent home in Cleveland, made efforts to get rid of the lease of her Mt. Clemens house and to sell her furniture, and had gone to Cleveland to stay, and insisted that, although she had been unable to dispose of her Mt. Clemens property and had continued the business there about as before, she had never given up her intention to reside permanently in Ohio. The proof of acts evidencing her intention to make her real home in Ohio is inconclusive; the inference that her home was in Michigan, rather than in Ohio, both be-

[1] NOTE 1.—For a discussion of the burden of proof on such questions, see opinions of Judges Hook and Amidon in Hill v. Walker, 167 Fed. 241, 92 C. C. A. 633. The principal case does not present the problem of a finding of diverse citizenship which is against the clear weight of the evidence.

fore and after the accident, would be as natural from all her acts as any other inference would be; but where a person is, during a series of years, habitually living in two different states for parts of each year, the location of the legal residence is determined largely by the actual intent, and in the face of her testimony as to this intent, we cannot say that the findings of the court and jury are clearly wrong.

[2] 2. In the course of selecting the jury, and after defendant had exercised three peremptory challenges, defendant interposed a fourth similar challenge. This was, at first, sustained by the trial judge, following the Ohio state practice and a special rule of the Circuit Court (apparently tacitly continued in the District Court after January 1, 1912) adopting that practice; but immediately, and before the juror had left the room, the judge recalled this ruling and seated the juror. This was because the judge thought that section 287 of the Judicial Code operated to abrogate the local rule, and forbade more than three challenges of this class. In this we think the District Judge was clearly right. This section says that "in all other cases, civil and criminal, each party shall be entitled to three peremptory challenges." Counsel argue that the word "entitled" is a word of grant and not a word of limitation; that it fixes the minimum and not the maximum. We cannot agree with this construction. We think this section, which, without change in this respect, has been in force since 1872 (R. S. § 819 [U. S. Comp. St. 1901, p. 629]), is intended not merely to give a minimum or to limit the maximum number of challenges, but finally to fix that number; and, Congress having spoken, the jury conformity statute (R. S. § 800) had no further force (if, indeed, it ever applied to the selection of jurors on the trial).

[3] It was not error thereafter to overrule the challenge against this same juror based on the prejudice which would arise in his mind because he had been peremptorily challenged. Whether such an occurrence would seriously affect the man's impartiality must be determined in each instance by the trial judge. His ruling here was fairly within his discretion. Nor can we think that, by his momentary discharge, the juror had become a mere bystander, incapable of recall into the box.

[4] 3. A physician, an expert witness for plaintiff, was permitted to state his opinion that she had "an affection of the spine at the eleventh dorsal vertebra—either a congestion or exudation in the spinal column." This was objected to and sought to be stricken out for the reason that it was not based either upon a hypothetical question or on any sufficient knowledge, study, or examination by the witness. The objection rested on the doctor's admission that there were no "objective symptoms" which particularly tended to support his diagnosis. He had testified, however, that, in making this diagnosis, he had examined the spinal column, going over the vertebræ one after another, and that he had given her electric treatment along the spine, and had applied that treatment repeatedly and especially to this particular vertebra, that the electrical treatment brought no reaction, but that pressure caused a "flinching" that he was sure was involuntary. There is apparent confusion in the record between witness and examiner, in

the use of the phrase "objective symptoms," and it is not clear that when the doctor disclaimed "objective symptoms," he meant that his physical and electrical examination and treatment at this point did not disclose local conditions justifying his conclusions. For all the record shows, and for all we can judicially know, the lack of reaction to an electrical shock and the sensitiveness to pressure at that point may have sufficiently indicated some "exudation or congestion." However erroneous it may appear to an expert, the doctor's entire testimony tends, at least, to support his inference. There was no error in receiving this statement.

The court permitted plaintiff to testify that, for several years before the accident, her average earnings or net profits in the boarding house business at Mt. Clemens had been from $800 to $900 a year. Objections were based on the ground that such profits were speculative, and that they were not shown to be different after the accident, while the true measure of damages was her loss of earning capacity. Whatever the admissibility of this testimony, the court charged:

"One of the items of damage claimed here is in reference to the loss suffered by the plaintiff in her business as a hotel or boarding house keeper. You will disregard any claims asserted by her in that connection."

And further:

"She would be entitled to compensation for the loss of earning capacity, if any, occasioned by reason of this injury, not taking into consideration these boarding house profits."

This charge cured the error, if any, in admitting testimony. If it was thought, as is now urged, that the general permission to give damages for "loss of earning capacity," although the common and ordinary measure of damages, was inappropriate in this case, special limiting instructions should have been asked.

The remaining assignments of error relating to receiving and rejecting evidence, we think do not merit detailed discussion. If the objections involved were well taken, we are satisfied that they involve nothing seriously prejudicial.

[5] 4. The court was asked to charge that there was no evidence that plaintiff had suffered any loss of earning capacity. The court, on the contrary, left this question, generally, to the jury, as above stated. The request was based on the theory that the loss of boarding house profits could not be considered, and that there was nothing else. There was, however, proof of actual absence from business, of time spent in a hospital, and of other illness and of physical and mental suffering. These things, suffered by one engaged in a gainful occupation, naturally imply a general loss of earning capacity. Some limitations of this general and naturally implied right to recover for such loss might have been proper to this case, but they were not asked.

The judgment is affirmed, with costs.

In re CHICAGO CAR EQUIPMENT CO.

KENWOOD TRUST & SAVINGS BANK v. BUELL.

(Circuit Court of Appeals, Seventh Circuit. January 6, 1914.)

No. 2014.

1. APPEAL AND ERROR (§ 1017*)—REVIEW—CONCLUSIVENESS OF FINDINGS.

Where a finding by a referee in bankruptcy that a mortgagee had reasonable cause to believe that the enforcement of his mortgage would effect a preference was based on facts and circumstances stipulated in writing for submission of the issues, the rule as to the persuasive force of findings was inapplicable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3911, 3961, 3996–4005; Dec. Dig. § 1017.*

Appeal and review in bankruptcy cases, see note to In re Eggert, 43 C. C. A. 9.]

2. BANKRUPTCY (§ 165*)—PREFERENCES—BURDEN OF PROOF.

Under Bankr. Act July 1, 1898, c. 541, § 60b, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3445), as amended by Act June 25, 1910, c. 412, § 11, 36 Stat. 842 (U. S. Comp. St. Supp. 1911, p. 1506), providing that if, at the time of a transfer by a bankrupt within four months before the filing of petition, the bankrupt be insolvent, and the transfer then operate as a preference, and the person receiving it shall have reasonable cause to believe that its enforcement would effect a preference, it shall be voidable by the trustee, insolvency and reasonable cause for belief on the part of the transferee that enforcement would effect a preference must be proved as facts.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 259, 260, 266; Dec. Dig. § 165.*]

3. BANKRUPTCY (§ 165*)—VOIDABLE PREFERENCES—STATUTORY PROVISIONS.

Such section as so amended does not make all transfers to creditors within the statutory period voidable per se whenever bankruptcy ensues and the transfer effects a preference.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 259, 260, 266; Dec. Dig. § 165.*]

4. BANKRUPTCY (§ 166*)—VOIDABLE "PREFERENCE"—STATUTORY PROVISIONS.

A "preference," as used in such section as so amended, is one made and accepted to evade the rule provided by that act for equal distribution among the creditors of the bankrupt, and there must be a reasonable cause for belief that such preference will be effected; the preference over unsecured creditors necessarily obtained by a mortgagee not being the preference intended.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 250–253, 255–258; Dec. Dig. § 166.*

For other definitions, see Words and Phrases, vol. 6, pp. 5498, 5499; vol. 8, p. 7759.]

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

Bankruptcy proceeding against the Chicago Car Equipment Company. From an order affirming an order of the referee disallowing its claim to the proceeds of mortgaged property, the Kenwood Trust & Savings Bank appeals. Reversed, with directions.

This appeal is from an order of the District Court, sitting in bankruptcy, affirming an order of the referee in bankruptcy, whereby the claim of the

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

appellant, as mortgagee, to proceeds in the hands of the trustee in bankruptcy derived from sale (under stipulation) of the mortgaged property in controversy, is disallowed, except to the extent of $300, on final hearing of the issues. The mortgage referred to is in the form of a chattel mortgage, executed as the instrument of the bankrupt corporation within four months of the commencement of proceedings in bankruptcy, and embraces its entire plant consisting of chattels—specifically described and including machines, tools, lumber and other supplies "now upon the premises occupied by said mortgagor" as described—and duly recorded. It was made and received to secure an indebtedness of $5,300, whereof $5,000 was pre-existing in notes and $300 was a present advance of cash. All facts in issue for hearing below were submitted in a written "stipulation of facts," whereof the material recitals are stated in the opinion.

The conclusions of the referee (affirmed by the District Court) are thus certified in substance: (1) That the mortgage "was given to secure a past indebtedness of $5,000 and for a present consideration of $300 only." (2) "That the effect of the enforcement of such chattel mortgage" beyond the advance of $300, will enable the bank "to obtain a greater percentage of its debt than any other of such creditors of the same class." (3) That the bank and its officers "acting therein at the time of taking said chattel mortgage had reasonable cause to believe that the enforcement of such chattel mortgage would effect a preference." (4) That the bank was entitled to a lien upon the proceeds "to the extent of $300 and interest * * * and no more." (5) And the claim in excess thereof was disallowed, with leave, however, to present its proof as an unsecured claim.

Thomas M. Hoyne, John O'Connor, Harry D. Irwin, and Carl J. Appell, all of Chicago, Ill., for appellant.

Elbert C. Ferguson, of Chicago, Ill., for appellee.

Before BAKER, SEAMAN, and MACK, Circuit Judges.

SEAMAN, Circuit Judge (after stating the facts as above). [1] The order of the referee, affirmed by the District Court, in effect sets aside the mortgage made by the bankrupt to secure the pre-existing indebtedness of $5,000 as an unlawful preference to the extent of such indebtedness, in derogation of the Bankruptcy Act. It is stated in the "findings" certified by the referee that the mortgagee "had reasonable cause to believe that the enforcement of such chattel mortgage would effect a preference," but such ruling rests entirely on facts and circumstances stipulated in writing for submission of the issues, so that the rule otherwise recognized in reference to the persuasive force of findings of fact by master, referee or trial court becomes inapplicable, and the ultimate fact in issue must be ascertained from the stipulated facts, including (as of course) reasonable inferences of fact therefrom.

These leading facts are expressly stated in the stipulation: The indebtedness secured by the mortgage was $5,300, of which $5,000 was pre-existing, in two loans upon notes of the mortgagor within a few months theretofore, incorporated in the new note, extending payment 60 days, together with a present loan of $300, each loan obtained "for the purpose of using the money in the business" of the mortgagor and so used. For "the purpose of procuring credit from time to time," and prior to the first-mentioned loan, a written statement of its "financial condition" was made by the mortgagor and held by the bank, showing $25,685 of assets and $1,600 of liabilities, with the mortgaged property specifically described at a valuation in excess of $16,000, aside from

lumber and other so-called "raw material"; and oral representations were made that it "was a growing concern." The president of the bank made a visit to the plant "and looked it over," before extending credit, and "found the same in a satisfactory condition"; and subsequently, when the mortgage was taken, the cashier of the bank visited the plant "to examine the same and verify the statement" made as to the amount of lumber on hand, and was satisfied therewith. At the time the mortgage was made and accepted it was not known or believed by the officials of either corporation (mortgagor or mortgagee) that the mortgagor was insolvent, but each "believed that it was solvent"; and not only did the president of the bank believe the mortgagor to be solvent, but "none of the said bank's officials believed, or had any reason to believe, otherwise, unless the facts herein stipulated were sufficient in law to charge the said bank with notice" of the mortgagor's "condition." Furthermore, "the said loans were made, and the said chattel mortgage was given by the said company and taken by the said bank in good faith, each believing that the said 'mortgagor' was solvent and would be able to pay all its debts." In reference to the status when bankruptcy intervened, one month after the mortgage was executed, it is stipulated "that there was no substantial change in the amount of the assets and liabilities of the mortgagor"; that the actual liabilities, inclusive of the mortgage-indebtedness, was about $11,000; that the "assets" of the bankrupt realized only $2,436.39 on public sale thereof by the trustee under order of the court. No proof of the actual value at any time, either of the mortgaged property or of assets not embraced therein, appears in the record; and the only facts which appear to bear upon the contention that the bank was chargeable with notice of any infirmity in the transactions are these stipulations: That the bank neither "procured another written statement" from the mortgagor, nor asked for one, nor asked it "to exhibit its books," nor made "any effort to examine the books of account"; and that the mortgagor "kept no books of account whatever," but the bank "did not know" such fact.

The above-mentioned finding of the referee upon the issue is neither expressed in terms as a finding of fact from the evidence submitted, nor do we infer that it can have been so intended. Treated as an issue of ultimate fact, no doubt is entertainable that these facts (as above recited) are established: That the mortgage was both given and taken "in good faith," neither in contemplation of insolvency or bankruptcy, nor with intent to give or obtain an unlawful preference; and that it was in truth received by the bank without "reasonable cause to believe that the enforcement of such" mortgage "would effect a preference" in violation of the Bankruptcy Act. This finding, therefore, can have no other force than a conclusion of law, resting on the terms of that act, that such "reasonable cause to believe" must be imputed to the bank, notwithstanding its entire good faith in the transaction so submitted. If the ruling thus adopted is untenable, we are advised of no ground on which the denial of the appellant's claim can be upheld.

While it appears from other findings of the referee (in accord with the evidence), (a) that the $5,000 amount in controversy secured by

the mortgage was a pre-existing indebtedness of the bankrupt, and (b) that enforcement thereof will enable the bank "to obtain a greater percentage of its debt than any other of such creditors of the same class," we are of opinion that these facts are without force for support of the order below, unless the amendment of section 60b of the Bankruptcy Act, adopted June 25, 1910 (36 Stat. L. 838, 842; 1 Fed. Stat. Ann. Supp. 1912, p. 739) makes one or both thereof operative per se to constitute an unlawful preference. Prior to such amendment, the rule applicable under the Bankruptcy Act as to voidability of preferences received during the prescribed period of four months was settled by decisions of the Supreme Court, in harmony with the interpretation theretofore upheld by this court and by the Circuit Courts of Appeals of other circuits. See Coder v. Arts, 213 U. S. 223, 240, 29 Sup. Ct. 436, 53 L. Ed. 772, 16 Ann. Cas. 1008; Pirie v. Chicago Title & Trust Co., 182 U. S. 438, 446, 21 Sup. Ct. 906, 45 L. Ed. 1171; and rulings of this court in In re Eggert, 102 Fed. 735, 738, 43 C. C. A. 1; Off v. Hakes, 142 Fed. 364, 73 C. C. A. 464; J. W. Butler Paper Co. v. Goembel, 143 Fed. 295, 296, 74 C. C. A. 433. The rule thereby established was this in substance: That the terms of subdivision "b," section 60, are made controlling upon the issue of validity of the security, as between the trustee in bankruptcy and mortgagee; that the issue thus created by the provision then in force was one of fact, whether the beneficiary or his agent therein "had reasonable cause to believe that it was intended thereby to give a preference." As stated in Pirie v. Chicago Title & Trust Co., supra, subdivision "a" defines what shall constitute a preference on the part of the debtor, and subdivision "b" provides the conditions under which it "may be avoided by the trustee" as against the creditor; and "so far, so clear. If the conditions mentioned exist, the preference may be avoided. But if the person securing the preference did not have cause to believe it was intended" as a preference, "it follows that, the condition being absent, its effect will be absent," so that the debtor "may keep the property transferred to him." This doctrine is expressly reaffirmed in Coder v. Arts, supra, in reference to a mortgage which was made by the bankrupt, within four months prior to the proceedings in bankruptcy, "to secure a pre-existing unsecured indebtedness," when the mortgagor was insolvent and "knew that he was insolvent," but was received by the mortgagee without knowledge or reasonable cause to believe that the mortgagor was insolvent, or "intended thereby to give him a preference over other creditors."

[2] The above-mentioned amendment of subdivision "b" (Act of 1910) makes the conditions of liability in question read thus:

"If at the time of the transfer * * * the bankrupt be insolvent and the * * * transfer then operate as a preference, and the person receiving it," or his agent therein, "shall then have reasonable cause to believe that enforcement of such * * * transfer would effect a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person."

It is unquestionable that this provision requires proof, both of insolvency of the bankrupt at the time of the mortgage, and of "reasona-

ble cause" for belief on the part of the mortgagee that enforcement thereof "would effect a preference," as conditions precedent for annulment of the mortgage; and we understand each of these requirements to present an issue of fact. We do not understand that either was so recognized in the ruling below, as no competent proof appears of insolvency in fact—as defined in section 1 (15) of the act—and the finding of "reasonable cause to believe" that the mortgage "would effect a preference" appears (as above stated) to be unsupported by the evidence, if intended or treated as purely a finding of fact.

[3, 4] In the light, therefore, of the rule and policy adopted by the various pre-existing provisions of the Bankruptcy Act in reference to preferences, as settled by the authorities, we believe it to be unmistakable that the finding referred to must rest on this proposition: That the amendment above quoted is to be interpreted as rejecting such prior policy and creating a new definition and rule, whereby all transfers to creditors, made within the statutory period, are rendered voidable per se, whenever bankruptcy ensues and the transfer effects a preference. Were such radical departure and object contemplated by the amendment, its expression in plain terms would be free from difficulty. It would involve neither of the conditions stated therein of preexisting insolvency or reasonable cause to believe that enforcement of the transfer would effect a preference; and we believe their incorporation to be inconsistent with the purpose thus assumed and that no interpretation is authorized to eliminate either of these requirements, as issues of fact, for testing the validity of the transaction. The term "preference," as there employed, must be construed in like sense with its use throughout the Bankruptcy Act, as made and accepted to evade the rule provided by the act for equal distribution among all creditors of the bankrupt. In Coder v. Arts, supra, the distinction preserved in the various provisions of the act, between preferences on the one hand, and fraudulent conveyances (referred to in section 67e) on the other hand, is well pointed out (pages 240–242 of 213 U. S., 29 Sup. Ct. 436, 53 L. Ed. 772, 16 Ann. Cas. 1008), in substance: That "an attempt to prefer is not to be confounded with an attempt to defraud, nor a preferential transfer with a fraudulent one"; that the well-recognized general or common-law right of a debtor to secure (and thus prefer) any creditor is unaffected by the Bankruptcy Act, except when the preference is given and accepted under the conditions named therein; that a preference which enables "one creditor to obtain a greater portion of the estate than others of the same class is not necessarily fraudulent"; and, when given and accepted within the statutory conditions, "the fraud is constructive or technical," as an infraction of the statutory rule and policy, while "in a fraudulent transfer" (denounced in section 67e) "the fraud is actual, as the bankrupt has secured an advantage for himself out of what in law should belong to the creditors, and not to him." The ruling thereupon is thus stated in the opinion: That while the "act strikes down preferential conveyances which come within its terms," it does not affect mere "preferential conveyances made in good faith" wherein the grantee "had no reason to believe that a preference was intended."

We are of opinion therefore that this distinction of preferences which were made voidable by the act was preserved in the amendment, so that the requirement in question, of cause for belief that enforcement of the transfer "would effect a preference," must be construed to mean a preference within such distinction, and not its effect as a preference in the general sense of that term. The fact alone that a creditor obtains security necessarily constitutes a preference over unsecured creditors, leaving no room for an issue of belief that its enforcement would so operate, and the provision referred to is strongly persuasive, if not conclusive for the reasons above stated, that such preferential effect was not within its purpose.

Several objections to the mortgage are urged in the argument—as (a) ultra vires, (b) unauthorized by the directors, (c) insufficiently executed, and (d) embracing property "consumable" in its nature—none of which appears to have been recognized below as lending support to the decree. We believe each of the objections to be untenable and they are overruled without further mention.

The order of the District Court is reversed, accordingly, with direction to proceed in reference to the appellant's claim in conformity with the foregoing opinion.

SHEPPARD-STRASSHEIM CO. v. BLACK.

(Circuit Court of Appeals, Seventh Circuit. January 6, 1914.)

No. 2010.

1. BANKRUPTCY (§ 165*)—PREFERENCES—CHATTEL MORTGAGE.

Whether a chattel mortgage executed by a bankrupt to a creditor constitutes a voidable preference is mainly, if not entirely, a question of law dependent on the construction and application of Bankr. Act July 1, 1898, c. 541, § 60b, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3445), as amended by Act June 25, 1910, c. 412, § 11, 36 Stat. 842 (U. S. Comp. St. Supp. 1911, p. 1506), providing what conveyances shall constitute preferences.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 259, 260, 266; Dec. Dig. § 165.*]

2. BANKRUPTCY (§ 166*)—PREFERENCES—AVOIDANCE—INSOLVENCY.

Where it did not appear that, at the time a bankrupt executed a chattel mortgage on certain of his assets to a creditor, he was insolvent, as required by Bankr. Act July 1, 1898, c. 541, § 60b, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3445), in order that the mortgage might be void as a preference, and the creditor had no reasonable cause to believe that the enforcement of the mortgage would effect a preference, it was not voidable as such.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 250-253, 255-258; Dec. Dig. § 166.*]

3. BANKRUPTCY (§ 100*) — PREFERENCES — INSOLVENCY — ADJUDICATION — RES JUDICATA.

An adjudication in bankruptcy, though it may be conclusive, as against a chattel mortgage creditor of the bankrupt, that the bankrupt was in fact insolvent when he executed the mortgage, does not determine the chattel mortgagee's right to retain the security.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 60, 131, 141-144; Dec. Dig. § 100.*]

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

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

Action by Archie T. Black, trustee in bankruptcy of the estate of Antonio Marzano, against the Sheppard-Strassheim Company. From a decree of the District Court in favor of plaintiff, defendant appeals. Reversed, with directions to dismiss.

The appellee, as trustee in bankruptcy, filed his bill against the appellant to recover the value of mortgaged chattels, derived from the bankrupt and sold for the benefit of the appellant, under chattel mortgage thereof alleged to be voidable as an unlawful preference in violation of the Bankruptcy Acts; and this appeal is from a decree of the District Court awarding such recovery, on final hearing of the issues and confirmation of a special master's report of testimony and findings.

Henry S. Blum and Isadore Wolfsohn, both of Chicago, Ill., for appellant.

Charles J. Faulkner, Jr., and Walter C. Kirk, both of Chicago, Ill., for appellee.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

SEAMAN, Circuit Judge. [1] The questions presented by this appeal are free from controversy as to the ultimate facts in evidence, and the issue, whether the appellant's mortgage in suit constitutes a voidable preference, is mainly, if not entirely, one of law, predicated on the terms of the Bankruptcy Act and the amendment of section 60b thereof (36 Stat. 838, 842) by the Act of June 25, 1910. These are the pertinent and controlling facts as established and reported by the referee as special master, namely:

[2] On July 20, 1911, the bankrupt owned a stock of groceries and conducted a small grocery business, in a building known as No. 146 East 117th street, Chicago; he also occupied, with his wife, an adjacent building known as No. 148, as a homestead. The title to both of these pieces of real estate was then held "in the name of Antonio Marzano" (the bankrupt), "and Anna Marzano, his wife." The bankrupt was indebted to the appellant in the sum of $251.66, for merchandise sold on account past due, and when payment was demanded, he requested an extension of time, with an offer of security in a chattel mortgage. He thereupon made and delivered to the appellant a sworn statement of his "financial condition," in substance showing: As assets, "merchandise at cost price," $400; store fixtures, $575; "notes and accounts good," $400; "cash on hand and in bank," $75; horse, buggy, wagon and harness, $265; and the above-mentioned real estate (as owned by himself and wife, with No. 148 named as homestead) of the "market value" of $3,500. As liabilities owing for merchandise, $599; mortgage on above real estate, $1,200. As "amount of assets over liabilities, $3,416." Believing this statement to be true and that the mortgagor was solvent, the appellant accepted and recorded the chattel mortgage in suit, as security for the $251.66. It

was executed July 20, 1911, embraces only the above-mentioned merchandise on hand and store fixtures, and upon foreclosure sale September 11, 1911, the appellant realized therefrom less than the amount of the debt. On September 8, 1911, through threats of violence and intimidation—supposed to proceed from "the so-called 'Black-Hand' organization," in no wise attributable to his financial condition—the bankrupt "and his wife fled, abandoning his store, and no one has known or disclosed his present abode"; and on September 11, 1911, a petition by other creditors was filed for an adjudication of involuntary bankruptcy against him, which alleged that he "owes debts to the amount of $1,000" and "is insolvent," and that he "committed an act of bankruptcy," in giving the above-mentioned mortgage to the appellant, "while insolvent as aforesaid." An adjudication of bankruptcy ensued October 31st, without personal service of process and without joinder of issue.

Other probative facts (not specified in the report) appear from the undisputed testimony of witnesses introduced on behalf of the trustee, as follows: The business of the bankrupt has long been carried on under like conditions, with goods on hand to the amount of $400 or $500, replenished from day to day by purchases from wholesalers, and his sales were sufficient to "turn over about $400 or $500 of stock a week." His credit was good with these houses, although sometimes "slow" in payments; and this method of business was conducted without substantial change, both before and after July 20th, up to his abandonment of business as above mentioned.

Testimony does not appear tending to impeach the correctness of the statement so made to the appellant on July 20th, with the single exception of the valuation there placed upon the real estate. While another item of valuation—$400 for "notes and accounts good"—is mentioned in the report as "valueless," no testimony appears tending to disprove either the existence of such assets or their valuation. In reference to the real estate, it appears from the evidence that the bankrupt and his wife disposed of both parcels when their flight from Chicago was impending—by exchanging them for Wisconsin lands at a nominal valuation of $3,500—and the special master thus states his deductions as to their value: "Evidence disclosed that the real estate has since then been sold for $2,850 on small deferred payments, but that its cash valuation was only $2,500"; that it "was incumbered for $1,200"; that "the bankrupt only owned half" thereof; that "there was a homestead exemption of $1,000 which attached to one of the pieces"; that he "eliminates the real estate as having in substance no equity for the creditors"; and that the appellant should not have "been governed by the valuation put thereon by the bankrupt."

We are not satisfied that this finding of $2,500 as the value of the real estate is either well founded, or in accord with the statutory requirement of "fair valuation"; nor do we understand the evidence to authorize the conclusion that the bankrupt appeared to have no substantial equity therein to be applicable for testing his solvency; and, in any view thereof, the ownership and use of such real estate, as described, would tend to support the claim of bona fides in giving

and taking the security in connection with the uncontroverted showing of personal property valuation in excess of liabilities.

The conclusions of the special master, confirmed by the District Court, that the mortgage was voidable as a preference, are involved with various recitals of the evidence and findings therefrom in the report, but they are stated, in substance, as follows: That "the question of law is found in section 60 (b) as amended in 1910," and "the mortgage was such a transfer" as there declared voidable by the trustee. That the "bankrupt unquestionably was insolvent as he was so adjudged—the involuntary petition setting up the execution of the mortgage and charging insolvency at the time same was executed, * * * the mortgagor not making any objection." And, in reference to the further condition provided by the amendment, it is stated, after reviewing various facts: (1) That it may be assumed from the testimony that the appellant "and its agents were familiar with the result to be anticipated in the foreclosure of chattel mortgages"; and (2) that "I am therefore satisfied from the evidence that not only was the bankrupt insolvent at the time he gave the mortgage, but that Sheppard-Strassheim Company had reason to believe that the enforcement of that mortgage by them would produce a condition that would give them a preference over the other creditors, and I so find."

Whatever may have been the view there adopted of the meaning of the amendment of section 60b, as mentioned, it appears that its requirements were ultimately treated as raising an issue of fact, in a limited sense, for the test of validity, so that the case may be distinguishable, in that respect, from the ruling presented on the appeal (No. 2014) in Kenwood Trust & Savings Bank v. Buell, Trustee, 211 Fed. 638, 128 C. C. A. 142, wherein our opinion is handed down herewith. It is unquestionable, however, that our ruling in that case is both applicable and controlling upon the present inquiry, for interpretation of the amended provision referred to upon which the single issue of fact involved in the foregoing finding must rest. As there interpreted, the only "preference" denounced by the several provisions of the Bankruptcy Act and amendments thereof is one given by the bankrupt when he is in truth insolvent, as defined in section 1 (15) of the act, so that the common-law right of a debtor to give a preference to one or more creditors over other creditors, by payment of or security for indebtedness, is otherwise unaffected by such provisions; and the amended provision of section 60b, requiring that the person receiving a preference "shall then have reasonable cause to believe that the enforcement * * * would effect a preference" to render it voidable, must be read as intending alone the character of preference inhibited by the Bankruptcy Act. Therefore, without evidence tending to charge the beneficiary with notice (actual or constructive) that the bankrupt was insolvent when the security was given, the statute does not authorize a finding of invalidity, although it must necessarily have been understood as preferential over other creditors in the general or common-law sense of that term.

We are of opinion, accordingly, that error is well assigned upon the above-mentioned rulings against the appellant; that the issue of

fact arising under the statute, as above defined, is neither recognized in the finding, nor determined in conformity with the uncontroverted facts in evidence. As appears from the foregoing recital of facts, the statement of the amount and valuation of personal assets on hand, and of the entire indebtedness of the bankrupt, when the mortgage was made, is not only unimpeached, but the testimony tends strongly in support of its verity. It is conceded by the report, as "fair to assume that the bankrupt got together all the money he could before running away," and that "it is possible he may have carried some of his goods away with him, but as to how much it is impossible to say"; and the testimony proves that he was constantly purchasing goods on credit during the ensuing two months. Thus the appearance of personal assets amounting to $1,715 to satisfy debts aggregating $599, in the business carried on as described, may well have satisfied the appellant that he was not insolvent, and authorizes a finding in his favor upon the issue, irrespective of the value of the equity in the real estate above mentioned.

[3] In support of the decree, counsel for appellee contends that the adjudication of bankruptcy is conclusive upon the appellant in the present issue, because the petition therefor alleged insolvency of the bankrupt at the time the mortgage was given; and this view of its effect appears to have been entertained by the special master, as indicated in his report. The ruling of this court in the case of In re American Brewing Co., 112 Fed. 752, 756, 50 C. C. A. 517, is relied upon for such contention; but the issue in the case at bar (as above defined) is distinguishable from the issue described in that opinion, and the question whether the doctrine thereof can be upheld when like issue arises for review does not require solution. We believe it to be free from doubt that the statutory issue upon the right of the appellant to retain his security was neither presented by the petition for adjudication of bankruptcy, nor adjudicated thereunder, and that it was not res adjudicata of such right, however conclusive may have been its effect upon the separate question of insolvency in fact. Hussey v. Richardson-Roberts Dry Goods Co., 148 Fed. 598, 602, 78 C. C. A. 370.

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

O. W. KERR CO. v. CORRY.

(Circuit Court of Appeals, Seventh Circuit. January 6, 1914.)

No. 2024.

1. APPEAL AND ERROR (§ 1170*)—REVIEW—PREJUDICE.

A reversal on a writ of error will not be granted, where the errors complained of do not injuriously affect the substantial rights of the parties.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4032, 4066, 4075, 4098, 4101, 4454, 4540–4545; Dec. Dig. § 1170.*]

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

2. BROKERS (§ 82*)—ACTION FOR COMPENSATION—COMPLAINT—AMENDMENT.
Where plaintiff sued on a contract to obtain a purchaser for a tract of land on which defendant had an option, the purchaser to agree to give defendant an option to repurchase the land at an advance of not to exceed $50,000 over what the purchaser may have invested in the land, plaintiff to receive a sum equal to the difference between $50,000 and the sum the purchaser would agree to reconvey for, and that plaintiff obtained a purchaser, who agreed to resell to defendant for an advance of $37,500, whereby defendant became indebted to plaintiff for $12,500, the court properly permitted plaintiff to amend at the opening of the trial by inserting a clause that defendant by its contract with plaintiff, which was not in writing, had agreed to pay to plaintiff, in addition to the sum ascertained as above alleged, $5,000 in any event, whereby defendant became liable to plaintiff for $17,500.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 101–103; Dec. Dig. § 82.*]

3. TRIAL (§ 64*)—ORDER OF PROOF—SURREBUTTAL.
Evidence to support one of defendant's witnesses, which was properly a part of defendant's case, was properly excluded when offered in surrebuttal.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 154, 155; Dec. Dig. § 64.*]

4. BROKERS (§ 85*)—ACTION FOR COMPENSATION—MATERIALITY OF EVIDENCE.
In a broker's action to recover compensation for obtaining a purchaser for an option on a tract of land, evidence concerning the nature of defendant's dealings with the parties from whom it expected to obtain the land was properly excluded as immaterial to the issue.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 106–115; Dec. Dig. § 85.*]

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

Action by James P. Corry against the O. W. Kerr Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Plaintiff in error, termed "defendant" herein, a corporation organized and existing under the laws of the state of Minnesota, claiming to have an option to purchase a large tract of land, approximately 150,000 acres, situate in the province of Saskatchewan, Canada, applied to defendant in error, herein designated as "plaintiff," to procure a purchaser for said tract of land upon certain terms set out in the complaint; one of the conditions being that such purchaser should agree to give to defendant an option to repurchase the same at an advance of not to exceed $50,000 over what such purchaser may have invested in said lands within the life of the original contract. In case the purchaser was secured, defendant agreed to pay to plaintiff a sum of money equal to the difference between $50,000 and the sum the purchaser would agree to reconvey for. A purchaser was secured by plaintiff, who agreed to resell to defendant for the sum of $37,500, whereby, it is alleged in the original proceeding, defendant became liable to pay plaintiff the difference of $12,500, for which he brought suit in the circuit court of Dane county, state of Wisconsin. The cause was removed to the United States Circuit Court for the Western District of Wisconsin. Thereafter, and at the opening of the trial, plaintiff obtained leave to and did amend his complaint by inserting a clause to the effect that defendant, in its contract for the securing of a purchaser by him above set out, which was not reduced to writing, had promised and agreed to pay to plaintiff, in addition to the sum ascertained as above stated, the sum of $5,000 in any event, whereby, the amended complaint charges, the defendant became liable to pay to plaintiff the sum of $17,500. Defendant by answer denied the material allegations of the complaint. On the trial the court

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

ruled out the item of $12,500. Whereupon the jury rendered a verdict against defendant in favor of plaintiff for $5,000, upon which verdict the court entered judgment. This cause is now before us on writ of error to reverse such judgment.

Errors assigned are: (1) That the court erred in permitting the complaint to be amended; (2) that the court erred in overruling defendant's objections to certain questions put by plaintiff's attorney to defendant's witness Owen on cross-examination; (3) that the court erred in sustaining plaintiff's objections to questions put by defendant to its own witness Owen on redirect examination; (4) that the court erred in sustaining plaintiff's objections to questions put by defendant to its own witness Kerr on direct and on surrebuttal examination; (5) that the court erred in overruling defendant's objections to the argument of plaintiff's counsel; (6) that prejudicial error occurred in certain questions put by plaintiff's counsel to plaintiff himself and to plaintiff's witness Currier on their direct examination; (7) that prejudicial error occurred in the asking of several questions put by plaintiff's counsel to defendant's witness Owen on cross-examination.

Objection was made and sustained to each of these last-named questions recited under division 7, except one, to which no answer was given. Further facts are stated in the opinion.

John B. Sanborn and Chauncey E. Blake, both of Madison, Wis., and W. A. Koon, of Minneapolis, Minn., for plaintiff in error.

Samuel T. Swansen, of Madison, Wis., Paul D. Carpenter, of Milwaukee, Wis., and T. C. Richmond and R. W. Jackson, both of Madison, Wis., for defendant in error.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

KOHLSAAT, Circuit Judge (after stating the facts as above). [1] For plaintiff it is contended that no prejudicial error appears among those assigned.

In Miller & Co. v. Wilkins, decided by this court in October, 1913, 209 Fed. 582, we held that reversal will not be granted where errors complained of do not injuriously affect the substantial rights of parties.

In Press Pub. Co. v. Monteith, 180 Fed. 356–362, 103 C. C. A. 502, 508, the United States Circuit Court of Appeals for the Second Circuit states the rule as follows, viz.:

"The more rational and enlightened view is that in order to justify a reversal the court must be able to conclude that the error is so substantial as to affect injuriously the appellant's rights. Prejudice must be perceived, not presumed or imagined."

To the same effect are Security Trust Co. v. Robb, 142 Fed. 78–84, 73 C. C. A. 302, and Barlow v. Foster, 149 Wis. 613–627, 136 N. W. 822.

[2-4] It will be observed that no error is assigned to the effect that the verdict and judgment were contrary to the evidence. For all that appears in the assignment, the plaintiff may have sustained his complaint by an overwhelming preponderance of the evidence, even conceding the alleged vice of the errors assigned. There is no merit in the claim that it was error to permit the amendment. The rule in that respect is too well settled to require discussion. While the record seems to suggest some ulterior purpose on the part of plaintiff in persisting in asking the questions to which objections were made and sus-

tained, we are of the opinion that there was nothing in those questions calculated to or that did prejudice the minds of the jurors against defendant. Nor can we say that the portions of the argument of plaintiff's counsel objected to by defendant were of such character and persuasiveness that the jury were likely to be misled thereby. There was nothing in the case appealing to the passion of the jurors, nor were the remarks, although of doubtful propriety, of such a nature as to warp the judgment of the 12 men. The same may be said of the questions permitted to be answered over objection of defendant. While the form may have been objectionable, the substance was neither misleading nor foreign to the matter involved. With reference to the errors assigned upon the action of the court in sustaining the objections to the questions put by defendant to its own witness Kerr, on surrebuttal, it appears that objection was made to the question asked on the ground that he was called to corroborate Owen after plaintiff had taken the evidence of one Currier to impeach the testimony of Owen as to the agreement to pay the $5,000 commission in any case. This evidence was a part of the defendant's case and was not improperly excluded in rebuttal. The attempt to prove by the same witness the nature of the dealings which defendant had with the parties from whom it expected to obtain the land in question was, we think, properly excluded, as not bearing upon the matter at issue. But whether properly excluded or not, we are unable to see that such action of the court served to prejudice defendant's case. It was offered to offset some testimony brought out on the cross-examination of Owen, vice president of defendant company, without objection, which in itself was not material.

Without going further into details as to whether there was error on the part of the court in overruling certain objections and sustaining others, it is sufficient to say that we find nothing in the record in its present state to satisfy us that what was done by court and counsel was calculated to or did affect the substantial rights of the defendant. The present case comes within the terms of the decisions above quoted.

We are unable to conclude that the record discloses errors so substantial as to affect injuriously the defendant's rights, and the judgment of the District Court is therefore affirmed.

CROWN CORK & SEAL CO. OF BALTIMORE CITY v. AMERICAN CORK SPECIALTY CO. et al. SAME v. BROOKLYN BOTTLE STOPPER CO. et al. SAME v. JOHNSON.

(Circuit Court of Appeals, Second Circuit. January 13, 1914.)

Nos. 34–36, 173, 174.

1. PATENTS (§ 328*)—INFRINGEMENT—BOTTLE CLOSURES.

The Painter patent, No. 792,284, for a method of manufacturing bottle closures, claim 1, requires the combined metal cap, cork disk, and binding medium which constitute the closure to be under pressure at least a part of the time during which heat is being applied to fuse the binder. The

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

Painter patent, No. 887,838, for a machine for carrying out such method, also applies pressure while the binder is being fused. As so construed, both patents *held* not infringed.

2. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—BOTTLE CLOSURES.
The Wheeler patent, No. 887,883, for apparatus for manufacture of bottle closures, *held* valid and infringed.

3. PATENTS (§ 326*)—SUIT FOR INFRINGEMENT—PROCEEDING FOR CONTEMPT FOR VIOLATION OF INJUNCTION.
Where, after the granting of an injunction against the use of an infringing machine, defendant's machine is reorganized, it is the better practice not to deal with the question of infringement by the new machine on motion to punish for contempt, unless the change made was merely colorable, but to leave the patentee to an application to enjoin its use.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 613–619; Dec. Dig. § 326.*]

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

These causes come here upon appeal to review decrees of the District Court, Eastern District of New York, holding certain claims of three patents to be valid and infringed by defendants. The patents in question are No. 792,284, granted June 13, 1905, to complainant as assignee of William Painter, for method of manufacturing bottle closures; No. 887,838, granted May 19, 1908, to complainant as assignee of Painter for a machine for making closures for bottles; and No. 887,883, granted May 19, 1908, to complainant as assignee of W. H. Wheeler, for apparatus for the manufacture of bottle closures. These three patents relate to the manufacture of that type of bottle seal which is now widely known under the name "crown cork."

At the same time there were argued appeals from orders made in the first two causes, subsequent to interlocutory decrees, holding defendants in contempt for disobedience of the injunctions contained in such decrees.

The several opinions of Judge Chatfield, who sat in the District Court, will be found in 190 Fed. 323, 201 Fed. 344, and 206 Fed. 473. In these opinions will be found a very full statement of the facts, with excerpts from the specifications of the patent and a recital of the several claims involved, all of which need not be repeated here.

Livingston Gifford and Robert B. Killgore, both of New York City, for appellants.

James Q. Rice, of New York City, and Robert H. Parkinson, of Chicago, Ill., for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge (after stating the facts as above). The peculiar seal for bottles containing gas-impregnated liquids, which has commended itself to the trade and has gone into general use, antedated these patents. The combination of a metal cap with corrugated flange to grip the bottle top, a cork lining or disk, and a fusible binder was covered by earlier patents and had for long been used by complainant. The validity of these earlier patents had been sustained. In producing this structure difficulties were encountered and defects in the product resulted. The patents in suit were devised to overcome these difficulties and to eliminate these defects, which difficulties and defects are fully referred to in the several specifications.

[1] In the first patent (792,284) claim 1 sets forth the process described and patented as follows:

"1. In the manufacture of gas-tight bottle-closures composed in part of metal, the method or process which consists, first, in interposing a suitable fusible protecting and binding medium between the packing or sealing gasket and the coincident surfaces of the metal co-operating therewith; secondly, heating the metal, the gasket, and the binding medium for properly fusing the latter, and in the meantime subjecting the whole to appropriate pressure; and thirdly, cooling the metal and avoiding injury to the gasket from undue heating and hardening the finished medium while maintaining said appropriate pressure, substantially as and for the purpose specified."

With regard to this claim two contentions are made by defendants:

A. That it must be confined to artificial cooling. The claim does not so state, nor do the specifications require such a limitation to be read into it. The text and the drawings do show air-jets for artificially cooling, but the patentee also states that:

"If the raceway was long enough (and there were no air-jets) the caps and blocks could be moved along (as others entered) and so kept under pressure until sufficient time had elapsed for the prevailing temperature of an average factory to assist in cooling of the cap and disk and hardening the fused medium. It will, however, be obvious that with the variable temperature of a room, as well as of the variations in exterior normal temperature, there would be corresponding variations in time required for perfecting the operation and also that with the long raceway suggested a large number of press-blocks would be required."

B. That the combined metal cap, cork disk, and binding medium are to be under pressure while the heat is fusing the binder. The claim expressly so states, for it says the *second* stage of the process consists of heating metal, cork and binder (for the purpose of fusing the latter) and that "meantime" the whole combination is under pressure. In the specification the patentee states that he deems it preferable to have the pressure slightly precede the heating, adding that in the second stage it is "immaterial whether or not the heating and compression be *initially* simultaneous"; this statement cannot be fairly construed as indicating that compression during the *entire* heating period (or *second* stage) is to be wholly dispensed with. It does not warrant a construction of the claim which will eliminate the word "meantime," which, it must be assumed, was put in the claim as a qualification of its terms. Nor do we find any authority for thus reconstructing the claim in the other passage in the specifications where the patentee, referring to his whole process in all its stages, describes it as "maintaining the parts under pressure while heated and until they are cooled."

Defendant's machine does not apply any pressure until *after* the combined metal, cork and binder have left the heating part of the machine and, in our opinion, does not infringe claim 1 of this patent.

As to the Second Patent.

This also we think is limited to pressure while the binder is fusing. The specifications refer to the process patent (No. 792,284) by its application number, 110,535, and state that the machine is devised for the manufacture of closures "in harmony with my said novel method." The description indicates that the "presser blocks" put the closures un-

der pressure before the heating begins and that pressure is continued until cooling ends (i. e., cooling sufficient to set the binder). At page 3 of the specifications the patentee says the heating apparatus may be widely varied and electricity, steam, or combustion used, but, "however heated," the organization of the machine "must appropriately heat the caps on the loaded presser blocks during their progressive movement," which includes their passage through the heating zone. While passing through there, they are under pressure—"the binding medium and packing (being) more or less heavily compressed because of the firm mechanical union of cap and presser block."

Since defendants do not press during heating—do not heat the caps when on loaded presser blocks—they do not infringe this patent.

The Third or Wheeler Patent.

[2] The organization of the first two patents was directed towards securing a better and smoother union of cork and metal through the binder, by applying pressure during the fusion process. The theory was that in that way (continued pressure) a defect known as "puffing" was overcome. This did not always happen. Wheeler pointed out that pressure during heating trapped air, moisture, or gases resulting from the fusion of the binder and really prevented perfect union. He therefore departed radically from the two patents above discussed by leaving the cork unpressed during the heating period, so that air, gas, etc., could escape, and applying pressure only when the heating zone was passed. This is just what defendant's organization accomplishes, and we are satisfied that it infringes this patent.

The decrees should be reversed as to the first two patents, and affirmed as to the third patent, with a modification hereinafter noted.

[3] After entry of decrees and issuance of injunction, defendants reorganized their machines, making the following change: In all the preceding patents, and generally in the prior art, the caps, corks, and binder were assembled before the heating and fusing process began. As reorganized only the caps and binder are thus assembled. These are heated and the binder fused, and *after* the cap, with fused binder, has passed the heating zone, the cork is driven down into it and held under pressure.

Complainant moved to attach for contempt because of the use of this reorganized machine. It has been the practice in this circuit (Bonsak Machine Co. v. National Cigarette Co. [C. C.] 64 Fed. 858) not to deal with modifications of a machine held to be an infringement, on motions to punish for contempt, unless the change was plainly a mere colorable equivalent; if the change was substantial, fairly arguable as to its being covered by the patent, it has been the practice to leave the patentee to an application to enjoin its use. That practice is a wholesome one, because an injunction covering the new machine is appealable at once, and can be promptly considered by the Circuit Court of Appeals. But there is no such summary appeal from an order holding a party in contempt, and in view of recent decisions of the Supreme Court it is not certain that the convenient practice, formerly followed

in this circuit, of reviewing such order by writ of error, is still available.

Complainant moves to dismiss these two appeals from the contempt orders. We do not find it necessary to decide this point now. We are satisfied that the District Judge should have left the question whether the changed device infringes to be settled upon an application for injunction, presumably in a new suit. To accomplish this result the decrees should be amended by inserting a clause which describes the infringing machines covered by said decrees as machines in which the combination of metal, cork, and binder is assembled before the processes of heating, fusing, pressing, and cooling begin.

Whether or not the patents are broad enough also to cover a machine operating as does the one now used by defendant may be determined in another suit which raises that question. This disposition of the main appeal makes it unnecessary to grant special relief under the contempt orders, the appeals from which are pro forma dismissed.

No costs to either side of this appeal.

WRIGHT CO. v. HERRING-CURTISS CO. et al.

(Circuit Court of Appeals, Second Circuit. January 13, 1914.)

No. 78.

1. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—FLYING MACHINE.
   The Wright patent, No. 821,393, for a flying machine, is valid, covers an invention of a pioneer character, and is entitled to a liberal construction; also *held* infringed.
2. PATENTS (§ 235*)—INFRINGEMENT—MACHINE.
   A machine that infringes part of the time is an infringement, although it may at other times be so operated as not to infringe.

   [Ed. Note.—For other cases, see Patents, Cent. Dig. § 371; Dec. Dig. § 235.*]

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

Suit in equity by the Wright Company against the Herring-Curtiss Company and Glenn H. Curtiss. Decree for complainant, and defendants appeal. Affirmed.

For opinion below, see 204 Fed. 597.

This cause comes here upon appeal from an interlocutory decree of the District Court, Western District of New York, upholding the validity of a patent and finding infringement thereof by defendants. The patent is No. 821,393, issued May 22, 1906, to Orville and Wilbur Wright for a flying machine. The claims in controversy are Nos. 3, 7, 14, and 15.

E. R. Newell and J. Edgar Bull, both of New York City, for appellants.

H. A. Toulmin, of Dayton, Ohio, and F. P. Fish, of New York City, for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

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

PER CURIAM. [1] The questions presented in this case have already been fully discussed. In the case at bar Judge Hazel wrote an opinion, upon granting preliminary injunction, which will be found in 177 Fed. 257. Upon appeal from that decision this court filed a brief memorandum. 180 Fed. 111, 103 C. C. A. 31. Subsequently in a suit by the same complainant against a different infringer Judge Hand elaborately discussed the questions. Wright v. Paulhan (C. C.) 177 Fed. 261. The opinion of Judge Hazel at final hearing, now here for review, will be found in 204 Fed. 597. As we are in full accord with the reasoning by which he (and Judge Hand) reached the conclusions that the patent in suit is a valid one, that the patentees may fairly be considered pioneers in the practical art of flying with heavier-than-air machines, and that the claims should have a liberal interpretation, it seems unnecessary to add anything to what has been already written. That the third claim, when liberally construed, has been infringed, seems too plain for argument.

[2] As to the other claims, in which the vertical rear rudder is an element, we are satisfied from the testimony, as was the court below, that during some parts of their flight defendant's machines use the rudder synchronously with the wings, so that by their joint action lost balance may be restored, or a threatened loss of balance be averted. Such use of the rudder constitutes infringement, and a machine that infringes part of the time is an infringement, although it may at other times be so operated as not to infringe.

Touching the question of the sufficiency of notice as a basis for damages and profits, under section 4900, U. S. Rev. Stat. (U. S. Comp. St. 1901, p. 3388), we are of the opinion that the notice to Glenn H. Curtiss was sufficient, not only for himself, but also to charge the corporation, which he thereafter organized to exploit his machine and of which he was an officer.

The decree is affirmed, with costs.

CONLEY v. THOMAS.

(Circuit Court of Appeals, Third Circuit. January 29, 1914. Rehearing Denied March 17, 1914.)

No. 1791.

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—GUIDE FOR PUNCHING PRESS. The Conley & Conley patent, No. 701,544, for a guide for punching presses, *held* valid, but not infringed, on the ground that defendant's device follows the prior art.

Appeal from the District Court of the United States for the Western District of Pennsylvania; Charles P. Orr, Judge.

Suit in equity by Thomas Conley against George P. Thomas. Decree for defendant, and complainant appeals. Affirmed.

For opinion below, see 204 Fed. 93.

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

Connolly Bros., of Washington, D. C. (Thomas A. Connolly and Joseph B. Connolly, both of Washington, D. C., of counsel), for appellant.

Christy & Christy, of Pittsburgh, Pa., for appellee.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

J. B. McPHERSON, Circuit Judge. Three reported cases in this circuit have already considered the patent in suit—No. 701,544, issued in June, 1902, to Conley & Conley for improvements in guides for punching presses—and in all of them the validity of the patent has been upheld. Judge Cross decided the first case in 1909 (Conley v. King Bridge Co. [C. C.] 175 Fed. 79) and sustained the patent, although in view of the prior art he felt obliged to restrict the invention to the particular construction shown and claimed (175 Fed. 84). On appeal this court (187 Fed. 137, 109 C. C. A. 412) agreed that the patent was valid, but held it to have been restricted too narrowly, regarding it as entitled to protection to the full extent of the disclosure (187 Fed. 140, 109 C. C. A. 412).

In the case now before us Judge Young has also sustained the patent (Conley v. Thomas [D. C.] 204 Fed. 93), although numerous references were before him that were not before either of the courts that decided the earlier controversy. Upon the question of validity we shall only say that the additional references have not persuaded us that our former decision should be changed. We still believe the patent to be valid, and may therefore turn at once to the question of infringement.

Here also Judge Young's opinion relieves us from the need of discussing the subject at large. We agree with him that the spacing tables that were in the prior art—whether before the court in the former case, or now referred to for the first time—may properly be considered; for, if these tables were so different from the Conley invention as to offer no obstacle to the patent, it is clear that the patent cannot now prevent the public from using them. If these tables did anticipate the invention, the patent in suit would of course be invalid, and therefore (since we uphold the patent) the question now before us may properly be put in this form: Does the Thomas table follow the prior art, or does it substantially copy the Conley device? We think the correct answer has been given by the District Court, namely, that Thomas has followed the prior art, and therefore does not infringe. We admit that the question is close, but we see no escape from the conclusion. The rival machines do resemble each other in several particulars, but each of them also resembles the prior art, so that the case is not free from perplexity. But we have come to the conclusion that each machine is entitled to a place in the art.

The judgment is affirmed.

GENERAL ELECTRIC CO. v. CITY OF DUNKIRK et al.

(Circuit Court of Appeals, Second Circuit. January 13, 1914.)

No. 124.

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—STEAM TURBINE.

The Emmet patent, No. 924,546, for improvements in steam turbines, *held* not anticipated, valid, and infringed.

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

This cause comes here upon appeal from a decree of the District Court, Western District of New York, granting injunction and accounting in a suit for infringement of a patent. The patent is number 924,546 issued June 8, 1909, to W. L. R. Emmet for improvements in turbines. The opinion of Judge Hazel which very fully sets forth the facts will be found in 211 Fed. 658.

Thomas F. Sheridan and George L. Wilkinson, both of Chicago, Ill. (Edwards, Sager & Wooster, of New York City, and Sheridan, Wilkinson & Scott, of Chicago, Ill., on the brief), for appellants.

Dyer, Dyer & Taylor, of New York City (Richard N. Dyer and John Robert Taylor, both of New York City, of counsel), for appellee.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge. The specifications very simply and clearly describe the mechanical change which the patentee made in the structure which he undertook to improve. For a covering ring, composed of a single integral piece of metal, shrunk on and fastened in place by screws attaching it to the buckets, he substituted a ring made in sections and fastened to the buckets by tenons cut out of the solid metal of each bucket and riveted over through holes in the ring. If the specifications were to be taken as disclosing the whole situation, the conclusion would follow that the mere substitution of a riveted tenon for a screw was such an elementary mechanical device that it involved no patentable invention to make the change. But the testimony throws a flood of light upon the situation which confronted Emmet, and, as it seems to us persuades convincingly to a different conclusion. The rotors in these turbines revolve at enormous speed—6 to 8 miles a minute at the periphery. The centrifugal stresses and other torsional—so-called cyclonic—stresses presented a problem, for the solution of which the mere fact that steam propellers had rings riveted to their blades would, by no means, be a sufficient suggestion. The best effort to meet the problem, before Emmet entered the field, was a continuous shrunk on ring. Its continuity was the feature which commended it; the screws which fastened it to the blades, or to a few of them—every tenth blade usually—added little to its rigidity. It was unsuccessful; in the demonstration and experimental machines involving the other improvements which Curtis brought into the art, it was an element of unsafety. How should that difficulty be eliminated? No one can read the testimony of the various engineers who were en-

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

gaged in the effort to make the Curtis type of machine a success, without realizing that the answer to this question was not apparent to the man "skilled in the art," however familiar he might be with the various ordinary mechanical devices for attaching a ring to spokes. The answers suggested were—make the ring stronger, make it heavier, make it—as Junggren suggested—of a better grade of steel, make it without a welded joint. Evidently all were so impressed with the necessity of sticking to the continuous ring, with the resisting power which its integrity possessed, that it was manifestly a new departure to cut it apart, to make it lighter, and to impose it as an additional load on the buckets, instead of trying to relieve the buckets by making it carry itself. The evidence clearly indicates to us that it was a meritorious invention.

We fully concur with Judge Hazel, and do not think it necessary to add anything to his discussion of the other points in the case.

I vote to affirm.

Decree affirmed, with costs.

GENERAL ELECTRIC CO. v. CITY OF DUNKIRK et al.

(District Court, W. D. New York. June 11, 1913.)

1. PATENTS (§ 27*)—INVENTION—ADAPTING OLD DEVICE TO NEW USE.

Under the patent law the inventive faculty resides in the reduction of an idea to practice as distinguished from merely making mechanical alterations, and whenever an old device is put to a new use, and such use produces a new result, a question of fact arises as to whether such adaptation would occur to a person of ordinary mechanical skill.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 31, 32; Dec. Dig. § 27.*

Reduction of invention to practical use or operation as affecting patentability, see note to Excelsior Supply Co. v. Weed Chain Tire Grip Co., 113 C. C. A. 7.]

2. PATENTS (§ 160*)—INVENTION—DRAWINGS AS EVIDENCE.

Invention is not to be ascertained from the drawings of a patent alone.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 234, 235; Dec. Dig. § 160.*]

3. PATENTS (§ 36*)—INVENTION—EVIDENCE.

In a patent suit, doubts as to invention may be overcome by the attitude of defendant in the patent office in claiming invention for his structure and declaring interference with the patent in suit.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 40; Dec. Dig. § 36.*]

4. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—STEAM TURBINE.

The Emmet patent, No. 924,546, for a steam turbine, relating specially to a sectional covering for the vanes of an axial-flow turbine secured to the outer ends of the vanes by tenons made integral therewith, was not anticipated, discloses invention, and is valid; also *held* infringed.

In Equity. Suit by the General Electric Company against the City of Dunkirk and the Board of Water Commissioners of the City of Dunkirk. On final hearing. Decree for complainant.

Affirmed 211 Fed. 657, 128 C. C. A. 575.

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

Dyer, Dyer & Taylor, of New York City (Richard N. Dyer and John Robert Taylor, both of New York City, of counsel), for complainant.

Sheridan, Wilkinson, Scott & Richmond, of Chicago, Ill., and Edwards, Sager & Wooster, of New York City (Thomas F. Sheridan and George L. Wilkinson, both of Chicago, Ill., of counsel), for defendants.

HAZEL, District Judge. The patent in suit, No. 924,546, granted June 8, 1909, to William L. R. Emmet, assignor to complainant corporation, relates to an improvement in the construction of steam turbines, and is especially adapted to the utilization of steam for driving dynamo electric machinery at a high rate of velocity. In its operation, as is commonly known, the turbine is different from the reciprocating engine, in that it has revolving disks, or wheels, or a drum surrounded by a plurality of vanes or buckets uniformly spaced side by side, or one succeeding another, forming a passage through which the steam flows parallel to the shaft.

A detailed discussion of the steam turbine and its bearing upon the use of modern high-power machinery, and of the existing differences between the impulse and reaction types of turbines—the latter the discovery of Mr. Parsons of England, the former of Mr. De Laval of Sweden—is not necessary to a decision of this controversy. Those interested in the subject are referred to the exhaustive and comprehensive opinion of Circuit Judge Buffington in International Curtis Marine Turbine Co. et al. v. Wm. Cramp & Sons Ship & Engine Bldg. Co., 202 Fed. 932, 121 C. C. A. 290. It is sufficient here to state that the reaction and impulse types of turbines are alike in appearance, although they differ somewhat in the principle of operation. In the reaction type, Parsons utilized a multiplicity of sets of rotating and stationary vanes, buckets, or blades around the rotor, through which the steam flowed from one side to the other, with the result that the heat energy produced a slower rotation; while in the impulse type, De Laval used a single wheel or rotor with one set of vanes, thereby achieving a higher rate of speed. Subsequently Curtis, an American inventor, who retained in his construction the Parsons' feature of rotary and stationary vanes, operating them on the De Laval principle, was given letters patent for improving both types of turbines. The Emmet improvement in suit is usable with these various types of turbines. The specification states generally:

"Elastic fluid turbines, as commonly constructed, are provided with one or more sets of rotary vanes or buckets arranged on the periphery of a wheel or cylinder, and between the rotary vanes, when more than one set is used, are other vanes or buckets which receive the motive fluid from one set of moving vanes, and direct it into a second set, this action being repeated for each set of moving and stationary vanes. The vanes or buckets of the moving element may be cut from the solid stock, or may be made detachable; in either event it is desirable to provide means for covering or closing in the ends of the buckets in order to form fluid passages of definite and predetermined cross-sectional area and to reduce losses by leakage. The same closing in of the ends is desirable on the stationary vanes or buckets and for the same reasons."

And in recognizing that prior to his improvement, to prevent the escape of steam, turbines had cover strips fastened to the ends of the vanes on the rotor, the patentee states:

"Previous to my invention all turbines of the above-described class with which I am familiar were provided with covers made of continuous steel rings shrunk or pressed on over the ends of the vanes of the revolving element, and retained in place by screws. Such a cover is expensive and inconvenient to machine, and with the speeds ordinarily used the strain on the holding devices due to centrifugal action is excessive. Owing to the construction of the parts it is often not practicable to make each one of these attachments strong, and consequently the cover is liable to be a source of danger and a limitation upon the safe design of a machine."

It was known long before the Emmet invention in suit that the vanes were liable to injury from the vibrations of the rotor, owing to the tremendous speed and resulting strains. Parsons, appreciating this, as hereinafter more particularly specified, provided for holding the vanes firm, a blade tie, which the complainant, however, claims did not succeed in performing the functions of the Emmet cover strip. To insure a clear understanding of the invention involved Figs. 1 and 4 of the drawings of the patent in suit are herewith reproduced:

Fig. 1.

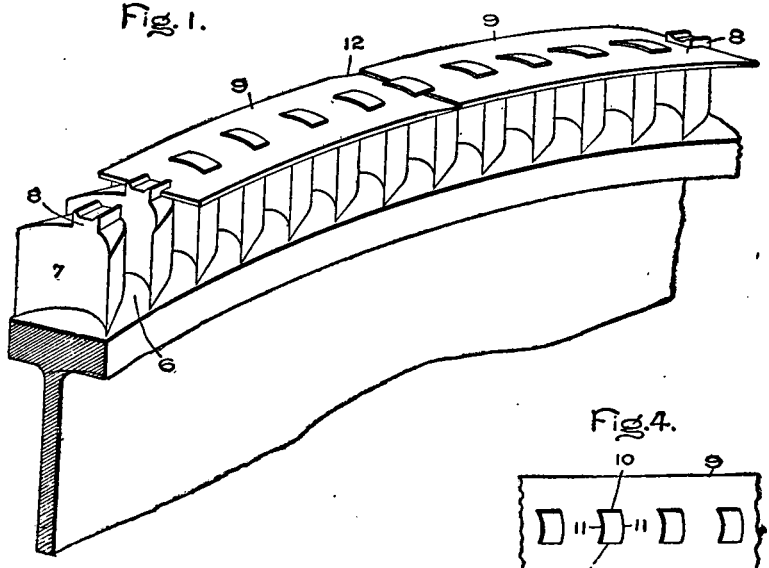


Fig. 4.

It will be observed that the cover plate is divided into sections and positioned over the vanes or buckets, which are integral with the base of the wheel blank, though they may be detachable; that the steam flows through the spaces between the vanes; that at the ends of the vanes there are tenons having two flat surfaces and two curved surfaces, formed integrally with the vanes to fit apertures in the cover sections; and that each section has straight ends notched to receive half a tenon or projection. The claims in controversy are as follows:

"3. In a turbine, the combination of a plurality of vanes, a sectional covering for the ends of the vanes, each section being provided with a plurality of openings registering with the vanes, and tenons which pass through the openings and are riveted over to hold the sections in place.

"21. In a turbine, the combination of vanes or buckets having curved front and rear faces, tenons formed on the buckets, having two flat surfaces and two surfaces, which partake of the curvature of the buckets, and a cover having openings therein, which register with and correspond in shape to the tenons.

"23. In an axial-flow turbine, the combination of a support, a plurality of radiating vanes carried thereby, tenons formed integral with the vanes and projecting from their outer ends, and a cover confining the steam to the bucket spaces applied to the free ends of the vanes, and provided with openings to receive the tenons and through which the latter extend, such cover transmitting its centrifugal strains radially to the support through the vanes.

"32. In a turbine, the combination with the vanes or buckets and a support therefor, of tenons made integral with the buckets and a discontinuous or jointed cover confining the steam to the bucket spaces having openings through which the tenons pass, the cover being secured to the buckets by the riveting of the tenons thereon."

Claim 3 specifies the jointed cover plate, with a series of opening through which the tenons are projected; claim 21 particularizes the peculiarly shaped tenons and cover openings; claim 23 specifies the principal elements of the combination, and refers to an axial-flow turbine; while claim 32 is more specific as to the cover strip and the means for attaching it to the vanes. It is clearly shown in the specification, and the proofs support the complainant's claim that the object of the patentee was to overcome the objectionable excessive strains caused to prior covers or rings by centrifugal action, and to prevent the leakage of steam and consequent loss of energy, which interfered with the desired velocity of the rotors. The rotor element should be included by implication in the claims from which it was omitted; but I think a construction of the claims so broad as to include the stationary element, which was not susceptible to rotary stresses, would not be warranted.

The defenses are want of novelty and invention, anticipation, and noninfringement. In view of the fact that cover plates or rings over the ends of the vanes were old and had previously been provided in an impulse type of turbine to prevent the spilling of steam, the important question is whether the patentee, by using tenons of peculiar shape to fit corresponding apertures in a sectional cover strip and riveting them thereto, exercised the inventive faculty, or whether what he accomplished consisted merely of a substitution of tenons for the screws which were used in continuous rings, as a means for joining the buckets to the cover, "and as an incident thereto made the cover of one or more strips in lieu of a continuous ring." The evidence is persuasive of the point that Emmet, by his combination of new and old elements, made an advance in the art. He was the first to use tenons in steam turbines for rigidly fastening the cover plate to the vanes, and such use, considering the difficulties encountered in the use of prior steam turbine covers, involved a fair amount of invention. By his combination he achieved a beneficial result which others working in the art had failed to achieve. In prior patents in evidence the covers or rings pressed on over the vanes, and, screwed in place, were designed to prevent centrifugal spilling of the steam and to tie the blades together to

strengthen them against vibratory strains which inhere in them during their rotations, but none of them suggest the use of tenons for fastening sectional covers over the ends of the vanes to protect them from excessive stresses and consequent distortion or displacement.

The patent to Schmaltz, it is true, discloses a propeller wheel having around it a wide continuous rim to which the blades are fastened at their ends by tenons, and the Montgomery patent, No. 5,364, shows integral tenons extending through the casing surrounding the propeller blades and riveted, and an earlier patent to Montgomery shows a casing made in various sections. There are also patents showing vehicle wheels having integral tenons at the ends of the spokes riveted on the outer surface of the rim; but such prior patents are not closely analogous. The adaptation of tenons for fastening the rims of propeller blades and wheels does not preclude patentability in their adaptation in steam turbines in combination with sectional covers, as an improvement over prior fastening means, as shown in the Emmet structure.

[1] The elicited facts preponderatingly show that the use of the peculiarly shaped tenon described in claim 21 to conjoin the cover sections to the vanes was not an obvious expedient, and that those skilled in the art, familiar with tenons and their adaptability, and actively engaged in the construction of steam turbines, in experimenting to prevent injury to the vanes and cover caused by the tremendous speed of rotation, never thought of fastening the cover plate to the vanes by tenons to impart rigidity and to reduce the leakage of steam. According to the patent law the inventive faculty resides in the reduction of an idea to practice as distinguished from merely making mechanical alterations, and whenever an old device is put to a new use, and such use produces a new result, a question of fact arises as to whether such other adaptation would occur to a person of ordinary mechanical skill. Hobbs v. Beach, 180 U. S. 383, 21 Sup. Ct. 409, 45 L. Ed. 586. It frequently happens that slight modifications in a machine producing a new combination and a meritorious result raise the presumption of invention. Beach v. American Box-Machine Co. et al. (C. C.) 63 Fed. 597. The witness Curtis, the inventor of the Curtis turbine, testifying as to the importance of the modification, stated that one of the difficulties with the screwed on covers was that the "thick part of the bucket was so small measured in the circumferential direction that a rivet or screw of sufficient size to have any great strength could not be put through the bucket without cutting it in two, or weakening it too much"; and he expressed the opinion that that had always been one of the problems. Surely such testimony from a witness thoroughly acquainted with the art and the details of steam turbine construction may well justify resolving any doubt as to invention in favor of the patentee.

The defendant, however, attaches importance to the patents to Parsons, Stoney and Fullager, and asserts that they are anticipatory. In such patents the blades were bound round near the outer ends with a metal strip; the extreme ends, however, were left uncovered and projected beyond the strip. Although the rings were made either continuous or in sections, still their principal purpose was to tie the blades

to impart rigidity and alignment to them. They were unable to perform the functions of the claims in suit, and therefore do not anticipate them.

In the Parsons patent, No. 639,608, of 1899, the blade tie is also essentially different from the Emmet invention. The wires or rings which tie the blades together, while concededly imparting rigidity to them, nevertheless failed to perform the dual function of the Emmet construction; they interfered with the uniform flow of the steam through the rotor, and did not actually prevent spilling of the steam at the outer ends of the blades. This patent, like the Parsons, Stoney and Fullager patents belongs to a class of patents in which the necessity was apparently appreciated for a more suitable cover or strip for the blades—one which would remove the vibratory stresses and lessen the leakage. The evidence shows, also, that tie blades and the rings or shrouds of the prior art were difficult of manufacture, owing to their bore, their thinness, and their notches making connection with the blades.

The Lash patent, No. 637,135, for a water wheel, is not in the same art as the steam turbine, and did not suggest the Emmet improvement. True enough, it is provided with buckets, but they are attached to side rings or plates, which are not the equivalent of the cover in suit, and are utterly unable to perform its function. The tenons or projections are inserted in openings in the side ring, but they are not riveted, as are the tenons of the patent in suit.

[2] The Larson patent, No. 598,998, acquired distinction in the Patent Office, which originally treated it with consideration, but later withdrew it as a reference. It relates to the radial-flow type of turbine as distinguished from the axial-flow type. The defendant claims that the specification shows that the Larson structure is provided with vanes and integral tenons extending through and riveted over holes in the wheel; but to this construction of the specification and drawings the complainant's expert witnesses do not agree. An inspection of the patent discloses that the undoubted object of the patentee was to combine the regulating valve and nozzle for turbines, and arrange the same to enable the expansion of steam as it passes from the source of supply into an element of the turbine. The description is indefinite as to whether or not the buckets are fastened to the rotor, and, if so, in what manner they are fastened thereto. Nor is it clearly stated that the ends of the buckets have covers which are riveted over tenons or projections, although the drawings seem to indicate such an arrangement. I feel convinced, however, that the cover or continuous ring was not designed to perform the function of the Emmet patent; its thickness (*F* of Fig. 2) would seen to indicate that its primary use was to support the buckets rather than to perform the function of a ring or cover for the blades. There is no evidence to show that the Larson structure was practicable. In any event, the indefiniteness of the description as to the manner in which the ring was attached to the buckets justifies the presumption that Larson had no such conception as the defendants accredit to him, and invention is not to be ascertained merely from the drawings. Canda et al. v. Michigan Malleable Iron Co., 124 Fed.

486, 61 C. C. A. 194; Taylor Burner Co. v. Diamond (C. C.) 72 Fed. 182; Australian Knitting Co. v. Wright's Health Underwear Co., 119 Fed. 921, 56 C. C. A. 451.

In the Geisenhoner patent, No. 665,600, the illustration shows vanes, and specifies the use of ordinary tenons or ears for entering recesses in the face of the back plates. The object of the patentee was to improve the form of the buckets, and, as the patent has no relation to a cover over the ends of the vanes, is therefore entitled to little consideration.

It is unnecessary to refer in detail to any other patents claimed by defendant to anticipate or negative the novelty of the Emmet claims in controversy. They have all, including the patent for a distinctive cover of the De Laval turbine, been examined by me, and the testimony bearing thereon has been considered. The proofs are that the continuous ring or shroud of the prior art was impracticable in high-power motors, that it lacked complete efficiency as a strengthening means for the blades, and that, while it was workable with short vanes, it was inefficient with longer vanes of thinner construction. Emmet by his improvement, which is applicable to both types of turbines, with vanes of differing dimensions, performs the double function of covering the ends of the vanes to prevent the escape of steam, and of holding them rigid to prevent warping from excessive strains, and therefore his patent is entitled to the protection of the patent laws.

There is an important difference between the facts of this case and those shown in Howard v. Detroit Stove Works, 150 U. S. 164, 14 Sup. Ct. 68, 37 L. Ed. 1039, cited by defendants' counsel, wherein the Supreme Court held the Beckwith patent for improvements in stoves invalid. In that case the improvement, consisting of bolting or riveting together sections of a stove, was held invalid because such manner of fastening parts was known at the time of the alleged invention, while in the case at bar, as elsewhere stated, the specific fastening means was an original adaptation.

[3] The Emmet patent in suit and the two patents to Fullager, of which much is said hereinafter, were engaged in interference proceedings in the Patent Office, and throughout such proceedings efforts were made to include the Emmet invention in the Fullager claims. In view of this attitude by Fullager and the Allis-Chalmers Company, owner or licensee of the Fullager patents under which the defendants' turbine was manufactured, I think the principle of Carlson Motor & Truck Co. v. Maxwell-Briscoe Motor Co. (C. C.) 178 Fed. 458, affirmed 197 Fed. 309, 117 C. C. A. 55, is not inapt. There it was substantially held that any doubts as to invention may be overcome by the attitude of a defendant in the Patent Office in claiming that his structure discloses invention and declaring interference with another patent. In support of this holding, see, also, Shuter v. Davis (C. C.) 16 Fed. 564, Roth v. Harris, 168 Fed. 279, 93 C. C. A. 581, and General Knit Fabric Co. v. Steber Mach. Co. 194 Fed. 99, 114 C. C. A. 177.

[4] The defendants have introduced in evidence the file wrapper and contents of the Fullager patents No. 696,867, and No. 746,061, and urge that the invalidity of the Emmet patent is established by

reason of the failure on the part of Emmet in the interference proceedings to prove that his invention was reduced to practice by the continuous exercise of diligence from a date preceding the filing of the Fullager application. The material filing dates of the Fullager patents are as follows: No. 696,867, granted April 1, 1902; application filed, April 18, 1901; No. 746,061, granted December 8, 1903; application filed, September 16, 1901.

The Emmet application was filed February 24, 1902, and was rejected on the first Fullager patent. In conformity with rule of practice No. 75 of the Patent Office, the patentee made the required oath, showing, among other things, a completion of his invention before the Fullager application, and such objection was then withdrawn. According to the evidence, Fullager, at this time, had pending another application for a patent, which was subsequently granted as No. 746,061; and, as it embodied the Emmet invention, interference was declared, but the proceeding was dissolved on technical grounds. In a second interference proceeding testimony was taken to antedate the Emmet invention showing a disclosure to others in February, 1901. Fullager relied on the filing dates of his applications. Though the examiner of interference decided in favor of Fullager on the ground that Emmet had not, with diligence, reduced his invention to practice, his decision was reversed on appeal by the Board of Examiners in Chief, and later on appeal to the Commissioner of Patents, on the ground that the Fullager application was defective, as it failed to make proper disclosure. The question of priority was next considered by the primary examiner on an application to nullify the Emmet patent and to overcome the objection to patent No. 696,867, which it was claimed disclosed the invention, though it made no claim therefore. A second rejection of some of the Emmet claims was withdrawn, following the filing of additional affidavits to prove diligence in reducing the invention to practice.

Other interference proceedings ensued between the Allis-Chalmers Company, assignee, and Emmet, based on Fullager reissues in which were included the precise claims in controversy, but such interference proceedings were later dissolved on technical grounds, and the patent in suit was granted. The conflicting views in the Patent Office regarding the priority of invention and the exercise of diligence in reducing the same to practice leave the questions open ones.

The proofs show that from February, 1901, to the following October the complainant was engaged in the construction of a 500-K. W. motor embodying the invention of the Emmet patent; both the witnesses Emmet and Mortensen substantially testifying that the motor was completed in October, 1901, and was continuously operated from such time, and that the work "was pushed as rapidly as possible." Such latter statement was criticized in the Patent Office as an obvious conclusion, but in the present record there is considerable additional evidence on the subject satisfactorily showing that, following the conception of the invention, sufficient diligence was exercised in reducing it to practice. The invention was conceived by Emmet early in February, 1901, and disclosure thereof was made to others while the work of completing the motor was under way. Immediately upon con-

ceiving the idea of tenons he determined to adapt the same to the turbine then under construction. Considering the character of the motor, the many separate parts of more or less intricate construction and special design required, and the drawings and blueprints of the various parts to be assembled, the delays and hindrances from outside sources, and the fact that the invention was an improvement which could not be tested until the various parts of the turbine were assembled, it is believed that whatever delay ensued was not due to the failure to use diligence in reducing the invention to practice. The testimony of Mortensen discloses daily work from February, 1901, to the following October in constructing the motor and in perfecting the invention. He testifies that the work was pushed to the complainant's utmost capacity, and narrates in detail the steps taken from day to day towards completion, stating that before the motor was completed, and indeed immediately after the invention was conceived, sketches were made of a turbine wheel segment with the buckets and projections thereon, and that within a few days afterwards the segment was completed and exhibited. Tests with weights were immediately made, with the result that it was tentatively ascertained that a cover fastened with tenons to the buckets was sufficiently strong to withstand objectionable vibratory strains and centrifugal forces. Such tests, it is true, were not positive evidence of reduction to practice, but nevertheless are to be considered upon the question of the exercise of diligence in reducing the invention to practice.

The defendant, however, contends that complainant, in view of the action in the interference proceeding, is estopped from contesting priority with Fullager, but I think that the decision of the Patent Office in which it was stated that Emmet had failed to diligently reduce the conception to practice was not res adjudicata. It would make no difference even if the decision of the interference had been completely in Fullager's favor on the question of lack of diligence and priority of invention. Appert v. Brownsville Plate Glass Co. (C. C.) 144 Fed. 115. While such Patent Office decisions are entitled to careful consideration and are often persuasive, yet as the record before me contains much new testimony, this court is required to exercise an independent judgment. The record in its entirety convinces me that the invention was reduced to practice in October, 1901, and that diligence was exercised from the time of its conception to the completion of the motor which clearly demonstrated its usefulness. Under such circumstances Emmet was the prior inventor, regardless of the filing date of his application for a patent. Laas et al. v. Scott et al. (C. C.) 161 Fed. 122; Agawam Co. v. Jordan, 7 Wall. 583, 19 L. Ed. 177.

As to infringement. The infringing turbine was installed by the Allis-Chalmers Company, and is of the reaction type as distinguished from the impulse type. In their turbine the defendants use a series of large buckets inclosed at their extreme ends by a thin sheet-metal cover made in sections and fastened to the buckets by integral tenons, which are projected through corresponding openings in the cover and are then riveted. The projections at the ends of the buckets are formed by cutting away at their edges and imparting to them the peculiar

shape of the tenons of the claims in suit. Such construction of the tenons and openings in the sectional cover precisely conforms to the terms of the claims in controversy which, considering what has been said, are entitled to a scope of such latitude as to include defendants' turbine, and it makes no essential difference that the defendants' turbine is of another type than complainant's. The prior art difficulties of leakage of steam and distortion of blades were existent in both types, and the Emmet improvement applies to both. That the cover strip in defendants' turbine also supports flanges around the casing is without importance; it is enough to constitute infringement that by the method of fastening the cover to the ends of rotary buckets defendants attain the precise function of the patent in suit.

The complainant may therefore have a decree as prayed for in the bill, with costs.

STANDARD MOTOR TRUCK CO. et al. v. PITTSBURGH RYS. CO. et al.

(District Court, W. D. Pennsylvania. December 19, 1913.)

No. 32.

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—BRAKE SHOE MECHANISM.

The Price patent, No. 818,639, for a brake shoe mechanism, discloses patentable novelty and invention only in the element of an automatically operated turnbuckle used in the combination to hold the brake shoe in contact with the wheel. As so construed, *held* not infringed.

In Equity. Suit by the Standard Motor Truck Company and another against the Pittsburgh Railways Company and the J. G. Brill Company. On final hearing. Decree for defendants.

Kay & Totten, of Pittsburgh, Pa., for plaintiff Standard Motor Truck Co.

Reed, Smith, Shaw & Beal, of Pittsburgh, Pa., and Jos. L. Levy, of New York City, for defendants.

YOUNG, District Judge. The complainants, the Standard Motor Truck Company the licensee of W. G. Price, the patentee, and W. G. Price, have filed this bill of complaint against the Pittsburgh Railways Company and J. G. Brill Company for infringement of letters patent No. 818,639, dated April 24, 1906. While there are 55 claims in the patent, we think, from an examination of the patent, the record, and the evidence, that the whole controversy lies in the consideration of whether or not the respondents have infringed the forty-eighth claim. This claim comprehends the whole device involved in this suit and is as follows:

"In a mechanism of the class described, the combination with a brake shoe and support, of a link, a bolt pivotally connecting said link with said support, a nut on said bolt, a spring engaged by said nut for producing frictional contact between the link and support when the nut is tightened, connections between the link and brake shoe, and means for taking up the slack of the brake shoe."

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

The last element of this claim, to wit, "and means for taking up the slack of the brake shoe," is perhaps more elaborately and specifically described in the first claim as follows:

"In a mechanism of the class described, the combination with brake mechanism of a turnbuckle controlling such mechanism, and a spring within the turnbuckle for actuating the same."

This is explained in the specifications as follows:

"As best seen in Figs. 5 and 6, the turnbuckle *36* consists of the threaded bars *42* and *43*, having their outer ends connected to the lower ends of the levers *34* and *37* respectively. A sleeve *44* is threaded onto the inner end of bar *42*, and a similar sleeve *45* is threaded onto the end of bar *43*. The sleeve *44* carries at its inner end a housing *46*, completed by a disk *47*, carried by sleeve *45*, suitable bolts *48 48* being passed through said housing *46* and disk *47* for securing the same together. A rod *49* extends into the bar *42* and is fixed therein against rotation, but left free to move longitudinally independently of the bar *42* and projects from said bar into the housing *46*. Rotation of bar *42* feeds the same into sleeve *44*, and such longitudinal movement of said bar is independent of said rod *49*. A spring *50* is fixed at one end of said bar *49* and is coiled about the same, and at its outer end is connected with a pin *51*, fixed transversely within the housing *46* whereby the housing *46* is subjected to a constant rotary pressure designed to unscrew the sleeves *44* and *45*, which action of the springs *50* insures the spreading apart of the lower ends of levers *37* and *34*, whereby the shoes *32* will necessarily be retained constantly in contact with the wheels *10*."

Examining these claims with the light given by the specifications, we find that the design of the inventor was as stated:

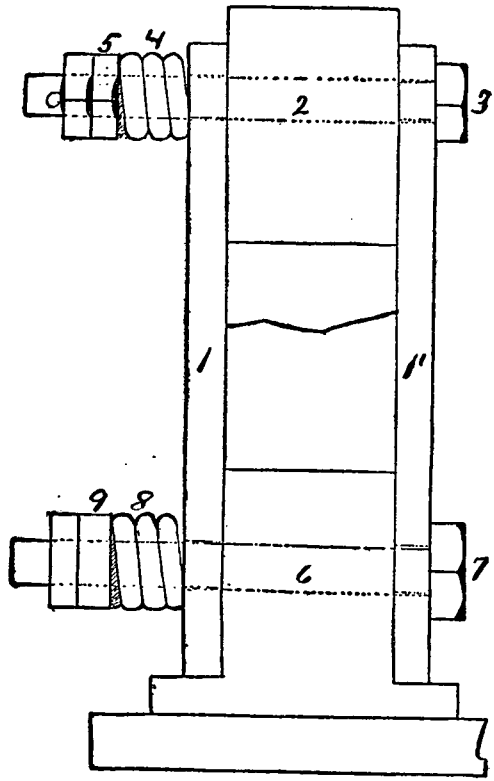
"The object of the invention is the provision of means for reducing to a minimum the amount of movement necessary for applying the brake shoes to the wheels. With this and further objects in view the invention consists, in combination with a truck frame and wheels supporting the same, of brake shoes for said wheels and means for normally retaining said shoes in contact with the said wheels. It further comprises a car truck, wheels supporting the same, brake shoes for said wheels, and a cushion retaining said shoes normally in contact with said wheel."

We find, then, that the object sought by the inventor was to provide means for normally retaining the brake shoes in contact with the wheels, and that the means provided by his patent, as set out in claims 1 and 2, were a turnbuckle comprising two bars, sleeves threaded thereon, a housing, and a spring within the housing. The purpose of this turnbuckle clearly appears from the patent to be that, as by the wearing of the brake shoe and wheel the space increases between them, the spring will rotate the bars into the sleeves automatically, thus forcing the bars apart and causing the shoes to be kept in contact with the wheel. This part of the invention concerns the keeping of the brake shoe in contact with the wheel after the shoe has been adjusted in a proper position in relation to the wheel.

Claim 48, then, with this explanation of the turnbuckle, consists of a combination, with a brake shoe and support, of a link, a bolt pivotally connecting said link with said support, a nut on said bolt, a spring engaged by said nut for producing frictional contact between the link and support, when the nut is tightened, and the same arrangement of bolt, spring, and nut connecting the link and brake shoe and means for taking up the slack of the brake shoe. In short, we have a brake hanger

consisting of a link pivotally connected by a bolt to the support, a nut on the bolt, and a spring placed between the nut and the side of the link, and the link pivotally connected with the brake shoe by a bolt having a nut thereon and a spring inserted between the nut and the side of the link.

1 and 1'—Sides of link.
2—Bolt through support.
3—Head of bolt.
4—Spring.
5—Nut.
6—Bolt through brake shoe.
7—Head of bolt.
8—Spring.
9—Nut.



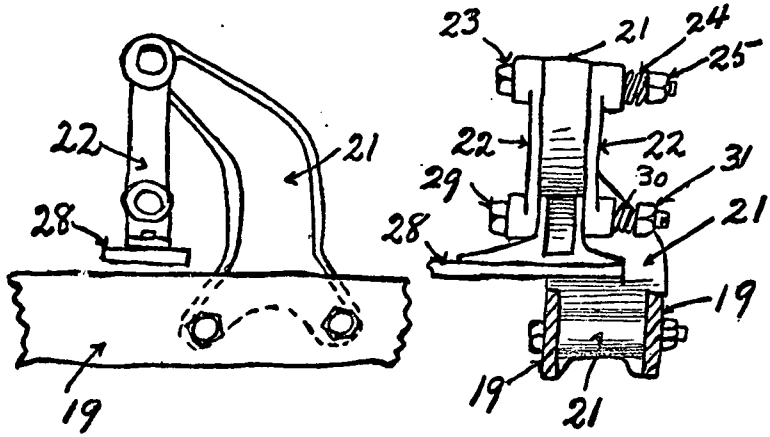
In brief, the respective bolts which are used to attach the links to the support and to the brake shoe have placed between the links and the nut on the end of the bolt a spring which forms a cushion, and as the pressure of the nut on the spring is increased the link becomes immovable at the pivotal joints, thus preventing the brake shoe from receding from the wheel after it has been adjusted until the wear of the wheel and the brake shoe causes a space between them. We can thus see that the mechanism is used to hold the brake shoe in its adjusted position to the wheel, and the slight space caused by the wear of the wheel and shoe will be taken up automatically by the turnbuckle. The patent, then, we interpret as covering the automatic turnbuckle, its combination with the brake levers, the brake hanger, comprising a link, a bolt pivotally connecting the link with the support; having a spring between the adjustable nut on the threaded end of the bolt

and the link, and a bolt pivotally connecting the link with the brake shoe, having a nut on the adjustable threaded end of the bolt, and the spring inserted between the nut and the side of the link—these all being used in combination with each other.

Let us now inquire first whether or not the elements of this mechanism or the combination of them have been anticipated either by prior patents or prior use; and first as to the separate elements of the turnbuckle.

From an examination of the evidence, consisting of the patents offered, the evidence relating thereto, and the evidence of prior use, we have concluded that the only element new in the turnbuckle is the spring contained in the housing and its combination with the housing and sleeves and bars by which is accomplished the automatic spreading apart of the bars, so as to take up the slack caused by the wear of the wheels and brake shoe.

As to the elements of the brake hanger, we find in complainants' brief the following drawing which shows an enlarged sketch of the brake and hanger and its parts:



The designation of these parts, their connections with the bracket, and their purpose appear, from line 36 of page 2 of the specifications, to be thus described:

"Each bar *19* carries near each end thereof a bracket *21*, secured between the plates of said bar and inclined inwardly from the bar. Depending from the upper free end of each bracket is a link *22*, pivotally connected to said bracket by means of a bolt *23*, extending through the bracket and through said link, said bolt being surrounded by a coil spring *24*, disposed between the link *22* and the nut *25* of said bolt. The nut *25* may be adjusted against the spring *24* to any desired degree, for producing sufficient frictional contact between the link *22* and the bar *21* for retaining the said link in a given adjusted position."

And in line 59, page 2, the connection of the link with the brake shoe is described as follows:

"* * * Penetrated by a bolt *29*, passing through the respective link and being provided with a coil spring *30*, interposed between the link and the nut

31 of the bolt *29*, whereby sufficient friction may be maintained between the link and the ear *28* for retaining the link and shoe in any given adjusted position."

As we have seen, this mechanism was for the purpose of producing sufficient frictional contact between the link *22* and the bar *21* for retaining the said link in a given adjusted position as to its connection with the bracket support, and the purpose of a like arrangement in the connection at the brake shoe was so that sufficient friction may be maintained between the link and the ear *28* for retaining the link and shoe in any given adjusted position.

The important element found in this mechanism is the placing of the spring between the nut and the link for the purpose of producing sufficient frictional contact to retain the link in its adjusted position. We find in the patents of McLeod, 330,251; Eames, 410,960; Hinckley, 475,014; Rego, 485,135; Holmes, 490,352; Ferguson, 493,491; Ritchie, 640,031; and Tesseyman, 620,724—that the device of taking up the slack caused by wear either in the wheels or brake shoes, or in the joints or journals of the braking device, had been patented before Price obtained his patent; but there remains the question whether or not there is novelty in the arrangement of springs in relation to the connections between the link and bracket, or support at the top of the hanger, and between the link and brake shoe at the bottom of the hanger, for the purpose of maintaining the brake shoe in its predetermined adjusted position, when the brake is released. The use of springs for producing frictional contact was old, but the application of these means for the purpose of holding the brake shoe in its adjusted position was new, and therefore there was novelty in the means provided by Price and in his application of them.

We have found that the new element in the Price turnbuckle was the automatic taking up of the slack by means of the spring in the housing or sheath of the turnbuckle, and we have also found that there was novelty in the use of the spring to produce frictional contact between the link and bracket and the link and brake shoe, and novelty in the application of means to produce frictional contact for the purpose of holding the brake shoe in its adjusted position. Was there novelty and invention in the combination, consisting of a turnbuckle working automatically to always keep the brake shoe in contact with the wheel, and the application, by the use of springs, to produce such a frictional contact at the bracket and brake shoe that the brake shoe would always retain its adjusted position; the brake shoe being thus always kept in contact with the wheel by means of the turnbuckle, and the brake shoe being always kept in its adjusted position by the frictional device?

We have carefully considered the combination from this point of view, and have considered the evidence, and we are of opinion that there was both invention and novelty in the combination claimed in the Price patent. The invention is a very narrow one, and consists in using the automatically operated turnbuckle in combination with a brake shoe held in its predetermined adjusted position by means of the springs which produce frictional contact between the link and the

bracket and the link and the brake shoe, and that the purpose of this combination was to keep the brake shoe in contact with the wheel.

We now pass to the consideration of the question whether or not the respondents have infringed this patent. The evidence shows beyond question that the respondents do not use in their structure the turnbuckle described in the Price patent, but do use an ordinary turnbuckle that must be manually adjusted from time to time, as the wear of the shoe and wheel, or of the other parts, requires. The evidence shows that the respondents use means described in the prior art to prevent rattling and to diminish wear, but not for the purpose of preventing the brake shoes from moving away from the wheels upon the release of the brake. The evidence shows conclusively that the springs employed by the defendant do not and are not intended to produce such frictional contact as will prevent the brake shoes on the release of the brake from moving away from the wheels, and that the brake shoes of defendants' structure do move away from the wheels. The evidence, therefore, in our opinion, does not show that the defendants in their structure have infringed the Price patent, as we have interpreted that patent.

The bill will therefore be dismissed, at the cost of complainants. Let a decree be drawn accordingly.

UNITED GAS IMPROVEMENT CO. v. GAS MACH. CO.

(District Court, N. D. Ohio, E. D. December 23, 1913.)

No. 167.

1. PATENTS (§ 26*)—INVENTION—NEW COMBINATION OF OLD ELEMENTS.

A new combination of old elements which by their co-operative action produce a more beneficial result amounts to invention, which is not negatived by the fact that such co-operation requires the mediation of an operator.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 27–30; Dec. Dig. § 26.*]

2. PATENTS (§ 36*)—EVIDENCE OF INVENTION—COMMERCIAL SUCCESS.

That a patented device went into immediate and successful use is evidence of invention, as is also the fact that a new combination of old elements in an apparatus greatly increased its efficiency.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 40; Dec. Dig. § 36.*]

3. PATENTS (§ 178*)—CONSTRUCTION—DESCRIPTION OF PREFERRED FORM OF DEVICE.

Where a claim of a patent contains a description of only one form of a thing which would perform the same office in other forms, the court will apply the general rule that the description covers all equivalent forms, and the form described will be treated only as the one preferred.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 254½; Dec. Dig. § 178.*]

4. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—WATER GAS APPARATUS.

The Rusby patent No. 857,760, for a water gas apparatus, *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

5. PATENTS (§ 328*)—INVENTION—WATER GAS APPARATUS.
The Dickey patent No. 940,925 for a water gas apparatus *held* void for lack of invention.

In Equity. Suit by the United Gas Improvement Company against the Gas Machinery Company. On final hearing. Decree for complainant in part.

F. C. Friend, of Cleveland, Ohio, and Augustus B. Stoughton, of Philadelphia, Pa., for plaintiff.

Smith, Taft & Arter and Thurston & Kwis, all of Cleveland, Ohio, for defendant.

DAY, District Judge. This is a suit in which the defendant is charged with infringing the Rusby patent No. 857,760, and the Dickey patent No. 940,925, both of which purport to be for improvements in water gas apparatus.

The Rusby patent contains but one claim, which is:

"Means for definitely controlling the quantity and quality of the production of gas, which means comprise the gas generating apparatus and its regulatable air supply connections and an ajutage interposed in said connections and provided with a pressure gauge, whereby the attendant is enabled to introduce a definite volume of air during the interval of each blow regardless of fire and other conditions in the apparatus, substantially as described."

The only claim of the Dickey patent which it is claimed is infringed is the first claim, which is:

"Means for definitely controlling the quantity and quality of the production of gas which means comprise the gas generating apparatus and its regulatable steam connection and a meter tube interposed in said connection and provided with a gauge whereby the attendant is enabled to introduce a definite volume of steam during the interval of each run, substantially as described."

Water gas apparatus consists essentially of a generator, a carburetor, a superheater appropriately interconnected and provided with oil, steam, and air connections.

In the process of manufacture of water gas it is essential that at stated periods definite volumes of air and steam should be introduced into the apparatus. I think it appears from the record that, following the suggestions of Rusby the improvement made in the art by him was immediately and extensively accepted by those engaged in gas manufacture, and that useful results were accomplished in securing a more uniform quality of gas, an increased gas production from a given apparatus, a saving in fuel and in oil and in repairs, and also in labor and supervision.

The elements of the claim of the Rusby patent are: (1) A gas generating apparatus; (2) a regulatable air supply; (3) an ajutage (sometimes designated a "Venturi" tube; (4) a pressure gauge. This ajutage is a pipe containing different areas, one more contracted than the other, and it affords means for indicating the volume of air per unit of time, passing through it, by reason of the different pressures which at the same time exist within, respectively, its most contracted

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

area and its larger area on each side of the throat, and since this indication is continuous, it enables the attendant to know the volume of air passing to the apparatus by computations for a given unit of time.

There is no difficulty in associating these mechanisms when one has conceived the desirability of making the association. It is claimed that the use of these elements was not invention, because it was such an association as enabled an operator to intelligently open the old air valve of the old water gas apparatus so as to bring about a predetermined rate of flow of air, and to close the same when by observing a clock, he saw that the time had elapsed which was required for the introduction, at the indicated rate of flow, of that volume of air which was known to be required. The operating purpose of the use of these several elements in combination is to enable the operator to introduce a definite volume of air during the interval of each blow, used in connection with gas manufacture, regardless of fire and other conditions. If the ajutage were eliminated the gauge would simply indicate air pressure. The ajutage in connection with the gauge causes the gauge to indicate the rate of flow of air per unit of time. In operating the apparatus it is necessary for the operator to observe the pressure gauge and simultaneously operate the hand valve in order to supply the air, and necessarily, in order that gas may be made, the gas generating element must be added to these other elements.

The claim of the patent is for introducing into the generator in a given time, measured by the interval of the so-called "blow" that takes place in the generator, that measured volume of air. The idea is to get into the generator during that short time, which is limited by the interval of the blow, a definite quantity of air, and, so far as doing this is concerned, it does not make any difference how the air is measured, or whether it was measured by old or new means. There never was any trouble in measuring air; it was difficult to get a definite volume of air into a gas generator in the time that was fixed and limited by the duration of the interval of the blow, which had been predetermined by the operator.

[1, 2] The gas industry demanded apparatus containing the combination of the patent in suit, and the invention in question met with immediate and successful use. By the direct use of the gas-generating apparatus the regulatable air supply, the ajutage and the pressure gauge each of these elements coacted with the other in a new organization, producing a more beneficial result than by their old or separate operation. It was true that the co-operation of these elements required the mediation of the operator, but this does not destroy the novelty. Each element performs only its peculiar function, but all together co-operate with respect to the ultimate work to be accomplished. This joint action is more than aggregation, and amounts to invention. Houser v. Starr, 203 Fed. 265, 121 C. C. A. 462; Western Electric Co. v. North, 135 Fed. 79, 67 C. C. A. 553; Krell v. Story, 207 Fed. 947, 125 C. C. A. 394; Hopkins on Patents, vol. 1, p. 431; Expanded Metal Co. v. Bradford, 214 U. S. 366, 29 Sup. Ct. 652, 53 L. Ed. 1034; Continental Paper Bag Co. v. Eastern Paper Bag Co., 205 U. S. 542, 27 Sup. Ct. 789, 51 L. Ed. 922. The fact that the patented device met

with immediate and successful use is evidence of invention. Electric Co. v. Westinghouse, 171 Fed. 83, 96 C. C. A. 187. Also the new combination of the old elements which produced a new and beneficial result greatly increasing the efficiency of the apparatus is evidence of invention. National Tube Co. v. Aiken, 163 Fed. 254, 91 C. C. A. 114. Likewise marked superiority in safety and economy is evidence of invention. Morgan Engineering Co. v. Alliance, 176 Fed. 100, 100 C. C. A. 30.

It is urged that the Dickey patent, in so far as the first claim is involved, is invalid on precisely the same grounds as have been urged in connection with the Rusby patent. It is also contended that the Dickey patent is invalid for want of novelty, and it is claimed that the defendant installed a water gas apparatus in Macon, Ga., in 1903, containing a steam-metering device which is the full equipment of the Dickey contrivance.

It is urged that Dickey was the first one to connect with a steam line of an old gas apparatus, a particularly cheap and serviceable steam metering device, namely a meter tube and its indicating gauge. It is contended that this was a valuable contribution to the art because it was well known that the old gas-making apparatus would operate most efficiently if there were introduced into it at each run a definite predeterminable volume of steam, and that the Dickey device afforded means by which the operator could know the rate per unit of time at which steam was flowing into the generator, and therefore could intelligently open and close the steam valve.

The meter tube and gauge indicate the rate per unit of time at which the steam is flowing into the generator, and the operator by the indications on the gauge, by a necessary watch or clock, could terminate the run when the predetermined volume of steam had been admitted to the apparatus.

The defendant's water gas apparatus installed at Macon, Ga., in 1903, contained a short stretch of pipe in which was a regulating cock. However, the defendant never did calibrate the cock, and therefore did not take advantage of measuring the amount of steam admitted to the apparatus.

The published proceedings of the Western Gas Association for their twenty-second annual meeting, held at Milwaukee in 1899, at page 293 of the proceedings, indicate that Mr. C. C. Hartpence of the New Amsterdam (New York) Gas Company, had conceived at that time a device for measuring the steam pressure before it entered the gas generator. Also the published proceedings of the American Gas Light Association of their thirty-first annual meeting, held at Detroit, Mich., in 1903, at page 69 and 70, in an article written by W. Cullen Morris, of Long Island City, N. Y., a method of measuring the steam supply before it enters the generator is also indicated. In view of the prior art it does not appear to me what Dickey did could be designated as invention.

In reference to the regulation of the air supply, the defendant's structure performs the same work in practically the same way as is called for by the Rusby patent. The defendant sells its structure, and

plans to regulate the air supply to meet the demand for the Rusby structure. The flange inserted in the defendant's structure, which joins the air pipe of the apparatus, can be termed an ajutage; and the flange inserted with the Pitot tube performs substantially the same office as the Venturi tube of the Rusby patent.

[3] Where a claim of a patent contains a description of only one form of a thing which would perform the same office in other forms, the court will apply the general rule that the description covers all equivalent forms and the form described will be treated only as the one preferred. Vrooman v. Penhollow, 170 Fed. 296, 102 C. C. A. 484.

[4, 5] I am accordingly of the opinion that the Rusby patent is valid and infringed, and that the Dickey patent is invalid.

An order may be drawn accordingly.

OHIO VARNISH CO. v. GLIDDEN VARNISH CO.

(District Court, N. D. Ohio, E. D. January 29, 1913.)

No. 30.

PATENTS (§ 328*)—VALIDITY—PRIOR USE—GRAINING PROCESS AND COMPOUND. The Clapp patents, No. 839,363, for a process of producing surfaces in imitation of graining, and No. 909,847, for a graining compound to be used in carrying out such process, *held* void for prior use in the art, and lack of novelty.

In Equity. Suit by the Ohio Varnish Company against the Glidden Varnish Company. On final hearing. Decree for defendant.

Albert H. Bates, of Cleveland, Ohio, for complainant.

Offield, Towle, Graves & Offield, of Chicago, Ill., and R. S. Leonard, of Cleveland, Ohio, for defendant.

'DAY, District Judge. The bill of complaint alleges infringement of patent No. 839,363, granted to Ford M. Clapp, of Cleveland, dated December 25, 1906, for an improved "process of producing surfaces in imitation of graining," and patent No. 909,847, dated January 12, 1909, for improvements in "graining compound." The first patent recited relates to a process, and the second to a compound used in carrying out the process. The combined objects sought in both patents is to provide a process and materials for producing a surface in imitation of natural wood, both as to the color and grain characteristics of such wood.

The process described, as contained in the process patent, consists briefly of first applying a flat coat of yellow paint to the surface to be grained, next applying a graining compound carried by a volatile vehicle, which compound is capable of absorbing color, and by reason of the volatile vehicle, of rapidly drying; next the manipulating of the graining compound by means of the hand or a suitable tool to form streaks therein for representing the grain of the wood to be imitated;

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

allowing the vehicle and the graining compound to evaporate, then applying over the graining compound a varnish, the color of the varnish depending upon the color of the wood to be imitated. This may be natural varnish or may be varnish colored to imitate the colors of the various woods sought to be reproduced.

The product patent claims a compound which is intended to be used in carrying out one of the steps in the process patent; that is, the step providing for the graining compound.

In the old art of graining as it existed for some hundreds of years, the coloring matter was carried in the graining compound, whereas, in the patents in suit, the coloring matter is carried in the varnish. The art of graining is an exceedingly old art. Graining had been done in the Tower of London some 200 years ago, and the record would indicate that grainers were a professional class of artisans over 3,000 years ago.

The product patent 909,847, has two claims:

"1. A graining compound in fluid form, consisting of a pigment ground in water and contained ready for use in alcohol as a vehicle."

"2. A composition of matter ready mixed for graining, consisting of substantially equal parts of raw sienna and whiting ground in water to make a thin paste, and thinned with alcohol in colorless form to make the proper consistency."

There are six claims in the process patent No. 839,363, and they substantially provide for a process of producing imitation grain surfaces, consisting in applying in a liquid form a graining compound consisting of permanent earths carried by a quickly evaporating vehicle, allowing such compound to dry, and then applying over the same a varnish carrying a pigment selected according to the wood to be presented, or applying a natural varnish.

Under these two patents the composition used as a graining compound consists of substantially equal portions of raw sienna and whiting, and alcohol is employed as the volatile vehicle. The patents are designed to provide for a ready method of sale of the ingredients mentioned in the process, which can be kept on hand by dealers ready mixed for use and for the trade.

Complainant's expert, Oscar Textor, describes the process and materials of these patents as follows:

"The patentee devised a method whereby a ready prepared universal graining compound could be applied by one not experienced in painting or graining, and with this graining compound were supplied, ready mixed and prepared, various varnishes of different colors, each color designed to impart to the graining the color intended to imitate the natural color of the wood aimed at. The color that it was designed to produce was obtained by the action of the whiting in the graining compound upon the soluble pigment or color in solution in the varnish. The desired colors were obtained by the inexperienced operator without the use of the special knowledge of the art, and by merely following the directions accompanying the graining outfit."

In this first respect, then, the new process differs from the old, namely, no experience is required by the patented process to obtain the desired color.

"All of the articles employed in the operation of graining and finishing are put up in a commercial way ready for use by inexperienced operators."

It is quite apparent that the floor sets manufactured by both complainant and defendant have a large sale. They enable the inexperienced person, desirous of imitating hard wood, without having any particular knowledge, to inexpensively duplicate in their homes the various characteristics and features of hardwood flooring or woodwork. One of the chief features which give these floor sets a commercial value is that they can be kept on hand ready mixed and ready for use. If the marketing or selling of the graining compound ready for use in a suitable form of retainer was the sole point of novelty, there would be no patentable invention in such a device. Averill Chemical Paint Co. v. National Mixed Paint Company et al. (C. C.) 9 Fed. 462.

As the art of graining is an exceedingly old one, it would be natural to inquire whether or not the process and compound described in complainant's patents were in use for the statutory time prior to the complainant's applications. For if they were so used, of course the complainant's patents could have no validity. For many years the process of graining was practically the same. Graining compounds always consisted of a pigment ground in water with some kind of a vehicle added to it. The vehicle varied according to the custom of the user, some using stale beer or vinegar, some using alcohol, benzine, or other substances. Various pigments were used, some grainers used whiting combined with sienna, and the whiting and sienna were used in varying proportions. The product patent covers a substance which is in itself old as to its ingredients, and there is no novelty disclosed by it, except the claim that it is ready for use, and surely such a claim is not patentable.

I have carefully examined the record in respect to the public use of the process referred to in the patents for more than two years prior to the filing dates of the applications. It appears from reading this record that colored varnishes were used for years in the trade, and that graining compounds containing substantially the substances referred to in the complainant's patent were employed, and it was the universal custom to use a ground coat of the nature specified in the patents. Witnesses called by the defendant in reference to this prior use come from all over the country and testify with frankness and in detail concerning the methods pursued by them in carrying on the art or profession of graining. These witnesses and the publications referred to by the defendant indicate to my mind that Clapp, who applied for and received the patents assigned to the complainant herein, took no new steps nor made no new discovery concerning this process and art of graining.

The use of a constant color graining compound required no invention. The graining compounds used were the same for years, and colored varnishes had been extensively employed. A number of defenses have been interposed, and I have not seen fit to consider them all; it being plain to me from the record that there was a prior use of both the compound and process sought to be covered by the patents in suit.

Being of the opinion that the patents are invalid, the bill will be dismissed.

UNITED STATES v. INMAN-POULSEN LUMBER CO.

(District Court, D. Oregon. February 23, 1914.)

No. 6202.

1. PUBLIC LANDS (§ 13*)—TIMBER CUT FROM PUBLIC DOMAIN—RIGHT OF POSSESSION.

An action by the United States to recover the value of timber cut from the public domain is essentially in trover, and cannot be sustained unless plaintiff shows a general or special property in the timber cut and a right to the possession thereof at the commencement of the action.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 16–18; Dec. Dig. § 13.*]

2. PUBLIC LANDS (§ 88*)—RAILROAD GRANT—RELINQUISHMENT—CUTTING TIMBER—RIGHTS OF UNITED STATES.

Act July 1, 1898, c. 546, 30 Stat. 620, provides for the relinquishment and exchange of certain lands within the Northern Pacific grant and declares that all right, title, and interest of the railroad company or its grantees in land relinquished shall revert to the United States, and such tracts shall be treated in the same manner as if no rights thereto had ever vested in the railroad grantee. *Held*, that such provision refers to the title and the treatment of the land after relinquishment, and does not vest in the government title to the land or timber growing thereon, or right to possession prior to relinquishment, or any right of action that the railroad company may have had for timber taken from the land by a trespasser while the land was included in the grant prior to relinquishment.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 235, 266–269; Dec. Dig. § 88.*]

Action by the United States against the Inman-Poulsen Lumber Company. On demurrer to complaint. Sustained.

John J. Beckman, Asst. U. S. Atty., of Portland, Or., for the United States.

Judge W. M. Cake, of Portland, Or., for defendant.

BEAN, District Judge. The action is to recover the value of timber cut and removed from 160 acres of land by one Stanley, and purchased by the defendant. The land from which the timber was removed is within the limits of the grant by Congress to the Northern Pacific Railroad Company, of July 2, 1864 (13 Stat. at Large, 365, c. 217), to aid in the construction of its road, and was duly patented to the company on May 24, 1895. On May 2, 1905, it was listed by the Secretary of the Interior for relinquishment to the government, under the Act of July 1, 1898, c. 546, 30 Stat. at Large, 620, which provides that where certain lands within the grant have been disposed of by the United States or settled upon or claimed in good faith by any qualified settler prior to January 1, 1898, under color of title or claim of right under some law of the United States or ruling of the Interior Department, and the settler or purchaser refuses to transfer his entry as therein provided, the railroad grantee or its successor may upon a proper relinquishment of such land select an equal quantity of public land in lieu thereof. The land was actually conveyed to the United States by the railroad company on January 3, 1908. On the same day

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

Stanley's application for a homestead entry thereon was allowed, in which he claimed settlement prior to January 1, 1898; but such entry was relinquished in April following. During the years 1900 to 1903, prior to the allowance of his homestead application, and while the title to the land was in the railroad company, Stanley cut and removed a large quantity of timber therefrom, and sold the same to the defendant.

The plaintiff brings this action to recover the value of such timber, claiming that the effect of the relinquishment of the land to the government by the railroad company, after the timber had been cut and removed, is to vest in the government a right of action therefor. There is no averment that the timber was cut and removed without the knowledge or consent of the railroad company, or that the land from which it was cut had been disposed of by the United States to any one other than the railroad company, prior to January 1, 1898, or had been settled upon or claimed in good faith prior to that date by any qualified settler under any law of the United States or ruling of the Interior Department. The defendant has demurred to the complaint, and in my judgment it should be sustained.

[1, 2] The action is essentially in trover, and to entitle the plaintiff to recover it is necessary for it to show a general or special property in the timber cut and a right to the possession of the same at the commencement of the action. 38 Cyc. 1004 et seq.; United States v. Loughrey, 172 U. S. 206, 19 Sup. Ct. 153, 43 L. Ed. 420. And this it does not do. On the contrary, it appears from the complaint that the title to the land, and consequently to the timber growing thereon, was in the railroad company at the time the timber was cut and removed, and presumably the land was in the possession of the company through some one holding under it. After the timber had been cut and removed, the land was relinquished to the plaintiff, as provided in the Act of July 1, 1898; but I can find nothing in such act which vests or is intended to vest in the government a right of action for timber cut and removed prior to such relinquishment. The provision that all right, title, and interest of the railroad company or its grantees in land relinquished "shall revert to the United States, and such tracts shall be treated, under the laws thereof, in the same manner as if no rights thereto had ever vested in the said railroad grantee," has reference to the title and the treatment thereof after the relinquishment, and does not vest the government with the title to the land or the timber growing thereon, or the right to possession thereof, prior to relinquishment, or with any right of action the railroad company may have had for the timber. The act provides when and under what circumstances the railroad company or its grantee might make a relinquishment, but an actual relinquishment was necessary to vest title in the government. Until the land was actually relinquished, the legal title, with the ownership of the timber growing thereon, was in the railroad company, and the United States could not have maintained an action for trespass against one going thereon and cutting and removing the timber therefrom. United States v. Loughrey, 172 U. S. 206, 19 Sup. Ct. 153, 43 L. Ed. 420. The case of Humbird v. Avery, 195 U. S. 506, 25 Sup. Ct. 123, 49 L. Ed. 286, was a controversy between purchasers from the

railroad company and parties claiming under color of title under some law of the United States or ruling of the Interior Department, and involved a question of title only, and not the right acquired by the United States by a relinquishment regularly made.

As the government had no title to the land or timber at the time the timber was cut and removed or the action commenced, it cannot, in my judgment, maintain an action to recover the value thereof.

In re LEICHTAG.

(District Court, W. D. Pennsylvania. February 18, 1914.)

No. 10,518.

ALIENS (§ 65*)—NATURALIZATION—QUALIFICATION—RESIDENCE.

Under Rev. St. § 2166 (U. S. Comp. St. 1901, p. 1331), providing that any alien who may enlist in the United States Army and be honorably discharged shall be admitted to citizenship without any previous declaration of his intention to become such, and that he shall not be required to prove more than one year's residence within the United States previous to his application, and Naturalization Act June 29, 1906, c. 3592, § 4, pars. 2, 4, 34 Stat. 596 (U. S. Comp. St. Supp. 1911, p. 529), requiring proof that applicants for citizenship have resided in the United States for at least five years and in the state for at least one year immediately preceding the filing of the petition, an honorably discharged soldier need not have been a resident of the state for one year; section 2166 not having been expressly or impliedly repealed by the Naturalization Law.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 129; Dec. Dig. § 65.*]

Application of citizenship by Joseph Leichtag. Application granted.

W. M. Ragsdale, of Pittsburgh, Pa., for the United States.

ORR, District Judge. The sole question now before us is whether or not an honorably discharged soldier may be granted citizenship without proving one year's residence in the state in which his application is filed.

The Act of June 29, 1906, 34 St. at Large 596, commonly called the "Naturalization Law," was intended to provide a uniform system for the naturalization of aliens. It, however, nowhere either expressly or by implication repealed section 2166 of the Revised Statutes (U. S. Compiled Statutes 1901, p. 1331). This is the view taken in the cases hereinafter referred to.

Section 2166 of the Revised Statutes is as follows:

"Any alien, of the age of twenty-one years and upward, who has enlisted, or may enlist, in the armies of the United States, either the regular or the volunteer forces, and has been, or may be hereafter, honorably discharged, shall be admitted to become a citizen of the United States, upon his petition, without any previous declaration of his intention to become such; and he shall not be required to prove more than one year's residence within the United States previous to his application to become such citizen; and the court admitting such alien shall, in addition to such proof of residence and good moral character, as now provided by law, be satisfied by competent proof of such person's having been honorably discharged from the service of the United States."

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

It will be noticed that there is no requirement in said section that the applicant shall have resided longer in the United States than one year, and that there is no provision for residence of any length of time within the state in which his application shall be made.

The Naturalization Law, in the second paragraph of section 4, provides, among other things, for affidavits of at least two credible witnesses, who are citizens of the United States, who shall state in their affidavits that they have personally known the applicant to be a resident of the United States for a period of at least five years continuously, and of the state, territory, or district in which the application is made for a period of at least one year immediately preceding the date of the filing of his petition. In the fourth paragraph of section 4 it is provided, among other things, that it shall be made to appear to the satisfaction of the court that the applicant "has resided continuously within the United States five years at least, and within the state or territory, where such court is at the time held one year at least."

The question now before us has been ruled by the District Court for the District of Oregon. In re MacNabb, 175 Fed. 511. That court by Judge Wolverton held that the Naturalization Law, in so far as it provided for proof of residence as therein required, is inapplicable to the petition of an honorably discharged soldier applying under section 2166 of the Revised Statutes on proof of one year's residence within the United States.

In Re Loftus, 165 Fed. 1002, the Circuit Court for the Southern District of New York by Judge Ward had before it the case of an honorably discharged soldier who appeared with only one witness. Notwithstanding the provisions in the act of 1906 that two witnesses should appear, Judge Ward admitted the applicant in the case before him because of the provision in section 2166 for proof "as now provided by law." The provision at the time of the adoption of section 2166 did not embrace the number of witnesses that should be produced. In other words, he gives effect to the word "now" in section 2166. We agree with his language as follows:

"Although the general act of 1906 expressly repealed various provisions of existing law, it made no mention of section 2166, which specially regulated the admission of honorably discharged soldiers. Congress must have intended that the admission of this class of aliens should continue to be regulated by section 2166. I do not think the two acts irreconcilable, and both should be given effect as far as possible. Congress probably regarded honorably discharged soldiers as a special class, as to whom precautions generally necessary were not required. This would be natural as to applicants who had actually been in the service of the United States and as to whose good character the officers of the United States had certified."

Section 2166 of the Revised Statutes was before the Court of Appeals for the Eighth Circuit in United States v. Peterson, 182 Fed. 289, 104 C. C. A. 571. The decision in that case is not inconsistent with the cases hereinbefore cited. It recognizes that section 2166 was not repealed by the Naturalization Law, but holds that because there was no provision in the law for securing an adjudication of the right to citizenship existing procedure must be followed. Therefore it held that the provisions of the Naturalization Act requiring posting of the

petition for 90 days prior to hearing was applicable to an honorably discharged soldier. Procedure, however, is distinct from evidence and proof. In the case at bar the procedure has been in accordance with the act of 1906. The evidence offered has been in compliance with section 2166. The applicant, having furnished proof that he has resided for one year within the United States previous to his application, and proof of his good moral character, and proof that he has been honorably discharged from the service of the United States, is entitled to citizenship, notwithstanding the fact that he has not resided within the state of Pennsylvania one year before the filing of his petition.

THE HARVEY D. GOULDER.

HAWGOOD TRANSIT CO. v. GREAT LAKES TOWING CO.

(District Court, N. D. Ohio, E. D. January 13, 1914.)

No. 2468.

TOWAGE (§ 11*)—INJURY TO TOW—LIABILITY OF TUG.

An injury to a steamer by striking against the abutment of a bridge while being towed through the draw *held* not due to any fault of the tug but to the fault of the master of the steamer in failing to comply with the direction of the master of the tug to put a man with a line on shore to hold steamer straight while passing through the draw.

[Ed. Note.—For other cases, see Towage, Cent. Dig. §§ 11–23; Dec. Dig. § 11.*]

In Admiralty. Suit by the Hawgood Transit Company against the Great Lakes Towing Company. Decree for respondent.

Goulder, Holding & Masten, of Cleveland, Ohio, for libelant.

Hoyt, Dustin, Kelley, McKeehan & Andrews, of Cleveland, Ohio, for respondent.

DAY, District Judge. At about 3 o'clock p. m. on May 19, 1908, the tug Harvey D. Goulder was called by the master of the steamer Harvey D. Goulder to assist the steamer from its place of mooring at the shipyard in the harbor of Lorain to the coal dock on the west side of the river at Lorain. With the exception of a slight rain, the weather was fair; there being no wind. The steamer was lying head upstream, with her port side to the dock, and, upon the arrival of the tug, it was agreed between the master of the steamer and the master of the tug that the steamer should run a line from her starboard bow to the west bank of the river, in order to keep the steamer straight in the channel, while going through the draw of the Erie avenue bridge further down the river. This bridge lies between the shipyard and the coal dock to which the steamer was destined. Before taking the steamer in tow the tug took a man from the steamer to the west bank of the river and placed him on the west bank of the river at a point about amidships of the steamer. This man had with him a heaving line. The tug took a harbor line furnished by the steamer, and, after the line from the

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

steamer had been cast off, proceeded to tow the steamer stern first down the river. When the stern of the steamer had entered the draw of the bridge, the steamer's bow was swinging to the eastward, thereby throwing her stern up to westward and toward the west abutment of the bridge. At this point the tug put her heel to port in an effort to pull the stern of the steamer away from the west abutment of the bridge. The tow line parted, and the stern of the steamer, continuing to swing to the westward, struck the west abutment of the bridge, doing some slight damage to both the bridge and the steamer.

It is urged on behalf of the steamer that the damages were occasioned by reason of the fact that the steamer was negligently towed, in that the tug maintained excessive speed and was not under control, and that the parting of the line was the result of the previous improper navigation of the vessel, making extreme measures necessary, and the negligence of the engineer in so recklessly handling his engine as to fetch up on a good line that would ordinarily withstand such a strain exerted upon it. It is contended on behalf of the steamer that after it had been agreed to put a man on shore on the opposite side of the river with a heaving line, and thereby convey a line from the steamer to the opposite shore, the captain of the tug told the captain of the steamer not to mind the line, and that the captain of the steamer obeyed this instruction. This is denied by the tug.

There is a sharp conflict in the testimony upon this point; the captain of the steamer alone claiming that the order to put out the line was countermanded. The crew of the tug are practically unanimous in saying that no such instructions countermanding the placing of the line were given. It is also contended, on behalf of the steamer, that the captain of the tug could have seen that this line had not been conveyed from the steamer to the opposite bank, and was therefore at fault in maneuvering the tug as he did.

Considering the testimony of all the witnesses, and the surrounding circumstances and the probabilities of the case, I am forced to reach the conclusion that the captain of the tug did not countermand the order to convey the line from the steamer, and I am also of the opinion that, as the steamer reached the point where the man was stationed on the bank, the captain of the tug could not see that this line had not been placed.

The record does not show that the tug was going at an excessive speed at any time; the weight of the testimony indicating that the tug was not proceeding at a rate much in excess of one mile an hour at the time of the occurrence. This fact has corroboration in that the steamer was not damaged to any great extent, nor was the bridge.

Under a contract which the company operating the steamer had with the company operating the tug, it was incumbent upon the steamer to furnish a line for towage which should be sufficient for the service. It appears that the line was given an inspection by those charged with the operation of the steamer, and it also appears that, from such an examination as it was possible for those operating the tug to make, it did not appear in either instance that the line was in any way insufficient. In any event, had the instructions of the captain of the tug

been obeyed, there would have been no necessity to have put any unusual strain upon this line, and the accident would not have happened.

I am of the opinion that the damage to the steamer Goulder was occasioned by the captain of the steamer failing to put the line across the river from the bow of the steamer, and I do not find that the tug was in any way at fault.

The libel will accordingly be dismissed.

THE THIELBEK.

THE THODE FAGELUND.

(District Court, D. Oregon. February 23, 1914.)

Nos. 6111 and 6116.

1. COLLISION (§ 115*)—LIABILITY—PORT OF PORTLAND.

The Port of Portland, a municipal corporation, doing pilotage and towage between the city of Portland and the open sea under L. O. L. § 6106, authorizing the port to establish and maintain an efficient towage and pilotage service and to operate tugboats, employ pilots, and collect pilotage and towage, is liable for a maritime injury due to the fault of its tugboat or the negligence of its pilot.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 244-247; Dec. Dig. § 115.*]

2. ADMIRALTY (§ 19*)—LOCAL LAW—STATE STATUTES.

Where a maritime injury was alleged to be due to the negligence of the pilot of a tug owned and operated by the Port of Portland, the extent of liability was governed by the general admiralty law and could not be limited by state statute (L. O. L. § 6108), declaring that the liability of the port for such injuries should not exceed $10,000.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 233, 234; Dec. Dig. § 19.*]

In Admiralty. Libels by Wilhelm Wilhelmsen against the German bark Thielbek and the Port of Portland, and by Knohr & Burchard against the Norwegian steamship Thode Fagelund. On exceptions to the answer of the Port of Portland. Sustained.

Wm. C. Bristol, of Portland, Or., for Wilhelm Wilhelmsen.

Wood, Montague & Hunt, of Portland, Or., for the Thielbek.

Teal, Minor & Winfree, of Portland, Or., for Port of Portland.

BEAN, District Judge. On August 24, 1913, a collision occurred in the harbor of Astoria between the German bark Thielbek, in tow of a tug belonging to the Port of Portland, and the Norwegian steamer Thode Fagelund, in charge of a pilot belonging to such port. The owner of the Fagelund libeled the Thielbek in rem and the Port of Portland in personam to recover $125,000 damages, alleged to have been due to the fault of the Thielbek and her tow. And the owners of the Thielbek libeled the Fagelund in rem and the Port of Portland in personam to recover $23,500, alleged to be the damages suffered by her, due, it is charged, to the negligence of the Fagelund and her pilot.

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

The Port of Portland is a municipal corporation, organized and existing under a law of the state, and authorized, among other things, to establish and maintain an efficient towage and pilotage service on the Willamette and Columbia rivers between the city of Portland and the open sea, and to that end to purchase, lease, control, and operate steam tugboats and steam and sail pilot boats, and employ and furnish pilots, and to collect charges for pilotage and towage. Lord's Oregon Laws, § 6106. It has answered the libel in each of the cases referred to, alleging, among other things, that the law under which it is organized provides that its liability for an injury to a vessel while being towed by one of its tugs, or in charge of one of its pilots, due to the fault of the tug or the negligence or incompetence of the pilot, is limited to $10,000. Lord's Oregon Laws, § 6108. Exceptions have been filed to the answers on the ground that the provision of the statute limiting liability is not binding on a court of admiralty.

[1, 2] That the Port of Portland is liable for a maritime injury due to the fault of its towboat or the negligence of its pilot is settled in this circuit. United States v. Port of Portland (D. C.) 147 Fed. 865; Port of Portland v. United States, 176 Fed. 866, 100 C. C. A. 336. But whether the state statute limiting such liability to a sum not exceeding $10,000 is binding on a court of admiralty is the question now presented. I think it is ruled by the decision of the Supreme Court in Workman v. New York, 179 U. S. 552, 21 Sup. Ct. 212, 45 L. Ed. 314. That was a libel against the city of New York in personam to recover damages to a vessel by being run into by a fire boat of the city while it was entering a slip for the purpose of getting in a position to aid in putting out the fire in a warehouse near the slip bulkhead. The District and Circuit Court of Appeals proceeded on the assumption that the local law controlled; the former holding that the city was liable (63 Fed. 298), and the latter that it was not (67 Fed. 347, 14 C. C. A. 530). But on certiorari the Supreme Court held that the question must be decided by the general admiralty and not the local law; that the local law or decisions of a state cannot as a matter of authority abrogate maritime law; that, when the relation of master and servant exists, an owner of an offending vessel committing a maritime tort is responsible under the rule of respondeat superior; that there is no limitation taking municipal corporations out of reach of the process of a court of admiralty; and that it must answer for a maritime tort, regardless of the capacity in which its agents were acting at the time, although under the local law it would not be liable. The effect of the decision, in short, is that courts of admiralty will afford redress for an injury committed by a vessel where the subject-matter is within the cognizance of such courts and where the wrongdoer is amenable to its process, although relief is afforded by the local laws, and that "state laws or decisions cannot deprive an individual of a right of recovery for a maritime wrong which, under the general principles of the admiralty law, he undoubtedly possessed," nor can they "destroy the symmetry and efficiency of that law by ingrafting therein a principle which violates the imperative command of such law that admiralty courts must administer redress for every maritime wrong in every case where they have juris-

dictional power over the person by whom the wrong has been committed."

If, as held in this case, state laws and decisions cannot exonerate a municipality owning an offending vessel from liability in admiralty for a tort committed by such vessel, it would seem logically to follow that such a law limiting the amount of recovery and thus affecting the relief to be granted is not binding on an admiralty court, where the wrongdoer is subject to the jurisdiction of such court and the proceeding is in accordance with the maritime law.

Exceptions will therefore be allowed.

In re DAVIDSON.

MOORE v. BREIT.

(District Court, N. D. California, First Division. February 19, 1914.)

No. 15,439.

JUDGMENT (§ 646*)—PREFERENCES OF BANKRUPT—ADJUDICATION OF REFEREE—CONCLUSIVENESS.

Where, in a bankruptcy proceeding, the trustee filed objections to a claim on the ground that the claimant had received a preference which came on for hearing before the referee before whom the claimant introduced evidence, and the referee made an order, judgment, and decree adjudging that a payment to such claimant constituted a voidable preference, and disallowing his claim until the surrender by him of the amount of the preference, no review of which was taken, such adjudication was conclusive as to the fact of preference, in an action by the trustee to recover back the preferential payment, since, while the referee could not have assumed jurisdiction in the first instance over the question of preference, the claimant, having litigated that question and acquiesced in the referee's findings and judgment, was concluded thereby.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1159; Dec. Dig. § 646.*]

In Bankruptcy. Action by William H. Moore, Jr., as trustee in bankruptcy of Philip T. Davidson, against H. Breit. Judgment for plaintiff on the pleadings.

Clarence A. Shuey, of San Francisco, Cal.; for complainant.
Samuel M. Samter, of San Francisco, Cal., for defendant.

DOOLING, District Judge. Plaintiff, as trustee in bankruptcy of the estate of Philip T. Davidson, sues the defendant to recover the sum of $250, alleged to have been paid to defendant by the bankrupt at such times and in such manner as to constitute a voidable preference. The complaint avers the facts necessary to show a voidable preference, and then alleges that the defendant had filed his proof of debt with the referee in bankruptcy for the sum remaining due him after deducting the $250 received; that the trustee had filed objections thereto on the ground that defendant had received a preference; that the said claim and objections came on regularly for hearing before the referee; that evidence was introduced to sustain the issues thereby

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

made; and that thereafter the referee rendered and filed his findings, judgment, and decree, the same being set out in full in the complaint. It appears therefrom that the defendant, in support of his claim before the referee, had introduced evidence in the form of a deposition, and that the referee, being fully advised, did find and adjudge that the payment to defendant of said $250 constituted a voidable preference, and that the claim of defendant should stand as proven as an unsecured claim to be disallowed until the surrender, by defendant to the trustee, of said sum of $250, constituting the amount of the voidable preference obtained by said claimant over the other creditors.

The complaint also avers that no review was taken from said order, judgment, and decree of the referee, and that the same is now in full force and effect.

The answer, while denying the fact of preference, does not deny that the proceedings were had before the referee, as alleged, with the result as above briefly stated. Plaintiff now moves for judgment on the pleadings upon the ground that the findings and judgment in the proceedings before the referee constitute an adjudication of the facts that the money was paid to defendant by the bankrupt, and that such payment was a voidable preference, and that these questions cannot again be litigated in the present action. I am of the opinion that such is the effect of the referee's adjudication. The defendant, by presenting his claim in the bankruptcy proceeding and pressing it after objection made to it by the trustee that he had received a preference, by offering evidence upon that issue, and by acquiescing in the referee's findings and judgment, is foreclosed from again litigating the questions therein decided. While the referee could not have assumed jurisdiction over these questions in the first instance, yet, when defendant submitted his claim to the bankruptcy court, he also included in such submission the question as to whether or not he had received a preference, provided such question were thereafter raised and litigated before the court or the referee in passing upon his claim. Having been heard once by a tribunal having jurisdiction to determine the matter, he cannot be heard again.

The motion for judgment on the pleadings will therefore be granted. The cost of reference and the fees of the referee will be included in the costs.

EQUITABLE TRUST CO. OF NEW YORK v. NATIONAL BANK OF COMMERCE IN ST. LOUIS.

(District Court, E. D. Missouri, E. D. January 12, 1914.)

No. 4094

1. CORPORATIONS (§ 155*)—STOCK—DIVIDENDS—RIGHT TO.

Defendant national bank, through an agent who acted altogether in its interest and as its representative, entered into a contract by which the agent became a joint purchaser with others of substantially all of the common stock of a manufacturing corporation. The contract provided that the agent as trustee should hold the stock until fully paid for by the

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

individual purchasers, with power to pledge the same as security for money borrowed to complete the purchase, the loans to be obtained on notes of one of the other purchasers, who also agreed to furnish additional collateral, the notes to be subject to renewals if desired for two years. It also provided that the trustee should collect all dividends which might be declared and paid on the stock "not disposed of under contract or contracts of pledge," and apply the same to the payment of the notes for borrowed money in his discretion. He borrowed from complainant trust company, on the recommendation of defendant, with which it had business relations, $250,000, and pledged as security therefor stock worth the same amount at par value, and also other collateral furnished by the maker of the notes. After about a year the manufacturing company declared and paid a dividend of 25 per cent., which was collected by the trustee, but no part of it was paid to complainant which was not advised of it or of the contract. Before the end of another year defendant through its said agent, induced complainant to exchange the pledged stock for other collateral, and shortly afterward another dividend of 50 per cent. was declared and paid on the stock. Defendant afterward sold the pledged stock. The collateral received by complainant in exchange was insufficient to pay its note. *Held*, that the dividends received by defendant on the pledged stock in equity belonged to complainant, which was entitled to recover the same or so much as was required to satisfy its claim.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 560–563, 568–576, 578, 593–603; Dec. Dig. § 155.*]

2. BANKS AND BANKING (§ 261*)—NATIONAL BANKS—LIABILITY FOR MONEY RECEIVED UNDER CONTRACT ULTRA VIRES.

A national bank cannot receive money equitably belonging to another without accounting for the same, even though it was received as an incident of a contract made by the bank, which was ultra vires and not enforceable.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 991–1000; Dec. Dig. § 261.*]

In Equity. Suit by the Equitable Trust Company of New York against the National Bank of Commerce in St. Louis. Decree for complainant.

Murray, Prentice & Howland, of New York City, and Judson, Green & Henry, of St. Louis, Mo., for complainant.

George L. Edwards, Edward D'Arcy, and Henry S. Priest, all of St. Louis, Mo., for defendant.

DYER, District Judge. It would be useless and unprofitable to enter into a lengthy discussion of the different phases of the evidence contained in the voluminous transcript now before the court. Such portions as may be considered important as bearing upon the real and controlling question in the case will either be copied or briefly referred to.

The claims advanced by and the contentions of the complainant and defendant are so numerous that in a measure they become confusing, and if the court should undertake to pass upon all of them, the chances are the main question would be lost sight of, or be at least greatly obscured.

The complainant in its bill seeks to recover of the defendant the sum of $150,000, with interest thereon at the rate of 6 per cent. per annum from the 1st day of July, 1911. The legal basis of the claim is that

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

the defendant has received certain moneys belonging to the complainant, which in equity and good conscience should be paid to it. This claim is stoutly denied by the defendant. The issue is sharply drawn, and its consideration and determination should not be clouded by other and less important questions, now vigorously urged upon the attention of the court by able and distinguished counsel. If the complainant's claim is not well founded, the bill should be dismissed. If, upon the contrary, it is well founded, there should be no delay in granting the relief prayed for in the bill.

[1] The facts—the important facts—as the court understands them are substantially these:

Some years prior to the autumn and winter of 1906, there was duly incorporated under the laws of the state of West Virginia the Iola Portland Cement Company. By its charter the company had a preferred capital stock of $1,500,000, divided into 60,000 shares of the par value of $25 each, and a common capital stock of $3,000,000, divided into 120,000 shares of $25 each.

The charter provided that the holders of the preferred stock should not be entitled to vote, but that they should be preferred as to dividends limited to 7 per cent. per annum, and preferred as to the principal of their stock and arrears of dividends upon dissolution.

The company was in the years 1906 and 1907, and for years prior and subsequent, engaged in the manufacture of Portland cement at Iola in the state of Kansas. In the latter part of 1906 and the early part of 1907 its stock, especially the common stock, was valuable and desirable.

At or near the same place in Kansas another plant, known as the Kansas Portland Cement Company was also engaged in the manufacture of cement.

At the head of this latter named plant was one George E. Nicholson. His attention was attracted to the Iola plant, and he concluded that the ownership of the Iola stock was very desirable. He thereupon, to wit, in the latter part of the year 1906, set about to get an option upon the stock, and thereafter avail himself of the option and buy the stock.

The evidence of Nicholson was taken at the hearing, and it throws much light upon the manner and means employed by him in obtaining the option, and the sources from which he obtained the money to pay for the stock. So much of his testimony as seems pertinent is as follows:

"Q. State when and how you became interested in the Iola Portland Cement Company. A. Well, how I became interested, or rather when, was in December of 1906 and January of 1907. How I became interested was largely through my knowledge of the business in the plant we had and the trouble that had occurred from time to time between the Iola Company and the company I represented or was president and general manager of. Q. What was the name of that company? A. The Kansas Portland Cement Company. Our going into the field created a good deal of feeling on their part, and notwithstanding, as I said a moment ago, we paid as high as $2 a barrel for our cement, when we got ready to put our product on the market we sold as low as 80 cents through an action on their part that we looked upon as trying to force us out of the business. We were the second plant in the

West, and they were the first—in saying 'West' I mean Middle West. There was more or less contention from time to time, and when it finally developed that there was a representative over there looking the Iola property over, we naturally proceeded to try to ascertain who he represented. It so happened that he had been a professor in chemistry, a gentleman who was out there in Ann Arbor, and my chief superintendent, Mr. E. C. Champion, had taken chemistry of him, and through that connection we began to investigate. I sent a gentleman from New York, and in due time got in touch with the principals involved in the purchasing of the Iola plant, which at that time consisted of Holmes & Brown of New York, I think I may say—they formerly lived in Detroit—and H. G. Hamilton, of Youngstown, Ohio. In due time I was brought in touch with the principals, first, I think, in New York, and afterwards in Cleveland and later in St. Louis, and after negotiations covering some weeks, the deal was consummated.

"Q. Mr. Nicholson, please state what was the plan after the negotiations that you have referred to, under which you sought to acquire a large part of the common capital stock of the Iola Portland Cement Company. In other words, did you undertake to accomplish that under the terms of an option that was held by H. G. Hamilton, of Youngstown, Ohio? A. Yes, we found —in answer to your question I will say, we found Mr. Hamilton and Holmes and Brown had an option on the property to acquire the common capital stock of the company, consisting of 120,000 shares of a par value of $3,000,000. Q. State briefly what that option was, Mr. Nicholson. A. I think the option was between Mr. Bassett as president of the company and some other members of his executive committee, for the acquiring of the common capital stock of the company at the value of $25 per share. There was an agreement on the part of the holders of the option to take all of the common stock offered at that price, with a guaranty on the part of the sellers to deliver not less than 51 per cent. It further carried with it an obligation on the part of the purchasers to take all the preferred stock of the company, consisting of $1,500,000, that might be offered in connection with the sale of the common stock. That preferred stock was to be taken at retirement price, that is, par and 10 per cent., so that it made a share of $25 cost the purchaser $27.50. Q. That is of the preferred? A. That is of the preferred. Q. What was finally done under that option, Mr. Nicholson, after you became interested in it? A. Well, after considerable negotiations back and forth, when I felt that I had the proposition pretty well in hand, I came on to St. Louis with a view of financing it.

"Q. Let me interrupt you just a moment: Did you, before coming to St. Louis—before we take up the financing of the purchase of that stock under that option—did you make any arrangements for having the rights of the holders of that option to buy the stock as you have outlined, transferred or assigned to you? A. Yes; I had an agreement to that effect. Q. You had an agreement with them to that effect? A. Yes, sir. Q. State what you did looking towards acquiring the stock under that option. A. My next step of necessity was to finance it. I had my own funds pretty well invested in propositions I was interested in, plants not only in the Kansas belt, but one in Tennessee, near Chattanooga, and the other up at Des Moines, Iowa. I think I came to St. Louis first right after Christmas of 1906. The first conference I had with Mr. Van Blarcom, then president of the National Bank of Commerce. I presented the proposition to him in all its details, and gave him the showing of what the company was doing in which I was interested at the time, the Kansas Portland Cement Company, and stated in general the cement situation here in the Middle West, and our reasons for wanting to acquire the plant. I stated to him about the amount it would take, in my judgment, to purchase the property, that I thought the common stock would come in pretty freely, and in all possibility a good proportion of the preferred stock. After considerable negotiations (I don't recall just how long it lasted, but I was in to see him several times) it finally resulted in this kind of an arrangement: Mr. Van Blarcom stated he would be willing to finance one-half the requirements, or approximately, $1,500,000 of the common stock, but that he would not become interested in the purchase of the preferred. He further stated that he would lend me the assistance of the

bank, and assist in every way they could on the outside in procuring the additional money to finance the purchase of the Iola Company. As near as I can recall, practically all my conferences were with Mr. Van Blarcom. I recall a little chat with Mr. Edwards, Mr. B. F. Edwards, then cashier, I think, of the bank, but Mr. Edwards never warmed up to the proposition, and the negotiations were practically all between Mr. Van Blarcom and myself; and later on Mr. Perry was called in to investigate, I presume, certain statements I had made, and later journeyed with me to different places for the purpose of raising these funds to complete the purchase of the Iola Company.

"Q. What amount of money for the purpose of acquiring this common capital stock of the Iola Company did you raise yourself, independently of the National Bank of Commerce or of any assistance which any of the officers of that bank gave you? A. I think my first negotiations were with the president of the Commerce in Kansas City, Dr. Woods. I got $100,000 from him and $100,000 from the Commerce Trust Company, in which the doctor was also interested, and W. T. Kemper, I think, was vice president or president, whom I was acquainted with, and I think I secured $50,000—I am sure I did—from Mr. Holmes of the Pioneer Trust Company, and a short time after that I secured $500,000 from a personal friend, William Lanyon, whom I met in Iola after selling his smelting property to some New York people. Mr. Lanyon is now in St. Louis. I have been acquainted with Mr. Lanyon ever since 1879, and constructed many smelting plants and furnaces for him. Q. Then you acquired unaided, $750,000, if I followed you correctly? A. How much? Q. $750,000? A. Yes, sir.

"Q. Who were interested with you, and how, Mr. Nicholson in the acquirement of this common capital stock of the Iola Portland Cement Company? What was the plan finally worked out for that purpose? A. The plan as finally worked out resulted in an agreement being drawn between three parties, H. G. Hamilton, of Youngstown, Ohio— Q. Whom did he represent? A. Well, I should say, himself and Mr. John Sherwin, president of the First National Bank of Cleveland. Q. Did he also represent Mr. F. H. Goff of the Cleveland Trust Company? A. I rather thought he did, but we never knew whether Mr. Goff was really interested as a party to the trade, or simply as counsel for Mr. Hamilton and Mr. Sherwin. Q. Go on. A. The next party was Mr. Perry, representing the National Bank of Commerce, and their associates there, and myself. The agreement was along the lines— Q. You have seen this agreement dated January 17, 1907, that was finally entered into between you and Mr. Perry, providing for those three interests; you have seen that frequently, have you not? A. Yes, sir. Q. Did that cover the plan that you referred to, which was subsequently reduced to writing? A. Yes, sir."

The agreement between Perry, representing the defendant bank, and Nicholson was subsequently reduced to writing, and dated the 17th of January, 1907. It is as follows:

"This contract and agreement, made and entered into this 17th day of January, 1907, by and between George E. Nicholson, of Iola, Kansas, and J. W. Perry, of St. Louis, Missouri, Witnesseth:

"That said parties have and do hereby associate themselves together for the purpose of purchasing, acquiring and owning all or such part as they may be able to purchase or acquire of the common capital stock of the Iola Portland Cement Company, a corporation organized under the laws of West Virginia, and having a common capital stock of three millions of dollars ($3,000,000) divided into 120,000 shares of the par value of twenty-five dollars ($25.00) each, upon the following understanding and agreement with each other, that is to say:

"(a) That J. W. Perry shall purchase all of the shares of the common capital stock of said company on deposit with the German Savings Bank of Davenport, Iowa, on the 17th day of January, 1907, with power to said bank or another, to sell and transfer, and all which may thereafter be deposited with said bank before April 1st, 1907, with power to said bank or another,

to sell and transfer, or which said J. W. Perry may be able to acquire from any shareholder, prior to April 1st, 1907, all at the price of twenty-five dollars ($25.00) per share.

"(b) George E. Nicholson hereby agrees, upon demand, to pay to J. W. Perry all sums of money expended by him in the purchase of the common capital stock of said company, and all expenses incurred by him incident thereto.

"(c) J. W. Perry hereby agrees and promises to use his best efforts and endeavors to procure and negotiate for George E. Nicholson the loan of such money as may be necessary to enable the latter to pay for said stock, and renewals thereof, if necessary to February 1st, 1909.

"(d) To enable J. W. Perry to procure the necessary loan of money to pay for said stock, George E. Nicholson agrees to execute or have others execute for him, in blank, his collateral promissory notes and contracts of pledge in such number and form, and conditioned and provisioned as said J. W. Perry, or B. F. Edwards, or the president or cashier of the National Bank of Commerce in St. Louis (all of which said parties are hereinafter referred to as 'said parties or either of them') may require, and to deliver the same to the National Bank of Commerce in St. Louis; and hereby authorizes said parties or either of them to fill up said notes and contracts of pledge in such way, and in such amounts, payable at such time and to such parties, and bearing such rate of interest as said parties or either of them may elect, and does hereby authorize said parties or either of them upon filling up said notes and contracts of pledge, to deliver the same to such party or parties as said parties or either of them may elect, for the purpose of obtaining said loan or loans of money. Said parties or either of them shall have the power, upon maturity of any such notes, to fill up and deliver renewal notes and contracts of pledge therefor, if they so elect, and for that purpose the said George E. Nicholson shall execute or have others execute for him, and deliver to said bank, in like manner as above provided, his collateral notes, and contracts of pledge.

"For the purpose of further enabling said J. W. Perry to procure said loan of money, and of securing the payment of said notes, said George E. Nicholson further agrees to deliver to the National Bank of Commerce in St. Louis, at least the sum of two million dollars par value of collateral, and maintain in value the same from time to time, to be satisfactory to said parties or either of them, and shall, in addition thereto, procure such of said notes and contracts of pledge as said parties or either of them may require to be signed by other party or parties, or maker or indorser, to the satisfaction of said parties or either of them.

"Said parties or either of them shall have the power to pledge said collateral or such part thereof for the payment of all or any of said notes, in such part and amount as in the judgment of said parties or either of them, they may deem best.

"(e) All of the common capital stock of said company so acquired or purchased by J. W. Perry shall be transferred upon the books of said company to his name, and he shall hold the same in trust until the full amount of all of the notes above provided for to be executed and delivered in procuring the necessary loan of moneys to pay the purchase price of said stock, shall have been fully paid, except as herein provided, and subject to the provisions of this contract, with the following powers and duties:

"1. During said period of time to vote said stock at all stockholders' meetings of said company, unless the same shall be disposed of pursuant to contract or contracts of pledge of said stock hereinafter authorized.

"2. To pledge or hypothecate the same or any part thereof, on such terms and conditions as he may approve, to secure the payment of any or all of said collateral notes as may be signed by George E. Nicholson or others for him, as above provided, for the purpose of obtaining the loan of money to pay the purchase price of said stock, or any note or renewal of said note or notes.

"3. Upon the full payment, by either J. W. Perry of St. Louis, H. G. Hamilton, of Youngstown, Ohio, or George E. Nicholson, of Iola, Kansas, of one-third of the purchase price of said stock, together with such interest thereon

as George E. Nicholson may have paid or become liable to pay, less such dividends as may be paid upon one-third part of said stock in the meantime, to deliver to the party making such payment or to such party as he may designate, one-third of the common capital stock of said company held in trust by him, and cause the same to be transferred to such party or such parties as he may designate on the books of said company; provided, said stock has not been sold or disposed of under contract or contracts of pledge hereinabove authorized, and further provided that any part of said one-third may be withdrawn on the same conditions pro rata.

"4. To collect and receive during said period of time all dividends that may be declared and paid on said stock not disposed of under contract or contracts of pledge, as hereinabove authorized and apply the same to the payment of the principal and interest on said notes, provided to be executed by George E. Nicholson or others for him, and filled up and delivered by said parties or either of them, as hereinabove provided, as in the judgment of the said parties or either of them may be deemed best; provided that if said J. W. Perry, H. G. Hamilton or George E. Nicholson shall elect to pay for and have transferred to him on the books of said company, as herein provided, one-third or any part thereof, of the common capital stock of said company, held in trust by said J. W. Perry, or such part thereof as may not have been disposed of under contract or contracts of pledge, as hereinabove authorized, he shall be entitled thereafter to receive all dividends paid on said stock.

"5. Upon the full payment from dividends paid on said stock of all notes, executed by George E. Nicholson or others for him, and filled up and negotiated by said parties or either of them for the purpose of obtaining loans as hereinabove provided, together with all interest on said notes, to deliver and cause to be transferred on the books of said company, one-third of the common capital stock of said company, so held by him as trustee at said time, and not disposed of under contract or contracts of pledge, as hereinabove authorized, to each said J. W. Perry, H. G. Hamilton and George E. Nicholson not electing to purchase the same prior thereto as herein provided, less such part to any party as he may have previously withdrawn hereunder.

"(f) Upon the full payment of all notes executed by George E. Nicholson or others for him, filled up and negotiated by said parties or either of them for the purpose of obtaining or securing loans, as hereinabove provided, together with interest thereon, according to their terms and to all other expenses incurred by J. W. Perry incident thereto, he shall cause to be delivered by the National Bank of Commerce in St. Louis, to George E. Nicholson, all collateral deposited by him with said bank for the purpose of securing the payment of said notes or any of them.

"(g) The National Bank of Commerce in St. Louis shall have the power at any time to remove as a party hereto and trustee herein, J. W. Perry, and substitute any other party in his stead, upon notice to that effect, in writing, delivered to Mr. George E. Nicholson; and in the event of the death of said J. W. Perry, to appoint a party to succeed him as a party hereto and as trustee herein. In either of said events, said party so appointed by the National Bank of Commerce in lieu of said J. W. Perry, shall succeed to all of his rights and duties herein as a party to this agreement and as trustee herein. This provision shall not be construed to make the National Bank of Commerce in St. Louis liable in any respect whatever on account of any obligation or duty assumed by J. W. Perry, either as party or trustee under this contract.

"(h) J. W. Perry as trustee herein covenants faithfully to perform and fulfill the obligations and duties imposed upon him as trustee herein, not being liable or responsible for any mischance occasioned by others, but only for willful misconduct or gross negligence on his own part as such trustee.

"In witness whereof, the parties hereto have hereunto subscribed their names on this 23d day of January, 1907.

"[Signed] Geo. E. Nicholson.
"[Signed] J. W. Perry.
"[Signed] J. W. Perry, Trustee.

"This agreement supplemental to a certain contract and agreement made and entered into on the 17th day of January, 1907, by and between George E. Nicholson, of Iola, Kansas, and J. W. Perry, of St. Louis, Missouri:

"Witnesseth: That the parties to said contract and agreement have and do hereby agree to extend the same indefinitely, to be terminated at any time at the option of said J. W. Perry.

"In witness whereof said parties have hereunto subscribed their names on this ——— day of December, 1908.

"[Signed] Geo. E. Nicholson.
"[Signed] J. W. Perry."

A fair analysis of the verbal contract subsequently embodied in the written one above quoted is as follows:

"The purpose of the plan is to acquire the common stock of the Iola Company.

"The bank is to acquire at its par value of $25 all the stock which can be had before April 1, 1907.

"Nicholson is to be liable to the bank for the purchase price of the stock and the expenses incident to its purchase.

"The bank is to endeavor to procure the loan of such money as may be necessary to pay for the stock and to obtain renewals of such loans up to February 1, 1909.

"In connection with the bank's raising of the money Nicholson is to execute in blank his collateral promissory notes and contracts of pledge in such number and form and so conditioned and provisioned as Perry or B. F. Edwards (then vice president of the bank), or the president or cashier of the bank may require, and deliver those notes to the bank. The bank is authorized to fill up these notes and contracts in respect of amounts, time, payees and interest rate as it may decide, and to use them for the purpose of obtaining loans; also to make renewal notes and contracts on Nicholson's blank obligations. Nicholson also agrees as margin collateral to put up with the bank all the collateral in his possession or under his control, amounting to $2,000,000 par value, and to keep it good according to the bank's direction, and also to procure other signatures on his notes as it may direct. The bank is authorized to pledge all of the collateral according to its own judgment.

"The stock purchased is to be transferred to the name of Perry (i. e. the bank), who is to hold it in trust until the notes have all been paid; he is to vote the stock until it shall have passed out of his name; he is to pledge it at his uncontrolled discretion for loans; upon full payment of one-third of it, either by the bank or by the Cleveland interests or by Nicholson, he is to deliver that one-third to the party making the payment, and likewise pro rata; he is to collect the dividends that may be declared and paid on the stock '*not disposed of under contract or contracts of pledge*; and apply those dividends to the payment of Nicholson's notes in his uncontrolled discretion; upon the full payment of the loans out of the dividends he is to divide the stock into thirds among the bank, the Cleveland interest and Nicholson, and upon the full payment of the notes, however made, Nicholson's margin collateral is to be returned to him.

"The National Bank of Commerce in St. Louis is to have power at any time to remove Perry as a party to the agreement and as trustee, and substitute any one in his stead, upon notice in writing to Nicholson, and such appointee of the bank is to have all powers, rights and duties as a part of the agreement and as trustee."

It seems to have been understood by the parties to the agreement that the bank, as such, was without authority under the National Bank Act to make a binding contract of this character. For that reason (it seems to the court) Perry was selected to do indirectly for the bank what the bank itself could not, under the law, directly do. The court finds from the evidence in the case that Perry, at that time and at all times subsequent thereto, up to the time he severed his connection

with the defendant bank, was acting as its agent and solely in its interests. If any doubt existed as to the correctness of this opinion, it was settled by the declaration made by Perry on the 16th of April, 1907. That is as follows:

"Exhibit B.

"This declaration witnesseth: That the undersigned, J. W. Perry, who is a party to a certain contract made and entered into on the 17th day of January, 1907, by and between George E. Nicholson, of Iola, Kansas, and J. W. Perry, of St. Louis, Missouri, made and entered into the same on behalf of and for the use and benefit of the National Bank of Commerce in St. Louis, and that all rights, benefits and profits that may accrue to the undersigned under and by virtue of said contract belong to and shall inure to the use and benefit of the National Bank of Commerce in St. Louis, and all obligations that may rest upon the undersigned by virtue of said contract shall be met and discharged by the National Bank of Commerce in St. Louis.

"Witness my hand and seal on this 16th day of April, 1907.

"_____."

After Van Blarcom and Nicholson reached the agreement before and at length set forth, the bank through its president, Van Blarcom, set out to comply with its agreement made with Nicholson—

"to procure the loan of such money as may be necessary to pay for the stock and to obtain renewals of such loans up to February 1, 1909."

Perry went to New York and with him carried the following letter:

"The National Bank of Commerce in St. Louis.

"St. Louis, Mo., January 12, 1907.

"J. C. Van Blarcom, President.

"Mr. W. H. Taylor, First Vice President,

"Bowling Green Trust Company,

"New York City.

"Dear Sir: This will introduce to you Mr. J. W. Perry, who is the representative of this bank, although not on the official staff. Mr. Perry is in New York in connection with a transaction which he will explain to you and you may rely upon any statement which he will make. We intend to take a large interest in the transaction ourselves and will advance the money on the same securities which he will offer to you. Further details will be explained by Mr. Perry. Thanking you for any courtesy extended to him, I am

"Yours sincerely, [Signed] J. C. Van Blarcom, President."

From all the testimony, facts, and circumstances shown in the evidence, the court finds that the Bowling Green Trust Company made the loan of $250,000 to Nicholson upon the representations made in that letter. Taylor, the vice president, had no acquaintance with Nicholson, and knew nothing of the value of the collateral offered, other than that given in the letter of Van Blarcom:

"We intend to take a large interest in the transaction ourselves and will advance the moneys on the same securities which he (Perry) will offer to you."

This was the representation made by the president of a bank with which the trust company had for a long time maintained friendly relations, and between which mutual accounts had been carried. The collateral offered to the Bowling Green Trust Company by Perry was ample and sufficient to secure the payment of $250,000. It was ac-

cepted by the trust company on the assurance that the Bank of Commerce was loaning money on the same character of collateral. The security was good, and if it had remained there, there never would have been any need of litigation between the Bowling Green Trust Company, or its successor, and the National Bank of Commerce. The note of Nicholson for $250,000, secured in part by 10,000 shares of the common stock of the Iola Company, was given to and accepted by the Trust Company. The proceeds of this note went in part to pay for 110,330 shares of the Iola common stock. So soon as this stock was bought, enough of the old directors of the Iola Company retired from the board to give the Bank of Commerce control of the business and finances of the company. This control was at all times subsequently maintained—officers and directors of the Bank of Commerce became officers and directors of the Iola Company, and the interlocking directorates of the two controlled in a large measure the cement business of the Iola Company and other companies.

The original note of the trust company ran for six months, and was renewed for that amount on the ——— day of July, 1907, and again renewed for the same amount January ——, 1908, the trust company retaining all of this time the same collateral (including the 10,000 shares of the Iola common stock) that had been originally pledged. Shortly after the second renewal, to wit, on the 6th of February, 1908, the Iola directors declared a dividend of 25 per cent. on the common stock, amounting in the aggregate to $750,000. The dividend on that part of the stock acquired by the bank under the agreement of January 17, 1907, amounted to $689,562.50. The dividend was paid on the 10th of March, 1907, to the Bank of Commerce. The proportionate share of this dividend on the 10,000 shares held by the Bowling Green Trust Company, amounted to $62,500, not a dollar of which reached the trust company, although it then held as collateral to its loan 10,000 shares of the stock upon which the dividend had been declared. Although it is stoutly contended by the defendant that the trust company, by letters and otherwise, was apprised of this dividend, the court finds as a matter of fact from all the evidence in the case that the trust company was not so apprised.

In December, 1908, Perry acting for the bank, induced the trust company to agree to an exchange of collateral. That is to say the trust company surrendered the common stock held by it to the Bank of Commerce for certain shares of the preferred stock held by it. Why was this exchange made and for what purpose and for whose benefit? At that time there was a very large amount of money in the treasury of the Iola Company, which could be distributed in dividends on the common stock. In a few days after the exchange had been effected the board of directors of the Iola Company (dominated and controlled by the defendant bank) declared a dividend of 50 per cent. on the common stock of the company, amounting to the sum of $1,500,000. The proportionate share of the dividend on the 10,000 shares then recently in the hands of the Bowling Green Trust Company, amounted to the sum of $125,000. This amount the defendant received and applied. It subsequently sold the 10,000 shares of stock

at something over $8 per share, aggregating $80,000, and received and applied that as it had the 50 per cent. dividend. The bank received the dividend of 25 per cent. declared in March, 1908, the 50 per cent. dividend declared in December, 1908, and the proceeds of the sale of the stock in 1909, making a grand total of $267,500—more than enough to have paid in full the loan made by the Bowling Green Trust Company. The court finds from the evidence in the case that the trust company knew nothing of these dividends until long after they were declared and paid. The court also finds from the evidence that the trust company was kept in absolute ignorance of the contract of January 17, 1907. It did not know, and had no reason to believe, that the bank had any further interest in the transaction than that of lender of money on the same kind of collateral that the trust company was induced to accept by the letter of Van Blarcom hereinbefore set out.

It appears that the complainant, the Equitable Trust Company of New York, took over the business and assets of the Bowling Green Trust Company, but the references made in this opinion to the "trust company" were intended to apply mainly to the Bowling Green Trust Company of New York. Upon a fair consideration of all the facts and circumstances given in evidence, it would, in the judgment of the court, be inequitable to withhold from the trust company the dividends declared upon, and the moneys received from the sale of the 10,000 shares of the common stock originally pledged to the Bowling Green Trust Company of New York.

[2] In reaching this conclusion the court has not been unmindful of the plea of ultra vires, so ably urged upon the court by the able counsel for defendant, and has no hesitancy in saying that the making of the contract of January 17, 1907, so far as the Bank of Commerce is concerned, was without authority of law, and a suit to enforce the same would be unavailing. That would be a very different proceeding from the one now before the court. The bank cannot receive moneys equitably belonging to another and not account for the same, even though they be received as an incident of the bank's illegal contract.

The court has tried to keep constantly in view what it has considered from the beginning the controlling question in the case, and has refrained from seeking or attempting to find legal technicalities as a basis or excuse for withholding from the complainant the equitable relief to which it seems to be so clearly entitled.

During the hearing various objections were made by the complainant and the defendant to the introduction of certain testimony. Many of those objections were not ruled upon at the time, but were taken under advisement to be later determined. To save to each party the benefit of each and every objection so made, the court now overrules the same and allows exceptions to the ruling.

It follows from what has been said that the complainant is entitled to the relief prayed for in its bill, and a judgment will be entered in accordance therewith.

UNION PAC. R. CO. v. BELEK et al.

(District Court, D. Nebraska, Omaha Division. October 22, 1913.)

1. INTERPLEADER (§ 33*)—DEPOSIT IN COURT—DECREE—EFFECT.
Where a railroad company offered a reward for the apprehension of certain train robbers who were subsequently arrested by certain police officers who claimed the reward, the fact that the railroad company thereupon paid the money into court and a decree of interpleader was entered, was not such an execution of the contract between the railroad company and the officers as to deprive other claimants of the right to claim the reward as against such officers.

[Ed. Note.—For other cases, see Interpleader, Cent. Dig. §§ 68–71, 74; Dec. Dig. § 33.*]

2. INTERPLEADER (§ 32*)—RIGHT TO REWARD.
Where police officers are not entitled to share in a reward on grounds of public policy, the court, in an interpleader proceeding to determine the persons entitled to the reward, would refuse of its own motion to grant any portion thereof to such officers without such objection being raised by other claimants.

[Ed. Note.—For other cases, see Interpleader, Cent. Dig. §§ 72, 73; Dec. Dig. § 32.*]

3. REWARDS (§ 11*) — POLICE OFFICERS — ACTS IN OFFICIAL DUTY — PUBLIC POLICY.
Under Cr. Code Neb. § 283, and Comp. St. Neb. 1909, c. 13, art. 2, § 64, providing the duties of a police officer in the city of South Omaha to make arrests without warrants, it was the official duty of such officers to arrest without a warrant or reward train robbers discovered in the city, and hence for so doing they were not entitled to any part of a reward offered for the apprehension of such robbers, on grounds of public policy.

[Ed. Note.—For other cases, see Rewards, Cent. Dig. §§ 14, 15; Dec. Dig. § 11.*]

4. INTERPLEADER (§ 21*)—ADVERSE CLAIMANTS.
Where a reward offered by a railroad company for the apprehension of train robbers was claimed by various persons, and the railroad company filed a bill of interpleader, it thereby admitted title in some of the claimants and its indifference between them, and hence no part of the reward could be returned to it.

[Ed. Note.—For other cases, see Interpleader, Cent. Dig. §§ 43–45, 51; Dec. Dig. § 21.*]

5. REWARDS (§ 12*)—RIGHT TO REWARD.
A reward having been offered for the discovery of train robbers, certain school boys discovered articles thought to belong to the robbers, and agreed to keep watch over the place and report to the police. They did this, and, on subsequently discovering the approach of certain men, one of the boys ran to a saloon, summoned help, and all were present and assisted in locating the bandits and in their arrest. *Held* that, the police officers not being entitled to any part of the reward on account of public policy, the portion thereof applicable to the arrest of persons then seized would be awarded to the boys.

[Ed. Note.—For other cases, see Rewards, Cent. Dig. § 16; Dec. Dig. § 12.*]

6. EXTRADITION (§ 37*)—AUTHORITY TO ARREST.
The authority to hold a fugitive from justice in extradition proceedings conducted under Rev. Codes Idaho 1908, §§ 8416–8418, the culmination of which is the removal of the person to another state, is distinct from the

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

authority of a peace officer to make a preliminary arrest until a proper complaint can be made and a warrant obtained.

[Ed. Note.—For other cases, see Extradition, Cent. Dig. §§ 34, 44, 48, 50; Dec. Dig. § 37.*]

7. EXTRADITION (§ 37*)—ARREST—AUTHORITY TO HOLD PRISONER.

Peace officers are authorized to arrest without a warrant and hold a fugitive from justice for a reasonable time for the institution of extradition proceedings, provided the officer has reasonable cause to believe accused has committed a felony.

[Ed. Note.—For other cases, see Extradition, Cent. Dig. §§ 34, 44, 48, 50; Dec. Dig. § 37.*]

8. REWARDS (§ 11*)—TOWN MARSHAL—ARREST—AUTHORITY.

Rev. Codes Idaho 1908, § 7522, provides that a town marshal is a peace officer, and section 7540 declares that he may make an arrest when a person has committed a felony, although not in the marshal's presence; when a felony has in fact been committed, and the marshal has reasonable cause for believing the person arrested to have committed it; and on a charge made, on reasonable cause, of the commission of a felony by the person arrested. *Held* that where a town marshal arrested a train robber who was a fugitive from justice, and for whose apprehension a reward had been offered, stating when he went to make the arrest that he was about to arrest "a train robber," but there was no evidence showing the nature of the marshal's information, it did not appear that it was any part of his duty to make the arrest so as to preclude him from earning the reward on the ground of public policy.

[Ed. Note.—For other cases, see Rewards, Cent. Dig. §§ 14, 15; Dec. Dig. § 11.*]

9. REWARDS (§ 11*)—POLICE OFFICERS—FUGITIVE FROM JUSTICE.

Mills' Ann. St. Colo. 1912, § 7272, makes it the duty of the police officers of Denver to arrest any person fleeing from justice in any part of the state, to apprehend persons in the act of committing any offense against the laws of the state or ordinances of the city, and to arrest on view any person guilty of a breach of the city ordinances, or of any crime against the laws of the state, etc. Section 7278 also declares that such officers shall have power to pursue and arrest any person fleeing from justice in any part of the state, and to receive and execute any proper authority for the arrest or detention of criminals fleeing or escaping from other places or states. *Held*, that the authority of the police of the city to arrest a fugitive from another state is limited to the execution of a warrant for such arrest, and hence where such officers arrested, without a warrant, a train robber who was a fugitive from justice from another state, they were not deprived of the right to share in the reward on the ground that in making the arrest they but performed a part of their official duty.

[Ed. Note.—For other cases, see Rewards, Cent. Dig. §§ 14, 15; Dec. Dig. § 11.*]

Bill of interpleader by the Union Pacific Railroad Company against James Belek and others to determine the persons entitled to a reward. Fund awarded to particular claimants.

Brown, Baxter & Van Dusen, of Omaha, Neb., for defendants Briggs and others.

Edgar T. Farnsworth, of Omaha, Neb., for defendants Belek and others.

T. C. MUNGER, District Judge. The Union Pacific Railway Company filed a bill of interpleader in this court, alleging that the defend-

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

ants claimed a reward which it had offered "for the apprehension of each of the persons" who had engaged in the robbery of one of its trains. There were five of the robbers who were arrested subsequently and convicted. In pursuance of the bill of interpleader and of a stipulation signed by all of the parties setting forth the terms of the offer, a decree of interpleader was entered in the case, from which no appeal was prosecuted, and the railway company paid the reward into court.

Three of the robbers were arrested in Nebraska at one time, and one was arrested in Denver and one in Idaho, whence they had fled after the crimes. The offer was of a separate amount for the apprehension of each of the guilty persons, and, as the acts of arrest of some of the robbers are entirely distinct from those relating to the arrest of the others, separate bills of interpleader doubtless could have been required as to each act of apprehension and the claimants therefor. As a result of the stipulation and decree, several issues are now presented in one suit. The physical arrest of the three robbers, Woods, Torgenson, and Grigware, was made in South Omaha by certain policemen of that city. On their behalf, the claim is made that under the decision of the Court of Appeals of this circuit in McClaughry v. King, 147 Fed. 463, 79 C. C. A. 91, 7 L. R. A. (N. S.) 216, 8 Ann. Cas. 856, they alone are entitled to the reward offered for the arrest of these three robbers, because they alone assumed the personal danger and responsibility of arresting the suspects.

[1] It is conceded by counsel for these claimants that, if the arrest was made by them as a part of their official duties, they could not enforce their claim against the objection of the Union Pacific Railway Company; but they contend that as a result of the decree of interpleader, and of the deposit of the reward money in court, the contract is executed, and the other claimants may not be heard to object to the award of the money to them. The payment by the railway company was not the final execution of the contract, because the payment was not made to any particular person, but into court, and it was for the benefit only of those legally entitled thereto. Ribbans v. Crockett, 1 B. & P. 264.

[2, 3] The other claimants were then called upon to assert their claims. Nothing they have done has estopped them from such assertion, nor from denying the claims of other defendants. It is not necessary, however, that such claimants either plead or contend that the police officers are not entitled to share in the fund, for, if public policy prevents such an award, the court of its own motion must refuse the relief asked by the police officers. Coppell v. Hall, 7 Wall. 542–558, 19 L. Ed. 244; Cooper Manufacturing Company v. Ferguson, 113 U. S. 727–733, 5 Sup. Ct. 739, 28 L. Ed. 1137. Was it the duty of these officers to make these arrests? A passenger train going east upon the Union Pacific Railway had been boarded by three men at the city of Fremont, who had climbed over the tender and by the display and threatened use of firearms had compelled the engineer to stop the train at an appointed place, where two more bandits were in waiting. The five then compelled the engineer and fireman to accompany them to the

mail car, where the postal clerks were overpowered, and some mail sacks, with their contents, were taken. The railway company at once offered the reward mentioned, and, at the time the three men were arrested by the South Omaha police officers, no complaint had been filed in any court. The reward was offered "for the apprehension of the persons who, on or about the 22d day of May, 1909, in the nighttime, held up and robbed of a part of the United States mail being carried thereon, one of the trains of" the Union Pacific Railway Company, known as the Overland Limited.

The offer they made was for the arrest of those who had committed the offense of train robbery, a felony, as defined in section 13a of the Nebraska Criminal Code, and had also committed the offense of robbery of the mails, as defined in the statutes of the United States. Rev. St. U. S. §§ 5472, 5473 (U. S. Comp. St. 1901, p. 3694).

The nature of the arrest must be judged by the situation at that time, and not by the fact that subsequently the prisoners were yielded to the United States marshal and convicted under the statutes of the United States. The prisoners were arrested by officers acting under the authority of the state and were lodged in a jail under like authority, and the state could have retained the custody and caused the prosecution of the robbers. Whether or not the officers acted in pursuance of authority from the United States, they acted in pursuance of the laws of the state at the time of the arrest, and with the evident purpose of holding the prisoners for prosecution by either the state or the United States, as might thereafter be determined by the prosecuting officers. Under the law of the state, the policemen were authorized to make the arrests without a warrant, on reasonable suspicion that a felony had been committed and that the persons arrested had committed it. Diers v. Mallon, 46 Neb. 121–126, 64 N. W. 722, 50 Am. St. Rep. 598; Pritchett v. Sullivan, 182 Fed. 480, 104 C. C. A. 624.

By sections 283 and 284 of the Criminal Code of Nebraska, it is provided:

"Sec. 283. (Arrest by officer.) Every sheriff, deputy sheriff, constable, marshal, or deputy marshal, watchman, or police officer shall arrest and detain any person found violating any law of this state, or any legal ordinance of any city or incorporated village, until a legal warrant can be obtained.

"Sec. 284. (Arrest by private person.) Any person not an officer may, without warrant, arrest any person, if a petit larceny or a felony has been committed, and there has been reasonable ground to believe the person arrested guilty of such offense, and may detain him until a legal warrant can be obtained."

Section 64 of article 2, c. 13, Compiled Statutes of Nebraska 1909, which is the charter of South Omaha, contains this clause:

"And the chief of police and policemen shall have power, and it shall be their duty to arrest all offenders against the laws of the state or of the city, by day or by night, in the same manner as a sheriff or constable, and to keep them in the city prison or other place to prevent their escape until a trial or examination may be had before a proper officer, and they shall have the same power as sheriffs and constables in relation to all criminal matters and all process issued by the police judge."

Section 263 of the Criminal Code of Nebraska defines the duty of constables as follows:

"Sec. 263. (Constables.) Constables shall be ministerial officers of the courts holden by justices of the peace in criminal cases, within their respective counties. And it shall be their duty to apprehend and bring to justice felons and disturbers of the peace, and to suppress riots and to keep and preserve the peace within their respective counties. They shall have power, and they are hereby authorized to execute all writs and process in criminal cases throughout the county in which they may reside and where they were elected or appointed."

It is apparent that these arrests were made under authority of their office, and that the law protected the policemen, as officers, in so acting. It was contended that the arrests were made by the policemen, either as private citizens or in pursuance of official authority, but not in pursuance of official duty. Neither contention can be accepted. The arrests were such as these officers could make by virtue of their office, and were made in the city of South Omaha and in the apparent exercise of official authority, and it must be presumed that they were made by the officer as an officer and not as a private individual. Somerset Bank v. Edmund, 76 Ohio St. 396, 81 N. E. 641, 11 L. R. A. (N. S.) 1170, 10 Ann. Cas. 726; Witty v. Southern Pac. Co. (C. C.) 76 Fed. 217–221; Ring v. Devlin, 68 Wis. 384, 32 N. W. 121.

Having authority to make arrests upon reasonable suspicion of felonies having been committed and of the guilt of the persons suspected necessarily implies that such authority shall be used in appropriate cases. Officers may not refuse to use their good judgment in such cases until they are first given a reward by some interested party, or are commanded by a specific warrant. If they may refuse or neglect to arrest one felon whom they have good cause to believe guilty they may refuse to act in all such cases. It often occurs that shots are heard, and cries for help, or accusations of crime ring out, by day or night, indicating to all reasonable men that a serious offense has been committed, and men are seen running away under circumstances of suspicion. Reliable information is often given to officers of the commission of a felony by some one designated, and delay often means the escape of the guilty person. In all such cases, when the law has given the authority to the officer to act, it does not permit him arbitrarily to refuse to exercise it except on the spur of reward or warrant. Because of his authority, the protection afforded to him as an officer, and of his official compensation, it is the duty of an officer to use diligence to exercise his authority to make arrests, when he has reasonable cause to believe a felony has been committed and that the guilty party may be apprehended.

In Lees v. Colgan, 120 Cal. 262, 52 Pac. 502, 40 L. R. A. 355, it is said:

"Was it the official duty of the petitioner to arrest the murderer? There can be but one answer to this question. Section 817 of the Penal Code of this state declares a police officer of a city to be a peace officer. The arrest in this case was made without a warrant, but such fact in no degree changes the legal complexion of the merits of the litigation. Section 836 of the Penal Code declares that a peace officer may make an arrest in obedience to a warrant delivered to him, or may without a warrant arrest a person: (1) For a public offense committed or attempted in his presence; (2) when a person arrested has committed a felony, although not in his presence; (3) when a felony has in fact been committed, and he has reasonable cause for believing the

person arrested to have committed it. In other words, it is the duty of the peace officer to make arrests under any of the foregoing conditions. It certainly would be his duty to make an arrest where a public offense was committed in his presence. It likewise would surely be his duty to make an arrest where he held a valid warrant ordering the arrest. Yet, under the statute quoted, it is no more his duty to make arrests under such circumstances than it is when a felony has been committed, and he has reasonable cause for believing a certain person to have committed it. Here of necessity it must be assumed that petitioner had reasonable cause for making the arrest. It will not be assumed that he made it without good cause, and, if he had good cause for the arrest, it was his duty to make it. It cannot be contended for a moment but that a police officer would be grossly neglectful of his duty if the opportunity presented itself and he failed to arrest a person, having reasonable cause to believe such person to be a murderer."

This duty has often been declared. Schultz v. Greenwood Cemetery, 190 N. Y. 276, 83 N. E. 41. Warner v. Grace, 14 Minn. 487 (Gil. 364); Somerset Bank v. Edmund, 76 Ohio St. 396, 81 N. E. 641, 11 L. R. A. (N. S.) 1170, 10 Ann. Cas. 726; Witty v. Southern Pac. Co. (C. C.) 76 Fed. 217–221; Mason v. Manning, 150 Ky. 805, 150 S. W. 1020, 43 L. R. A. (N. S.) 131; State v. Jones, 91 Ark. 5, 120 S. W. 154, 18 Ann. Cas. 293; McNeil v. Board of Supervisors, 114 App. Div. 761, 100 N. Y. Supp. 239. In re Russell, 51 Conn. 577, 50 Am. Rep. 55.

The evidence, more fully stated hereafter, shows that these officers had reliable information that a felony had been committed, and that there was reasonable cause for them to believe, from the incriminating circumstances, that those arrested were the guilty parties. It is admitted that the officers who actually took the men into custody were on duty at the time, and that a telephone call had been sent in from the neighborhood where some revolvers, masks, a flashlight, and clothing had been found, stating that suspicious persons were lingering about, and in response thereto the officers went to the place designated, which was in the limits of South Omaha, and there they awaited near the hiding place where the revolvers had been hidden, evidently for those who had placed the articles there and whose return was expected. It is not claimed that they sought the arrest for any other charge, and each of the arresting officers says that he had the reward in mind at the time he went to the scene of the arrest and when it was made. As the reward was for the arrest of the train robbers, it must have been in the minds of the officers that the men to be arrested were probably guilty of that crime. The result is that the police officers of South Omaha must be held to have been acting in the line of their duty and on grounds of public policy are not entitled to any part of the reward. Section 157, Criminal Code of Nebraska; 24 Am. & Eng. Encyc. (2d Ed.) 952; United States v. Matthews, 173 U. S. 381–384, 19 Sup. Ct. 413, 43 L. Ed. 738.

[4] It follows that the money offered as a reward for the apprehension of Woods, Torgenson, and Grigware, which has been paid into court, must either be returned to the Union Pacific Railway Company or be given to some of the other interpleaded claimants therefor. The reward cannot be ordered returned to the complainant, for its bill of interpleader admitted title in some of the defendants, and its indiffer-

ence between them, and the decree placed it outside of the present controversy. Killian v. Ebbinghaus, 110 U. S. 568–571, 4 Sup. Ct. 232, 28 L. Ed. 246; 4 Pom. Eq. Jur. § 1325.

As in the case of any other contract, one who offers a reward may waive substantial conditions of the offer and accept such performance as is satisfactory to him. By its bill and the payment of the money into court, the complainant admits that some one of the defendants, who is legally qualified to accept, has apprehended the robbers. Kinn v. First Nat. Bank, 118 Wis. 537, 95 N. W. 969, 99 Am. St. Rep. 1012.

[5] Under the decision of McClaughry v. King, supra, the reward for the arrest of Woods, Torgenson, and Grigware, should go, if possible, to those who assumed the personal danger and responsibility of either actually arresting them, if any of the qualified claimants performed such acts, or, if none either actually arrested or caused the arrest, to such as most effectually and proximately aided in causing the arrest which was actually accomplished. The robbers, after leaving the train, carried the mail sacks that they stole, to a public school building in South Omaha, where they hid them in the attic. In a few days some school children discovered, buried in a ravine near the school building, some new revolvers of late pattern, cartridges, a flashlight, masks, hats, and overalls, which the robbers had buried there soon after the crime. They were turned over to the school authorities and by them to the police of South Omaha. The newspapers of Omaha had given publicity to the facts of the robbery, and the finding of these articles became generally known to the people in the neighborhood of the school. That afternoon the chief of police, with another officer of South Omaha, went to the place where the articles had been found and made inquiries of a number of young men whose ages ran from about 14 to 18 years, living adjacent to the place, and asked them to keep watch over the place and to report if any strangers appeared. It was not a populous part of the city, and strangers were easily detected. Six boys, James Belek, John Belek, Frank Krudna, John Krudna, John Krowlik, and Rudolph Morowisky, who had heard of the robbery and knew of the discovery of the suspicious articles, banded themselves together to keep watch and discover if any persons came about the hiding place where these articles had been found. They secreted themselves about 6 o'clock in the evening in a yard overlooking the place and kept up their vigils until about 10 o'clock at night, when they were rewarded by seeing four men approach, and one of them, who later proved to be Woods, went into the ravine and engaged in digging at the place where the articles had been buried. One of the boys, Rudolph Morowisky, was dispatched to a telephone at a saloon several blocks distant where he arrived so exhausted from his haste that the saloon keeper had to send his message for him to the police station, summoning immediate help. Two officers soon arrived in response to the call and accompanied Morowisky to the vicinity where the men had been seen. The other boys had drawn closer and were keeping watch from a point 15 or 20 feet away, and, as Woods started to leave the ravine, they followed behind him at a distance of about 60 feet. Morowisky and a police officer were approaching Woods

from one direction and the other five boys following Woods soon came up closely behind him. The policeman ordered Woods to hold up his hands, and the boys came up to the place of the arrest. Some inquiries were made of Woods as to his business there, to which he gave evasive answers. He was searched for weapons, but none were found. One of the officers was searching the ravine, and the officer in charge of Woods requested the boys to hold Woods for a few minutes while he made a further search. While he was gone, Woods endeavored to curry favor with the boys guarding him by insisting that they knew him and that he would "fix it" or "square it" with them the next time he saw them, but the boys refused to acknowledge prior acquaintance with him. The officer soon returned, and, another one having arrived, one was dispatched with Woods to the police station, while the two other officers continued their search of the ravine and adjacent places. The boys kept with the officers and claim that they soon apprised them of the returning approach of two of the other suspected robbers. As they approached, the two officers with drawn weapons placed them under arrest. The boys were at the immediate scene of the arrest and closed in on the robbers at the same time that the policemen commanded them to surrender. The officers then took the men last arrested, who proved to be Torgenson and Grigware, to the police station, and these boys renewed their watch and claim to have seen a fourth man escape down the bank and run away later in the night. The acts of these six boys bring them within the class, described in McClaughry v. King, of those who assumed the personal danger and responsibility of causing their arrests. In case of resistance, or of desire to escape by these desperadoes, each was exposed to hazard of his personal safety. They had laid the trap for the bandits and kept surveillance over them when they had been found and had sent the word, which caused the police to arrive and make the arrests, and, in fact, were the effective cause of the arrests, and the policemen may be said to have acted for them in making the arrests at the time they were made, as is made clear by the line of decisions distinguished and not disapproved by the court in the decision of McClaughry v. King, supra. On that ground, as well as on the ground that these police officers may not receive the reward offered in this case, the amount offered for the apprehension of these three robbers must be awarded to the six boys named, in equal portions. While others had given information that in some degree led to these arrests, the apprehension itself was not made by them, and the reward was not for information which would lead some one to make an apprehension, but to those who performed the act of apprehension.

[6, 7] One of the robbers was arrested, without a warrant, in Buhl, Idaho, by Willie E. May, who was at that time town marshal of the village, and a special deputy sheriff. His appointment had been made in writing, but he received no pay as such special deputy. It is urged that he had no duty to arrest a fugitive felon, under the circumstances, without a warrant, because the statutes of Idaho providing for the arrest and removal in extradition proceedings (sections 8416–8418, Idaho Revised Codes 1908) require that a written complaint be first

filed in the state to which the person charged is to be removed, and that then a warrant must issue in the state where the fugitive is and the arrest can be made only under such warrant. In Ex parte White, 49 Cal. 433, under similar statutes it was decided that one could not be held for removal unless he had first been so charged by a complaint in the demanding state. The authority to hold one in proceedings instituted under such statutes, the culmination of which means the removal of the person to another state, is quite distinct from the authority to make a preliminary arrest, until a proper complaint can be made, and a warrant obtained. See Virginia v. Paul, 148 U. S. 119, 13 Sup. Ct. 536, 37 L. Ed. 386. The authority to hold a prisoner for a reasonable time for such proceedings to be instituted has been many times affirmed. See 2 Moore on Extradition, §§ 591–595. The power of the proper peace officer to make arrest, without a warrant, of a fugitive from justice, provided he has reasonable cause to believe he has committed a felony has also been declared. State v. Taylor, 70 Vt. 1, 39 Atl. 447, 42 L. R. A. 673, 67 Am. St. Rep. 648; State v. Anderson, 1 Hill (S. C.) 327; In re Henry, 29 How. Prac. (N. Y.) 185; Cochran v. Toher, 14 Minn. 385 (Gil. 293); Simmons v. Vandyke, 138 Ind. 380, 37 N. E. 973, 26 L. R. A. 33, 46 Am. St. Rep. 411.

If this power does not exist, then one who has committed a felony may make his escape across the narrow boundary that may exist between two states, and be free from arrest by officers who may know of his guilt and may even have seen his offense committed, because no complaint in writing has been filed in the state where the crime occurred, nor has another complaint been filed in the state to which the criminal has fled, nor has a warrant been issued there. Such preposterous delay would often result in successful escape.

[8] There is no testimony to show the nature of the special deputyship conferred on May by the sheriff of his county. See article 18, § 6, Constitution of Idaho; section 2119, Idaho Revised Codes 1908; Lansdon v. Washington County, 16 Idaho, 618, 102 Pac. 344. He may have been deputized for some particular cases or otherwise limited in his powers, and, in the absence of all evidence as to his authority, it cannot be said that his duties included the arrest of Matthews. As town marshal he was a peace officer (section 7522, Idaho Revised Codes 1908), and therefore could make an arrest (2) when a person had committed a felony, although not in his presence, (3) when a felony has in fact been committed and he has reasonable cause for believing the person arrested to have committed it, (4) on a charge made, upon reasonable cause, of the commission of a felony by the party arrested. Section 7540, Idaho Revised Codes 1908.

May's duty, however, must be judged by the knowledge he possessed at the time he made the arrest. There is no evidence in the record that shows that he knew, or had any reasonable cause to believe, Matthews guilty of a felony. The only testimony on the subject is, from one who accompanied him when he made the arrest, that May stated he was about to arrest "a train robber." There is no evidence as to when or from what source May received any information, nor of its character or extent. In the absence of any testimony showing the nature of

the information possessed by May, it was not shown to be a part of his duty to make the arrest nor was he precluded from earning the reward.

[9] Shelton, another of the robbers, was arrested in Denver, Colo., by two policemen of that city. The duty and power of these particular officers to make this arrest is found in section 41 of chapter 147 of the Revised Statutes of Colorado 1908 (section 7278, Mills' Ann. Stat. 1912), which reads as follows:

"The duty of the chief and other officers of the police, and of the watchmen shall be under the direction of the mayor, and in conformity with the ordinance of the city, to suppress all riots, disturbances and breaches of the peace, to pursue and arrest any person fleeing from justice in any part of the state; to apprehend any and all persons in the act of committing any offense against the laws of the state or ordinances of the city and to forthwith bring such person or persons before the police court or other competent authority for examination, and at all times to diligently and faithfully enforce all such laws, ordinances and regulations for the preservation of good order and public welfare as the city council may ordain, and for such purpose they shall have all the power of constables. The mayor, chief of police and watchmen of the city may, upon view, arrest any person who may be guilty of a breach of the ordinances of the city, or of any crime against the laws of the state, and may, upon reasonable information supported by affidavits, procure process for the arrest of any person who may be charged with a breach of any ordinances of the city." Rev. St. 1908, § 6553.

This authority to arrest a fugitive from justice is evidently confined to the arrest of one who has committed a crime within that state, for by section 36 of the same chapter (section 7272, Mills' Ann. Stat.) it is provided with reference to the chief of police:

"He shall have power to pursue and arrest any person fleeing from justice in any part of the state, and to receive and execute any proper authority for the arrest or detention of criminals fleeing or escaping from other places or states."

This is a limitation of authority to the chief of police for the arrest of a fugitive from another state, and his authority is limited to the execution of a warrant for such arrest. As there does not appear to have been any duty imposed by law upon the two police officers who made the arrest of Shelton, they are entitled to receive the amount offered for that service.

The fee for the stenographer's service in taking testimony will be allowed in the sum of $40, to be taxed as costs, and a decree may be prepared finding that John Belek, James Belek, Frank Krudna, John Krudna, Rudolph Morowisky, and John Krowlik are each entitled to one-tenth of the amount paid into court, that Peter J. Carr and Coleman Bell are entitled jointly to one-fifth, and Homer A. Searle, as administrator of the estate of Willie E. May, to one-fifth, and that the bill of each of the other defendants be dismissed, and that each party pay his own costs.

SOUTHERN BELL TELEPHONE & TELEGRAPH CO. v. CITY OF BIRMINGHAM, ALA., et al.

(District Court, N. D. Alabama, S. D. January 3, 1914.)

No. 240.

1. CONSTITUTIONAL LAW (§ 121*)—OBLIGATION OF CONTRACTS—LAW IMPAIRING.
A municipal ordinance, the effect of which is merely to deny liability on a contract or to declare the repudiation thereof, and which prescribes no antagonistic rights or duties, is not legislation impairing its obligation in violation of the contract clause of the Constitution, although the contract repudiated is valid and binding.
[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 285, 304–311, 342–348; Dec. Dig. § 121.*]

2. CONSTITUTIONAL LAW (§ 135*)—INJUNCTION (§ 59*)—SUBJECTS OF RELIEF—ENFORCEMENT OF MUNICIPAL ORDINANCES.
A city ordinance merely repealing, a prior ordinance which purported to make effective a contract between the city and a telephone company fixing rates to be charged by the company to subscribers for a term of years, on the ground that the contract was ultra vires and invalid, without substituting other rates or restricting the right of the company to fix rates, or prescribing any steps to be taken by the city thereunder, did not impair the obligation of the contract, and a court of equity has no power to grant injunctive relief against it.
[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 380–387; Dec. Dig. § 135;* Injunction, Cent. Dig. §§ 114–116, 128; Dec. Dig. § 59.*]

3. INJUNCTION (§ 59*)—SUBJECTS OF RELIEF—ENFORCEMENT OF CONTRACT.
A court of equity is without jurisdiction to grant an injunction restraining individual subscribers of a telephone company from refusing to pay rates fixed by a contract between the company and the city.
[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 114–116, 128; Dec. Dig. § 59.*]

In Equity. Suit by the Southern Bell Telephone & Telegraph Company against the City of Birmingham, Ala., and others. On motion for preliminary injunction. Denied.

J. T. Stokeley, of Birmingham, Ala., and J. C. Rich, of Mobile, Ala., for plaintiff.

Romaine Boyd, of Birmingham, Ala., for defendants.

GRUBB, District Judge. This is a bill filed by the plaintiff to restrain the enforcement of an ordinance of the city of Birmingham, and to have it declared null and void and a cloud on the plaintiff's title to its franchise to collect tolls from its subscribers. The parties defendant are the city, in its corporate capacity, the three commissioners, in their official capacity, and also individually, as representing the class of subscribers to plaintiff's service who are or will be affected by the increase of rates, who are made parties, under the authority of Equity Rule 38 (198 Fed. xxix). A temporary injunction is prayed for in the bill, and the matter is submitted for decision only upon the application for an injunction pendente lite at this time.

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

The ordinance assailed was enacted December 12, 1913, and, in effect, repealed a previous ordinance of December 22, 1911, which purported to make effective an agreement, between the plaintiff and the city, to fix rates for service to be charged by the plaintiff to the inhabitants of the city, in the future, for a period of five years. By its terms, the plaintiff was to have the right to raise its rates, for duplex residence service, 50 cents a month to each subscriber, beginning the 1st day of January, 1914. The repealing ordinance merely recited the making of the agreement, the passage of the ordinance; that the contract was ultra vires of the powers of the city commission; that it had been breached by the plaintiff's alleged failure to give the character of service stipulated to be given by plaintiff to its subscribers, and declared the contract and ordinance rescinded and annulled as being both ultra vires, and as having been breached by plaintiff. This is the ordinance the validity of which is assailed by the bill. The contention of the plaintiff is that the repealing ordinance impairs the obligation of the original contract and the ordinance ratifying it, and is for that reason obnoxious to both the federal and state Constitutions.

In order to sustain the contention that the ordinance of December 12, 1913, is invalid for the reason asserted, the plaintiff must establish: (1) The existence of the contract; (2) the obligation imposed on the city and its inhabitants by it; and (3) the impairment of such obligation by state legislation. Each is essential to plaintiff's relief and must be established to the satisfaction of the court before an injunction pendente lite should be granted.

[1] The rule is well settled that an ordinance of a municipality, the effect of which is merely to deny liability on a contract or to declare the repudiation thereof, and which prescribes no antagonistic rights or duties, is not legislation impairing its obligation, though the contract so repudiated is valid and binding. In the case of St. Paul Gas Light Co. v. St. Paul, 181 U. S. 142, 21 Sup. Ct. 575, 45 L. Ed. 788, the court expressed the principle in this language:

"The other provision in question created no new right, or imposed no new duty substantially antagonistic to the obligations of the contract, but simply expressed the purpose of the city not in the future to pay the interest on the cost of the construction of the lamp posts which were ordered to be removed. That is to say, it was but a denial by the city of its obligation to pay, and a notice of its purpose to challenge in the future the existence of the duty to make such payment. This denial, whilst embodied in an ordinance, was no more efficacious than if it had been expressed in any other form, such as by way of answer filed on behalf of the city in a suit brought by the company against the city to enforce what it conceived to be its rights under the contract. When the substantial scope of this provision of the ordinance is thus clearly understood, it is seen that the contention here advanced of impairment of the obligations of the contract arising from this provision of the ordinance reduces itself at once to the proposition that wherever it is asserted on the one hand that a municipality is bound by a contract to perform a particular act, and the municipality denies that it is liable under the contract to do so, thereby an impairment of the obligations of the contract arises in violation of the Constitution of the United States. But this amounts only to the contention that every case involving a controversy covering a municipal contract is one of federal cognizance, determinable ultimately in this court. Thus to reduce the proposition to its ultimate conception is to demonstrate its error."

In the case of Mercantile Trust Co. v. Columbus. 203 U. S. 311, 27 Sup. Ct. 83, 51 L. Ed. 198, the court said:

"The ordinance and act were not mere statements of an intention on the part of one of the parties to a contract not to be bound by its obligations. Such a denial on the part, even of a municipal corporation, contained in an ordinance to that effect, is not legislation impairing the obligation of a contract. St. Paul Gaslight Co. v. St. Paul, 181 U. S. 142 [21 Sup. Ct. 575, 45 L. Ed. 788]."

And after quoting from the case there cited, the portion incorporated in this opinion, the court said further:

"In the case at bar the conditions are entirely different. There was not merely a denial by the city of its obligation under the contract, but the question is whether there were not new and substantial duties in positive opposition to those contained in the contract created and their performance provided for by the ordinances and act. The act of the Legislature aided the city by granting it power to itself erect waterworks and to issue bonds in payment thereof, and the city was proceeding to avail itself of the power thus granted, when its progress was arrested by the filing of the bill in this case and the issuing of a temporary injunction. It would seem as if the case were really within the principle decided in Walla Walla v. Walla Walla Water Co., 172 U. S. 1 [19 Sup. Ct. 77, 43 L. Ed. 341]; Vicksburg Water Co. v. Vicksburg, 185 U. S. 65 [22 Sup. Ct. 585, 46 L. Ed. 808]; again reported 202 U. S. 453 [26 Sup. Ct. 660, 50 L. Ed. 1102, 6 Ann. Cas. 253]; Davis v. Los Angeles, 189 U. S. 207 [23 Sup. Ct. 498, 47 L. Ed. 778]; Knoxville Water Co. v. Knoxville, 200 U. S. 22 [26 Sup. Ct. 224, 50 L. Ed. 353.]"

The case of Dawson v. Columbia Trust Co., 197 U. S. 178, 181, 25 Sup. Ct. 420, 422 (49 L. Ed. 713), clearly differentiates the class of cases in which the ordinance merely denies liability and repudiates the contract obligation from the other class in which the ordinance creates rights or duties antagonistic to the contract rights, charged to have been impaired. In that case, the court said:

"The mere fact that the city was a municipal corporation does not give to its refusal the character of a law impairing the obligation of the contracts or deprive a citizen of property without due process of law. That point was decided in St. Paul Gaslight Co. v. St. Paul, 181 U. S. 142–150 [21 Sup. Ct. 575, 45 L. Ed. 788]. Undoubtedly the decisions on the two sides of the lines are very near to each other. But the case at bar is governed by the one which we have cited, and not by Walla Walla v. Walla Walla Water Co., 172 U. S. 1 [19 Sup. Ct. 77, 43 L. Ed. 341], which is cited and distinguished in St. Paul Gaslight Co. v. St. Paul. In Vicksburg Waterworks Co. v. Vicksburg, 185 U. S. 65 [22 Sup. Ct. 585, 46 L. Ed. 808], the city had made a contract with the waterworks company, and afterwards a law was passed authorizing the city to build new works. The city, acting under this law, denied liability and took steps to build the works, whereupon the waterworks company filed its bill, alleging the law to be unconstitutional. This bill was held to present a case under the Constitution. In the case before us there was no legislation subsequent to the contract, and it is not even shown that there was a color of previous legislation for the city's acts. These acts are alleged to be unlawful, and the allegation would be maintained by showing that they were not warranted by the laws of the state. See Hamilton Gas Co. v. Hamilton City, 146 U. S. 258–266 [13 Sup. Ct. 90, 36 L. Ed. 963]; Lehigh Water Co. v. Easton, 121 U. S. 388–392 [7 Sup. Ct. 916, 30 L. Ed. 1059]. We repeat that something more than a mere refusal of a municipal corporation to perform its contract is necessary to make a law impairing the obligation of contracts, or otherwise give rise to a suit under the Constitution of the United States."

In the case of Weller et al. v. City of Gadsden et al., 141 Ala. 642, 37 South. 682, 3 Ann. Cas. 981, the then Chief Justice said:

"The last question is whether, in view of the nullity of the ordinance, assailed by the bill, a resort to a court of equity by the complainants, under the circumstances disclosed, is either proper or necessary. This question has not been discussed by counsel for the city, who have confined themselves to insisting that the ordinance contract was totally invalid, and that, at all events, the city had the right to repeal or revoke it, before work was begun. It necessarily arises, however, and must be decided, upon the motion to dismiss for want of equity; for although the rights of appellants are declared, in arriving at the ultimate conclusion here reached, it would be idle to return the case to the court below, merely for the purpose of having a decree, nullifying that which appears on its face to be void. 6 Am. & Eng. Ency. Law (2d Ed.) 155; Meloy v. Dougherty, 16 Wis. 269.

"In the fourth paragraph of the bill, it is alleged in general terms that 'the board of aldermen are threatening and endeavoring and attempting to breach said contract and repudiate the same, by preventing orators from using said streets, avenues, and alleys for the purpose of laying said water pipes, mains,' etc., but at the close of the same paragraph there is a specification under this general allegation that 'the said mayor and board of aldermen attempted to deny and deprive orators of the use of said streets, avenues, and alleys in a particular way, that is, by the passage of an ordinance, a copy of which is hereto attached, marked "Exhibit B."' It will be noted that the time for beginning work, and for the actual enjoyment of the franchise, has not arrived and the bill does not aver a readiness or an offer to begin work, nor any application to the city to fix grades or designate streets, wherein mains are to be laid, nor any threatened act of interference with anything complainants desired to do, or that they had a right to do. Obviously, the bills simply make a case of the passage of a void ordinance, which does not even cast a cloud on their franchise or contract; it not being necessary to introduce evidence to demonstrate its invalidity. Parker v. Boutwell, 119 Ala. 297 [24 South. 860]; Borst v. Simpson, 90 Ala. 373 [7 South. 814].

"Counsel on both sides in their briefs treat the case upon the theory that nothing further was done by the city than to pass the ordinance. It is conceded by complainants that this is not a bill for specific performance. It is said to be one 'to prevent the destruction of contractual obligations,' and is treated also by their counsel as one to protect a franchise. In support of its equity, four cases are cited. S. & N. R. Co. v. Highland Avenue & Belt R. Co., 98 Ala. 400 [13 South. 682, 39 Am. St. Rep. 74]; Bienville Water Co. v. Mobile, 112 Ala. 260 [20 South. 742, 33 L. R. A. 59, 57 Am. St. Rep. 28]; Port of Mobile v. L. & N. R. Co., 84 Ala. 115 [4 South. 106, 5 Am. St. Rep. 342]; Hendricks v. Hughes, 117 Ala. 591 [23 South. 637]. But each of them was a case, wherein there was a threatened invasion by some special act of interference with a right or franchise then being enjoyed or exercised. When Mitchell and associates, their successors or assigns, are ready to begin work under their contract, the void ordinance will be no obstacle, and if any interference with their rights is then threatened, it will be time enough to resort to judicial proceedings, and to consider what the remedy shall be. The repealing ordinance prescribed no penalties, and, in and of itself required no affirmative action, hostile to the rights of the complainants, on the part of the mayor or other officers or agents of the municipality.

"The bill, therefore, is without equity. As the Supreme Court of Iowa said in Des Moines Gas Co. v. City of Des Moines [44 Iowa, 505] 24 Am. Rep. 756: 'If the ordinance sought to be enjoined is void, by reason of its unconstitutionality, the plaintiff can be in no wise injured by its passage. A void law is no law, and this without doubt is true as to an ordinance. No injury —much less one of an irreparable character—can be inflicted by such an ordinance.' It is only when the invalid ordinance is sought to be put in force, or its enforcement is threatened to the injury of a right or franchise, then being enjoyed or sought to be exercised, that resort to a court for protection is necessary; and then relief is granted, not against the void ordinance, but against the wrongful act, which threatens invasion of the right."

The plaintiff relies upon the cases of Iron Mountain R. R. Co. v. Memphis, 98 Fed. 113, 37 C. C. A. 410, Detroit v. Detroit Citizens Ry.

Co., 184 U. S. 368, 22 Sup. Ct. 410, 46 L. Ed. 592, and Cleveland v. Cleveland City Ry. Co., 184 U. S. 317, 24 Sup. Ct. 756, 48 L. Ed. 1102. In each of these cases there was something more in the ordinance than a mere declaration of repudiation of the contract. The ordinance, in each case, had an affirmative provision, susceptible of enforcement, in addition to the declaration of invalidity.

In the case of Iron Mountain R. R. Co. v. Memphis, the ordinance declared the forfeiture of a franchise to occupy a street with railroad tracks, and, as the court held, authorized a re-entry by the city upon the premises in possession of the railroad. Its effect, if enforced, was to dispossess the railroad of property in its possession, and it was to prevent this enforcement and the consequent dispossession of the railroad, that it was held entitled to relief. In the case at bar the ordinance authorizes no interference or disturbance of the plaintiff or its property or franchise, but merely attempts to declare invalid a contract.

In the case of Detroit v. Detroit Citizens' Ry. Co., 184 U. S. 368, at page 380, 22 Sup. Ct. 410 (46 L. Ed. 592), the city by an ordinance had reduced the fare of the street railroad company, and had prescribed a specific maximum fare as the lawful fare. Having fixed a specific fare as the only lawful fare, the railroad company was forced to accept the reduced fare, or eject the passenger, and likely create in so doing a breach of the peace. The answer of the city admitted that "they intend to enforce obedience by the company to such ordinances." Even then, the court stressed the fact that the answer of defendants did not question the jurisdiction of a court of equity, as partly justifying its retention of jurisdiction over the cause.

In the case of Cleveland v. Cleveland City Ry. Co., 194 U. S. 517, at page 531, 24 Sup. Ct. 756, at page 761 (48 L. Ed. 1102), there was also a specific maximum fare of four cents fixed by the ordinance as the only lawful fare, as was true in the Detroit case. The court relies upon the peculiar fact, present in the case, that the enforcement of the ordinance would have established two rates of fare on the same line—

"leading to consequences dangerous to the public interest, peace, and tranquility, the extent of which it would be difficult in advance to perceive. And this, we think, brings the case directly within the principle by which jurisdiction in equity was maintained in Detroit v. Detroit Citizens' Ry. Co., 184 U. S. 368 [22 Sup. Ct. 410, 46 L. Ed. 592]."

It is clear that jurisdiction was only sustained because, by reason of the peculiar relations of a passenger carrier to its patrons and the fact that the ordinance fixed a specific rate of fare, the ordinances would either necessarily have to be observed by the carrier, or breaches of the peace continually provoked in the resistance of them, to the detriment of the parties and the public. In each of those cases, as in this case, the ordinance provided no penalty for its breach, but there were other means of enforcement, from the nature of the carrier's business, that do not exist in this case.

[2] The ordinance complained of in the bill in this case fixes no rate to be observed by the plaintiff. It merely declares void a con-

tract which fixed rates. It leaves the plaintiff at liberty to fix its own rates, subject to liability only if they are unreasonable. It seeks to deprive the plaintiff of the protection of the agreement, but otherwise leaves it unhampered. The plaintiff can still put in force the increased rates. Its effect is therefore limited to repudiation of the contract, and it comes within the line of cases which holds that a mere declaration of repudiation of a contract is not action impairing the obligation of a contract, rather than within the other line of cases, relied on by the plaintiff, in which the ordinances prescribed, in addition, action looking to the enforcement of the contract.

Again, in this case the danger of breaches of the peace, as a result of the plaintiff's resistance to the ordinance, is removed because of the differing character of plaintiff's business from that of a carrier of passengers. If the plaintiff's patrons refuse to pay the rate fixed by it, it has but to discontinue their service. Its rates are collected in advance. By refusing to furnish service, it subjects itself only to the liability to be sued that any person does who breaches a contract, in good faith, but under a mistaken view of his rights. Equity does not relieve against such a situation. Discontinuance of service does not imply the necessity of ejection by force, as does the refusal to accept a reduced fare from a passenger who is already on the carrier's vehicle. The reasons which induced the Supreme Court to distinguish the cases, relied upon by plaintiff, from the general legal principle stated are absent from this case. It presents only a case of a declared repudiation of a contract by an ordinance, one which, it is well settled, does not constitute impairing action by the state.

The ordinance of December 12, 1913, has no other effect than to declare the invalidity of the previous contract and ordinance of December 22, 1911. It does not prescribe any new or different rates or tolls to be adopted by plaintiff, nor any steps to be taken by the city, or any of its officers, to enforce the abrogation of the contract. It contains no penalties, and there is nothing required to be done under it in the way of enforcing it. The harm, if any, to be caused by it, was completely accomplished upon its enactment. Its enactment could not have been properly enjoined in advance, since, being legislative action, it was not subject to the control of the courts. Its enforcement by the city cannot be enjoined, since by its terms it is not to be so enforced and no steps are prescribed to be taken by any one in the way of its enforcement.

It is said that the injury to plaintiff from its enactment comes from the moral effect its passage will have on the willingness of its subscribers to pay the increased rates after January 1, 1914. The court, however, to avoid such a result, would have been powerless to enjoin its passage, if timely application had been made to it, and a fortiori it has no power now to direct its repeal. The purpose of the plaintiff seems to be to offset the moral effect of the declaration of the invalidity of the contract, contained in the repealing ordinance, by obtaining from the court a declaration of the invalidity of the repealing ordinance in the decree for a temporary injunction.

The issuance of a temporary injunction is solely to preserve the

status pending final hearing. If it can have no such effect, if there is no disturbance of the status imminent, or if the writ, when issued, will be a mere abstract declaration of a legal principle, the court has no jurisdiction to issue it. The prevention of irreparable material injury, pending final hearing, alone justifies the court in so acting. It has no right to issue the writ for the purpose merely of declaring the law for the moral effect such a declaration may have on the parties to the suit, and when no material good can be accomplished, or is expected to be accomplished, directly thereby. There is no jurisdiction in the court to enjoin the enforcement of an ordinance which, by its terms, admits of the taking of no steps looking towards its enforcement.

The prayer for an injunction pendente lite asks that the defendants and the subscribers be enjoined—

"from doing any act or thing pursuant to or under the terms of said ordinance of December 12, 1913, in violation of said contract of December 22, 1911, and from molesting your orator in the exercise of its right to collect the rates or charges fixed by said contract, or refusing to pay the rates and charges fixed thereby."

An inspection of the ordinance of December 12, 1913, shows that no action of the city or its officers could be taken "pursuant to or under the authority" of it, since it prescribed none to be taken. It is declarative only of a forfeiture of the contract, without providing at all as to how the forfeiture is to be enforced. The only action taken, or to be taken with relation to the ordinance, upon the part of the city was its enactment. That could not have been enjoined in the first instance. Its repeal cannot now be ordered by the court. As the ordinance contains no provisions looking to its enforcement by the city or its officers, it is clear that there is no room for injunctive relief with relation to the ordinance against the city or its agents or the commissioners, as such.

[3] The bill also makes the commissioners parties defendant in their individual capacity, as representing the class of plaintiff's subscribers adversely affected by the change in rates, and the prayer asks that the subscribers be enjoined from "refusing to pay the rates and charges fixed" by the contract of December 22, 1911. It is quite clear that such relief could not be granted if there had been no ordinance of repeal involved in the case. In the absence of such an ordinance, there could be no contention of an impairment of the contract by state legislation, since in that case there would be no such legislation upon which the plaintiff could rely. The bill bases plaintiff's right to relief entirely upon such impairment.

A court of equity will not take jurisdiction to enjoin the refusal to comply with a contract in ordinary cases, nor will it do so in cases where one person has a number of contracts with different persons, but of a similar nature, for the purpose of preventing a multiplicity of suits. Laying aside the ordinance which is assailed, the bill presents merely a case in which it is anticipated that a number of persons may decline to pay a single person claimed debts because a similar legal question has arisen as to each as to their liability. It requires no argument or citation of authority to show that a court of equity has no

jurisdiction over such a controversy, even for the purpose of avoiding a multiplicity of suits, or that Equity Rule 38 is not intended to apply to such a case. Such a controversy is legal and not equitable in its nature, and the fact that one party may have many separate controversies with entirely different persons, but involving the same legal question, cannot deprive a court of law of its jurisdiction over such a controversy, and vest it in a court of equity.

The bill does not aver that the subscribers, even those who are made parties defendant as representatives of the class, have actually refused, or have even threatened to refuse, to pay the increased rates. The averment is that they will refuse to pay, relying upon the enactment of the ordinance of December 12, 1913. This is insufficient to justify injunctive relief, even if the court had general equitable jurisdiction of the cause. An order would be drastic that enjoined 14,000 persons from refusing to pay the plaintiff's charges, regardless of their ability or inability to pay, and regardless of what defenses they might have to the claim, and in a suit in which but three of the 14,000 were made parties defendant. It would require a clear case for injunctive relief to justify such action.

If the injunction would not lie in the absence of the ordinance, has the passage of the ordinance changed the situation? The ordinance does no more than express the opinion of the city commissioners that the contract of December 22, 1911 was (1) ultra vires in its inception and for that reason null and void, and (2) that the plaintiff had breached it by failing to give the service required and an election to rescind. It is manifest that the courts and not the commission must determine between the parties whether or not the original contract is ultra vires, and whether or not it has been breached, as claimed by the commissioners. If it was valid in its inception, and has not been broken subsequently by the plaintiff, the declaration of the commissioners, contained in the ordinance, to the contrary, cannot make it invalid. On the other hand, if it was ultra vires when made, or has been since broken by the plaintiff, it would be just as void in the absence of such a declaratory ordinance. The ordinance, at most, expressed the election of the commissioners to rescind. The burden was on them after, just as it was before, the passage of the ordinance, either to show the original invalidity of the ordinance, or subsequent breach by the plaintiff. Rescission was not even a condition precedent to action, legal or otherwise, on the part of the city, based on the invalidity of the contract. The passage of such an ordinance, merely declaratory in its nature, did not change the situation or the attitude of the parties to each other, or afford the plaintiff any ground for injunctive relief, if it had none before; and, if the subscribers could not have been enjoined from refusing to pay in the absence of such an ordinance, they should not be after and because of its enactment.

My opinion is that the bill does not make out a case for the granting of an injunction pending the final hearing, because it fails to show any state legislation impairing the obligation of the contract of December 22, 1911. In view of this conclusion, it is not necessary to pass upon the validity of that contract, or the obligation upon the city

and its inhabitants, by virtue of it, to respect the rates provided in it; and the solution of these questions will be best determined upon the final hearing, if it then appears that the bill contains equity.

BAY v. MERRILL & RING LUMBER CO.

(District Court, W. D. Washington, N. D. February 20, 1914.)

No. 2439.

1. TRIAL (§ 139*)—QUESTIONS OF LAW AND FACT—DIRECTION OF NONSUIT.

It is the duty of the court to direct a nonsuit when the evidence is not sufficient to sustain a verdict.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 338–341, 365; Dec. Dig. § 139.*]

2. MASTER AND SERVANT (§ 265*)—INJURIES TO SERVANT—EMPLOYERS' LIABILITY ACT.

In order that an injured servant of a railroad company may recover under Employers' Liability Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp. 1911, p. 1322), the burden is on him to show that the railroad company owned and operated a common carrier railroad; that it was engaged in interstate or foreign commerce; and that plaintiff was injured while employed by it in such commerce.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 877–908, 955; Dec. Dig. § 265.*

Employés engaged in interstate commerce within Employers' Liability Act, see note to Baltimore & O. R. Co. v. Carr, 124 C. C. A. 571.]

3. CARRIERS (§ 4*)—"COMMON CARRIER."

A "common carrier" is one who undertakes to transport for hire from one place to another the goods of such as wish to employ him.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1, 462–478; Dec. Dig. § 4.*

For other definitions, see Words and Phrases, vol. 2, pp. 1313–1319; vol. 8, p. 7607.]

4. COMMERCE (§ 27*)—INJURIES TO SERVANT—EMPLOYERS' LIABILITY ACT—INTERSTATE COMMERCE.

Defendant owned a tract of timber land, which it was engaged in logging, and a railroad on which it transported its logs from the woods to Puget Sound, where they were sold to millowners and manufactured into lumber; 80 per cent. of the output of the mill being shipped to other states or countries. Defendant's articles of incorporation authorized it to do business as a common carrier, but in fact the services rendered on its road had all been private and only for the purpose of carrying the logs to the Sound. *Held*, that the transportation of the logs did not constitute interstate commerce within the rule that a commodity is not in interstate commerce until it has entered on its final passage to another state or foreign country, and hence defendant could not be made liable under Employers' Liability Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp. 1911, p. 1322), for injuries to an employé while assisting in the operation of the road.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 25; Dec. Dig. § 27.*]

At Law. Action by August Bay against the Merrill & Ring Lumber Company. On motion for a new trial after nonsuit. Denied.

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

John T. Casey, of Seattle, Wash., for plaintiff.

Hughes, McMicken, Dovell & Ramsey, of Seattle, Wash., for defendant.

Plaintiff cites the following authorities: Colasurdo v. Central Ry. (C. C.) 180 Fed. 832; The Daniel Ball v. U. S., 10 Wall. 557, 19 L. Ed. 999; El Paso Ry. v. Gutierrez, 215 U. S. 88, 30 Sup. Ct. 21, 54 L. Ed. 106; Slocum v. New York Life Ins. Co., 228 U. S. 364, 33 Sup. Ct. 523, 57 L. Ed. 879; Pedersen v. Delaware, etc., Ry., 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. 1125; St. Louis Ry. Co. v. Seale, 229 U. S. 156, 33 Sup. Ct. 651, 57 L. Ed. 1129; N. & W. Ry. Co. v. Earnest, 229 U. S. 114, 33 Sup. Ct. 654, 57 L Ed. 1096; I. C. Ry. v. Porter, 207 Fed. 311, 315, 125 C. C. A. 55; Winona Ry. v. Blake, 94 U. S. 180, 24 L. Ed. 99; State ex rel. Clark v. Superior Court, 62 Wash. 612, 114 Pac. 444; North River Boom Co. v. Smith, 15 Wash. 138, 45 Pac. 750; State ex rel. Wilson v. Superior Court, 47 Wash. 397, 92 Pac. 269; State ex rel. Burrows v. Superior Court, 48 Wash. 277, 93 Pac. 423, 17 L. R. A. (N. S.) 1005, 125 Am. St. Rep. 927; McCall v. People, 136 U. S. 104, 10 Sup. Ct. 881, 34 L. Ed. 391; Railroad Co. v. Worthington, 225 U. S. 101, 32 Sup. Ct. 653, 56 L. Ed. 1004; Behrens v. Railway (D. C.) 192 Fed. 581; Darr v. Railway (D. C.) 197 Fed. 665; Thompson v. Railway (D. C.) 205 Fed. 203; Northern Pacific Ry. v. Maerkl, 198 Fed. 1, 117 C. C. A. 237; Worthington v. Elmer, 207 Fed. 306, 125 C. C. A. 50; R. R. Commission of La. v. Tex. & Pac. Ry., 229 U. S. 336, 33 Sup. Ct. 837, 57 L. Ed. 1215, decided June 10, 1913; General Oil Co. v. Grain, 209 U. S. 212, 28 Sup. Ct. 475, 52 L. Ed. 754; Dozier v. Alabama, 218 U. S. 124, 127, 30 Sup. Ct. 649, 54 L. Ed. 965, 28 L. R. A. (N. S.) 264; Rearick v. Pennsylvania, 203 U. S. 507, 27 Sup. Ct. 159, 51 L. Ed. 295; In re Selman (D. C.) 204 Fed. 839; Baltimore v. Darr, 204 Fed. 751, 124 C. C. A. 565; Rosenbaum Co. v. Railway (C. C.) 130 Fed. 46; State v. Ry. (Tex. Civ. App.) 44 S. W. 542; Caldwell v. Nor. Car., 187 U. S. 622, 23 Sup. Ct. 229, 47 L. Ed. 336; Houston v. Insurance Co., 89 Tex. 1, 32 S. W. 889, 30 L. R. A. 713, 59 Am. St. Rep. 17; I. C. C. v. Railway, 215 U. S. 452, 30 Sup. Ct. 155, 54 L. Ed. 280; Texas Ry. v. R. R. Commission (C. C.) 183 Fed. 1005; Horton v. Railway, 72 Wash. 503, 130 Pac. 897; U. S. v. Colorado Ry., 157 Fed. 321, 85 C. C. A. 27, 15 L. R. A. (N. S.) 167, 13 Ann. Cas. 893; Robbins v. Shelby County, 120 U. S. 489, 7 Sup. Ct. 592, 30 L. Ed. 694; Mondou v. N. Y. Ry., 223 U. S. 1, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44; Kelly v. Rhoades, 188 U. S. 1, 23 Sup. Ct. 259, 47 L. Ed. 359; U. S. v. Ry. (D. C.) 197 Fed. 624; So. Ry. v. Gadd, 207 Fed. 277, 125 C. C. A. 21; Yazoo Ry. v. Wright, 207 Fed. 281, 125 C. C. A. 25; Walker v. New Mexico & S. P. R. Co., 165 U. S. 593, 17 Sup. Ct. 421, 41 L. Ed. 837; U. S. v. Union Stockyards, 226 U. S. 286, 33 Sup. Ct. 83, 57 L. Ed. 226, decided December 9, 1912.

NETERER, District Judge. The testimony upon the trial, on the part of the plaintiff, established the fact that the defendant was the owner of a large tract of timber land in King and Snohomish counties, and was engaged in logging the land, selling all logs upon the open market, and in connection with this land it owned a logging road of standard gauge build which was connected by switch or siding with the Great Northern Railway; that the defendant operated over its road engines and logging cars; that it has large booming grounds in the waters of Puget Sound about two miles below Mukilteo; that it operates several large logging camps upon its lands; that over its logging road it runs five or six logging trains each day to and from its various camps and places in its booms over half a million logs per day; that the logs are sold by the defendants to the various mills upon Puget Sound; that poles and piles which it cuts from its land are sold to a company which ships them to California; that the logs are sold by it from its boom to the Weyerhouser Mill at Everett, and are manu-

factured by said mill with other logs purchased by it from other sources and sold on the market upon orders which are received by the mill from the eastern and central western states and coast cities, and from foreign countries, and from the state of Washington; that about 80 per cent. of the output of the mill is shipped to other states or countries; that the defendant is a corporation organized under the laws of the state of Washington, and among its authorized powers is that of common carrier together with numerous other powers; that the defendant never at any time operated its road as a common carrier or tendered it in any way to the public for service; that the services rendered by the said road have all been private, and for the purpose of carrying to the booming ground of the defendant the timber taken from its land; that no other product has been taken over the road except some timber taken from the land of another under contract with the defendant to log the land for the owner and deliver the logs in the waters of Puget Sound; and certain poles or piles taken from the land of the defendant which were sold to the National Pole Company at a certain rate per stumpage delivered at the boom of the defendant company; that no service was rendered by the plaintiff in the hauling of any of the poles.

After the plaintiff rested his case, the defendant moved for a nonsuit on the ground that there was no testimony to sustain a verdict. The motion was granted. A motion for a new trial has been filed and submitted.

[1] It is strongly urged by the plaintiff that the court erred in granting motion for nonsuit, citing Slocum v. New York Life Ins. Co., 228 U. S. 364, 33 Sup. Ct. 523, 57 L. Ed. 879. It is urged in argument that it is the duty of the judge to submit a case to the jury upon the testimony which is presented, and let the jury determine whether recovery should be had, upon the instructions which the court gives upon the law, and that it is an invasion of the constitutional right of the plaintiff to deprive plaintiff of this privilege. In the Slocum Case the trial judge submitted the issues to the jury upon the testimony which was presented on the part of the litigants. Thereafter a judgment was entered non obstante veredicto by the Circuit Court of Appeals. The Supreme Court held that this was an infraction of the seventh amendment to the Constitution of the United States, which provides:

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined * * * than according to the rules of the common law."

The court stated that the entering of a judgment by the court non obstante veredicto was the trial of an issue that had been submitted to the jury, and that the power of the court was limited to granting a new trial. The same case, however, holds—and this has been recognized by all of the federal courts—that, where there is no testimony to support a verdict, it is the duty of the court to grant a dismissal. The judge's function is to superintend and direct the course of trial, and the jury are to determine the ultimate facts in issue; and, when the facts disclosed by the testimony clearly cannot under the law support a verdict, it would be useless to submit it to a jury.

The act under which this action is prosecuted provides:

"That every common carrier by railroad while engaged in commerce between any of the several states * * * shall be liable in damages," etc.

[2] In order for the plaintiff to recover he must establish that the defendants owned and operated a common carrier railway and was engaged in interstate or foreign commerce, and that the plaintiff was employed by the defendant in such trade or commerce and was injured while so employed. Second Employers' Liability Cases, 223 U. S. 1, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44; Pedersen v. Del. Lack. & West. Ry., 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. 1125.

[3] A common carrier is one who undertakes to transport for hire from one place to another the goods of such as choose to employ him. 2 Words & Phrases, 1312; Jackson, etc., Iron Works v. Hurlbut, 158 N. Y. 34, 52 N. E. 665, 70 Am. St. Rep. 432.

[4] A concern is not a common carrier that is engaged in transporting its own products, and, before a concern incorporated as a common carrier could come within the terms of the Employers' Liability Act of Congress, it would have to do something further than merely file its articles of incorporation. The timber holdings and the railroad are held by the same concern, operated together as one property; the railroad is used as a "plant" facility to bring the logs to the booming grounds of the defendant on tidewater. Joint Rates with Wash. Western Ry., 27 Interst. Com. Com'n Rep. 630. The defendant was simply engaged in placing the product of its own land in its own booming grounds so as to be in a marketable condition. The act of the defendant in placing its logs in the boom or sale grounds can best be compared to the farmer placing his corn or wheat in a crib or granary, and when so placed to dispose of it upon the market to persons offering the best prices. So long as the product of the forests of the defendant remained in the boom grounds, it certainly cannot be contended that any relation of common carrier or interstate commerce could enter into or attach thereto. If no interstate commerce character or common carrier relation could attach to the logs in the boom by being permitted to remain there covering a long period of time, the fact that they remained there for a short interval cannot change that relation or character.

It becomes important to know when the logs in issue began their final journey to the market and to their final destination. A commodity is not in interstate commerce until it has entered upon its final passage to another state or foreign country.

"Whenever a commodity has begun to move as an article of trade from one state to another, commerce in that commodity between the states has commenced." The Daniel Ball Case, 10 Wall. 565, 19 L. Ed. 999.

"When the products of the farm or the forest are collected and brought in from the surrounding country to a town or station serving as an entrepot for that particular region, whether on a river or a line of railroad, such products are not yet exports, nor are they in process of exportation, nor is exportation begun until they are committed to the common carrier for transportation out of the state to the state of their destination or have started on their ultimate passage to that state." Coe v. Errol, 116 U. S. 517, 525, 6 Sup. Ct. 475, 477 (29 L. Ed. 715).

The same language is in substance and effect repeated by the same court in every case which has been called to my attention. "Continuity of movement," said the Supreme Court in the Sabine Tram Case, 227 U. S. 111, 33 Sup. Ct. 229, 57 L. Ed. 442, is the concluding factor in determining whether a commodity has started on its ultimate passage to a foreign state.

The Supreme Court of the United States, in Bacon v. Illinois, 227 U. S. 504, 33 Sup. Ct. 299, 57 L. Ed. 615, which was a case where grain was purchased in localities in a number of states and shipped by original owners who were residents of such states and consigned to New York, Philadelphia, and other eastern cities, the owner reserving the right to remove the grain at Chicago for the purpose of weighing, cleaning, inspecting, etc., and thereafter to be reshipped to destination and consignees at the election of the owners, held that the owner had the privilege of continuing the transportation under the shipping contract, of which he might avail himself, but that this provision in the contract made it optional with the owner whether the grain should continue to its destination or not, and when it was taken from the cars at Chicago to the private elevator that the transportation had ceased and the interstate commerce character had been ended. In the instant case the logs had not entered upon a final journey to their ultimate destination. They had simply been accumulated in their raw state and shipped to the boom grounds, where they were distributed to the various mills which purchased the logs and manufactured them into lumber. I do not believe that the act was intended to cover such a case, and the conclusion is inevitable that the facts in this case do not bring the plaintiff within the liability act, under which this action is prosecuted. Any other conclusion on the part of the court, it seems to me, would be revolutionary in endeavoring to adopt a plan or system which had not been contemplated by Congress to the business interests of the country, and no good purpose could be subserved.

The motion for a new trial is denied.

NORDGARD v. MARYSVILLE & N. RY. CO. et al.

(District Court, W. D. Washington, N. D. February 21, 1914.)

No. 2364.

1. TRIAL (§ 139*)—QUESTIONS OF LAW AND FACT—DIRECTION OF NONSUIT.
   It is the duty of a federal court to direct a nonsuit when the evidence is not sufficient to sustain a verdict.
   [Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 338–341, 365; Dec. Dig. § 139.*]

2. COMMERCE (§ 27*)—INJURIES TO SERVANT—EMPLOYERS' LIABILITY ACT—COMMERCE.
   Defendant railroad company carried logs from the forests in Washington to Puget Sound, where part of them were sold to various mills and the remainder taken to defendant milling company where they were manufactured. The lumber was piled in a yard, about 20 per cent. sold in the local market, and the remainder shipped to various points in and

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

out of the state. *Held* that, since continuity of movement is essential in determining whether a commodity is started in interstate commerce, the logs, during transportation from the forest to Puget Sound, in which plaintiff was employed, were not being transported in interstate commerce, and hence the railroad company in so transporting them was not liable for injuries to plaintiff under Federal Employers' Liability Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp. 1911, p. 1322).

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 25; Dec. Dig. § 27.*]

At Law. Action by Gunder Nordgard against the Marysville & Northern Railway Company and the Stimson Mill Company. On motion for a new trial after nonsuit. Denied.

John T. Casey, of Seattle, Wash., for plaintiff.

Hughes, McMicken, Dovell & Ramsey, of Seattle, Wash., for defendants.

NETERER, District Judge. The testimony in this case shows that the defendant was a common carrier and was carrying logs on its railroad or logging road from the forests in the state of Washington to Puget Sound; that it employed the plaintiff in such transportation; that the logs were dumped into the waters of Puget Sound, and thereafter a part of the logs were disposed of to various mills on the sound, the remaining logs being taken to the Stimson Mill Company, also on Puget Sound, and there manufactured into lumber. This lumber was piled in the lumber yard, and about 20 per cent. was sold in the local market, and the remainder shipped upon orders thereafter obtained either by rail or boat to various points in the state of Washington and other states and foreign countries. At the conclusion of the testimony, the defendants moved for a directed verdict, and a judgment was entered in favor of the defendants. The matter is now before the court upon a motion for a new trial.

[1] The contention of the plaintiff that the court in granting judgment on the motion for a directed verdict violated the seventh amendment to the Constitution has no merit. The Supreme Court of the United States in an unbroken line of decisions has held that, where the evidence produced at the trial was not sufficient to sustain a verdict, it is the duty of the court not to submit the matter to the jury. This is expressly sustained in Slocum v. New York Life Ins. Co., 228 U. S. 364, 33 Sup. Ct. 523, 57 L. Ed. 879, cited by the plaintiff, and this rule is adhered to by this court in Bay v. Merrill Lumber Co., 211 Fed. 717, filed February 20, 1914.

Does the testimony show that the defendant was engaged in interstate or foreign commerce, and that the plaintiff was injured while employed in such transportation? If it does, a motion for a new trial must be granted. Second Employers' Liability Cases, 223 U. S. 1, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 144; Pedersen v. Del., Lack. & West. Ry., 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. 1125.

[2] It is contended that, the local demand not being sufficient to consume all the lumber, it therefore was intended for interstate or foreign shipment. It has been uniformly held by the Supreme Court of

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

the United States that a commodity is not in interstate commerce until it has entered upon its final passage to another state or foreign country.

"Whenever a commodity has begun to move as an article of trade from one state to another, commerce in that commodity between the states has commenced." The Daniel Ball Case, 10 Wall. 563, 19 L. Ed. 999.

"When the products of the farm or the forest are collected and brought in from the surrounding country to a town or station serving as an entrepôt for that particular region, whether on a river or on a line of railroad, such products are not yet exports, nor are they in process of exportation, nor is exportation begun until they are committed to the common carrier for transportation out of the state to the state of their destination, or have started on their ultimate passage to that state." Coe v. Errol, 116 U. S. 517, 525, 6 Sup. Ct. 475, 477 (29 L. Ed. 715).

"Continuity of movement is the concluding factor in determining whether a commodity has started on its ultimate passage to a foreign state." Sabine Tram Case, 227 U. S. 111, 33 Sup. Ct. 229, 57 L. Ed. 442.

The logs in issue or their product had not begun to move from the state of Washington to another state or foreign country. The relation of foreign commerce at no time had been acquired. No continuity of movement had at any time been inaugurated. The entire product of the logs not sold to other local mills was accumulated in the millyard of the Stimson Mill Company awaiting orders, either local or foreign, and it cannot be determined whether the product of the logs at the time they were transported, in the act of which the plaintiff was injured, would be intrastate, interstate, or foreign commerce, and this cannot be ascertained until after the orders had been received. There was nothing to prevent all being sold locally or shipped to points within the state, if demand had been made. The shipment of the logs to the waters of Puget Sound and the transporting of a portion of these logs to the Stimson Mill Company, where they were manufactured into lumber, which was afterwards sold, cannot be said to have entered them upon a final journey to their ultimate destination at the time they were transported over the railroad or logging road. How can it be said that the product of the logs was interstate commerce when the Supreme Court of the United States, in Bacon v. Illinois, 227 U. S. 504, 33 Sup. Ct. 299, 57 L. Ed. 615, held where grain was purchased in localities in a number of states and shipped by original owners who were residents of such states and consigned to Philadelphia, New York, and other eastern cities, place of ultimate destination, the owner reserving the right to remove the grain at Chicago for the purpose of weighing, cleaning, inspection, etc., and thereafter the grain to be shipped to consignees at the election of the owner, held that the interstate character was ended when it was temporarily removed from the cars in Chicago for the purpose designated? In the instant case the interstate character had never been initiated.

The authorities cited by the plaintiff are not in point here. Bay v. Merrill & Ring Lumber Co., 211 Fed. 717, filed February 20, 1914.

The motion for a new trial is denied.

UNITED STATES v. CHICAGO JUNCTION RY. CO. (four cases).

(District Court, N. D. Illinois, E. D. November 28, 1913.)

Nos. 10,103, 10,406, 10,408, 10,608.

• CARRIERS (§ 37*) — TRANSPORTATION OF CATTLE — 28-HOUR LAW — SWITCHING SERVICE.

Defendant railroad company maintains a switching service connecting various railroad lines with the Union Stockyards in Chicago, transporting cattle from the trunk line carriers to the stockyards for unloading in accordance with orders sent to defendant's servants from the stockyard company. Defendant transported certain cars of horses that had been confined in excess of the statutory period before they were delivered to defendant, consuming no more time than was reasonably necessary to perform the service of transporting the cars to the unloading chutes with the exception of one car, which was delayed because it was discovered, after it had been "spotted," that it could not be unloaded at the particular chute because the horses were not provided with halters. *Held*, that defendant was not guilty of knowingly and willfully confining the animals in violation of the 28-Hour Law (Act June 29, 1906, c. 3594, 34 Stat. 607 [U. S. Comp. St. Supp. 1911, p. 1341]).

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 95, 927; Dec. Dig. § 37.*]

Actions by the United States of America against the Chicago Junction Railway Company. Judgment for defendant in each case.

Four actions to recover penalties for alleged violations of the Act of June 29, 1906, "An act to prevent cruelty to animals while in transit." The facts covered by stipulation are:

The Chicago Junction Railway Company, the defendant, is a railroad corporation organized under the laws of the state of Illinois, and doing a railroad business wholly within the city of Chicago, in said state, and principally within the district comprising the Union Stockyards in that city. The Union Stockyards are owned and operated by a corporation known as the Union Stockyard & Transit Company of Chicago. The tracks owned and operated by the defendant at the present time and during the period of the alleged violations herein are located wholly within the city of Chicago, county of Cook, and state of Illinois. They consist of main tracks running east and west from a point on the lake front in the city of Chicago, near the intersection of Thirty-Ninth street and the tracks of the Illinois Central Railroad Company westerly 8¼ miles to a point in the city of Chicago. In addition to the main tracks running between those two points, the company operates a large number of switch tracks in and through the Union Stockyards district to the industries located there and to the various loading and unloading platforms of the Union Stockyard & Transit Company. The defendant does not own, lease, control, or operate loading and unloading platforms or facilities.

Car load shipments of horses, such as are involved in these cases, originating outside of Illinois, and destined to eastern points beyond Chicago, or to points in the Stockyards district, are transported from points of origin to Chicago in stock trains of the trunk line carriers, to a receiving track of the defendant, known as the "Horse Track," located at Fortieth street and Emerald avenue, Emerald avenue being the first street east of Halsted street, and are placed on the horse track by the trunk line carrier. The conductor on the trunk line carrier bringing the horses into Chicago takes his waybills to the south receiving office of the Union Stockyard & Transit Company at Fortieth and Laurel streets. These waybills are retained by the Union Stockyard & Transit Company in its possession until subsequently returned to the trunk line carrier and are never in the possession of the defendant. From

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

the waybills the Union Stockyard & Transit Company makes out a written order directed to the Chicago Junction Railway Company containing the following information and no other: Date, car initial, car number, loaded or empty, from what railroad, to what point, with the request, "Please switch the following cars." This order is taken to the live stock train director's office of the defendant, from which point the order is telephoned to the yardmaster's office of the defendant at Fortieth and Halsted streets. The yardmaster notifies the defendant's switching crew to take the cars on the receiving tracks and deliver them to the point designated in the order. The defendant's switching crew then takes the car on the receiving track and delivers it to the particular unloading platform of the Union Stockyard & Transit Company designated by the order where the cars are unloaded by employés of the Union Stockyard & Transit Company. These various unloading platforms are designated "Express Chutes," "Michigan Central Chutes," and "Fort Wayne Chutes." After the cars are once set at the particular chutes designated in the written order, the defendant has no further control over the shipment, and the shipment is entirely in the charge of the Union Stockyard & Transit Company employés. In the usual course of business, 15 or 20 minutes after the cars are set out on the receiving tracks, orders have been received by the defendant to switch the cars, and this is done usually in from one to two hours. The defendant acts merely as a switching carrier in accordance with the orders given it and at no time sees the waybilling or has any information as to the point of origin of the horses, or the time they have been confined in the cars, or whether during transit they have been unloaded for feed, water, and rest. For the services performed by the defendant it receives a fixed switching charge from the trunk line carrier.

After the horses have reached the receiving tracks, the quickest and only way in which they can be unloaded is by the performance of the switching service by the defendant from the receiving tracks to the unloading platforms of the Union Stockyard & Transit Company. These facts apply to all of the cases involved in this stipulation.

The particular facts with reference to case No. 10,103 are as follows:

Chicago, Milwaukee & St. Paul car No. 1233 was loaded with 22 head of horses at Kansas City, Mo., on May 19, 1908, at 6 p. m. by B. & G. Walcott, consigned to A. H. Morgan, Poitland Avenue Yards, Rochester, New York. The car was set out by the trunk line carrier on the Horse Track of the defendant at 6:25 a. m. May 21st; ordered by the Union Stockyard & Transit Company to the Michigan Chutes, and delivered to the Michigan Chutes at 7:30 a. m. by the Chicago Junction Railway Company, with its engines No. 35 and was unloaded at said chutes at 8:15 a. m., the car having been in the possession of the defendant, Chicago Junction Railway Company, one hour and five minutes before delivery by said defendant to said chutes; and said horses having been in said car at said chutes of the Union Stockyard & Transit Company 45 minutes and having been in the possession of the trunk line carrier 36 hours and 25 minutes, or 8 hours and 15 minutes in excess of the 28-hour period. At the time the shipment was loaded at Kansas City, a 36-hour request, as provided by the act, was made and executed by the shippers, thus making the total time of excess confinement 2 hours and 15 minutes. The total time of confinement allowed by the act expired prior to the delivery of the car to the defendant.

The particular facts with reference to case No. 10,406 are as follows:

A. T. & S. F. car No. 45767 was loaded with 26 horses by J. E. Eash, of Springer, N. M., at Kansas City, Mo., February 5, 1910, at 11:30 a. m. consigned to J. S. Eash, Shipshewana, Ind. The car was set out on the Horse Track of defendant by the trunk line carrier at 1:00 a. m. February 7, 1910. Orders were received from the Union Stockyard & Transit Company to deliver the car to Express Chute. Chicago Junction engine No. 116 delivered the car to the Express Chute for unloading at 3:10 a. m. At 4:15 a. m. the Union Stockyard & Transit Company gave the defendant orders to switch the car from the Express Chute to the P. F. W. & C. Chute, so that the horses could be unloaded at that point. This was done for the reason that the horses were western horses and had no halters on them, by which they could be led

into the barn at the Express Chute. The car was moved to the P. F. W. & C. Chute at 7:30 a. m. and unloaded at that point at 8:50 a. m. The car was in the possession of the defendant Chicago Junction Railway Company 5 hours and 25 minutes before delivery by said defendant to said chutes, and said horses were in said car at said chutes of the Union Stockyard & Transit Company 2 hours and 25 minutes, and had been in the possession of the trunk line carrier 37 hours and 30 minutes, or 16 hours and 20 minutes over the 28-hour period, and 9 hours and 20 minutes over the 36-hour period.

At the time said shipment was loaded at Kansas City, a 36-hour request as provided by the act was made and executed by the shippers, thus making the total time of excess confinement 9 hours and 20 minutes. The total time of confinement allowed by the act expired prior to the delivery of said car to the defendant.

The particular facts with reference to case No. 10,408 are as follows:

C., M. & St. P. car No. 2245 was loaded with 21 horses, by John Sharkey, of Mellette, S. D., February 12, 1910, and reloaded at 10:30 a. m. February 14, 1910, at Sioux City, Iowa, consigned to John Sharkey Belleview, Mich. The car was set out on the Horse Track of defendant by the trunk line carrier at 5:20 a. m. February 26th, was ordered by the Union Stockyard & Transit Company to the Grand Trunk Chutes, and was delivered to the Grand Trunk Chutes at 7:35 a. m. by the Chicago Junction Railway Company engine No. 35, and was unloaded at that point at 8:15 a. m. The car was in the possession of the defendant Chicago Junction Railway Company 2 hours and 15 minutes before delivery by said defendant to said chutes, and said horses were in said car at said chutes of the Union Stockyard & Transit Company 40 minutes, and in the possession of the trunk line carrier 42 hours and 50 minutes, or 14 hours and 45 minutes over the 28-hour period, or 9 hours and 35 minutes over the 36-hour period.

At the time said shipment was loaded, a 36-hour request, as provided by the act, was made and executed by the shipper, thus making the total time of excess confinement 9 hours and 35 minutes. The total time of confinement allowed by the act expired prior to the delivery of said car to the defendant.

The particular facts with reference to case No. 10,608, are as follows:

Chicago & Alton car 29209 was loaded with 22 head of horses by J. C. Stevens at Kansas City, Mo., April 22, 1911, at 5:45 p. m., consigned to J. C. Stevens, Courtland, N. Y. This car was set out on the Horse Track of the defendant, by the Trunk Line carrier at 6:35 a. m., April 24, 1911; was ordered by the Union Stockyard & Transit Company to the Michigan Central Chutes and delivered to the Michigan Central Chutes by the Chicago Junction Railway Company engine No. 130 at 7:45 a. m. April 24th; unloaded at that point at 8:25 a. m. The car was in the possession of the defendant, Chicago Junction Railway Company, 1 hour and 10 minutes before delivery by said defendant to said chutes; and said horses were in said car at said chutes of the Union Stockyard & Transit Company 40 minutes and in the possession of the trunk line carrier 36 hours and 50 minutes, or 38 hours and 40 minutes —total confinement, being 10 hours and 40 minutes over the 28-hour period and 2 hours and 40 minutes over the 36-hour period.

At the time the shipment was loaded at Kansas City, the 36-hour request as provided by the act was made and executed by the shippers, thus making the total time of excess confinement 2 hours and 40 minutes. The total time of confinement allowed by the act expired prior to the delivery of said car to the defendant.

J. H. Wilkerson, U. S. Atty., of Chicago, Ill.

Winston, Payne, Strawn & Shaw, of Chicago, Ill., for defendant.

GEIGER, District Judge (after stating the facts as above). The fact that the defendant's functions are limited to a terminal, switching, or interchange service, while not relieving it from the obligations of the statute, is of controlling importance, when considered with the

further concession that, in the situation presented in each of the cases before us, the "quickest and only way in which they (the confined horses) can be unloaded, is by the performance of the switching service by the defendant from the receiving tracks to the unloading platforms of the Union Stockyard & Transit Company." There are cases which intimate that, when the statutory period of permissible confinement of cattle has expired, a connecting carrier receives a shipment at its peril; that it conclusively assumes liability for the penalty. In the cases before us, such a rule would result, necessarily, in continuing the very cruelty which the statute was designed to avoid; because, if such be the rule, it must follow as a corollary that the carrier could refuse to receive the stock. The reasonable construction requires in each case a determination whether the particular carrier knowingly and willfully failed to discharge its obligation under the statute. In other words, it is merely a question of proof. In three of the present cases there is no evidence to support the government's contention. In none of them was the time consumed in the performance of the switching service substantially in excess of what is conceded to be within the bounds of diligence, to wit, from one to two hours. As indicated, the peculiar character of the defendant's service as a switching carrier, not only permits, but requires, recognition of matters of common knowledge, among which is the necessarily slow movement of cars in a congested terminal district. Hence, as compared with ordinary movement of trains outside such district, the same inference cannot be drawn from the lapse of time. In the three cases referred to, it was therefore incumbent upon the government to prove something in addition to the fact that the permitted period of confinement had expired before the cars came to the possession of the defendant, and the further fact that the latter took from one to two hours to bring them to the unloading platform. This is particularly true in view of the fact that the defendant did not have actual knowledge of the expiration of the statutory period.

In the fourth case, No. 10,406, the car was in the possession of the defendant company something like five hours. In view of the stipulation that the ordinary time for performing the service was from one to two hours, this much longer time, if unexplained, might well give rise to an inference of culpable delay. But the stipulation discloses that such car was originally placed at one chute, and then it was discovered that the horses in the car were not equipped with halters to enable unloading at that point—a condition necessitating their transfer to another chute. There is nothing to show that the first delivery was made with knowledge of the situation, or that the defendant was in any respect culpable in not appreciating the uselessness of the original delivery. On the contrary, it must be assumed that the reason for making the change was in fact a good reason, whose recognition was consistent with the proper care of the horses in the defendant's charge, notwithstanding the obligation speedily to unload them.

It has been said that a failure "knowingly and willfully" to observe the statute means that a carrier, having a free will or choice, either intentionally disregards the statute, or is plainly indifferent to its re-

quirements. C., B. & Q. Ry. Co. v. United States, 194 Fed. 342, 114 C. C. A. 334. In view of the limited connection of the defendant with the transportation of the horses in question, the admitted facts do not justify such inferences in the cases before us.

Judgment may be entered for the defendant in each case.

H. G. BAKER & BRO. v. PINKHAM et al.

(District Court, E. D. South Carolina. February 6, 1914.)

1. REMOVAL OF CAUSES (§ 11*)—REQUISITES—ORIGINAL JURISDICTION.
   Original jurisdiction in a federal court is in all cases essential to a right to remove.
   [Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 29–31; Dec. Dig. § 11.*]

2. REMOVAL OF CAUSES (§ 12*)—STATUTE—DISTRICT—WAIVER.
   The provisions of the removal act, describing the district in which the suit must be brought, relates to venue only and may be waived.
   [Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 32, 33; Dec. Dig. § 12.*]

3. COURTS (§§ 270, 271*)—FEDERAL COURTS—SUITS BY AND AGAINST ALIENS.
   Where an alien brings suit in a federal court, he must sue in the district in which the defendant resides or is an inhabitant, but such alien may be sued in any district in which he may be found or in which valid service may be made.
   [Ed. Note.—For other cases, see Courts, Cent. Dig. § 810; Dec. Dig. §§ 270, 271.*]

4. REMOVAL OF CAUSES (§ 11*)—JURISDICTION—JOINT DEFENDANTS—CITIZENSHIP.
   A suit wherein the plaintiffs were residents of New York, and two of the defendants were aliens and a third was a resident and citizen of Georgia, was within the original jurisdiction of the federal courts and removable for diversity of citizenship; it not being necessary that all the defendants should be nonresident citizens.
   [Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 29–31; Dec. Dig. § 11.*]

At Law. Action by H. G. Baker & Bro. against one Pinkham, master of the British steamer West Point, John Doe and Richard Roe, owners of said steamer, and Strachan & Co., agents. On motion to remand. Denied.

Mitchell & Smith, of Charleston, S. C., for plaintiffs.

J. P. K. Bryan, of Charleston, S. C. (Bryan & Bryan, of Charleston, S. C., of counsel), for defendants.

CONNOR, District Judge. Plaintiffs are residents of the state of New York. Defendant Pinkham is an alien and citizen of Great Britain. Furness Withy & Co., owners of the steamer West Point, is a corporation organized under the laws of Great Britain. Defendants Strachan & Co., agents of the owners of said steamer, are residents and citizens of the state of Georgia. The action was instituted in the

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

court of common pleas of Charleston county, S. C., for the recovery of damages, for a joint tort.

Defendants, in apt time, joined in a petition for removal of the case, by reason of diversity of citizenship, into the Circuit Court of the United States for the Eastern District of South Carolina, for that:

"The said suit is a suit of a civil nature of which the circuit court of the United States has original jurisdiction and is a suit in which there is a controversy between citizens of different states and an alien corporation, and that the matter in dispute in such suit exceeds, exclusive of interest and costs, the sum of $2,000."

A transcript of the record was docketed in the Circuit Court. Thereafter plaintiffs moved the court to remand the cause to the state court, for that:

"This court was without jurisdiction in the premises, because this action does not involve a controversy, or dispute, properly within the jurisdiction of this court, and that it appears upon the face of the record herein that the plaintiffs are citizens and residents of the state of New York and the defendants F. P. Strachan, George P. Walker, and George F. Armstrong, copartners under the firm of Strachan & Co., are citizens and residents of the state of Georgia, and that this cause is not within the original jurisdiction of this court, nor one which it can acquire jurisdiction of by removal."

It may be conceded that the right of removal, asserted by the defendants, is dependent upon the provisions of Act March 3, 1875, c. 137, 18 Stat. 470, as amended by Act March 3, 1887, c. 373, 24 Stat. 552, and corrected by Act Aug. 13, 1888, c. 866, 25 Stat. 433, and found in 4 Fed. Stat. Ann. 265–312, §§ 1 and 2 (U. S. Comp. St. 1901, p. 508). The action was brought, removed, and motion to remand lodged, prior to January 1, 1912. Two questions are presented:

(1) Did the Circuit Court, into which the action was removed, have original jurisdiction?

(2) If so, were the defendants entitled to remove the cause from the state court into the United States Circuit Court?

Eliminating immaterial language of the statute, jurisdiction is conferred upon the federal courts in controversies between:

(a) "Citizens of different states; * * *" (b) "citizens of a state and foreign states, citizens, or subjects."

Suits coming within either of these two classes, originally brought in a state court, may be removed into the federal court, upon compliance with the statutory requirements:

(1) "By the defendant or defendants therein, being nonresidents of the state." (2) "In any suit, coming within either of the classes, where there is a controversy wholly between citizens of different states, and which may be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the Circuit Court of the United States for the proper district."

It may be conceded that the instant case does not come within the last class; it is not a suit or controversy "wholly between citizens of different states."

We are thus brought to inquire whether the case comes within the first class. The right of removal, being statutory, is controlled by the

legislative will, as expressed in the statute. At the present term, the Supreme Court has reaffirmed, in unmistakable language, the doctrine that:

"The right of removal from a state to a federal court * * * exists only in certain enumerated classes of cases. To the exercise of the right, therefore, it is essential that the case be shown to be within one of those classes." Chesapeake & Ohio Ry. Co. v. Cockrell, 232 U. S. 146, 34 Sup. Ct. 278, 58 L. Ed. — (January 19, 1914).

[1] It is also settled that the right to remove is not conferred by the Constitution, but is dependent upon congressional legislation. Original jurisdiction in the federal court is, in all cases, essential to the right to remove. There would seem to be no doubt that the plaintiffs may, if so advised, have brought actions in the circuit court against defendants separately; that defendant Pinkham, and the owners of the steamer, being aliens, may have been sued in the district in which they were found.

[2-4] The provision, found in the statute, prescribing the district in which the suit is required to be brought, relates to venue and may be waived. An alien, if he come into the federal court, must sue in the district in which the defendant resides, or is an inhabitant. He may be sued in any district in which he may be found or in which valid service may be made. In re Hohorst, 150 U. S. 653, 14 Sup. Ct. 221, 37 L. Ed. 1211; Galveston R. R. v. Gonzales, 151 U. S. 496, 14 Sup. Ct. 401, 38 L. Ed. 248; Barrow Steamship Co. v. Kane, 170 U. S. 100, 18 Sup. Ct. 526, 42 L. Ed. 964. In the last-cited case, the action was brought in the Circuit Court of the United States, in the state of New York, by a citizen of New Jersey against a foreign corporation for the recovery of damages sustained by an alleged tort, committed abroad. The court sustained its jurisdiction. That a defendant, alien corporation, when sued in a state court by a corporation of another state, is entitled to remove the case into the Circuit Court is decided in Wind River Lumber Co. v. Frankfort, etc., Plate Glass Co., 196 Fed. 340, 116 C. C. A. 160 (C. C. A. 9th Circuit). Judge Gilbert, after noting the language of the statute, says:

"The defendant was an alien corporation, and could have been sued in the District Court of the United States for the District of Oregon. The case was therefore properly removed, and there was no error in denying the motion to remand."

In Attleboro Mfg. Co. v. Frankfort, etc., Ins. Co. (D. C.) 202 Fed. 293, Judge Brown (D. C. Mass.) reviews the decisions, and holds that the alien defendant, sued in the state court, is entitled to remove his case into the federal court. The sole question remaining open, therefore, is whether the fact that the alien defendants are joined with the defendants, residents and citizens of the state of Georgia prevents the removal upon their joint petition. A careful examination of the decided cases discovers but one case in which the exact question is presented. In Roberts v. Pac. Ry. & Nav. Co. (C. C.) 104 Fed. 577, plaintiff, a citizen of the state of Washington, sued jointly a corporation, citizen of West Virginia and an alien corporation. The cause was removed into the Circuit Court, and Judge Hanford denied a motion to remand. The question presented is thus stated by him:

"It is asserted that the statute does not confer upon United States Circuit Courts jurisdiction on the ground of diverse citizenship of the parties, where the controversy is between citizens of a state on one side, and a citizen of a different state and an alien on the opposite side."

After citing and discussing the authorities relied upon to sustain the contention against the jurisdiction, he says:

"The true rule applicable to this case was laid down by the Supreme Court, in an opinion by Chief Justice Marshall, in the case of Strawbridge v. Curtiss, 3 Cranch, 267 [2 L. Ed. 435]: To bring a case in which there is more than one plaintiff or defendant within the jurisdiction of a United States Circuit Court on the ground of diversity of citizenship of the parties, 'each distinct interest should be represented by persons, all of whom are entitled to sue, or may be sued, in the federal court; that is, that, when the interest is joint, each of the persons concerned in that interest must be competent to sue, or liable to be sued, in those courts.' "

The refusal to remand was sustained in Roberts v. Pac. & A. Ry. Nav. Co., 121 Fed. 785, 58 C. C. A. 61 (C. C. A. 9th Cir.). Gilbert, Circuit Judge, says:

"It is argued that since the plaintiff in error was a citizen of Washington, and one of the defendants in error was a citizen of West Virginia, and the other an alien, no cause was made for removal under the removal act."

After quoting the opinion expressed in Black's Dillon on Removal of Causes, §§ 66–84, to the contrary, he proceeds to say:

"According to this doctrine, an action brought by a citizen of a state against a citizen of another state, and an alien is not removable, although if two actions had been brought by the same plaintiff, the one against the alien, and the other against the citizen, both would have been removable. * * * It is true that the present case does not present one which is wholly between a citizen and subjects of a foreign state; but can it be said, in view of the fair intendment of the statute, that it is not a case in which there is a controversy between citizens of different states, or a controversy between a citizen of a state and a foreign subject? Considering the purpose of the act and the general scope of its provisions, we think its language should be construed as comprehending the present case. There is here presented a controversy between the plaintiff in error and each of the defendants in error. It is true that the latter are sued jointly, but, notwithstanding that fact, a controversy exists as to each. The act does not declare that the controversy shall be one wholly between citizens of different states."

The conclusion reached, after a discussion of the decided cases, was that the case came within the terms of the statute. Judge Dillon and Mr. Hughes are of a contrary opinion. The last named, in his very accurate and carefully prepared work on Federal Procedure (2d Ed.) 326, 327, referring to Roberts v. Pac., etc., Co., supra, says:

"Judge Hanford, in a well-considered opinion, holds that such a case would fall within the federal jurisdiction. It seems to the author that, however liberally the removal act ought to be construed, the line of decisions holding that the case does not fall within the jurisdiction of the federal courts best accords with the statute."

He cites Tracy v. Morel (C. C.) 88 Fed. 801. In that case Judge Munger adopts the opinion of Judge Dillon, in which he says:

"It is * * * necessary that all the parties on one side of the case should be citizens of a state or states, and all the parties on the other side aliens. * * * When a plaintiff, citizen of the state where the suit is

brought, sues two defendants, one of whom is a citizen of another state, and the other an alien, * * * the cause is not removable, because it does not come within any of the provisions of the statute. It is casus omissus, etc. It cannot be said to be a controversy 'between citizens of different states,' because one of the parties is not a citizen; and it cannot be described as a controversy 'between citizens of a state and foreign citizens or subjects,' because one of the defendants is not a foreigner."

Judge Munger was of the opinion that "the same rule is stated" in King v. Cornell, 106 U. S. 395, 1 Sup. Ct. 312, 27 L. Ed. 60. If this is a correct interpretation of the decision of that case, that is the end of the controversy. Judge Hanford was of the opinion:

"That there is not even a faint hint or suggestion of the idea that the mere joinder of nonresident citizens with aliens as defendants has the effect to deprive all of the defendants of the right of removal which they would have had if sued separately." Roberts Case, supra.

He notes the view of Judge Munger and gives his reasons for not considering it as an authority. The Circuit Court of Appeals (121 Fed. 789, 58 C. C. A. 61) took the same view of the decision of King v. Cornell. There the suit was brought in the Supreme Court of New York, by a citizen of that state against a citizen thereof and an alien. The latter filed the petition for removal, alleging that the controversy was severable. Certainly the decision of the question thus presented could not be decisive of this motion. The Chief Justice placed the decision upon the fact that section 639 of the Revised Statutes, relied on to support the removal, was repealed. After reviewing the legislation on the subject, which it is unnecessary to do more than refer to here, he concludes:

"It follows that the whole of the second subdivision of section 639 was repealed by the act of 1875, and that the cause was not removable on the separate petition of alien."

That was the point decided in that case; the process of reasoning is confined to the effect of the legislation upon that specific subject and casts no light upon that now presented.

I am constrained to conclude that the view of the court in the Roberts Case is a reasonable construction of the statute. Certainly the conclusions reached by Judge Dillon and Mr. Hughes, based upon their construction of the statute, is entitled to great weight. While the status of the parties in Smith v. Lyon, 133 U. S. 315, 10 Sup. Ct. 303, 33 L. Ed. 635, is, in no respect, similar to that presented here, the discussion by Mr. Justice Miller is helpful. He says that the principle announced in Strawbridge v. Curtiss, supra, has been adhered to and recognized by the courts, and kept in view in the legislation. In Coal Co. v. Blatchford, 11 Wall. 172, 20 L. Ed. 179, Mr. Justice Field, citing Strawbridge's Case, says that, while the designation of the party entitled to remove (by Act Sept. 24, 1789, c. 20, 1 Stat. 73) is in the singular number, it is "intended to embrace all the persons who are on one side, however numerous, so that each distinct interest must be represented by persons, all of whom are entitled to sue, or are liable to be sued, in the federal courts. In other words, if there are several coplaintiffs, the intention of the act is that each plaintiff must be com-

petent to sue, and, if there are several defendants, each defendant must be liable to be sued, or the jurisdiction cannot be entertained." The question was presented in that case by an exception to the jurisdiction; the question of removal was not involved. In the case of the Sewing Machine Companies, 18 Wall. 587, 21 L. Ed. 914, Mr. Justice Clifford says:

"Either the nonresident plaintiff (the decision was prior to the act of 1875) or nonresident defendant may remove the cause under the last-named act March 2, 1867, c. 1196, 14 Stat. 558), provided all the plaintiffs, or all the defendants, join in the petitions, and all the parties petitioning are nonresidents," etc.

If, upon this record, the plaintiff may have, in the first instance, invoked the jurisdiction of this court, that the cause of action stated in the complaint being joint, the defendants both being nonresidents and joining in the petition, it would seem that they come within the principle of Strawbridge's Case, supra, and are within the terms of the removal act.

While the question is not free from doubt, and the authorities, so far as they have discussed it, differ, I am of the opinion that the case was properly removed into this court. The motion to remand must therefore be denied.

OSTRANDER v. BLANDIN et al.

(District Court, N. D. New York. March 14, 1914.)

1. REMOVAL OF CAUSES (§ 118*)—AMENDMENT OF COMPLAINT—JURISDICTIONAL FACTS.

Where a case is removed to a federal court, the complaint may be amended so that the citizenship of the parties and the jurisdictional amount in controversy shall appear on the face of the complaint.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig § 250; Dec. Dig. § 118.*]

2. BROKERS (§ 82*)—SALE OF LAND—ACTION FOR COMMISSIONS—COMPLAINT—DEMURRER.

A complaint alleged that plaintiff was employed to sell certain timber land for not less than $500,000, in which case he should receive 5 per cent. of that sum, and in addition all of the purchase price in excess thereof. It further charged that, as a result of negotiations had by plaintiff with a lumber company, the latter purchased "the said property," and that the amount paid for the timber alone was $550,000, and the fee with the timber removed was worth $100,000; wherefore plaintiff sought to recover 5 per cent. on $500,000, $50,000, the excess of the sale price, and $100,000, the selling price of the land after the timber had been removed. *Held*, that the complaint should be construed as alleging a sale of the entire property for sums aggregating $650,000, and was therefore not demurrable as showing a failure of plaintiff to perform in that he sold the timber without the land.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 101–103; Dec. Dig. § 82.*]

3. JUDGMENT (§ 237*)—PARTIES (§ 25*)—JOINT DEFENDANTS—FAILURE TO SERVE ONE.

Code Civ. Proc. N. Y. § 1932, provides that where a complaint is against two or more defendants alleged to be jointly indebted, and the summons is

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

served on one or more, but not on all, plaintiff may proceed against the defendants served unless the court otherwise directs, and may take final judgment against such defendants, which is conclusive of their liability, etc. Judicial Code, § 50 (Act March 3, 1911, c. 231, 36 Stat. 1101 [U. S. Comp. St. Supp. 1911, p. 149]), provides that where there are several defendants, and one or more of them are neither inhabitants of nor found within the district and do not voluntarily appear, the court may entertain jurisdiction and proceed to trial and judgment between the parties who are properly before it, but the judgment shall not conclude or prejudice others not regularly served with process nor voluntarily appearing, and nonjoinder of parties who are not inhabitants of nor found within the district shall not constitute matter of abatement or objection. *Held* that, under both provisions, plaintiff may make all of several joint debtors parties to the suit, though he can obtain service on only one of them, and may proceed and recover judgment against the one served without reference to the others.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 415, 418–421, 429; Dec. Dig. § 237;* Parties, Cent. Dig. §§ 31, 36–40; Dec. Dig. § 25.*]

At Law. Action by George N. Ostrander against Amos N. Blandin and another to recover commissions on a sale of timber land. On demurrer to complaint. Overruled.

Edward M. Angell, of Glens Falls, N. Y., for plaintiff.

J. B. McCormick, of Granville, N. Y., for defendant Blandin.

RAY, District Judge. A defect in the amended complaint appears which is not raised or presented by the demurrer, and which was not alluded to on the argument, but of which the court ought to take notice. This is an action to recover the compensation agreed to be paid the plaintiff by the defendants for negotiating and procuring the sale of certain premises or timber lands.

[1] The complaint alleges that the defendant Deerfield Lumber Company is a corporation of the state of Vermont, but contains no allegation or statement whatever as to the citizenship of the defendant Blandin, or of the plaintiff, Ostrander. For this reason it does not appear on the face of the amended complaint that this court has jurisdiction of the action. In some of the prior proceedings and papers used herein it has appeared that the defendant Blandin is not a citizen of the state of New York and was not when the action was commenced, but of some other state, and that the plaintiff then was a resident and citizen of the state of New York, thus showing the necessary diversity of citizenship. This should appear on the face of the amended complaint and also the jurisdictional amount in controversy, more than $3,000 exclusive of interest and costs.

By the act of March 3, 1911, "An act to codify, revise and amend the laws relating to the judiciary" (36 Stat. 1087, 1091, § 24), the jurisdiction of the District Court is defined, and section 28 of the same act provides for removal.

The District Court of the United States has jurisdiction "of all suits of a civil nature, at common law or in equity * * * or when the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars and * * * or is between citizens of different states."

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

An amended complaint may be served, and the parties can stipulate that the present demurrer stand as the demurrer thereto, or a new demurrer may be served; but this court to expedite matters will take up and pass on the question raised thereby as the record stands. The case being now in this court having been removed thereto by the defendants, the new pleadings should show the jurisdiction of this court at the time the action was commenced. As the necessary diversity of citizenship and the jurisdictional amount appear on the record, in the removal papers, and motions connected therewith, it is perhaps sufficient; but, as an amended complaint has been served, the better practice is to have the pleadings show jurisdiction in this court.

The amended complaint alleges that the defendant Deerfield Lumber Company is a corporation of the state of Vermont and that defendant Blandin is its president; that defendants are or were the owners, or the authorized and accredited agents and representatives of the owners, of certain forest lands in the state of Vermont; that on or about December 1, 1911, "the defendants employed plaintiff to negotiate and procure the sale of the above-described lands" to the International Paper Company and agreed to pay certain compensation for so doing. Also, that thereafter the plaintiff had certain negotiations with said International Paper Company for the sale of such lands, but while same were pending it "was further agreed between plaintiff and defendants that, in case plaintiff was instrumental in procuring any purchaser for said property for a sum not less than $500,000, defendants would pay plaintiff a commission of 5 per cent. on said price of $500,000, and in addition thereto pay plaintiff all the purchase price in excess of said sum of $500,000." Also, that thereafter the plaintiff negotiated a sale of said premises to the Rich Lumber Company, and that as a result of such negotiations the Rich Lumber Company did purchase the said property on or about October 1, 1912, and that such purchaser was found and procured by the plaintiff and by him introduced to the defendants, and that the said sale was made because of and through the instrumentality of plaintiff's services in the matter. Also, that the amount to be paid for the timber alone was $550,000, and the fee of the land with timber removed was and is worth $100,000. Also, that the defendants have refused and failed to pay as agreed, etc.

[2] The defendant Blandin urges, in support of his demurrer, that it appears on the face of the complaint that the undertaking of the plaintiff was to secure a purchaser of the property, as a whole, and that he only procured a purchaser of the timber or wood on the stump, same to be severed and leaving the land itself unsold. But even if this fact, if it be a fact, would defeat plaintiff's recovery, it does not so appear on the face of the complaint. The complaint, after setting out the contract and its modification and plaintiff's negotiations with the Rich Lumber Company, alleges as follows:

"As a result of said negotiations of plaintiff with said Rich Lumber Company, the Rich Lumber Company purchased the said property on or about October 1, 1912," and that the said purchaser was found, etc.

This is a plain and comprehensive allegation that the whole property before described was purchased by the Rich Lumber Company. The allegations of paragraphs 6, 7, and 8 go to values of timber and land separately for the purpose of determining the price paid so as to fix the amount the plaintiff is entitled to recover. That is, the timber purchased was worth the sum of $550,000, and the land outside thereof with the timber off, the sum of $100,000, in all $650,000. This is accentuated by the fact that plaintiff demands judgment on the basis of a sale of the entire property, viz.: 5 per cent. commission on the selling price of the timber, $500,000, or $25,000; and $50,000, the excess of such sale over $500,000; and also $100,000, the selling price of the land after the timber was removed—or $175,000, in all. This demand of judgment can be based only on the theory that the entire property and all interest in it was sold. Hence the complaint must be construed as alleging a sale of the entire property for sums aggregating $650,000.

[3] The defendant Blandin also contends that a defect of parties defendant appears on the record. This contention is based on these facts: The action was brought in the state court and both defendants were served. The defendants before pleading removed the case into the United States court on the ground that the plaintiff is a citizen and resident of the state of New York, and both defendants citizens and residents of another state or of other states, and that the necessary jurisdictional amount is in controversy. After such removal, the defendants moved in this court to vacate and set aside the service of the summons made in the state of New York, Northern district, on the grounds that such service was obtained by trick, artifice, and fraud; and, second, as to the defendant Deerfield Lumber Company, that it had and has no property or business in the state of New York, that it did and does no business in the state of New York and had and has no place of business in that state and no property therein, and that its president on whom service was made in the state of New York was not here on business of said defendant company and doing business at the time for said company. The motion to set aside the service on the first ground (trick, artifice, and fraud) was denied as to both defendants, but as to defendant Deerfield Lumber Company granted on the second ground. This leaves both defendants, defendants on the record. Both are made parties defendant, but legal service has been made on the defendant Blandin alone. The action as to the Deerfield Lumber Company has not been dismissed. The service of the summons on it, alleged to have been made, has been set aside. That is, Blandin has been served with process, but defendant Deerfield Lumber Company has not been served. There is no defect of parties defendant on the face of the complaint or on the record, and, notwithstanding the fact that Deerfield Lumber Company has not been served, the action is properly brought and may be prosecuted to judgment.

Section 1932 of the Code of Civil Procedure of the state of New York provides as follows:

"In an action wherein the complaint demands judgment for a sum of money against two or more defendants, alleged to be jointly indebted upon contract,

if the summons is served upon one or more, but not upon all of the defendants, the plaintiff may proceed against the defendant or defendants upon whom it is served, unless the court otherwise directs; and, if he recovers final judgment, it may be taken against all the defendants thus jointly indebted."

The next section provides for the effect of such a judgment and is as follows:

"Such a judgment is conclusive evidence of the liability of each defendant, upon whom the summons was personally served, or who appeared in the action. Where it is taken against a defendant, upon whom the summons was served by publication, or without the state, pursuant to an order for that purpose, it has the effect, as against that defendant, specified in section 445 of this act. As against such a defendant, who is allowed to defend after judgment, or as against a defendant not summoned, it is evidence only of the extent of the plaintiff's demand, after the liability of that defendant has been established, by other evidence."

The result is that this action is properly brought and may be maintained notwithstanding no legal service of process has been made on the defendant jointly liable with Blandin who was legally served. And the question is further settled by section 50 of the Judicial Code of the United States, formerly section 737 of the Revised Statutes of the United States, which provides as follows:

"When there are several defendants in any suit at law or in equity, and one or more of them are neither inhabitants of nor found within the district in which the suit is brought, and do not voluntarily appear, the court may entertain jurisdiction, and proceed to the trial and adjudication of the suit between the parties who are properly before it; but the judgment or decree rendered therein shall not conclude or prejudice other parties not regularly served with process nor voluntarily appearing to answer; and non-joinder of parties who are not inhabitants of nor found within the district, as aforesaid, shall not constitute matter of abatement or objection to the suit."

This is derived from the act of 1839 (5 Stat. at L. 321). The effect of this is declared in Clearwater v. Meredith, 62 U. S. (21 How.) 489, 492 (16 L. Ed. 201) where the court said:

"It is well known that the act of 1839 was intended so to modify the jurisdiction of the Circuit Court (now District Court) as to make it more practical and effective. When one or more of the defendants sued were citizens of the state, and were jointly bound with those who were citizens of other states, and who did not voluntarily appear, the plaintiff had a right to prosecute his suit to judgment against those who were served with process; but such judgment or decree shall not prejudice other parties not served with process, or who do not voluntarily appear. Now, it is too clear for controversy, that the act of 1839 did intend to change the character of the parties to the suit. The plaintiff may sue in the Circuit Court (now District Court) any part of the defendants, although others may be jointly bound by the contract who are citizens of other states."

It follows that, following the practice prescribed by either the Code of Civil Procedure of the state of New York (section 1932) or that formerly prescribed by the Revised Statutes of the United States (section 737, R. S., now section 50, Judicial Code of the U. S.), the plaintiff may make all the joint debtors parties, obtain service on one only, and proceed to judgment against the one so served whether service is obtained on the other or not.

Demurrer overruled, with $10 costs, and defendant may answer, on payment of such costs, within 30 days after being served with an amended complaint.

UNITED STATES v. ROSENSTEIN et al.

(District Court, E. D. New York. March 2, 1914.)

Nos. 1475–1478.

1. PERJURY (§ 25*)—INDICTMENT—MATERIALITY.

Where an indictment for perjury, alleged to have been committed before a referee in bankruptcy, charged that the referee was investigating the affairs of the bankrupt, and that the answers to the questions put were material with respect to the financial condition of the bankrupt's business and the amount of the bankrupt's assets and liabilities, it sufficiently alleged that the matter inquired about was material, unless it was apparent from the subject-matter of the allegation that it was not so in fact.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. §§ 82–89; Dec. Dig. § 25.*]

2. PERJURY (§ 11*)—MATERIALITY OF TESTIMONY—EXAMINATION OF BANKRUPT—SCOPE.

An inquiry as to the assets or liabilities of a bankrupt before the referee may be carried back as far as is necessary to determine the facts, and everything bearing on the question of assets or liabilities at the time of bankruptcy is material.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. §§ 38–54; Dec. Dig. § 11.*]

3. INDICTMENT AND INFORMATION (§ 147*)—DEMURRER—GROUNDS—PERJURY—IMMATERIALITY.

Immateriality, as a defense to an indictment for perjury, alleged to have been committed on the examination of a bankrupt before the referee, could not be raised on demurrer to the indictment, unless the immateriality was apparent.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 490–494; Dec. Dig. § 147.*]

4. BANKRUPTCY (§ 494*)—OFFENSES—INDICTMENT — ASSETS — CONCEALMENT — "BANKRUPT"—"PERSON."

Bankr. Act July 1, 1898, c. 541, § 29b, 30 Stat. 554 (U. S. Comp. St. 1901, p. 3433), makes concealment of assets a crime when committed by a person having knowingly and fraudulently concealed, while a bankrupt or after his discharge, any of the property belonging to his estate in bankruptcy, and section 1, subd. 19, defines a "bankrupt" as a person against whom a petition has been filed, or who has filed a voluntary petition to be adjudged a bankrupt; the word "person" including corporations and officers, partnerships, etc., and, when used to refer to the commission of forbidden acts, including persons who are participants therein as agents, officers, and members of the board of directors or trustees or other controlling bodies of corporations. Section 29b, subd. 4, also makes it a crime for any person to receive any material amount of property from a bankrupt after the filing of the petition, with intent to defeat the act. *Held*, that counts of an indictment against individuals, alleging that the bankrupt had many provable claims and insufficient assets to pay the same, and that, while the "company" was bankrupt, the defendant (an individual) did conceal from the trustee in bankruptcy the proceeds of a certain sale of the bankrupt's property, etc., but failing to allege, however, any receipt of assets by the defendant after the filing of the petition

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

or any act or acts by the defendant as an officer or agent or accessory for the bankrupt corporation, were demurrable.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 911; Dec. Dig. § 494.*

For other definitions, see Words and Phrases, vol. 1, pp. 700, 701; vol. 8, p. 7587; vol. 6, pp. 5322–5335; vol. 8, p. 7752.]

5. CONSPIRACY (§ 43*)—INDICTMENT—CONCEALMENT OF ASSETS OF BANKRUPT.
An indictment charged three defendants jointly with conspiracy to conceal or continue and accomplish the concealment of assets belonging to the estate of a bankrupt corporation from the trustee in bankruptcy, charging that the business of the bankrupt was conducted by the three defendants as its officers, specifying the offices held by each, charging that they, as individuals, "did business as aforesaid," and planned to sell the corporation's outstanding accounts and conceal the proceeds which were to be paid to the three defendants for the assignment of the accounts of the bankrupt corporation, with intent to defraud its creditors, and charging the defendants with conspiring, in anticipation of the election of a trustee in bankruptcy, to conceal from such trustee, while the corporation should be a bankrupt, the property which should then and there belong to the bankrupt's estate. *Held*, that the indictment sufficiently charged a conspiracy, to which the corporation, through its officers and agents, was a party, to conceal assets on behalf of the corporation, and was not objectionable for failure to definitely allege the corporation's insolvency at the time of selling the assets.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 79, 80, 84–99; Dec. Dig. § 43.*]

6. CONSPIRACY (§ 43*)—ASSETS OF BANKRUPT—CONCEALMENT—DEMAND FOR REPAYMENT.
An indictment against the officers of a corporation for conspiracy to conceal its assets from a trustee in bankruptcy to be appointed was not objectionable for failure to allege that the assets concealed had been demanded of the defendants and delivery refused.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 79, 80, 84–99; Dec. Dig. § 43.*]

Indictments were found against Harry Rosenstein and others collectively, and also individually. On demurrer to the individual indictments. Sustained in part, and overruled in part.

William J. Youngs, U. S. Atty., and Samuel J. Reid, Jr., Asst. U. S. Atty., both of Brooklyn, N. Y.

J. Stewart Ross and Leroy W. Ross, both of Brooklyn, N. Y., for defendants.

CHATFIELD, District Judge. Demurrer has been interposed to the individual indictments by each of the above-named defendants.

[1] These indictments charge the customary facts relating to the institution and progress of a bankruptcy proceeding to the point of examination before the referee at the first meeting. The defendant in each case is alleged to have been called as a witness, properly sworn, and questioned before the referee, who is alleged to have had authority to administer the oath and conduct the examination. Each indictment is attacked because the transactions in question had to do with the keeping of books or the making of financial statements in 1909, while the filing of the bankruptcy petition occurred upon May 29, 1913.

There is no allegation of insolvency in 1909, and no statement of the evidence which the government intends to produce connecting the present situation with that shown by the books of the earlier year, or tracing the assets from the financial statements of that year to 1913.

The indictment, however, does allege that the referee was investigating the affairs of the bankrupt, and that the answers to the questions put were material "with respect to the financial condition of the business of the said bankrupt and with respect to the amount of assets and liabilities of the said bankrupt." It is evident that the questions would be upheld if they were material to any step in the bankruptcy proceeding. The question under discussion is not one of refusal to testify, nor was it raised by objection interposed as to "materiality."

[2] An inquiry as to assets or liabilities may be carried back as far as is necessary, and everything bearing upon the question of assets or liabilities at the time of bankruptcy (which is the time to which the sentence above quoted relates) was material to the inquiry. An allegation in the indictment that inquiry as to assets or financial statements at some previous time was material is a sufficient averment of fact, unless it is apparent that the subject-matter of the allegation is not in fact material to the issue charged.

[3] Immateriality as a defense to a perjury indictment would have to be raised upon testimony and not upon demurrer, unless the immateriality is apparent. It perhaps could be judged upon the government's case, but cannot be tested upon the general allegations of the indictment, if the acts of the bankrupt or its agents were matters under inquiry, and if a question of fact, in its nature material to that inquiry, and stated to be connected with the transactions entering into the filing of the petition, is the subject-matter of the questions under investigation. U. S. v. Lake (D. C.) 129 Fed. 499, at page 501.

The demurrer, therefore, to counts 1 and 2 of indictments Nos. 1476 and 1477 and to count 1 of indictment No. 1478 should be overruled, and the defendants directed to plead thereto. A further count has been inserted in each indictment alleging the pendency of the bankruptcy proceedings, the appointment of the receiver, election of a trustee, and the general reference to a referee in the Matter of the United Metal Bedstead Co.

[4] This count in each indictment further alleges that the bankrupt had a large number of provable claims and insufficient assets to pay the same, and that, while the "company" was bankrupt, the defendant (an individual) did conceal from the trustee in bankruptcy the proceeds of a certain sale of property of the bankrupt (which proceeds had been paid over to the bankrupt) and certain other property of the bankrupt to the grand jurors unknown.

There is no allegation in any one of these counts that there was concealment by the bankrupt, nor that the three individuals mentioned as defendants were acting for the bankrupt or concealing the property for the bankrupt. The other counts of the indictment indicate that these individuals were officers of the corporation, but these other counts are not included in the counts under discussion, even by refer-

ence, and the counts in question must therefore be judged as to sufficiency from the statements contained in the counts themselves.

As was held in U. S. v. Lake, supra, 129 Fed. at page 502, the bankruptcy statute makes concealment of assets a crime under section 29b (1) when committed by a person "having knowingly and fraudulently concealed while a bankrupt, or after his discharge, from his trustee, any of the property belonging to his estate in bankruptcy." The statute also defines the word "bankrupt" to be a person "against whom a petition has been filed, or who has filed a voluntary petition or been adjudged a bankrupt." The word "person" includes corporations and officers, partnerships, and women (section 1 [19])," and when used with reference to the commission of acts which are herein forbidden shall include persons who are participants in the forbidden acts, and the agents, officers, and members of the board of directors or trustees, or other similar controlling bodies of corporations" (19). Section 29b-(4) makes it a crime for any person to "receive any material amount of property from a bankrupt after the filing of the petition, with intent to defeat this act."

The matter contained in the last count of each of the indictments under discussion would seem to relate to the receipt of assets prior to bankrputcy, and, following the decision in U. S. v. Lake, supra, the conspiracy section of the Criminal Code (section 37 of the Act of March 4, 1909, c. 321, 35 Stat. 1096 [U. S. Comp. St. Supp. 1911, p. 600]), or the sections as to accessories (332–333), would be the only provisions under which an outsider or third party could be prosecuted for concealing assets in contemplation of claim thereto or search therefor by a trustee.

The counts under discussion do not allege any receipt of assets after the filing of the petition, nor do they show any act by officers acting for the corporation. Nor do the counts allege concealment from the trustee by the corporation, with participation therein by the defendants named, under section 1(19) and section 332 of the Penal Code, nor do these counts set forth a conspiracy. The precise language of the counts could only be supported as a general charge of the concealment of property which apparently belonged to another person, and this, while forbidden under the Penal Code of the state of New York, is not specifically made a crime by any section of the United States law, unless brought within the definition of larceny or the provisions above recited. The demurrer to these counts must be sustained.

[5] The joint indictment charging the three defendants with conspiracy has been demurred to on the following ground: That no offense against the United States or attempt to defraud the United States is set forth, and that no conspiracy to commit a crime specified in section 29b of the Bankruptcy Law is shown. It may be assumed that the indictment is directed against offenses named in the bankruptcy statute, and that the charge sought to be made is that of conspiracy to conceal or continue and accomplish the concealment of assets belonging to the bankrupt estate, from the trustee in bankruptcy.

The suggestion of the defendants is that the indictment does not show in its allegations a conspiracy for the concealment of assets by

the corporation. As was claimed with respect to the counts in the individual indictments, the assertion is made that concealment of assets from a trustee by an outside party might even be larceny against the bankrupt estate, but would not be concealment from the trustee for the purpose of defrauding creditors, and fall within the language of section 29 of the statute, unless the bankrupt was a party to the concealment.

The indictment charges that the business of the bankrupt was conducted by the three defendants as its officers, and their offices are specified. The three defendants are charged as individuals with "doing business as aforesaid" and planning to sell "its outstanding accounts" and to conceal the proceeds which were to be paid to the three individuals for the assignment of the accounts of the bankrupt corporation, with intent to defraud the creditors. The defendants are then charged with conspiring, in anticipation of the election of a trustee in bankruptcy, to conceal from that trustee, while "the said United Metal Bedstead Company should be a bankrupt, the property which should then and there belong to the estate in bankruptcy." This sets forth sufficiently a conspiracy to which the bankrupt corporation, through its officers and agents, was a party, and, under the language of section 1(19) of the statute, the concealment of assets on behalf of the corporation by the individuals named from the trustee during bankruptcy would be a crime, and a conspiracy to commit that crime could be prosecuted. U. S. v. Cohn et al. (C. C.) 142 Fed. 983. The present indictment seems to sufficiently set forth such a charge of conspiracy.

Further objection is made that insolvency at the time of selling the assets is not sufficiently alleged. This is unnecessary. Conspiracy by a solvent corporation, to conceal assets in contemplation of insolvency, would be a crime, and the indictment states that the corporation was insolvent and properly in bankruptcy.

[6] A further objection is based upon the absence of any statement in the indictment to the effect that the return of the sum alleged to have been received by the three defendants has been ordered or demanded and repayment thereof refused. Repayment of the amount might show restitution, and refusal to repay the amount, if ordered, might be the basis for a contempt proceeding, but there is no necessity for allegations of either in the indictment. In U. S. v. Grodson (D. C.) 164 Fed. 157, demurrer to a conspiracy indictment was sustained upon the ground that no overt act was shown after the bankruptcy, but the indictment in that case also failed to charge that bankruptcy was contemplated or that the conspiracy was to conceal the goods from the trustee and not merely from creditors. The present indictment is sufficient in these respects, and alleges sufficiently an overt act in pursuance of a conspiracy in itself sufficiently defined and charged.

The demurrer to this indictment will be overruled, and the defendants ordered to plead.

NATIONAL BANK OF COMMERCE IN ST. LOUIS v. ALLEN, United States Internal Revenue Collector.

(District Court, E. D. Missouri, E. D. March 16, 1914.)

No. 4104.

INTERNAL REVENUE (§ 9*)—CORPORATION TAX ACT—NET INCOME—DEDUCTION—TAXES.

Rev. St. Mo. 1909, § 11357, imposes a tax on bank shares, and section 11359 declares that the tax be paid in the first instance by the corporation, but it may recover the same from the owners or deduct it from dividends accruing on the shares, and the amount is also made a lien on the shares and is payable before a transfer of the shares can be made. Act Cong. Aug. 5, 1909, c. 6, § 38, 36 Stat. 112 (U. S. Comp. St. Supp. 1911, p. 946), imposes an internal revenue tax on the net income of corporations above $5,000, subject to deduction of all sums paid by it within the year for taxes imposed under the authority of the United States or any state. *Held*, that taxes assessed on the corporate shares of a bank and paid by it under sections 11357, 11359, were not taxes assessed against the bank which it was entitled to deduct in determining its net income for the assessment of corporation taxes under the Corporation Tax Act.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 13–28; Dec. Dig. § 9.*]

At Law. Action by the National Bank of Commerce in St. Louis against E. B. Allen, United States Collector of Internal Revenue for the First District of Missouri, to recover taxes paid on the reassessment of corporation taxes for the years 1909, 1910, and 1911. On plaintiff's motion for judgment on the pleadings. Denied.

Stewart, Bryan & Williams, of St. Louis, Mo., for plaintiff.

Charles A. Houts, U. S. Atty., of St. Louis, Mo., for defendant.

DYER, District Judge. The question before the court and presently to be decided is raised by the plaintiff's motion for judgment on pleadings.

The plaintiff filed its petition against the defendant to recover certain sums of money paid by it (under protest) to the defendant, who was and still is the Collector of Internal Revenue for the First Collection District of Missouri.

The petition is in three counts. Under the first count judgment is asked in the sum of $1,932.31; under the second count for the sum of $1,870.43; and under the third count for the sum of $1,502.04. These several amounts are for taxes alleged by plaintiff to have been illegally assessed against it by the Commissioner of Internal Revenue for the years 1909, 1910, and 1911, and illegally and wrongfully demanded and collected of it by the defendant. The several counts in the petition are in all respects the same, except in the amount claimed and the year for which the assessment was made. It will therefore be unnecessary to refer at length to any more than the first count. That count, omitting the purely formal parts, is as follows:

"Plaintiff further states that in the year 1910, and on or prior to the 1st day of March, 1910, in the time and in the manner provided by section 38 of the act of Congress, approved August 5, 1909, relating to special excise tax on corpora-

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

tions, made due and proper return to the United States Commissioner of Internal Revenue of the entire gross and net income received by it, from all sources during the year 1909, together with all other information required by said act of Congress; that in its said return the plaintiff, as authorized by said act of Congress, deducted from the gross amount of the income received by plaintiff during the year 1909 the sum of $193,230.98, which it had paid within and for the year 1909 for taxes imposed under the authority of the state of Missouri, and as required by the provisions of chapter 117, art. 2, of the Revised Statutes of Missouri 1909.

"Thereafter said United States Commissioner of Internal Revenue, in pursuance of such return, duly and properly assessed against this plaintiff the sum of $9,848.57 as and for the special excise corporation tax against this plaintiff on account of its said net income for the year 1909, which said sum was in due time, to wit, on or prior to the 30th day of June, 1910, paid by this plaintiff to E. B. Allen, esquire, United States Collector of Internal Revenue for the First District of Missouri, as aforesaid.

"Plaintiff further states, however, that during the month of April, 1912, said United States Commissioner of Internal Revenue made a new, additional, and unwarranted assessment of a tax against this plaintiff in the sum of $1,932.31, as a special corporation excise tax on account of its (plaintiff's) said net income for the year 1909, and that thereafter this plaintiff received from said Collector of Internal Revenue notice of such additional assessment, which said notice (form 647, List month of April, 1912, p. 1) notified this plaintiff that said sum of $1,932.31 had been assessed against it by the United States Commissioner of Internal Revenue as a special corporation excise tax on account of its said net income for the said year 1909, and that the same had been transmitted to said Collector of Internal Revenue for collection and was due and payable on or before the 30th day of June, 1912, and required and demanded that this plaintiff pay said Collector of Internal Revenue said amount of said additional assessment, to wit, the sum of $1,932.31.

"Plaintiff further says that this additional assessment was and is unwarranted and unlawful and contrary to the provisions of said act of Congress, and was made because said United States Commissioner of Internal Revenue and said Collector illegally claimed that this plaintiff, in making its return of its gross and net income received for the year 1909, had no right to deduct from the gross amount of its income for the year 1909 the sum of $193,230.98, which plaintiff had actually paid within the year 1909, as and for taxes imposed on plaintiff under the authority of the state of Missouri.

"Whereas, in truth and in fact, said last-mentioned sum had been actually paid by this plaintiff within said year of 1909, for taxes imposed on this plaintiff under the authority of the laws of the state of Missouri, and as required by the provisions of chapter 117, art. 2, of the Revised Statutes of Missouri 1909, and was a sum which plaintiff was compelled by law to pay, and was not a sum which this plaintiff had any option to pay or refuse to pay, and was a sum which plaintiff was entitled, under the provisions of said act of Congress, to deduct from the gross amount of the income of plaintiff for the year 1909.

"Plaintiff further says that it has never received nor recovered back from any one said sum of $193,230.98, so paid by it as aforesaid for taxes in compliance with the laws of the state of Missouri, and said sum never constituted any part of the net income of this plaintiff for the year 1909."

The answer of the defendant is as follows:

"Defendant further admits that prior to March 1, 1910, plaintiff made a return of its gross and net income received by it from all sources during the year 1909, as required by the act of August 5, 1909, which said return was correct, except as hereinafter stated; that thereupon the Commissioner of Internal Revenue assessed against plaintiff the sum of $9,848.57, as and for the special excise corporation tax which plaintiff should pay on account of its net income for said year of 1909; that said tax was thereupon, as alleged in said petition, paid to defendant; that thereafter the Commissioner of Internal Revenue made a new and additional assessment of a tax against plaintiff in

the sum of $1,932.31, as a special corporation excise tax on account of plaintiff's net income for said year 1909; that notice thereof was given and the payment thereof demanded, as alleged in plaintiff's petition; that thereafter plaintiff paid said additional assessment of $1,932.31 under protest; that, at the time plaintiff paid said additional assessment, plaintiff notified the United States Commissioner of Internal Revenue and said Collector that plaintiff would take steps to recover the amount so paid by plaintiff under protest; that thereafter, on the 12th day of October, 1912, plaintiff did appeal in writing to the United States Commissioner of Internal Revenue, and did claim that said sum so paid under protest had been improperly paid; that the same had been paid under protest and did demand that said sum be refunded to plaintiff; that said claim and appeal was in writing and in due form as prescribed by the Secretary of the Treasury of the United States; that said Commissioner of Internal Revenue denied and rejected said appeal and refused the same; and that no part of said $1,932.31 has been repaid to plaintiff.

"Defendant, further answering, states that after plaintiff had made its said return of its gross and net income for the year 1909, as required by the act of August 5, 1909, and after the Commissioner of Internal Revenue had made said assessment based upon the net income of plaintiff for the year 1909, as shown by said return, evidence was produced before the Commissioner of Internal Revenue which in his opinion justified the belief that said return of the plaintiff was incorrect in this: That in making said return plaintiff had unlawfully and wrongfully deducted from its gross income the sum of $193,230.98, which said sum had been during the year 1909 paid out by plaintiff (and never received or recovered back by plaintiff) on account of taxes assessed against the share and shareholders of plaintiff's capital stock under the provisions of article 2, c. 117, of the Revised Statutes of Missouri 1909, no part of which said sum of $193,230.98 had been assessed against plaintiff. And defendant says that in truth and in fact plaintiff during the year 1909 was required to pay and did pay the sum of $193,230.98 on account of taxes imposed under the provisions of article 2 of chapter 117 of the Revised Statutes of Missouri 1909, no part of which said sum has ever been repaid to it; and plaintiff's net income for the year 1909, as reported in its said return, was arrived at by deducting from its gross income the said sum of $193,230.98, so paid out by it. But defendant says that said taxes so paid out by plaintiff were not assessed against the plaintiff or the property of the plaintiff, but on the contrary were taxes assessed against the shares and shareholders of plaintiff's capital stock, and were assessed and collected under the provisions of article 2 of chapter 117 of the Revised Statutes of Missouri 1909, and particularly under sections 11357, 11359, and 11360 of said statutes.

"Thereupon the Commissioner of Internal Revenue duly amended plaintiff's return theretofore made and added to the net income of plaintiff on said return the said sum of $193,230.98, so wrongfully deducted by plaintiff, and thereupon assessed against plaintiff said additional tax of $1,932.31, the same being 1 per cent. upon said additional net income amounting to $193,230.98, as aforesaid."

It is upon these pleadings that the plaintiff asks judgment.

The real, substantial, and controlling question raised by the petition and answer is this: Had the plaintiff the right, in reporting its net income, to deduct from its gross income the taxes assessed against its shareholders and paid by it, under the provisions of sections 11357 and 11359 of the Revised Statutes of Missouri 1909? These two sections are as follows:

"Sec. 11357. Assessment of manufacturing and business companies and stock in other corporations. The property of manufacturing companies and other corporations named in article VII, chapter 33, and all other corporations, the taxation of which is not otherwise provided for by law, shall be assessed and taxed as such companies or corporations in their corporate

names. Persons owning shares of stock in banks, or any joint-stock institution or association doing a banking business, or any insurance company, whether of fire, marine, life, health, accident or other insurance, incorporated under or by any law of the United States or of this state, shall not be required to deliver to the assessor a list thereof, but the president or other chief officer of such corporation, institution or association, shall, under oath, deliver to the assessor a list of all shares of stock held therein, and the face value thereof, the value of all real estate, if any, represented by such shares of stock, together with all reserved funds, undivided profits, premiums or earnings, and all other values belonging to such corporation, company, institution or association; and such shares, reserved funds, undivided profits, premiums or earnings, and all other values so listed to the assessor, shall be valued and assessed as other property at their true value in money, less the value of real estate, if any, represented by such shares of stock. Private bankers, brokers, money brokers, and exchange dealers shall make like returns, and be assessed and taxed thereon in like manner, as hereinbefore provided. Insurance companies, or any corporations or associations doing business on the mutual plan, without capital stock, shall make like returns of the net value of all assets or value belonging thereto, which net value shall be assessed and taxed in the manner hereinbefore provided: Provided, however, that the license hereafter required to be paid by any such bankers, brokers and dealers, in addition to such taxes, shall not exceed one hundred dollars per annum. It is hereby made the duty of the county clerk to include in his abstract of the assessor's books required to be sent to the state auditor, valuation of all property assessed under this section, under the head of 'corporate companies,' and in addition thereto he shall make out from the lists delivered to the assessor as above provided, and send the same to the state auditor to be laid before the state board of equalization, on or before the 20th day of February in each year, an abstract of the assessment of all corporations or persons doing a banking or insurance business in his county, showing the name of each bank and insurance company, the number of the shares of stock and their face value, amount of reserve funds, undivided profits, premiums or earnings, and all other value, together with the assessed value thereof, also the value of real estate deducted as above provided, and the assessed value of such real estate as shown by the real estate book."

"Sec. 11359. Such taxes, how paid and covered. The taxes assessed on shares of stock embraced in such list shall be paid by the corporations, respectively, and they may recover from the owners of such shares the amount so paid by them, or deduct the same from the dividends accruing on such shares; and the amount so paid shall be a lien on such shares, respectively, and shall be paid before a transfer thereof can be made."

Section 38 of the act of Congress, approved August 5, 1909, contains, among others, the following provisions:

"Sec. 38. That every corporation * * * shall be subject to pay annually a special excise tax * * * upon the entire net income over and above $5,000 received by it from all sources during such year. * * * Second. Such net income shall be ascertained by deducting from the gross amount of the income: * * * (1) All the ordinary and necessary expenses actually paid within the year out of income in the maintenance and operation of its business and properties. * * * (4) All sums paid by it within the year for taxes imposed under the authority of the United States or of any state."

It is upon this latter provision, I take it, that the plaintiff chiefly relies.

Can it be successfully claimed that the tax imposed by the state upon the shareholders of a bank is in any wise a tax imposed upon the bank itself? True, the bank is required to pay (i. e., advance) the amount of the tax, but it is given a lien upon the shares of stock and all dividends thereon, until it is fully reimbursed by the shareholder.

The shareholder is not allowed to get a transfer of his holdings so as to cut the bank out of its lien.

The Supreme Court of Missouri, in the case of State ex rel. Campbell v. Brinkop, 238 Mo. 298, 143 S. W. 444, convincingly says:

"Under our statute, stock in a bank, federal or state, is assessed against the shareholder, but the tax is paid in the first instance by the bank, and the bank is reimbursed by the shareholder. That is merely a mode of convenience in collecting the tax; the effect is the same as if the shareholder paid it in the first instance."

The plaintiff had no right to deduct from its gross income the taxes assessed against its shareholders under the state statutes. By doing so it did not correctly state its net income, and for that reason the Commissioner of Internal Revenue acted well within his rights and duties in making the assessments complained of in plaintiff's petition.

In reaching the conclusion above stated, the court is well supported by the decision of the United States District Court of Massachusetts, in the case of Eliot National Bank v. Gill, 210 Fed. 933, recently decided.

The motion of plaintiff for judgment on the pleadings is denied.

ROBINSON v. WESTERN ASSUR. CO.

(District Court, N. D. New York. March 16, 1914.)

1. INSURANCE (§ 349*)—FIRE POLICY—CONDITIONS.

A provision in a fire policy that, if the premiums were not paid within 60 days from the date of the attachment of the insurance, the policy should be void during the time the premiums were past due and unpaid should be construed to mean voidable at the election of the insurer, and not void.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 891; 895–902, 913; Dec. Dig. § 349.*]

2. INSURANCE (§ 390*)—FIRE POLICY—PREMIUM—DEFAULT—WAIVER.

A fire policy was issued to plaintiff, covering a launch, May 9, 1912, providing that it should be void if the premium was not paid within 60 days from date of the attaching of the risk and during the time the premium remained due and unpaid. The policy attached May 31st following. On August 12th payment was demanded, and on September 23d the insurer's general agent wrote that, unless remittance was received on or before October 1st, notice of cancellation would be served. No notice of cancellation was served, however, until, on October 15th, the agent wrote to plaintiff notifying him of cancellation, but during the night of the 16th, and before notice of cancellation was received by plaintiff on the 19th, the boat was lost. *Held*, that such facts were sufficient to show a waiver of the insurer's right to cancel the policy for nonpayment of premium when due.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1037, 1038; Dec. Dig. § 390.*]

At Law. Action by Ernest J. Robinson against the Western Assurance Company, on a policy of fire insurance. Verdict having been returned for plaintiff, defendant moves for a new trial. Denied.

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

Weeds, Conway & Cotter, of Plattsburgh, N. Y. (Frank E. Smith, of New York City, of counsel), for plaintiff.

Carpenter & Park, of New York City (Donald F. McLennan, of Syracuse, N. Y., and Henry E. Mattison, of New York City, of counsel), for defendant.

RAY, District Judge. About May 9, 1912, the defendant, a foreign corporation, through its general manager in the United States, one E. S. Kelley, issued to the plaintiff, Ernest J. Robinson, a policy of insurance on the hull, tackle, etc., of his gasoline launch "Dan." It was issued in consideration of a premium of $131.25, and contained the following:

"It is agreed that should the premiums on this policy be not paid within sixty days from date of attaching, the policy shall be null and void during the time the premium is past due and unpaid."

The plaintiff obtained this policy through one Carl H. Oliver, who, in this transaction, was an insurance broker only, and who obtained it from Kelley, the general agent of the defendant. Oliver was not Kelley's agent and did not represent him, nor was he the agent of the defendant. The policy was sent to Oliver by Kelley, and by Oliver delivered to the plaintiff about May 6, 1912, and was a valid delivery. Robinson did not pay the premium to the defendant, or to Kelley, or to Oliver at that time, but later gave his note to Oliver. Kelley knew the premium was not paid, and by letter urged payment on at least three different occasions. October 1, 1912, Oliver wrote Kelley that Robinson would pay the 10th of the month. That, of course, informed Kelley that the premium was not yet paid to Oliver. October 15, 1912, Kelley wrote Oliver that, as the premium was not paid, he was sending notice of cancellation of the policy, but would be glad to reinstate the same on payment of the premium. This letter of notice of cancellation to Oliver was received by him at about 2 o'clock p. m. on October 17, 1912, but Kelley's letter of cancellation sent to Robinson was not received until October 19, 1912. During the night of October 16, 1912, the boat Dan was destroyed by fire and sank. Whether she was a total loss or not was a question of fact submitted to the jury. On the 18th of October the defendant company was notified by telegram of the loss. Kelley was also notified, but denied liability. In August, 1912, Kelley had reported to the defendant company the issuing and delivery of this policy to Robinson, and reported it as an outstanding policy, and also charged himself with the amount of the premium in his account with the defendant company and actually remitted it. Later, and in December, after the fire, on learning that Kelley had not received the premium from Oliver or Robinson, the premium was returned.

The court charged the jury that the premium was not paid; that Oliver was not the agent of Kelley or of the defendant; that the defendant company had the right, through its agent Kelley, to waive the provision that the policy should become null and void after 60 days from the date of attaching in case the premium was not paid, and treat

the policy as valid, outstanding, and binding, notwithstanding such nonpayment. The court charged:

"If the insurance company did so waive the provisions and did so recognize and treat the policy as valid and subsisting and outstanding, and if the plaintiff only received the letter canceling the policy after the fire, then you will come to the question of damages."

The court said and finally charged:

"Now, gentlemen, I charged you and I charge you again; of course during the 60 days that policy was valid whether the premium was paid or not. After the 60 days had run, from the time it attached, and it was after that that the fire occurred, whether this was a valid and binding policy and contract of insurance in force would depend on whether or not the defendant company, through its agent Kelley, who I told you had the power in that regard, waived the nonpayment of the premium by having reported it, paying it over, and by writing on two or three occasions, I think three, at different dates, asking payment of the entire premium, treating it as due, and saying nothing at all about this condition, and not giving any notice that they elected to treat the policy as void, or would if the premium was not paid, not calling attention to it, under all these facts and those that I called attention to as I read it here (I will not repeat it), by those acts and letters waived that condition which defendant had a right to do. The question is: Did it? That is for you to say. If the defendant, through Kelley, did so waive that provision and treat the policy as valid and in force, notwithstanding that nonpayment, and waived it, the plaintiff is entitled to recover. If the defendant, through Kelley, did not waive it, that ends this case, and the plaintiff cannot recover, and your verdict should be for the defendant."

The court also charged that, if the notice of cancellation sent Robinson was received prior to the fire, he could not recover.

[1] I think it is fairly well settled that such a condition in a policy meant not "absolutely void" but "voidable at the election of the insurer." Grigsby v. Russell, 222 U. S. 149, 32 Sup. Ct. 58, 56 L. Ed. 133, 36 L. R. A. (N. S.) 642, Ann. Cas. 1913B, 863; Knickerbocker Life Ins. Co. v. Norton, 96 U. S. 234, 24 L. Ed. 689; Oakes v. Manufacturers' Fire & Marine Ins. Co., 135 Mass. 248.

In Grigsby v. Russell, supra, which reverses 168 Fed. 577, 94 C. C. A. 61, the Supreme Court said:

"But a condition in a policy that it shall be void if premiums are not paid when due means only that it shall be voidable at the option of the company."

[2] So the right which this defendant company undoubtedly had to avoid the policy for nonpayment of the premium could be waived. Waiver has nothing to do with this case, if the clause referred to operates to make the policy ipso facto null and void in case the premium was not paid within the 60 days from date of attaching. A policy which had become null and void could not be renewed by waiver. The very language of the condition quoted plainly indicates that the policy is not to become void in case the premium is not paid. It is to be null and void; that is, inoperative during the time the premium is past due and unpaid. Further credit can be given; the policy can remain in force by consent, by waiving immediate payment (that is, extending further credit). And here Kelley treated the policy as a valid policy in force by writing at least three times for the payment of the premium, by reporting it as valid and outstanding, and by himself ad-

vancing the premium to the company, and by finally giving notice that it was canceled for nonpayment of the premium, thus ending the credit. The policy attached May 31, 1912. July 31, 1912, the premium was due. August 12, 1912, Kelley wrote for the premium. September 23, 1912, Kelley again wrote for the premium, and said:

"This premium is long past due, and unless remittance is received on or before October 1st, we will be under the necessity of serving cancellation notice on the assured for nonpayment."

October 1st Oliver telegraphed Kelley:

"Will pay the 10th of month."

The matter ran until October 15th, when Kelley wrote Robinson:

"You will please take notice that the premium of $135.25 on policy No. 1375, of the Western Assurance Company, dated May 31, 1912, has not been paid. Owing to the failure on your part to pay said premium, I herewith notify you that the policy is canceled according to its conditions, and the company will not be liable for any loss under said policy. E. S. Kelley,
"Agent Western Assurance Company."

Kelley's letter to Oliver of the same date reads:

"We beg to advise you that inasmuch as the premium on the Western Assurance policy #1375, covering motor boat of Mr. Ernest J. Robinson has not been paid, we are to-day serving notice of cancellation on the assured for nonpayment of premium. We will of course be very glad to reinstate the policy upon receipt of the premium.
"Yours very truly."

It is impossible to conclude otherwise than that this policy was regarded as valid and in force until the notice of cancellation was given. If it was void for nonpayment of the premium, why give notice that it would be declared void, etc., and then why say, "Notify you that the policy is canceled," etc.? I think Washoe Tool Mfg. Co. v. Hibernia Ins. Co., 7 Hun, 74, affirmed 66 N. Y. 613, Robinson v. Pacific Ins. Co., 18 Hun, 395, and Titus v. Glens Falls Ins. Co., 81 N. Y. 410, are substantial authority to the effect that nonpayment of the premium did not make this policy void, and that it was competent for the company to waive the nonpayment and continue it in force.

The evidence is clearly sufficient to sustain the finding of the jury that this company waived the nonpayment of the premium and treated and regarded the policy as valid, in force, and outstanding down to the time the notice was given. The policy was delivered without payment of the premium; it was left outstanding, and repeated and unconditional demands of payment of the premium were made; the general agent and the defendant company, the insurer, dealt with each other on the theory and basis that the policy was valid and outstanding; and the notice of cancellation sent October 15th, which assumed a valid outstanding policy and that notice of cancellation was necessary, demonstrates the understanding of the company. This demand was for the entire premium, that earned and that unearned, and, as the entire premium was the consideration for the continuance of the policy for the entire term, it seems to me that the demand for the payment of such premium was a plain recognition, not only that the policy was in

force, but that it would be kept in force at least until notice to the contrary. Kelley, the general agent, had power to waive the payment of the premium. Wood v. P. I. Ins. Co., 32 N. Y. 619; Boehm v. W. Ins. Co., 35 N. Y. 131, 90 Am. Dec. 787; M. & M. Ins. Co. v. Armstrong, 145 Ill. 469, 34 N. E. 553.

I do not think it was error to admit the evidence as to the transactions between the defendant company and its general agent in the United States, Kelley. It was not allowed to have any improper influence on the jury. I think this was a proper case for determination by a jury; that questions of fact were presented; that there was evidence to sustain the findings made; and that a new trial should be denied.

So ordered.

GOLDSMITH SILVER CO. v. SAVAGE.

(District Court, D. Maine. March 16, 1914.)

No. 703.

1. TRADE-MARKS AND TRADE-NAMES (§ 5*)—MARKS CAPABLE OF APPROPRIATION—NUMERALS.

A numeral when combined with some other symbol may become a vital part of a valid trade-mark.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 9; Dec. Dig. § 5.*]

2. TRADE-MARKS AND TRADE-NAMES (§ 70*)—UNLAWFUL COMPETITION—CIGARS.

Where defendant, after jobbing complainant's cigars sold under a trade-name "108," ceased buying the same and put out a cigar of his own under the name "208" of similar size and shape but in a box so differently marked and labeled that it did not appear natural or probable that the public would be deceived or that defendant's goods would be passed off as those of complainant's, the facts did not sustain a cause of action for unlawful competition.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 81; Dec. Dig. § 70.*]

In Equity. Suit by the Goldsmith Silver Company against Llewellyn W. Savage. Complaint dismissed.

Harry Silver, of South Bend, Ind., and Maurice E. Rosen, of Portland, Me., for complainant.

Phillips B. Gardner, of Bangor, Me., and Frank Fellows, of Portland, Me., for defendant.

HALE, District Judge. This case has already been before the court. 206 Fed. 1001. A preliminary injunction was denied. After passing on that question, and in order to bring the case promptly to a final hearing, it was decided to proceed immediately to pleadings and proofs. Inasmuch as the court was just entering upon a term of jury trials, the case was referred to Hon. John F. A. Merrill, as master, under Equity Rule 59 (198 Fed. xxxv, 115 C. C. A. xxxv). After the pleadings were made up, the master proceeded promptly with the proofs.

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

He has now reported his finding of facts and conclusions of law. He has found that the complainant has not shown a valid trade-mark in the symbol "108," and is not entitled to an injunction on account of infringement of such alleged trade-mark. He has further found that the complainant has not established a case of unfair competition on the part of the defendant such as will entitle it to an injunction or to an accounting.

[1] Upon examination of the proofs, it seems clear that this cause belongs to the line of unfair competition cases, rather than to the technical trade-mark cases. It has been held that a numeral, when combined with some other symbol, may become a vital part of a valid trade-mark. In Dennison Manufacturing Co. v. Scharf Tag, Label & Box Co., 135 Fed. 625, 68 C. C. A. 263, Judge Lurton (now Mr. Justice Lurton) refers to Gillott v. Esterbrook, 48 N. Y. 374, 8 Am. Rep. 553, as giving some support to the contention that a bare number is capable of being a valid trade-mark. In the case at bar the proofs fall far short of entitling the complainant to any relief by way of injunction, or otherwise, on the ground of infringement of any technical trade-mark. The proofs, however, present a much more difficult problem in the matter of unfair competition.

[2] It is urged on the part of the complainant that for 20 years, in the eastern part of Maine, it has manufactured, advertised, and sold cigars under the name "108"; that, during the early part of this time, the defendant was a jobber of cigars, and bought the cigars in question, and was therefore well acquainted with the brand; that, some years later, he stopped buying them, and began selling a cigar of his own under the name "208"; and that he did this in practically the same territory in which the complainant's cigar had been sold. The complainant therefore urges that these facts necessarily point to the conclusion that the defendant adopted the symbol "208," on account of its similarity to the complainant's symbol "108"; that he sold his cigar marked "208" with the intention of taking advantage of the advertising done by the complainant for the cigar "108"; and that he did this with the further intention of unfairly competing with complainant in the territory in question.

The proofs show that for many years the defendant has been manufacturing and selling his cigar in Eastern Maine under the style 208; that for about six years the complainant has had knowledge of this; but has taken no proceedings to enjoin such manufacture and sale. On examination of the proofs, it is found that the cigar box marked 108, when compared with the defendant's cigar box marked 208, shows no such resemblance between the two as would naturally lead to any deception. The labels on the boxes are different. The shape and size of the boxes are different. Their general appearance is dissimilar. The numerals upon the respective boxes differ in size, and in the place where marked on the boxes; they present no similarity to the eye. The size of the cigars themselves are practically the same; they are Londres shape, and five inches long. The cigars in the complainant's box are branded with complainant's numerals; those in the defendant's box are not branded. It is urged on behalf of the complainant

that the defendant has adopted the particular size and shape of the cigar with an intent to deceive, and to unfairly compete. In the Daoust Case, 206 Fed. 434, 124 C. C. A. 316, lately decided in this circuit, the defendant had his bottles manufactured for him of the same shape and appearance as those used by the complainant; so that, when used for dispensing the beverage over the counter, the resemblance of the bottles was so close that the Bo La bottle appeared to the casual inspection of the customer to be a Moxie bottle. There was also a great mass of testimony to the effect that many retail dealers, when asked for Moxie, served Bo La from Bo La bottles. In the Moxie Case (D. C.) 197 Fed. 678, such testimony with regard to the custom of retail dealers was full and convincing. In the case at bar, such testimony is meager and unsatisfactory. The shape of the cigar is of the ordinary Londres variety. It is in testimony that there is on the market at the present time a great number of brands of similar shape. On examination of the boxes and labels, it seems clear that there would be scarcely a possibility of a dealer being deceived in buying cigars from boxes of the defendant, and of being led to suppose that he was buying complainant's cigars.

The learned counsel for complainant urges with great earnestness and ability that, by manufacturing his cigars and selling them under the symbol 208, the defendant put into the hands of retail dealers means of deceiving the ultimate consumer by substituting the 208 brand for the 108 brand manufactured by complainant. He introduces testimony of witnesses who, at the request of complainant's manager, visited various places where cigars were sold with a view of showing that the purchasing public was being deceived. Without going into a detailed discussion of these proofs, I find that they are very incomplete. Upon this point the report of the special master is clear, and helpful to the court. After summarizing the testimony upon the point to which I have alluded, the master says:

"To me the testimony of the complainant's two witnesses as to their alleged purchases tends to show that an unscrupulous retail dealer, who is trying to defraud a purchaser by palming off a different cigar from that asked for, whether a 108 or 208, might possibly be able so to do provided his customer did not know the real name of the cigar he wanted; that is, that he might possibly substitute a 108 when a 208 cigar was asked for, or vice versa, and that he could equally well give any other cigar of the same shape and size either when a 208 or a 108 was asked for. Therefore the putting of the 208 cigar upon the market by the defendant would not especially help the retail dealer to pass off his cigar when a 108 cigar was asked for, when he might as well pass off any other cigar of the same general shape, size, and color, of which, as appears from the testimony, there are about 1,000,000 brands. On this point I call attention to the fact that the complainant's counsel admits in his argument that they have no monopoly of the manufacture of the Londres, five-inch cigar, but that it is a universal shape and size, and from the testimony of complainant's manager himself it appears that there are a million brands of cigars manufactured of similar shape and size. * * * The boxes are of different size and entirely dissimilar in appearance except for the name, and, although the cigars themselves of both complainant and defendant are of similar size and shape, complainant's counsel admits that they have no monopoly or exclusive right to the use of this particular size and shape. Also it is of importance that each of complainant's cigars were stamped with the symbol or numerals 108, whereas the cigars of the defendant had no stamp

upon them. In other words, the cigars themselves manufactured by the defendant in this case were simply on general lines and were only similar to cigars manufactured by complainant as all cigars of this shape and size are. * * * The adoption of the universal Londres shape and size by the defendant for his cigar was not necessarily done, as complainant's counsel would have us believe, for the purpose of furnishing to the retailer under the name 208, a cigar which the retail dealer might palm off on intending purchasers of complainant's 108 cigar. In fact, it would seem that the mere use of the name or symbol 208 by a wholesale manufacturer would be of little or no assistance to the retail dealer if he wished to substitute an inferior cigar in the place of the 108 cigar; it being shown by the exhibits in the case that there was no special resemblance between the cigar boxes of complainant and defendant other than the symbol or numerals, which symbol or numerals, under most circumstances, were not visible to the purchaser. In other words, any cigar of this universal size and shape could have been as easily substituted for the 108 cigar as the one bought by the retailer under the name 208."

In view of the evidence that there is a multitude of brands of cigars manufactured of similar shape and size, it cannot be held that the rule should be applied requiring an article which is likely to deceive as to its origin to be distinctly tagged with the name of the real producer, as in the Coca Cola Case, 200 Fed. 720, 725, 119 C. C. A. 164. In the case now before me, the proofs fail to show a purpose on the part of the defendant that this cigar should be used by dealers to deceive customers. Neither the shape of the cigars themselves, nor the boxes, nor the labels are calculated to mislead purchasers as to the origin of defendant's goods. Manufacturing Co. v. Trainer, 101 U. S. 51, 56, 25 L. Ed. 993. A careful examination of all the proofs leads me to the conclusion that they do not show conduct, on the part of the defendant, the natural, probable tendency and effect of which is to deceive the public, or to pass off defendant's goods as those of complainant. The complainant, then, has not met the burden of showing unfair competition by satisfactory proofs.

The report of the master is confirmed.

The complainant's bill is dismissed, with costs for defendant.

THE WM. H. GILBERT.

(District Court, N. D. Ohio, E. D. February 2, 1914.)

No. 2549.

COLLISION (§ 100*)—STEAMER AND VESSEL ANCHORED IN FOG—NEGLIGENT NAVIGATION.

The steamer City of Genoa, with a cargo of grain, was compelled by a dense fog to anchor in the early morning at a place in the St. Clair river between 250 and 333 feet distant and about abreast of the ferry dock at Sarnia, Ontario; the channel there being 1,300 feet wide. She set her anchor lights and continuously rang her fog bell. On hearing the fog signals of a vessel up the river she sounded alarm signals, but was struck and sunk by the steamer Gilbert having a cargo of ore and a tow. The Gilbert had followed other vessels into the river after lying up in Lake Huron, but owing to the fog was off her course. There was at least 1,000

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

feet of open water to the westward of the Genoa. *Held*, that the Genoa, while anchored in a dangerous place, was justified by the circumstances and was not in fault in any respect, but that the collision was due solely to the fault of the Gilbert in being off her course and in not maintaining a proper and competent lookout, who should have heard the fog bell of the Genoa.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 213–215; Dec. Dig. § 100.*]

In Admiralty. Suit for collision by G. A. Garretson and others, receivers of the Gilchrist Transportation Company, against the steamer Wm. H. Gilbert. Decree for libelants.

A. J. Gilchrist, of Cleveland, Ohio, for libelant.

Goulder, Day, White & Garry, of Cleveland, Ohio, for respondent.

DAY, District Judge. On the early morning of August 26, 1911, the steamer City of Genoa, loaded with a cargo of grain, was compelled by a dense fog to anchor at a place in the St. Clair river between 250 and 300 feet distant from and about abreast of the ferry dock at Sarnia, Ontario. In the interim between putting out her anchor, swinging around, and bringing up on a heading a little off of directly up river and almost parallel to the dock, the Genoa blew several alarm signals, and immediately after her running lights were taken in, her anchor lights put out, and her fog bell continuously rung at the required intervals. While so lying and within three-quarters of an hour after anchoring, the watch on the Genoa heard the fog signals of a steamer, afterwards ascertained to be the W. H. Gilbert, approaching from above. The Genoa immediately blew an alarm signal and later blew another alarm signal. Almost immediately after the second alarm signal, the Gilbert appeared, heading on the Genoa's port side, and collided with the Genoa, causing the Genoa to sink.

On this same morning the steamship W. H. Gilbert, laden with a cargo of iron ore with the barge 137 in tow, arrived at the foot of Lake Huron at an early hour.

Thereupon the atmosphere at the head of the St. Clair river being rather smoky, the steamer and her consort rounded to at the lightship in Lake Huron and waited for the atmosphere to clear. Between 3 and 4 o'clock in the morning it did clear, and other vessels which had been outside proceeded down the river, and the Gilbert and her consort followed them in. The atmosphere continued clear until the Gilbert had arrived at a point about abreast of Butler street in Port Huron, when it appeared hazy ahead. The Gilbert's speed was then checked from one-half speed to slow and her fog whistles sounded. The vessels proceeded into the fog under slow speed on a course which was estimated by compass, by a stern observation of lights on the shore, and when the steamer had arrived at a certain point in the river, at about which time an alarm signal was heard, which proved to be the signal from the Genoa ahead, the wheel was put hard aport, and shortly thereafter the Gilbert was backed full speed astern and very shortly collided with the City of Genoa abreast her pilot house on the port bow.

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

The bell on the Genoa was an ordinary efficient fog bell located on the foremast on the after side about 8 feet from the deck of the steamer, and ahead of the bell the texas and pilot house of the Genoa arose to a distance of some 5 feet higher than the location of the bell.

The Genoa came to anchor at a point where the channel was 1,300 feet in width, near where vessels turn to go on the downward course and where the river had a cross-current of some four miles an hour in velocity.

It is urged on behalf of the Gilbert that the bell on the Genoa was improperly placed; that an improper lookout was maintained; and that, the location of the Genoa being a very dangerous one, it was incumbent upon her navigating officers to move to a safer place.

The bell was sounded in compliance with the rule which provides:

"(e) Any vessel at anchor, any vessel aground in or near a channel or fairway shall at intervals of not more than two minutes ring the bell rapidly for three to five seconds."

Regardless of the location of the bell, the master and mate of the Lakeland heard it sounding while they were on the Port Huron side of the river and in a direct line of the course afterwards followed by the Gilbert. The captain of the tug Fisher heard the bell ringing continuously as he proceeded down on the Port Huron side of the river close to the shore. Four or five shore witnesses who were variously located in Sarnia also heard the bell ringing continuously. The captain of the City of Genoa and others of the crew positively testify as to the sounding of this bell. From the end of the ferry dock at Sarnia was a bell which was rung when the ferry was running; but at this time of the morning of this occurrence the ferry was not in operation, and consequently the bell was not rung. During the interval of time during which the fog bell was sounded on the Genoa, the captain of the Gilbert was busily engaged in trying to mathematically determine his position; the mate was with him in conference; the wheelsman testified that he was paying no attention to the signals, and the lookout on the forecastle deck forward testifies that he did not hear any bell from the Genoa. No one testifies that this bell was not rung. While the captain of the Genoa, after coming to anchor, was in his room for a portion of the time, nevertheless the mate was on watch continuously, and from the testimony it is apparent that a proper lookout was maintained. It is evident that the captain of the Genoa knew about where his ship was located when he came to anchor, as in swinging around he saw the light on the dock at Sarnia. It is true that the Genoa was located in a dangerous position. There was at least a thousand feet of navigable channel between the Genoa and the American side of the river. The fog was very dense, and prudent navigation might well require that under the circumstances in this much traveled river in this dense fog that the correct thing to do was to come to anchor and sound the precautionary signals as the Genoa did. To have endeavored to have moved to a safer location would in my opinion have been more hazardous than to have remained at anchor and sounded the fog bell. Under existing conditions an exact location for a safe place to anchor was impossible. The Gilbert was

coming down with a tow in a river with a swift current, and when the Gilbert and her tow entered the river she was following a number of vessels down, and I think by the weight of the evidence it is established that when her captain decided to go on down the river he was in exercise of prudent seamanship. The situation presented to the captain was a difficult one. The obligation was upon him in navigating the Gilbert to exercise more than the ordinary diligence and care in navigating his boat. At the time of the collision the Gilbert's speed over the land was between six and seven miles an hour. The Gilbert far overran the ordinary place of porting and making the turn to starboard and down the channel between the gas buoy and the Sarnia dock. The wheelsman had not yet started to port when the collision with the Genoa became imminent. The Gilbert chose to navigate through this dense fog on a course which was simply calculated by guess. With a thousand feet of clear water she collided with the Genoa located not over 300 feet off the Sarnia dock. The lookout was a young, inexperienced man, and I am of the opinion that if he had properly listened for signals this accident would not have happened. Every one else in a position to hear heard this fog bell, and I am firmly of the opinion that the only reason that it was not heard upon the Gilbert was either through the inefficiency or inattention of the lookout maintained. The case of inscrutable fault is not presented here. I am unable to find that the Genoa was at fault in any way, and I am forced to reach the conclusion that the navigation of the Gilbert was negligent, both in the manner in which her course was shaped across the river resulting in the collision and in the manner in which her lookout was maintained.

An entry may be drawn accordingly.

In re PARMETER'S ESTATE.

(District Court, D. North Dakota. March 13, 1914.)

PUBLIC LANDS (§ 35*)—DEBTS—EXEMPTIONS—STATUTES—CONSTRUCTION.

Rev. St. U. S. § 2296 (U. S. Comp. St. 1901, p. 1398), provides that no land acquired under the provisions of the chapter shall in any event become liable to the satisfaction of "any debt" contracted prior to the issuing of the patent therefor. *Held*, that the debts referred to in such section were those of the patentee, and that the exemption did not run with the land and inure to the benefit of the patentee's heirs and assigns, so as to render the lands exempt from execution for debts of the patentee's husband contracted prior to patent on his acquiring the land on her death.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 72–77; Dec. Dig. § 35.*]

In Bankruptcy. In the matter of bankruptcy proceedings of William J. Parmeter. Application by the bankrupt's trustee to review an order setting over to the bankrupt, as exempt, certain real property. Reversed.

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

F. C. Heffron, of Dickinson, N. D., for trustee.
John Carmody, of Hillsboro, N. D., and T. F. Murtha, of Dickinson, N. D., for bankrupt.

AMIDON, District Judge. This cause comes on to be heard upon the certificate of the referee, certifying to the court for review his order made herein, directing the trustee to set over to the bankrupt, as exempt, the south half of the northeast quarter, and the south half of the northwest quarter of section 20, township 140, range 96.

The controversy arises out of the following facts: Vina Rasmussen filed upon the land as a government homestead on the 5th day of June, 1907, and was thereafter married to the bankrupt. Thereupon she and the bankrupt took up their home upon the land. Thereafter the wife made final commutation proof, under the homestead laws, and a final certificate was issued to her by the proper officers of the Land Department, on December 14, 1912. In March, 1913, the wife died, leaving the bankrupt, William J. Parmeter, her sole heir. There were no children born of the marriage, and there were no persons living with the bankrupt and dependent upon him, so as to make him the "head of a family," within the homestead law of the state of North Dakota. He could not, therefore, claim the property as exempt as a homestead under the laws of the state. On June 5, 1913, the United States duly issued a patent for the land in favor of Vina Parmeter, and, under section 2448 of the United States Revised Statutes, the title to the land inured to, and became vested in, the above bankrupt, as the sole heir of the patentee. On the 26th day of June, 1913, the bankrupt filed a voluntary petition in bankruptcy herein. None of the debts scheduled in his list of liabilities were incurred subsequent to the issuance of the patent. He claims the land as exempt under section 2296 of the Revised Statutes of the United States, which reads as follows:

"No land acquired under the provisions of this chapter shall in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor."

Inasmuch as all of the bankrupt's debts were incurred prior to the issuing of the patent, he claims that he holds the property exempt from such debts, by reason of this section. The case turns upon whether the exemption mentioned in the statute is confined to the debts of the patentee, to whom the government issues the patent, or runs with the land, and inures to the benefit of the patentee's heirs and assigns, so as to be exempt also from their debts contracted before the issuance of the patent. The referee held the exemption extended to the debts of the bankrupt, as the heir of the patentee. The trustee insists that the exemption should be confined to the debts of the patentee.

Section 2296 has not been literally construed by the courts. It has been uniformly held that the homestead is liable, at least after final proof, for liens voluntarily impressed thereon by the homesteader, and subject to sale for the payment of the debt secured by such liens. It has been the practice for more than a generation for homestead

entrymen to borrow the money with which to make their final proofs, and pay the commutation price for the land, and give back a mortgage upon the homestead as security, and such mortgages have been sustained by the courts, and enforced against the homestead, although they were created frequently years before the issuance of the patent. In this way an exception has been built up to the general language of section 2296, and the words "any debt," contained in the section, have been held to mean general contract debts as to which no specific lien was voluntarily impressed upon the homestead by the entryman. Stark v. Morgan, 73 Kan. 453, 85 Pac. 567, 6 L. R. A. (N. S.) 934, 9 Ann. Cas. 930; Doran v. Kennedy, 122 Minn. 1, 141 N. W. 851.

It seems to me clear that the exemption must also be confined to the debts of the patentee. After final proof, it has been the uniform practice to alienate homesteads the same as if the homesteader had a title in fee. Section 2448, by providing that the patent, when issued, shall inure to the benefit of the "assignee" of the patentee, clearly countenances such conveyance. They have been held valid by all the courts, both state and federal. Upon the death of the homesteader, after final proof, the title passes to his heirs, if the homesteader is still the owner of the property. These "heirs" are not confined to the wife and children of the homesteader, but extend to remote collateral heirs. The title may go to the brothers and uncles of the deceased, if he leaves no nearer kindred. Again, if the homesteader mortgages the property, after making final proof and before patent, it will frequently happen that the title will pass to third parties upon the foreclosure of the mortgage before the patent issues. Now, is the land exempt, in the hands of these remote holders, from *their* debts incurred prior to the issuance of the patent? It might happen that the land would pass to a brother or an uncle of the deceased homesteader who is himself the holder of a government homestead, and enjoying in his own right the full benefits of the exemption granted by section 2296; or the homesteader might have sold the land to a purchaser of independent fortune, in no way needing or entitled to the benefits of the statute. Or, again, the land might be held by the purchaser on the foreclosure of a mortgage given after final proof. Now, to hold that each of these classes of persons would hold the land not only exempt from the debts of the homesteader, but likewise from his own debts, contracted prior to the issuance of the patent, is to carry the exemption wholly beyond the purpose of the law. A construction which leads to such absurd results must be wrong, and proves that we have the right meaning of the statute when we confine the exemption to the debts of the patentee.

But counsel for bankrupt insists that the property should be exempt in the hands of the heirs of the homesteader, when such heirs are members of his immediate family. I find no ground in the statute upon which to base such a classification. If the exemption follows the land beyond the patentee of the government, then there is no rule prescribed by the statute to determine how far we shall go in allowing the exemption. It must therefore be confined to the debts of the

patentee or extend to the debts of all holders prior to the issuance of patent.

The family of the homesteader will, in the great majority of cases, be fully protected in their homestead rights. If the entryman dies before making final proof, then his widow or heirs would be entitled, under section 2291 of the United States Revised Statutes, to comply with the provisions of the homestead law, and receive a patent to the land. In such a case they would obtain title, not as heirs of the original entryman, but as purchasers from the government; and the land would remain exempt in their hands from all liability for debts incurred by them, or the original entryman, prior to the issuance of the patent. If the "heir" be "the head of a family," the homestead would also, as a rule, be exempt under state laws.

The views which I have expressed are sustained in Duell v. Potter, 51 Neb. 241, 70 N. W. 932. Observations to the contrary contained in Gould v. Tucker, 20 S. D. 226, 105 N. W. 624, and Blair v. Mayer, 24 S. D. 563, 124 N. W. 721, 140 Am. St. Rep. 797, do not seem to me to rest upon a sound construction of section 2296 of the United States Revised Statutes.

It is therefore ordered that the order of the referee be, and the same is hereby, reversed, and the application of the bankrupt for an order directing the trustee to set off the land above described to him, as exempt, is denied.

NATIONAL CLOAK & SUIT CO. v. LONDY & FRIEND.

(District Court, N. D. Illinois, E. D. February 6, 1914.)

No. 30,513.

TRADE-MARKS AND TRADE-NAMES (§ 3*)—UNLAWFUL COMPETITION—CORPORATE NAME.

Complainant, National Cloak & Suit Company, began business in 1888 and used the word "National" as applied to their mail order cloak and suit business, which, by extensive and expensive advertising and fair treatment to customers, became well and favorably known throughout the United States as applying to garments of complainant's manufacture. Defendants, citizens of Illinois and engaged in the retail cloak and suit business, began to use the word "National" in 1908 and 1909, advertising "National garments," "Made by the National Cloak Manufacturing Company," so wording their advertisements as to mislead the public to believe that the goods were manufactured by complainant. *Held*, that the word "National," while not distinctive, had nevertheless acquired a meaning which was the property of complainant, and that it was entitled to an injunction restraining defendants' use thereof.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 4–7; Dec. Dig. § 3.*]

In Equity. Suit by the National Cloak & Suit Company against Londy & Friend, to restrain defendants' use of the word "National." Writ granted.

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

Archibald Cox and Abraham L. Gutman, both of New York City, and Frank F. Reed and Edward S. Rogers, both of Chicago, Ill., for complainant.

Jesse Lowenhaupt and Lewis F. Jacobson, both of Chicago, Ill., for defendants.

KOHLSAAT, Circuit Judge. The bill herein was filed to restrain unfair competition, among other objects.

Complainant is a New York corporation. Defendants reside in and are citizens of Illinois. The suit involves only the cloak and suit business, and the use of the name "National" in connection therewith. Complainant conducts its business in New York City under what is known as the mail order system, while defendants are engaged in the retail trade at Chicago.

From 1888 to 1903, the business now being conducted by complainant was operated by Rosenbaum and Hartman as copartners, who, in 1889, admitted Solomon G. Rosenbaum, the present president of the company, into the firm. In 1903 the business was incorporated; the corporation taking over the business, good will, assets, etc. During all the time since 1888 the business had been carried on in association with the name "National Cloak," in a women's clothing business. The corporation name of "National Cloak & Suit Company" was taken at the time of incorporation. It has always kept the word "National" to the front. As is customary in the mail order business, advertising has been done in magazines and otherwise, and a vast number of catalogues have been distributed to persons desiring them, whereby a very extensive business has been built up—always in connection with the word "National."

From the record it appears that complainant's was practically the only business run under that name, so that its manufactures were known in connection with the word. Numerous attempts have been made to use the name in the cloak and suit trade, which complainant has headed off by representation, or suit, as in Rosenbaum et al. v. Bull et al. (no written opinion), in which a decree was entered in this district. There is oral reference in the records to other successful suits.

It appears that from an humble beginning in 1888 the business had grown to vast proportions, amounting annually to many million dollars, and extending throughout the United States. Among other localities, that of Chicago and vicinity embraced a constituency of several thousand. So that the National Cloak & Suit Company of complainant was well known in this community prior to the commencement of this suit. In 1908 and 1909, defendants began to use the name, including the word "National," in connection with the cloak business. In 1911 they were doing business under the name "Palmer's" exclusive cloak house, 146 State street, Chicago; and at another location under the name "Macey's." At the former place, on or about January 19, 1911, defendants advertised in the Chicago papers, in part as follows:

"Extra, Extra, Extra, $50,000 worth of cloaks, suits and dresses purchased from the National Cloak Mfg. Co. at less than 50 cents on the dollar. Every woman throughout the land knows the National garments. No need for us to mention character and quality, the name alone suffices."

This manufacturing business, defendants say, ended in 1911. The name National Cloak Manufacturing Company does not appear in the Chicago city directory for any of the years named, and it appears to have not had even a local popular recognition as a manufacturing concern. The statement in the advertisement, therefore, as to the widely known character and quality of "National garments" was not fairly applicable to defendants' goods. The names "Palmer" and "Macy," it appears, were well-known cloak and suit houses, the former in Chicago and the latter in New York, which facts seem from the record to explain defendants' manner of availing themselves of business conditions.

It further appears from the evidence that in January and February, 1911, defendants advertised cloaks, etc., again, under the name "National garments," "made by the National Cloak Mfg. Co." On protest being made by complainants, this ceased. In August, 1911, defendants opened a retail cloak and suit store under the name National Cloak Company. A number of persons, being familiar with complainant's National garments, were deceived by these signs. Some were aggrieved at the treatment accorded them. It was complainant's policy to fill orders promptly and carefully, and on complaint to always return the money, relying upon this fair treatment and other considerate methods for the building up of its business. The record shows instances in which defendants by their contrary methods worked injury to complainant. Several parties testified that they supposed defendants were a branch house of complainant.

It seems clear from the testimony that defendants deliberately took advantage of complainant's good name, acquired through popular business methods and expensive advertising, to sell their goods. While it would not ordinarily seem probable that complainant's mail order business would be affected by local attempts to appropriate its trade, it appears from the record that complainant was injured. Defendants were notified to discontinue the use of the name National Manufacturing Company and other misleading uses of the word National in connection with cloaks and suits, and must have known what complainant claimed. The word National is not, of itself, very distinctive; but where, as here, it has acquired a meaning which is the property of complainant, it should be protected.

The injunction may go as prayed.

THE LANGHAM.

(District Court, N. D. Ohio, E. D. January 19, 1914.)

No. 2525.

COLLISION (§ 95*)—STEAMER AND TOW MEETING—PARTING OF TOW LINE.

A steamer with two barges in tow, the second of which, the Plymouth, had just been taken up, was turning in St. Clair river to head downstream, when the towline of the Plymouth parted, and she headed across, and drifted down upon the steamer Langham, which was then meeting and passing the tow part to port, and which backed and went to the eastward until she touched bottom. *Held*, that the collision was due solely to the fault of the Plymouth in furnishing an insufficient towline, and also either for not dropping an anchor, or for not having an anchor in a position where it could be used in case of emergency.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 200–202; Dec. Dig. § 95.*]

In Admiralty. Suit for collision by J. Joseph McTigue, owner of the barge Plymouth against the steamer Langham, with cross-libel by the owner of the Langham. Decree for cross-libelant.

Dorr E. Warner and L. B. Ware, both of Cleveland, Ohio, for libelant.

Goulder, Holding & Masten, of Cleveland, Ohio, for respondent.

DAY, District Judge. This libel and cross-libel involve a collision between the steamer Langham, up-bound, and the barge Plymouth, in tow of the steamer Adiramled, which also had the barge Melbourne in tow directly ahead of the Plymouth, in the St. Clair river, abreast of Marine City, Mich., at about 3 o'clock on the afternoon of Saturday, August 21, 1909.

The steamer Langham is a wooden freighter, 281 feet long, and 48 feet beam, while the barge Plymouth is a schooner barge, 213 feet long, 30 feet beam. The navigable channel where the collision occurred is about 1,800 feet wide, and on the Canadian side of the channel, below Bell river, which is on the American side, is Woodtick Island, which is surrounded by a shoal; this shoal as marked on the chart having a depth of from one to five feet.

The Langham was bound up, laden with coal, with the officers and crew properly placed. Previous to meeting the Adiramled, the Langham passed the boat Essex under one-blast signals, at which time the Langham was about in the middle of the river and was going about 10 miles an hour.

When the barge Plymouth was first seen, the tow was just starting to turn around. The Plymouth had been lying at a dock just below the mouth of the Bell river on the American side, and the Adiramled, with the Melbourne in tow, had gone down the river, rounded to, and come alongside of the Plymouth, and the Plymouth's towline was then passed to the stern of the Melbourne and made fast on the Melbourne. The towline was furnished by the Plymouth. The tow then started up the river, and started coming around on a port wheel, and the

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

Adiramled was about opposite the mouth of the Bell river, near the middle of the channel, and the Langham opposite the Michigan Salt Works, about a mile or a mile and a half apart. The Adiramled blew a two-blast passing signal. Those in charge of the navigation of the Langham have testified that an alarm whistle was blown, followed by a one-blast passing whistle, and at the same time that the Langham was checked. In any event, the one-blast passing signal was accepted by the Adiramled, and her captain testifies that this method of passing port to port was satisfactory to him.

While there is some dispute in the testimony, the Adiramled in all probability passed the Langham 150 to 200 feet off. The Melbourne was following along after the Adiramled; but the Plymouth did not straighten down after the Melbourne, but appeared to be going right across the river toward Woodtick Island.

From the weight of the evidence, at the time the Plymouth was observed to be adrift on board the Langham, the Langham had passed the Adiramled and was close on to the Melbourne. The Langham was then backed full speed astern, and at this time the Langham was close up to Woodtick Island, touched the bottom, and was stopped, and the forward part of the Plymouth struck the port bow of the Langham, breaking in several planks and frames and stanchions. The Plymouth then drifted down past the Langham.

The day was clear, and there was scarcely any wind blowing. The St. Clair river has a current of about two miles an hour at the point of collision. Until the towline attached to the Plymouth parted, there was no danger of collision between these various vessels.

It appears from the record that no undue strain was placed upon the towline, and that the Adiramled executed a proper maneuver in straightening out herself and her tows preparatory to going down the river. After the towline broke, the Plymouth had no means of self-propulsion, did not drop any anchor, and in the course of a few minutes drifted downstream athwart of the river.

The Plymouth did nothing but blow distress signals, which appear to have been blown at about the time that the Langham passed the Adiramled. The record does not satisfactorily show that this towline which parted was sufficient; it does not show that it was inspected, and the reasonable inference would be that this collision occurred by reason of the parting of an insufficient towline. From the time when the towline broke, until the time of the collision, a sufficient period of time elapsed to enable those in charge of the Plymouth to drop an anchor without any danger to any of the crew, had an anchor been placed in such a position as to have been serviceable. The Plymouth had two anchors forward, one on the port and another on the starboard side, each of which weighed not less than 1,200 pounds. They were lying on deck inside of the rail. To drop the anchor it was necessary to lift the anchor clear of the rail and fasten the same to the cat-head of the Plymouth by means of a steam windlass, and then drop the anchor from the cat-head into the water. It is apparent that the anchors were not so placed as to have been readily dropped.

The navigation of the Langham is criticised; it being urged on be-

half of the Plymouth that the Langham should have made an effort to have gone to the stern of the Plymouth, or, in other words, crossed between the Melbourne and the Plymouth. In view of the fact that the Langham was an up-bound boat, heavily laden, and that the Plymouth had considerable headway, the judgment of the captain of the Langham in steering towards Woodtick Island as far as he could, until prevented by shoal water, cannot be said to be improper navigation.

The collision was primarily caused by the parting of this towline. The evidence introduced on behalf of the Plymouth is not sufficient to show that she herself was not responsible for the parting of this line. The strain put upon this line by the Adiramled was usual, and one that would be expected in the towing of barges on rivers such as the St. Clair. As far as the anchors are concerned, either no effort was made to drop them, or else they were so placed as to render their dropping impossible. In any event, had the anchors been dropped, this collision might have been averted, and the Plymouth was at fault, either for not dropping these anchors, or for not having its anchors in shape to let them go in a case of emergency.

I am accordingly of the opinion that this collision was due solely to the fault of the Plymouth, and the libel will be dismissed, and a decree for cross-libelant entered for the full amount of damage it can show before a special master.

SMITH et al. v. PUGET SOUND ELECTRIC RY.

(District Court, W. D. Washington, N. D. March 14, 1914.)

No. 2155.

NEW TRIAL (§ 42*)—GROUNDS—DECEPTION BY JUROR AS TO QUALIFICATIONS.

Where a juror on his examination testified that he voluntarily left the employ of a company under the same management as defendant, that he had another position, that he thought it was to his advantage to take the other position, and that everything was entirely friendly when he left the employ, an affidavit, alleging that he was discharged for failure to properly discharge his duties and did not resign voluntarily, but not alleging that the employer's dissatisfaction was imparted to him, did not show such intentional deception on his part as required a new trial, since unwillingness is not, necessarily, imputable to an employé who is discharged.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 74–79; Dec. Dig. § 42.*]

At Law. Action by Anna E. Smith and husband against the Puget Sound Electric Railway. On petition by defendant for a new trial. Petition denied.

Edward Judd and O. E. Sauter, both of Seattle, Wash., for plaintiffs.

James B. Howe and Hugh A. Tait, both of Seattle, Wash., for defendant.

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

CUSHMAN, District Judge. Defendant petitions for a new trial, among others, upon the ground of irregularity in the proceedings of the jury, by which it is alleged to have been prevented from having a fair trial.

The following occurred during the examination of one of the jurors:

"Q. (Mr. Tait) Mr. Gordon, did you ever engage in railroading in any way at all? A. I was engaged by the Seattle Electric Company as a conductor once.

"Q. How long ago was that? A. Three years ago.

"Q. How long did you work for the company? A. Three or four months.

"Q. Did you leave the company's employ voluntarily? A. Yes; I had another position.

"Q. You thought it was for your advantage to take the other position, which was a better position than that which you had as a conductor? A. Yes, sir.

"Q. So that when you left the employ everything was entirely friendly? A. Yes.

"Q. Are you conscious of any unfriendly feeling towards the company now? A. No.

"Q. And you have no unfriendly feelings towards the Puget Sound Electric Railway? A. No, sir."

In an affidavit by the superintendent of transportation of the Seattle Electric Company, filed in support of the petition for a new trial, it is averred:

"That on the 17th day of May, 1909, P. C. Gordon was employed by said the Seattle Electric Company as a conductor upon its said street railway lines, and worked for said company as such conductor until the 3d day of June, 1909, on which last-mentioned day affiant discharged said P. C. Gordon as such conductor and from the employ of said company, for failure to properly discharge his duties; and that said Gordon did not voluntarily resign from the employ of said company, but was discharged therefrom by affiant, for the reason aforesaid."

Plaintiffs cite the following authorities: State v. Underwood, 35 Wash. 558, at 573, 77 Pac. 863; State of Wash. v. Antonio Moretti, 66 Wash. 537, 120 Pac. 102.

Defendant cites the following cases: Heasley v. Nichols, 38 Wash. 485, 80 Pac. 769; Gibney v. St. Louis T. Co., 204 Mo. 704, 103 S. W. 43–47; Johnson v. Tyler, 1 Ind. App. 387, 27 N. E. 643; State v. Lauth, 46 Or. 342, 80 Pac. 660–663, 114 Am. St. Rep. 873; Hyman v. Eames (C. C.) 41 Fed. 676; Fealy v. Bull, 11 App. Div. 468, 42 N. Y. Supp. 569; McGarry v. City of Buffalo, 24 N. Y. Supp. 16;[1] Pearcy v. Michigan M. L. Ins. Co., 111 Ind. 59, 12 N. E. 98, 60 Am. Rep. 673; Texas, etc., Ry. Co. v. Elliott, 22 Tex. Civ. App. 31, 54 S. W. 410; State v. Morgan, 23 Utah, 212, 64 Pac. 356; State v. Thompson, 24 Utah, 314, 67 Pac. 789; Tarpey v. Madsen, 26 Utah, 294, 73 Pac. 411.

The Stone & Webster Management Association operates both the defendant corporation and the Seattle Electric Company, which fact is generally known throughout this district. A juror prejudiced against one of these corporations might, not unreasonably, be expected to be

[1] Reported in full in the New York Supplement; reported as a memorandum decision without opinion in 70 Hun, 597.

prejudiced against the other, by reason of the common management. That this was realized upon the trial is not only shown by the examination of the juror by defendant's counsel, but by the fact that the examination was had without objection upon complainant's part.

The question remains whether intentional deception on the part of the juror, in the answers given by him, is clearly shown. The questions asked the juror were of a leading nature. When asked if he left the company's employ voluntarily, he said, "Yes," and volunteered, "I had another position." When asked if he thought it was to his advantage to take the position—assumed by the questioner to be a better one—the juror answered, "Yes."

Does the discharge of an employé plainly imply unwillingness, or dissatisfaction upon his part? When an employé is hired, it is voluntarily done on the part of both the employer and employed. When he is discharged, unwillingness is not, necessarily, to be imputed to him, any more than it would be imputed to the employer if an employé of his own initiative quits work. Dissatisfaction upon an employer's part is not implied from the discharge of an employé. Gwynn v. Hitchner, 67 N. J. Law, 654, 52 Atl. 997, 998. No reason appears why a different rule should obtain for the employé, especially where it appears he had another, or better position.

While it appears by the superintendent's affidavit that the discharge was because of dissatisfaction on the part of the employer, it does not appear that this fact was imparted to the employé; nor that the discharge was of such an instant and peremptory character as to prevent the juror from fairly saying that he quit the employ voluntarily.

In the cases cited by defendant, the misrepresentations, held to constitute misconduct, were of a certain and definite character, and not so largely conclusions as those alleged upon the present showing.

While giving full consideration to the other grounds of the petition, it is not deemed necessary to discuss them.

The petition for a new trial is denied.

In re NADEL.

(District Court, E. D. New York. March 16, 1914.)

BANKRUPTCY (§ 408*)—DISCHARGE—SPECIFICATIONS—CONCEALMENT OF ASSETS.

Where a bankrupt, prior to bankruptcy, transferred his property to an assignee for the benefit of creditors, and an application for discharge was resisted on the ground that he had concealed part of his goods from his trustee in that a van load had been removed from a house near his store and sold by an auctioneer, and that he had made a false statement on which he had obtained credit, but the evidence did not connect the removed goods with the bankrupt, he was not entitled to resist the specifications with reference to his having obtained credit on the false statement, on the ground that, if any goods had been removed, they were removed by his assignee for the benefit of creditors, and that such goods if added to the admitted assets would show that the statement made by him was not materially false.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 732–736, 759, 762, 763; Dec. Dig. § 408.*]

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

In Bankruptcy. In the matter of bankruptcy proceedings of Louis Nadel. On application for a bankrupt's discharge. Denied.

Lesser Bros., of New York City, for objecting creditors.
Walter T. Kohn, of New York City, for objecting creditor.
Robert P. Levis, of New York City, for bankrupt.

CHATFIELD, District Judge. Upon application for discharge, a special commissioner has reported that the specifications as to concealment of a large stock of goods have not been sustained. The only definite charge of specific concealment was as to the removal of a van full of goods on May 29, 1911, from a house on Seaside avenue, near the store of the bankrupt at Far Rockaway, L. I., to New York, and their sale there by an auctioneer. The removal of this van load of goods and the sale was shown, but the special commissioner held that the evidence did not satisfactorily connect these goods with the stock of the bankrupt nor with the bankrupt himself. The special commissioner, however, also reported that other specifications charging the bankrupt with having made a false statement upon which credit was given were sustained.

Upon the argument of the motion to confirm the commissioner's report an unusual situation was presented. The bankrupt pointed out from the testimony and the record that his property had been turned over in May, 1911, to an assignee for the benefit of creditors, who was in possession at the time the petition in bankruptcy was filed. He suggests if a van load of goods worth several thousand dollars was removed from the bankrupt's place of business after the assignee was in possession, or from any locality in the neighborhood to which they had previously been taken from the bankrupt's place of business, that the trustee in bankruptcy should call upon the assignee to account therefor and that the bankrupt was not responsible for these goods.

In this respect the bankrupt alleges that the finding of the special commissioner on the question of concealment is correct, and yet he seeks to make use of the testimony presented, which indicates that goods which should be in the hands of the trustee in bankruptcy had previously been in the bankrupt's possession and presumptively had been turned over by him to his assignee.

The bankrupt then alleges that the special commisioner is incorrect in his second finding for the reason that, if a large stock of goods was in the bankrupt's possession and has been accounted for, the statement furnished to the creditors and upon which credit was given was not false merely because the goods turned over were much less in value than the figures shown in the statement. In re Amer. Knit Goods Mfg. Co., 173 Fed. 480, 97 C. C. A. 486; In re Lesser, 114 Fed. 83, 52 C. C. A. 31.

It is urged that these facts, when taken into consideration in connection with the inability to read or write and to keep books on the part of the bankrupt, show that the special commissioner was not justified in sustaining the specifications as to the financial statement.

It was apparent that the creditors and the trustee in bankruptcy

should have sought to discover the thousands of dollars of assets which both they and the bankrupt seem to imply had disappeared or had been removed and secreted by somebody, and opportunity has been given therefor. The argument of the motion resulted in a protest from the assignee for the benefit of creditors to the effect that there was not the slightest basis for charging him with responsibility for, or with having made any disposition of, assets from the bankrupt estate. The creditors and the trustee did not follow the court's suggestion nor undertake to initiate further proceedings to discover assets, but merely submitted the matter to the court as it stood. The bankrupt, while relying upon the intimation that assets had been in existence, in order to relieve himself from the charge of falsehood, nevertheless disavowed any knowledge of those assets and repudiated any intention of charging the assignee with making way therewith.

This leaves the bankrupt in a position where he shows nothing which would indicate that the finding of the special commissioner was not correct in so far as it went. The discharge therefore should be denied.

The other finding of the commissioner, that the goods removed and sold are not shown to have come from the bankrupt's property, cannot be disturbed upon the consideration of the application for discharge, and, unless the creditors or the trustee see fit to proceed further in endeavoring to locate any property of this estate and to show that it was concealed by the bankrupt, they must remain content with the situation as it stands.

Upon the record the bankrupt was guilty of obtaining credit on a false statement unless he has assets which he has concealed from his creditors. If he has assets which he has concealed from his creditors, his discharge should be denied and the trustee should endeavor to secure those assets. The inference that the property alleged to have been concealed came from the bankrupt's estate is strong, and it would seem that the trustee and the assignee for the benefit of creditors should have followed up the assets unless they wished to take the responsibility of concluding that such a proceeding would be profitless. But the creditors and trustee have done nothing except state to the court by letter their readiness to do anything properly indicated. The mere opposition to an application for discharge, without any application to the referee or court, or without the bringing of any suit or proceeding to get assets into the estate, will not transfer from the trustee to the referee or the court the duty of protecting the creditors' rights by the initiation of any steps which may be required.

Discharge denied.

UNITED STATES v. CHICAGO, R. I. & P. RY. CO.

(District Court, N. D. Illinois, E. D. November 28, 1913.)

No. 10,589.

CARRIERS (§ 37*)—TRANSPORTATION OF ANIMALS—28-HOUR LAW—WILLFULLY AND KNOWINGLY.

Defendant, an initial carrier of cattle, delivered cars to the Illinois Central Railroad Company, its next connecting carrier, when 9 hours of the 28-hour confinement period remained (Act June 29, 1906, c. 3594, 34 Stat. 607 [U. S. Comp. St. Supp. 1911, p. 1341]); but this company refused to accept the cattle because it could not reach its nearest feeding point under 9 hours, and that, as the time would be nearly up when the cars would reach its next connecting carrier, the shipment would be refused by such carrier. Defendant refused to receive a redelivery of the cars, but after the expiration of the period hauled the stock to its yards, where the stock was unloaded. *Held*, that such facts did not show that defendant "willfully and knowingly" confined the cattle for a period longer than that authorized and did not render it liable to a penalty.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 95, 927; Dec. Dig. § 37.*]

Action by the United States against the Chicago, Rock Island & Pacific Railway Company to recover penalties for violation of the 28-hour law. Judgment for defendant.

The facts agreed to are as follows:

On November 22, 1910, at 3:30 p. m., defendant railway company received five cars of cattle at Selma, Iowa, billed to Philadelphia routed over its lines to Chicago; thence over the Illinois Central Railroad to Kankakee, Ill.; thence via the Big Four and connecting lines to destination. Releases authorizing confinement of cattle for 36 hours were duly executed. The defendant brought the cars to Chicago, delivered them to the Illinois Central Railroad at 6:30 p. m. November 23, 1910, at Burnside, the interchange point for delivery of cars to such connecting carrier, the cars being placed on interchange track, waybills delivered to the representative of the connecting carrier, the cars removed by the latter to its own yards. At 7:30 p. m., and again at 8:30 p. m., November 23, 1910, a representative of the connecting carrier telephoned to the Blue Island yard of the defendant that the former would not accept the stock. The defendant's yardmaster promised to let the connecting railroad know what to do about the matter; and at 10:30 p. m. an employé of the defendant advised the connecting carrier of the former's refusal "to accept the cars back." At 11:30 p. m. November 23, 1910, the cars were placed back on the interchange track by the Illinois Central Railroad Company, and the waybills had been placed in a box at Burnside used jointly by the Illinois Central Railroad Company and the defendant for that purpose. The reason given by the Illinois Central Railroad was that they did not have time to reach their nearest feeding point under 9 hours; that their train No. 75, for Kankakee, being the connection with the Big Four, left at 6:30 p. m., and the cars did not arrive in time to make this train; that their next train left at 11 p. m., and this would not reach Kankakee until the time limit was nearly up; and that "the shipment would be refused by the Big Four on that account."

The defendant maintains no switching service on its South Chicago branch during the night, and the cars were permitted to stand on the interchange track just as they were placed by the Illinois Central until 9:35 a. m. November 24, 1910. The defendant, at 9:35 November 24, 1910, sent a switch engine to Burnside, and had the cars hauled to its stockyards at Burr Oak, where the stock was unloaded at 10:30 a. m. November 24, 1910.

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

J. H. Wilkerson, U. S. Atty., of Chicago, Ill.
M. L. Bell, of Chicago, Ill., for defendant.

GEIGER, District Judge (after stating the facts as above). The question in the case is whether the defendant has violated the "28-Hour Law" (Act June 29, 1906), which penalizes carriers for confining cattle in cars for a longer period than the prescribed period of 28, or a stipulated period (as in the present case) of 36 hours. It will be noted that, 9 hours before the expiration of such time, it delivered the cars to the connecting carrier, which received them—apparently in fulfillment of its obligation to continue the transit. Although its obligation had attached, such connecting carrier seems to have renounced it because the 9 hours remaining, although sufficient for performance of its obligation to transport the cars, would be so nearly consumed that the next succeeding carrier would refuse to accept them. Why it would refuse does not appear, but perhaps because of the inability of such next succeeding carrier, in view of the time and place of delivery, to comply with the statute.

Now it may be assumed that, in transportation through a connection of carriers, each carrier must observe the statute. That is, no carrier who contributes "knowingly and willfully" to the acts which constitute a violation of the statute can escape the penalty because another also participated therein or contributed thereto. But it cannot be true that the carrier, who, having discharged its obligation in the transportation without a violation of the statute, stands, after delivery to a connecting carrier, as a sort of absolute guarantor of the latter's compliance with the statute. The defendant herein surrendered to the Illinois Central Railroad, rightfully, and in discharge of its obligation as a carrier, the possession of the cars. Therefore, in so far as the duty of compliance with the statute rests upon such possession under an obligation to transport, the defendant had freed itself, rightfully (if not absolutely, certainly provisionally), from the capacity, and hence the necessity, on its part, further to discharge the statutory obligation. When, how, or by force of what circumstance, disclosed in the record before us, was it reinstated, as it were, to the obligation of the statute? Certainly, the notification by the connecting carrier, after it had, according to customary method of interchange, fully accepted the cars, and removed them to its own yards, that it would not accept them, did not compel the defendant at once to submit to reassumption of full responsibility for their further transit and the discharge of the statutory duty. It refused, properly, to submit to the connecting carrier's attitude, based as it was wholly upon a prophecy, or conjecture that a further connecting carrier might or would, nine hours later, decline to accept the cars. Now in this situation, and, so far as the record shows, without the actual knowledge of the defendant, the connecting carrier again placed the cars upon the defendant's interchange track, where they remained until the statutory period had expired. In my judgment the facts fall very short of showing a retaking of the cars with such full knowledge as to justify the finding that it "willfully and knowingly" failed to obey the

statute. The contention advanced by the government, that the defendant, through the refusal and acts of the connecting carrier, was reinstated, constructively, in the possession of the cars, it seems to me, negatives, rather than supports, the claim of willfully or knowingly failing to discharge the statutory obligation.

Judgment for the defendant.

Ex parte KWAN SO.

(District Court, N. D. California, First Division. February 3, 1913.)

No. 15,359.

1. ALIENS (§ 44*)—IMMIGRATION AUTHORITIES—HEARING—INSPECTORS—DISQUALIFICATION.

An immigration inspector was not disqualified to hear a deportation proceeding against relator, an alien, charged with being found in a house of prostitution, because he participated in a so-called raid of the house in which petitioner was found, and had such personal knowledge of the facts as was so acquired.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 102–104; Dec. Dig. § 44.*]

2. ALIENS (§ 54*)—DEPORTATION—HEARING—RECORD.

Where, in proceedings to deport relator for being found in a house of prostitution after entering the United States, it was conceded that she was found in a raid on a house that was reputed to be a rendezvous for harlots, she was not prejudiced by the failure of the inspector, who participated in the raid, to make a formal record statement of the matters within his own knowledge, by which he was influenced in directing deportation.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 112; Dec. Dig. § 54.*]

Habeas corpus on petition of Kwan So. On demurrer to petition. Sustained.

George A. McGowan, of San Francisco, Cal., for petitioner.

John L. McNab, U. S. Dist. Atty., of San Francisco, Cal., for respondent.

DIETRICH, District Judge. The time is not opportune for a review of the pertinent judicial decisions, nor would any useful purpose be subserved thereby. The principles of law are pretty well settled, and the question is largely one of the application of such principles to the particular facts of the case.

As I understand her contention, the petitioner relies mainly upon two propositions: (1) That the inspector, before whom the hearing was had, was biased; and (2) that he based his judgment upon facts which were not made of record in a formal way.

[1] Under the first head it is urged, not that the inspector had any feeling of ill will or was in any wise prejudiced against the petitioner personally, but only that, upon information acquired from sources out-

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

side the record, he had received a strong impression against the petitioner before she had an opportunity to make her defense. Concretely stated, the fact seems to be that he himself participated in the so-called raid of the house in which the petitioner was found, and which it is claimed by the government was a house of ill fame; and of course he had such knowledge as was thus acquired. While it is somewhat difficult for the mind, accustomed to the contemplation only of investigations conducted strictly in accordance with the time-honored rules of judicial procedure, to adjust itself to the informal and sometimes ex parte methods of administrative officers, I do not think that, under the law as the same has been interpreted by the Supreme Court, the inspector here was disqualified. Indeed, sometimes, in our court procedure, judicial officers act upon facts within their own knowledge and do not resort to formal proofs in the nature of sworn testimony: Grand juries may return indictments upon information which they themselves acquire at first hand; and notably, in a certain class of contempt proceedings, judges convict upon facts which they themselves have observed.

[2] As to the second point, while the practice referred to is not to be commended, I am satisfied that the petitioner was not prejudiced by reason of the failure of the inspector to make a formal, record statement of the matters within his knowledge and by which he was influenced. Upon inquiry from petitioner's counsel, he frankly indicated the facts and conditions which in his mind tended to make a prima facie case, and the petitioner was in that way fully advised of what she had to meet. In so far as appears, he had no disposition to decline to submit to interrogation or cross-examination, and I am unable to see how the petitioner would have been any better off if he had prepared and filed as a part of the record an affidavit formally setting forth the same matters which he stated orally in the presence of the petitioner and her counsel. Moreover, I am satisfied that the evidentiary facts are such as to make a case upon which, in the most favorable view to the petitioner, reasonable men might differ. She admits that she was present in this house, and the record makes it clear that, in some quarters at least, it had the reputation of being a rendezvous for harlots. It is true the petitioner makes the further defense that her presence was entirely innocent, but, to say the least, her explanation is not conclusive, and the issue is one upon which reasonable men might very well differ.

The demurrer will therefore be sustained.

GREEN v. DELAWARE, L. & W. R. CO.

(District Court, D. New Jersey. March 10, 1914.)

1. PLEADING (§ 316*)—BILL OF PARTICULARS—AUTHORITY TO ORDER.
A federal court has jurisdiction to order a bill of particulars when necessary to clarify issues, regardless of statute, or whether the action is founded on contract or tort.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 951; Dec. Dig. § 316.*]

2. PLEADING (§ 313*)—BILL OF PARTICULARS—EVIDENCE.
A bill of particulars being applicable only to the pleadings, an application for such a bill, in the absence of statute providing otherwise, will not be allowed where its purpose is to secure evidence.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 949; Dec. Dig. § 313.*]

3. PLEADING (§ 313*)—EVIDENCE—EXAMINATION BEFORE TRIAL—INTERROGATORIES.
Evidence may not be obtained before trial in an action at law by an application for a bill of particulars as to particular matters which are in fact mere interrogatories under Rev. St. § 861 (U. S. Comp. St. 1901, p. 661), providing that the mode of proof in the trial of actions at law shall be by oral testimony and the examination of witnesses in open court.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 949; Dec. Dig. § 313.*]

4. PLEADING (§ 313*)—BILL OF PARTICULARS—EXTENT OF INJURY.
An application for a bill of particulars asking plaintiff to state the nature, extent, and probable duration of her injuries, and her present physical condition as affected by such injuries, would not be granted, since such information might be obtained by an order for plaintiff's physical examination.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 949; Dec. Dig. § 313.*]

At Law. Action by Lillian M. Green against the Delaware, Lackawanna & Western Railroad Company. On motion to relieve plaintiff from filing a bill of particulars. Granted.

Wicoff & Lanning, of Trenton, N. J., for plaintiff.
Frederic B. Scott, of New York City, for defendant.

RELLSTAB, District Judge. The action is founded on negligence. The plaintiff having filed her declaration, the defendant demanded a bill of particulars, specifying 19 different matters in regard to which additional information was desired. The plaintiff thereupon moved to be relieved from answering such demand. At the argument, 6 of these specifications were withdrawn. The remaining 13 are as follows:

"(1) What was the date of your alleged injury?"
"(4) When you boarded the defendant's train, what did the plaintiff do?"
"(8) State particularly just how you were injured.
"(9) Was the sole cause of the plaintiff's injury the negligent and unskillful movement of the defendant's train, and, if not, what were the other causes of the plaintiff's injury?

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

"(10) Did you strike or hit yourself against a suit case or any other object upon the floor of the coach or car in which you were injured, and, if it was not a suit case, what was it you hit or struck?

"(11) Where was this object against which you struck or hit yourself at the time you entered the defendant's car in which you were injured?"

"(13) In what way or manner did the defendant negligently operate its said train?

"(14) State the nature, extent, and probable duration of your injuries.

"(15) State how the same has affected your earning capacity.

"(16) State what sum or sums of money you have lost by reason of said accident.

"(17) State what you have done to alleviate and effect a cure of your said injury.

"(18) State what sums of money you have spent or contracted to spend on account of said injury.

"(19) State your present physical condition as affected by said injury."

The plaintiff contends: First, that no bill of particulars is demandable in an action of tort; and, second, that the defendant is seeking evidence in advance of the trial, under the guise of a bill of particulars, and that its specifications, in reality, are interrogatories, which are not allowable in the federal courts.

[1] The first contention is not tenable. The purpose of the bill of particulars is to aid the opposite party to interpose the proper answer and prepare for trial, by giving him more specific information of the nature of the cause of action or defense than is often afforded by the permissible generality of the pleadings. The power of the court to order such clarification is incident to its general authority in the administration of justice, regardless of statute, or whether the action be founded on contract or tort. 31 Cyc. 567–576; Watkins v. Cope (N. J.) 86 Atl. 545; Buckeye Powder Co. v. E. I. Du Pont De Nemours Powder Co. (D. C.) 196 Fed. 514, 522; Wilson v. New England Navigation Co. (D. C.) 197 Fed. 88, 94. If the pleading is objectionable solely in respect to the generality of its terms, relief can be had only through a bill of particulars.

[2, 3] As to the second contention: As the bill of particulars is applicable only to the pleadings, it follows, in the absence of a statute providing otherwise, that it may not be used to secure evidence. An examination of the specified matters to which the demand for particulars relates shows that in the main they seek light in regard, not to the cause of action stated, but to matters of evidence, and that in reality they are interrogatories. Such means of securing evidence in advance of the trial is not permitted in the federal courts. R. S. § 861 (U. S. Comp. St. 1901, p. 661); Hanks Dental Association v. International Tooth Crown Co., 194 U. S. 303, 24 Sup. Ct. 700, 48 L. Ed. 989; Smith v. International Mercantile Co. (C. C.) 154 Fed. 786.

Of the specifications of the defendant's demand, Nos. 1, 8, 14, and 15 seek information concerning matters which, considered in the abstract, might be obtained through a bill of particulars; but, as the declaration is sufficiently explicit to give all the aid the defendant is entitled to in that regard, no additional particulars are demandable. The remaining specifications call for evidence only; and, as stated, that cannot be obtained through a bill of particulars.

[4] The information sought through Nos. 14 and 19, though in the nature of evidence, may be had by obtaining an order for the physical examination of the plaintiff. Camden & Suburban Ry. Co. v. Stetson, 177 U. S. 172, 20 Sup. Ct. 617, 44 L. Ed. 721.

The plaintiff's motion is granted.

BOGERT et al. v. SOUTHERN PACIFIC CO.

(District Court, E. D. New York. March 3, 1914.)

EQUITY (§ 363*)—INDISPENSABLE PARTIES—FAILURE TO JOIN—MOTION TO DISMISS—TIME FOR HEARING.

Rule 29 (198 Fed. xxvi, 115 C. C. A. xxvi) abolishes demurrers and pleas and provides that every defense in point of law arising on the face of the bill, whether for misjoinder, nonjoinder, or insufficiency of fact to constitute a valid cause of action in equity, shall be raised by a motion to dismiss or in the answer, and may be disposed of before final hearing, and that if the defendant move to dismiss the motion may be set down for hearing on five days' notice, and if it be denied answer shall be filed within five days or a decree pro confesso entered. *Held*, that where a motion to dismiss is made for a defect in the pleadings, and a hearing is had in advance of the trial, the motion must be considered on the complaint alone; and hence, where defendant answered, alleging nonjoinder of an indispensable party, and it was necessary to invoke the record in another case to show the necessity for joining such party, a motion to dismiss would not be heard in advance of the trial, but would be heard and determined before the taking of testimony on the main issue.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 762–766, 768; Dec. Dig. § 363.*]

In Equity. Suit by Henry L. Bogert and others, as executors of the will of Walter B. Lawrence, deceased, suing on behalf of themselves and other stockholders of the Houston & Texas Central Railway Company similarly situated who may come in and contribute to the expenses of the suit, against the Southern Pacific Company. On motion to dismiss. Denied.

Dittenhoefer, Gerber & James, of New York City (A. J. Dittenhoefer, H. Snowden Marshall, David Gerber, Russell H. Landale, and Dudley F. Phelps, all of New York City, of counsel), for plaintiffs.

Arthur H. Van Brunt and Henry V. Poor, both of New York City, for defendant.

CHATFIELD, District Judge. This action has been removed by defendant from the Supreme Court of New York and an answer has been filed in this court. The complaint has been drawn to meet the questions raised in a previous action in which dismissal resulted from inability to serve or bring in an indispensable party. Lawrence v. Southern Pac. Co. et al. (C. C.) 180 Fed. 822.

Demurrers having been abolished, the defendant has pleaded the alleged lack of the same party upon the claim that the cause of action has not been changed and that the indispensable party is still absent.

Rule 29 (198 Fed. xxvi, 115 C. C. A. xxvi) provides:

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

"Demurrers and pleas are abolished. Every defense in point of law arising upon the face of the bill, whether for misjoinder, nonjoinder, or insufficiency of fact to constitute a valid cause of action in equity, which might heretofore have been made by demurrer or plea, shall be made by motion to dismiss or in the answer; and every such point of law going to the whole or a material part of the cause or causes of action stated in the bill may be called up and disposed of before final hearing at the discretion of the court. Every defense heretofore presentable by plea in bar or abatement shall be made in the answer and may be separately heard and disposed of before the trial of the principal case in the discretion of the court. If the defendant move to dismiss the bill or any part thereof, the motion may be set down for hearing by either party upon five days' notice, and, if it be denied, answer shall be filed within five days thereafter or a decree pro confesso entered."

The defendant has now moved to dismiss and for judgment on the merits upon the pleadings because of the alleged defect of parties as shown by the defense interposed as above, and has asked for disposition thereof before trial of the "principal case."

The plaintiff claims that under rule 29 such motion should be "made by motion to dismiss," or if that is not made and answer be interposed (as has been done) that the right to make a motion to dismiss has been waived.

The plaintiff asserts that the last clause of the rule relates back to a motion upon the complaint alone and is not the equivalent of a hearing on the "plea in bar."

It is apparent that if the facts are sufficiently shown by the pleadings, and if both parties agree, a hearing can be had upon a motion made upon the pleadings in advance of trial as well as if trial were called and the plea were considered upon the record at the outset of the trial or before the taking of testimony.

On the other hand, if testimony is needed or offered by either party upon the plea, then a "hearing" is necessarily held ipso facto whether on the motion or at the trial. As the case is brought in equity and will be heard in open court without any jury, the only differences will be in the matter of convenience and in the possibility of disposing of the whole issue upon the plea as interposed.

The motion to dismiss the bill, if denied, would require a hearing of the other defenses rather than a direction to answer over as provided for in the rule.

The defendant has also raised the defense of laches and as to this depends upon the record of the pleadings as to elapsed time, previous litigations, and the charge that the plaintiff, in bringing a representative action upon alleged causes of action which were open to the plaintiffs in the prior actions (of which the plaintiff had knowledge), is burdened with the delay or estoppel resulting from their wrong choice of remedy.

Unless this motion be treated as a hearing and opportunity be given to both sides to make a record, it is apparent that the motion must be based upon the complaint alone.

The defendant cannot prove facts by allegations in his answer and by moving thereon as if they were admitted or stated in the complaint. In other words, such a motion must be judged solely by the plaintiff's pleading.

In the present instance the case is on the calendar, and the defendant invokes the record of the other cases above referred to in such a way that they must be treated as proofs if the plea is to be determined in advance of hearing upon the merits.

The motion to dismiss will therefore be denied, but upon the call of the case the plea will be heard upon such record as may be offered before the taking of testimony in support of the main issue.

In re MITCHELL & CO.

Ex parte McGOVERN.

(District Court, S. D. New York. March 11, 1914.)

1. BANKRUPTCY (§ 15*)—PARTNERSHIP—ADJUDICATION—JURISDICTION.
Under Bankr. Act July 1, 1898, c. 541, § 2, subd. 1, 30 Stat. 545 (U. S. Comp. St. 1901, p. 3420), giving the bankruptcy court jurisdiction to adjudge persons bankrupt who have had their principal place of business, resided, or had their domicile within their respective territorial jurisdictions for the preceding six months, or the greater portion thereof, and section 5c, providing that the court which has jurisdiction of one of the partners may have jurisdiction of all the partners and of the administration of the partnership and individual property, where the court had jurisdiction over all the partners of an alleged bankrupt firm, it had jurisdiction of the firm, though it had been organized less than three months.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 21; Dec. Dig. § 15.*]

2. BANKRUPTCY (§ 90*)—JURISDICTION—PARTNERSHIP—ISSUES.
In bankruptcy proceedings against a partnership, the court has no concern with any fraud through which a partner has been induced to enter the firm.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 124; Dec. Dig. § 90.*]

3. BANKRUPTCY (§ 100*)—ADJUDICATION—APPLICATION TO REOPEN.
Where, in bankruptcy proceedings against a firm, petitioner, one of the partners, knew of the proceedings and selected an attorney in fact against that event, who appeared formally and filed an answer and later, on receiving notice of hearing before the master, deliberately chose to abandon the case, and the attorney at law who acted for the attorney in fact informed the attorney for the petitioning creditors that he did not intend to appear and that the default should stand, petitioner was not entitled to have the adjudication reopened on the ground that it was entered by default or his excusable neglect.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 60, 131, 141-144; Dec. Dig. § 100.*]

In Bankruptcy. In the matter of bankruptcy proceedings of Mitchell & Co. On petition of Thomas B. McGovern to set aside the adjudication. Denied.

A. J. Keogh, of New York City, for trustee and petitioning creditors.

Roy M. Robinson, of New York City, for petitioner.

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

HAND, District Judge. The first question is of this court's jurisdiction to adjudge the firm bankrupt. As a firm it had been organized less than three months, and the petitioner asserts that under subdivision 1 of section 2, this court had no jurisdiction. The words of that section are:

"Adjudge persons bankrupt who have had their principal place of business, resided, or had their domicile within their respective territorial jurisdictions for the preceding six months, or the greater portion thereof."

Section 5, subd. "c" provides:

"The court of bankruptcy which has jurisdiction of one of the partners may have jurisdiction of all the partners and of the administration of the partnership and individual property."

[1] This section seems to me to leave no doubt that wherever you have jurisdiction over one partner you have over the whole firm, whether or not the firm is over three months old. Its first purpose probably was territorial convenience, but the words are general, and there is no reason to limit them so that you may not bring in the firm if any partner has for three months resided in the district. The nearest case I find is In re Blair (D. C.) 99 Fed. 76; but that is not in point, because the firm had done business in this state as long as the individual partners. It is quite clear, however, that Judge Brown supposed the only question was whether this court had jurisdiction over the partners personally. A contrary ruling would be very inconvenient; for, in a case like this, all the partners individually could be adjudicated bankrupts, but as a firm they could not, a very undesirable result practically. I agree that for all purposes of administration the entity theory should be observed as rigidly as possible; but I am satisfied that section 5c did not mean to keep the firm entity out of the bankruptcy court when, as here, all the partners were bankrupt and had done business for more than three months in the district in question.

[2] Upon the merits, it is clear that the bankruptcy court has no concern with the fraud, if any, practiced on the petitioner which induced him to enter the firm. Bankruptcy is a matter between the creditors and the firm, and fraud between the partners does not affect it. If the petitioner was unfortunate in signing the articles, he took his chances of the truth of the inducements on which he entered, and is none the less bound to creditors who dealt with the firm itself.

[3] The only relevant consideration is whether there is ground to reopen the adjudication. It was not a case of default at all; the petitioner knew of the prospective bankruptcy and selected an attorney in fact against that very event; the attorney in fact appeared formally and filed an answer; later he received express notice of the hearing before the master and deliberately chose to abandon the case, thus allowing a decree to go against his client. Indeed, the attorney at law who acted for the attorney in fact told the attorney for the petitioning creditors that he did not intend to appear and that the default should stand. It is hard to see, in the face of all this, what is the petitioner's ground of complaint, except as against his attorney in fact.

Furthermore, the papers do not show any ground to suppose that an act of bankruptcy was not committed. There is no allegation that the firm or the petitioner was solvent. The fact that the preference laid in the petition for adjudication occurred after dissolution is not material, if it was of firm funds, since they should be distributed equally to all firm creditors as much after as before dissolution. All the other proposed allegations of a new answer, which are set forth in the eighth article of this petition, are equally irrelevant.

I can see no ground to disturb the adjudication. The motion is denied.

UNITED STATES v. TWO HUNDRED CASES OF ADULTERATED TOMATO CATSUP.

(District Court, D. Oregon. March 9, 1914.)

No. 6232.

1. FOOD (§ 24*)—PROCEEDINGS TO CONDEMN ADULTERATED FOOD—SUFFICIENCY OF EVIDENCE—"ADULTERATED."

In a proceeding to condemn tomato catsup, evidence *held* to show that it was decomposed and "adulterated" within the Pure Food and Drug Act (Act June 30, 1906, c. 3915, § 7, 34 Stat. 769 [U. S. Comp. St. Supp. 1911, p. 1357]).

[Ed. Note.—For other cases, see Food, Cent. Dig. § 17; Dec. Dig. § 24.* For other definitions, see Words and Phrases, vol. 1, pp. 210–212.]

2. FOOD (§ 6*)—ADULTERATION—STATUTORY PROVISIONS.

Under the provision of the Pure Food and Drug Act (Act June 30, 1906, c. 3915, § 7, 34 Stat. 769 [U. S. Comp. St. Supp. 1911, p. 1357]) that a food product is adulterated if it consists in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance, no standard being fixed by which it can be determined when the product has reached such a stage of decomposition as to consist wholly or partly of filthy, decomposed, or putrid substance, each case must be determined on its own facts, and a product which is so far decomposed as to be unfit for food is within the meaning of the statute.

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

3. FOOD (§ 6*)—ADULTERATION—STATUTORY PROVISIONS.

Under the provision of the Pure Food and Drug Act (Act June 30, 1906, c. 3915, § 7, 34 Stat. 769 [U. S. Comp. St. Supp. 1911, p. 1357]), declaring that a food product is adulterated if it consists in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance, the interstate shipment of such a product is prohibited whether or not its use would be injurious to health.

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

Libel by the United States for the condemnation of two hundred cases of adulterated tomato catsup. Decree in favor of the government.

E. A. Johnson, Asst. U. S. Atty., of Portland, Or.

Platt & Platt, of Portland, Or., for claimant.

BEAN, District Judge. The United States, proceeding under the Pure Food and Drug Act (34 Stat. at Large 770), filed a libel in this

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

court for the condemnation of 200 cases of tomato catsup, alleging that it was adulterated within the meaning of the act, which declares that a food product is deemed to be adulterated "if it consists in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance." After the seizure, the product was claimed by the company which manufactured it and the proceedings defended. The claimant admits the interstate shipment and other jurisdictional facts, but denies that the catsup was decomposed or adulterated within the meaning of the law.

[1] By stipulation of the parties, the case was tried before the court without a jury. It turns upon two questions: First, whether the product was in fact decomposed; and, if so, whether it was "adulterated" as defined by the Pure Food Law. It was manufactured from pulp screened from peelings, cores and by-products of tomatoes, obtained in the course of their preparation for canning. The decay or decomposition of tomatoes or tomato products is commonly the result of the attack upon the fruit in the field, or in process of manufacture, of various forms of plant life, such as yeast, bacteria, and mold. They feed upon certain compounds in the fruit, reducing the food value of the product, and producing a by-product of a more or less offensive character, and are evidences of decay and decomposition. The condiments used in the manufacture of tomato catsup have the effect of concealing decomposition or putrefaction from the senses, and its existence can most readily be determined by a bacteriological analysis of the manufactured product to ascertain whether the organisms referred to are present in sufficient quantities to indicate a decomposed state.

Various samples of the product in question have been carefully analyzed under the microscope, separately, by Dr. Schneider, of the University of California and the Government Laboratory in San Francisco, and Prof. Beckwith, of the Oregon Agricultural College, both of whom are expert bacteriologists, and they agree that it contains bacteria, yeast, and mold in very large and unusual quantities, as high as from 350 million to 1 billion bacteria and 15 million yeast spores per cubic centimeter (about one-quarter of a teaspoonful) and mold hyphæ in abundance, thus indicating, in the opinion of these experts, a largely decomposed condition, Dr. Schneider says from 10 to 15 per cent., and according to their testimony it is unfit for human food. This testimony is not contradicted in any way, although the claimant was permitted to and did take samples of the goods for analysis after their seizure. Nor is there any conflict among the experts as to the scientific deductions to be made therefrom. It would seem conclusive therefore of the fact that the product is decomposed in part or in whole. The examination of the bacteriologists is confirmed by a chemical analysis made by the chemist at the government laboratory, and in my judgment finds support in the method of manufacture. The evidence shows that the fruit from which the product in question was manufactured was brought to the factory in car load lots in boxes containing about 50 pounds each. Without being sorted or examined in any way except the merest visual examination of the outer layer of

fruit, the contents of the boxes were emptied for washing into a vat containing about 150 gallons of water, which was only changed once a day, except as it might be affected by a one-inch stream running into the vat and an overflow pipe at the top. While in the water the tomatoes were stirred by a mechanical screw-like agitator, which subsequently carried them to the steaming table, where they were scalded with hot water to loosen the skin, and washed under a spray of cold water. From there they were taken in buckets to the peeling table, where the skins were removed and the tomatoes graded for canning. Then the skins, with such pulp as adhered to them, the stem ends, and like by-products were placed in buckets by the operatives and subsequently taken to another department of the factory, where they were used in the manufacture of the catsup in question.

The washing of a large quantity of fruit which necessarily is more or less infected with bacteria, mold, and decay in the manner described, would naturally have a tendency to foul the water and infect the entire lot, and especially the skins and by-product from which the catsup in question was manufactured. Again, the claimant depended on the peelers or sorters to sort out and reject the decayed portions from the trimmings before they were sent to the catsup department. The peelers were paid by the piece for the peeled tomatoes only, and it is but natural that they would become careless or indifferent about the removal of the decayed material from that portion of the output for the handling of which they received no direct compensation. It therefore seems to me that the method of manufacture adopted by the claimant was calculated to produce just such a product as the bacteriologists found the one in question to be. Better methods of handling the fruit are in vogue, for it is in evidence that in other factories, the output of which was shown to be unobjectionable, the tomatoes were sorted and the decayed or infected ones removed before being washed, and were washed in perforated metal cylinders by sprays of clean water.

If the testimony in this case is to be considered, and it is uncontradicted, there is in my judgment but one conclusion which can be reached, and that is, the product in question was decomposed and adulterated within the meaning of the Food and Drug Act.

[2, 3] It is argued for the claimant that since the presence of bacteria, mold, and yeast in any quantity is evidence of decomposition or the process of decomposition, and there is no fixed standard by which it can be determined when a product has reached such a stage of decomposition as to "consist in whole or in part of filthy, decomposed, or putrid vegetable substance," the government cannot prevail. I infer from the testimony of the experts that it would be difficult, if not impossible, to fix any arbitrary standard by which the question could be determined, as it depends upon so many contingencies. In any event, no such standard has been fixed, in the absence of which each case must be determined on its own facts, and when it appears, as in this case, that the product is so far decomposed as to be unfit for food, it comes within the letter and spirit of the law. It was also urged that, since there is no proof that the product in question would be injurious to health, a verdict should be ordered in favor of the claimant; but I

do not understand that such proof is necessary or required under the provisions of the Food and Drug Act, on which this proceeding is based. The object of the law is to prevent the manufacture or interstate shipment of adulterated food, and, when food is adulterated so as to "consist in whole or in part of filthy, decomposed, or putrid animal or vegetable substance," its interstate shipment is prohibited, whether its use would be injurious to health or not.

The recent decision of the Supreme Court, while not at hand, involved, as I understand from the press report, the construction of the fifth subdivision of section 7, and not the one involved in this controversy.

I conclude, therefore, that the motions for nonsuit and directed verdict should be overruled, and that a decree should be entered in favor of the government, as prayed for in the libel.

THE LOUIS DOLIVE.

(District Court, E. D. Louisiana. January 22, 1914.)

No. 14,569.

ADMIRALTY (§ 50*)—SUIT TO ENFORCE LIEN FOR SUPPLIES—BRINGING IN NEW PARTIES.

In a suit in rem against a vessel to enforce a lien for supplies furnished, the claimant may, by analogy to the procedure authorized by admiralty rule 59, bring in a charter which procured the supplies and was bound by the charter to pay for the same, that the entire controversy may be determined in one suit.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 414–429; Dec. Dig. § 50.*]

In Admiralty. Suit by the Kittredge-Waters Supply Company against the steamer Louis Dolive; the St. Tammany Steamship Company, claimant. On exceptions to petition of claimant to bring in new parties. Exceptions overruled.

Jno. D. Grace, of New Orleans, La., for libelant.

Rice & Montgomery, of New Orleans, La., for claimants.

E. Vidrine and Grant & Grant, all of New Orleans, La., for exceptors.

FOSTER, District Judge. In this matter libelant caused the seizure of the steamer Louis Dolive for certain supplies furnished, and other materialmen intervened. The St. Tammany Steamship Company claimed the vessel and now files a petition, alleging that the steamer Dolive had been chartered to the Mandeville Steamboat Company and that it was the duty and obligation of said company to pay all the claims now asserted against the boat. They also set up that the Mandeville Steamboat Company is not a corporation because of certain informalities of organization, and therefore the stockholders are commercial partners under the laws of Louisiana. They pray that the

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

company and its members be made parties to the suit and for judgment against them the same as may be rendered against the vessel.

The Mandeville Steamboat Company and its members except to the petition on the grounds that it misjoins in the same case a suit in personam with a suit in rem; that it misjoins a cause of action for violation of a charter party with a cause of action for supplies furnished; that it discloses no cause of action; that petitioners are estopped to sue the members of the steamboat company individually, having dealt with it as a corporation.

With regard to the first and second grounds, exceptors rely upon the twelfth rule in admiralty, which permits materialmen to proceed either in rem or in personam, and certain decisions holding that they cannot pursue both remedies in the same proceeding. This, however, is entirely beside the issue, as the petitioners are not seeking to recover for supplies. Petitioners rely upon the fifty-ninth rule and say that their action comes within its spirit, if not its letter, and cite numerous cases to sustain that position, particularly The Barnstable, 181 U. S. 466, 21 Sup. Ct. 684, 45 L. Ed. 954. The decisions cited, while not exactly in point, are persuasive. Furthermore, it is elemental that courts of admiralty administer the broadest equity and have the right to adopt any rule not inconsistent with law or the rules adopted by the Supreme Court.

It seems to me to be entirely equitable and right that the charterers should be brought into this proceeding in order that the entire matter may be determined at one time, which can readily be done with due regard to the rights of all parties.

The exception of no cause of action is not well taken. The question of estoppel has been repeatedly decided adversely to exceptors' contentions by the Supreme Court of Louisiana.

The exceptions will be overruled.

LEHIGH VALLEY R. CO. v. MEEKER (two cases).

(Circuit Court of Appeals, Third Circuit. August 27, 1913. On Rehearing, February 19, 1914.)

Nos. 1720, 1721.

1. COMMERCE (§ 91*)—INTERSTATE COMMERCE ACT—ACTION FOR DAMAGES FOR VIOLATION.

Interstate Commerce Act (Act Feb. 4, 1887, c. 104, §§ 14, 16, 24 Stat. 384 [U. S. Comp. St. 1901, pp. 3164, 3165]), as amended by Act June 29, 1906, c. 3591, §§ 3, 5, 34 Stat. 589, 590 (U. S. Comp. St. Supp. 1911, pp. 1297, 1301), make a clear distinction between a suit brought to enforce an administrative order made by the Interstate Commerce Commission, which is in equity, the only question in issue being the lawfulness of the order, and an action brought to recover damages for which reparation has been awarded by the Commission. The latter is not a suit to enforce the order, nor based thereon, but is an independent plenary action at law, triable to a jury, and to proceed "like all other civil suits for damages," except that the findings and order of the Commission are receivable as prima facie evidence of the facts therein stated, the Commission being required by section 14, on making an order awarding damages, but not otherwise, to make and report the findings of fact on which the award is made.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 143; Dec. Dig. § 91.*]

2. COMMERCE (§ 95*)—INTERSTATE COMMERCE ACT—ACTION FOR DAMAGES FOR VIOLATION—EVIDENCE.

A finding by the Interstate Commerce Commission as to the reasonableness or otherwise of a rate charged by a carrier in interstate commerce is an administrative function, properly and constitutionally delegated by the legislative power to the Commission, and is, if lawfully made, conclusive.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 145; Dec. Dig. § 95.*]

3. COMMERCE (§ 95*)—INTERSTATE COMMERCE ACT—ACTION FOR DAMAGES FOR VIOLATION—EVIDENCE.

A finding by the Interstate Commerce Commission, on the hearing of a petition for reparation, that a given rate charged the complainant is unreasonable, while pertinent to the issue in a subsequent suit by such complainant to recover damages, in that it establishes a violation of the act, is not decisive of the question of liability for damages under Act Feb. 4, 1887, c. 104, § 8, 24 Stat. 382 (U. S. Comp. St. 1901, p. 3159), either prima facie or otherwise, but its evidential value on that issue is for the determination of the court and jury.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 145; Dec. Dig. § 95.*]

4. COMMERCE (§ 97*)—INTERSTATE COMMERCE ACT—ACTION FOR DAMAGES FOR VIOLATION—INSTRUCTIONS.

On the trial of such an action for damages, in which plaintiff has been permitted to introduce the report of the Commission, it is the duty of the court to instruct the jury as to what are and what are not findings of fact therein which are made prima facie evidence by the statute.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 147; Dec. Dig. § 97.*]

5. COMMERCE (§ 95*)—INTERSTATE COMMERCE ACT—ACTION FOR DAMAGES FOR VIOLATION.

In such an action, a finding made by the Commission that plaintiff was charged an unreasonable rate as a shipper by defendant, and an order of the Commission awarding plaintiff damages in a sum representing the

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

difference between the amounts paid by him under such rate and what he would have paid under a rate found to be reasonable do not constitute evidence making a prima facie case, since others than plaintiff as the shipper may have sustained the actual pecuniary loss from the overcharge, and the statute authorizes the recovery only of actual damages sustained by the plaintiff, and not of a penalty. The statute although making the findings of fact of the Commission prima facie evidence of the facts found, does not make such facts prima facie evidence of anything; but their pertinency and evidential weight and value are for the determination of the court and jury as in other civil cases.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 145; Dec. Dig. § 95.*]

6. COMMERCE (§ 87*)— INTERSTATE COMMERCE COMMISSION — JURISDICTION — CLAIMS FOR DAMAGES—LIMITATION.

The provision of Interstate Commerce Act (Act Feb. 4, 1887, c. 104, § 16, 24 Stat. 384 [U. S. Comp. St. 1901, p. 3165]), as amended by Act June 29, 1906, c. 3591, § 5, 34 Stat. 590 (U. S. Comp. St. Supp. 1911, p. 1301), that "all complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not after, * * * provided, that claims accrued prior to the passage of this act may be presented within one year," does not by the proviso permit the filing within one year of claims accrued prior to the passage of the amendatory act without limitation, but the proviso applies only to claims accrued not more than two years prior to its passage.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 139; Dec. Dig. § 87.*]

In Error to the District Court of the United States for the Eastern District of Pennsylvania; James B. Holland, Judge.

Actions at law by Henry E. Meeker, surviving partner of the firm of Henry E. Meeker and Caroline H. Meeker, doing business under the trade-name of Meeker & Co., and by Henry E. Meeker, against the Lehigh Valley Railroad Company. Judgment for plaintiff in each case, and defendant brings error. Reversed.

See, also, 175 Fed. 320.

George W. Field, of New York City, John G. Johnson, of Philadelphia, Pa., and Edgar H. Boles, of New York City (Frank H. Platt, of New York City, Everett Warren, of Scranton, Pa., and Geo. W. Field, of New York City, of counsel), for plaintiff in error.

William A. Glasgow, Jr., of Philadelphia, Pa., and John A. Garver, of New York City, for defendant in error.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

GRAY, Circuit Judge. On September 3, 1912, Henry E. Meeker, surviving partner of the firm of Meeker & Co., defendant in error (hereinafter called the plaintiff), instituted in the court below, under the provisions of section 16 of the Act to Regulate Commerce, a suit against the Lehigh Valley Railroad Company, plaintiff in error (hereinafter called the defendant), to recover damages alleged to have been incurred by reason of certain acts and practices of the defendant, in violation of said act, and theretofore the subject of complaint by the said plaintiff before the Interstate Commerce Commission.

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

To the judgment obtained by the plaintiff against the defendant, this writ of error has been sued out by the latter.

In his petition in the court below, "setting forth briefly the causes for which he claims damages," plaintiff charges that the defendant company, as a common carrier, subject to the provisions of the Interstate Commerce Act, from November 1, 1900, to August 1, 1901, discriminated against his firm, in that it demanded and received from Meeker & Co. greater compensation for services rendered in the transportation of anthracite coal, from the Wyoming region in Pennsylvania, to Perth Amboy, in New Jersey, than it demanded or received from another shipper for "a like and contemporaneous service in the transportation" of anthracite coal between the same points, in violation of section 2 of the Act to Regulate Commerce (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3155]); and further charges that from August 1, 1901, to July 17, 1907, the defendant company demanded and received from plaintiff's firm unjust and unreasonable rates for the transportation of anthracite coal from the Wyoming region in Pennsylvania to Perth Amboy, New Jersey, in violation of said act.

In support of this charge, it is alleged in the petition, as follows: That defendant is a common carrier engaged in interstate railroad transportation between points in the states of Pennsylvania, New Jersey and New York, and is largely engaged in transporting anthracite coal for plaintiff and other shippers over its lines, from collieries in the Wyoming coal region of Pennsylvania, to Perth Amboy, in the state of New Jersey; that one of said shippers other than plaintiff is the Lehigh Valley Coal Company, a corporation of the state of Pennsylvania, engaged in the business of mining and buying anthracite coal in said Wyoming region.

Plaintiff alleges that from November 1, 1900, to August 1, 1901, the defendant company, intending to unjustly and unreasonably discriminate in favor of, and to prefer, the Lehigh Valley Coal Company to the plaintiff and other independent shippers, unlawfully charged the plaintiff with excessive and discriminatory rates on 55,257.75 tons of anthracite coal of prepared sizes, 16,689 tons of pea coal, 11,448.93 tons of buckwheat coal, and 4,926.77 tons of rice coal, shipped between the said Wyoming coal region and Perth Amboy, New Jersey, the total charges on such coal amounting to $129,989.18, whereas, had the plaintiff been given the benefit of the rates charged by defendant for similar shipments of the said Lehigh Valley Coal Company, the total charge upon plaintiff's said shipments would have been $11,909.33 less than the sum exacted as above during the period aforesaid, which sum, with interest thereon from August 1, 1901, was awarded by the Interstate Commerce Commission in favor of the plaintiff, in their supplemental report dated May 7, 1912, as also in their orders supplemental thereto, issued June 8 and 15, 1912, attached to said petition and marked Exhibits "A" and "B," respectively.

Plaintiff further alleges that from August 1, 1901, to July 1, 1907, the defendant charged and exacted from petitioner, over its said line

of road from the Wyoming coal region, aforesaid, to Perth Amboy, at tidewater in New Jersey, the following unreasonable and excessive charges upon all shipments of anthracite coal, to wit: $1.55 per ton for prepared coal, $1.40 per ton for pea coal, $1.25 per ton for buckwheat coal, and $1.10 per ton for coal smaller than buckwheat coal. That from August 1, 1901, to July 1, 1907, these shipments amounted to 248,870.15 tons of prepared sizes of such coal, 106,051.09 tons of the pea size of such coal, 87,250 tons of the buckwheat size of such coal, and that the charges paid thereon amounted to $685,375.27, at rates exceeding $1.40 per gross ton in prepared sizes, $1.30 on pea coal, and $1.15 on buckwheat coal, the rates fixed by the Interstate Commerce Commission as proper and reasonable, the amount of such excess being $58,236.45, paid by plaintiff to the defendant. That said payments were made under protest that the same were unreasonable and excessive.

The petition then recites that on July 17, 1907, plaintiff filed with the Interstate Commerce Commission a complaint, setting forth the aforesaid unreasonable and discriminatory practices and charges of defendant, to the prejudice of the plaintiff and in violation of the Act to Regulate Commerce, and praying for a hearing upon the allegations set forth in said complaint, and that the Commission make an order, requiring the defendant to cease and desist from the practices aforesaid, and fixing the proper and reasonable rate for transportation of anthracite coal over defendant's line, from the Wyoming region to tidewater at Perth Amboy, and awarding complainants reparation in damages in such amount as they might have suffered loss by reason of said improper practices and charges. Defendant, being duly served with a copy of said complaint, made answer thereto, issue was joined, and the complaint regularly heard and argued by all the parties thereto, and submitted. A report was duly filed by the said Commission on June 8, 1911, in Docket No. 1180, a copy of which report, with the conclusions and orders of the Commission, is attached to plaintiff's petition as "Exhibit C."

By this report, the Interstate Commerce Commission held that the charges by the defendant company to the plaintiff, between November 1, 1900, and August 1, 1901, were discriminatory, and therefore unlawful, and also that the charges of defendant company, between August 1, 1901, and July 1, 1907, were unreasonable, and the same were ordered to be discontinued, and that reasonable and proper charges for the transportation of anthracite coal over defendant's line between the points of origin and destination aforesaid, should thereafter be $1.40 per gross ton on prepared sizes, instead of $1.55, the rate charged, and $1.30 on pea coal, instead of $1.40, the rate charged, and $1.15 on buckwheat coal instead of $1.20, the rate charged, and the Commission held

"that reparation should be awarded upon the basis of the rates herein found to be reasonable, upon all shipments of coal by complainants from the Wyoming region to Perth Amboy, since August 1, 1901. The amount of reparation which should be awarded under our finding in this case cannot be ascertained from the exhibits now on file, and such further proceeding will be had as may be necessary to determine the amount of money due to complainants."

Plaintiff's petition further recites that a hearing was had upon the question of reparation, and that a supplemental report was filed by said Commission, May 7, 1912. In this report, attached to the petition and marked "Exhibit A," the Commission state

"that the original report in No. 1180 disposed of all the questions at issue, except the claim for reparation, and the case was held open for the purpose of securing further information regarding that feature. A further hearing has been held, and complainant has presented exhibits, showing the total number of tons of each variety of coal shipped and the amount of reparation due on such shipments. These exhibits have been examined by defendant and admitted to be correct."

They then refer to their finding in the original report, that the rates exacted by defendant from November 1, 1900, to August 1, 1901, were unjustly discriminatory and in violation of section 2 of the act, to the extent that they exceeded the rates contemporaneously charged the Lehigh Valley Coal Company under the contract then in effect between that company and the defendant, and to the further finding in said original report, that the rates in effect from August 1, 1901, to July 17, 1907, were unreasonable, to the extent that they exceeded rates of $1.40 per gross ton on prepared sizes, $1.30 on pea, and $1.15 on buckwheat.

They then proceed to say that on the basis of their conclusions in the former report, and upon consideration of the evidence adduced at the hearing upon the question of reparation, they now find that, during the period from November 1, 1900, to August 1, 1901, in regard to the charges exacted from plaintiff and found to have been unjustly discriminatory, that complainant was entitled to an award of reparation in the sum of $11,009.33, with interest thereon from August 1, 1901. And they further find, in regard to the rates exacted for coal shipped by plaintiff from August 1, 1901, to July 7, 1907, which were found unreasonable in the original report, that plaintiff is

"entitled to an additional award of reparation in the sum of $58,236.45, with interest, amounting to $27,750.64, on the individual charges comprising said sum, from the dates of payment thereof to September 1, 1911, together with interest on said sum of $58,236.45, from September 1, 1911."

Following said supplemental report, and on the same day, to wit, May 7, 1912, a so-called supplemental order was entered, which, as amended in an unimportant particular May 15, 1912, read as follows:

"This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a supplemental report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

"It is ordered, that defendant Lehigh Valley Railroad Company be, and it is hereby authorized and required to pay unto complainant, Henry E. Meeker, surviving partner of Henry E. Meeker and Caroline H. Meeker, copartners, trading as Meeker & Company, on or before the 15th day of July, 1912, the sum of $11,009.33, with interest thereon at the rate of 6 per cent. per annum from the 1st day of August, 1901, as reparation for unjustly discriminatory rates charged for the transportation of anthracite coal from the Wyoming coal region, in Pennsylvania, to Perth Amboy, New Jersey, which rates so charged have been found by this Commission to have been unjustly discrimina-

tory, as more fully and at large appears in and by said report of the Commission.

"It is further ordered, that defendant Lehigh Valley Railroad Company be, and it is hereby authorized and required to pay unto complainant, Henry E. Meeker, surviving partner of Henry E. Meeker and Caroline H. Meeker, copartners, trading as Meeker & Company, on or before the 15th day of July, 1913, the sum of $58,236.45, with interest thereon at the rate of 6 per cent. per annum, amounting to $27,750.64, upon the various individual charges comprising said sum, from the dates of payment thereof to September 1, 1911, as itemized in complainant's Exhibit 2, together with interest at the rate of 6 per cent. per annum on said sum of $58,236.45 from September 1, 1911, as reparation for unreasonable rates charged for the transportation of various shipments of anthracite coal from the Wyoming coal region in Pennsylvania, to Perth Amboy, New Jersey, which rates so charged have been found by this Commission to have been unreasonable, as more fully and at large appears in and by said report of the Commission."

The petition then avers that a true copy of this order of the Commission was duly served upon the defendant, and demand made for payment of the sum claimed in the petition, and as set forth in the aforesaid orders of the Commission and attached to the petition as Exhibits "A" and "B," but the defendant had failed and refused to pay the said sums, or any part thereof. "Wherefore," it is alleged, "petitioner has instituted this proceeding to enforce the aforesaid order, regularly and lawfully made under the Act to Regulate Commerce." (The theory of the petition thus appears to be that this is a proceeding to enforce the order of reparation made by the Commission, and not a suit for the recovery of such damages as plaintiff has actually incurred by reason of the alleged unlawful acts of defendant, as found by the Commission.) The court is then prayed to enter a rule upon said defendant to file a plea, answer, or demurrer to the petition within thirty days from the date of serving a copy of the same, and to fix a time and place for the trial of the cause under the provisions of the Act to Regulate Commerce.

The defendant accordingly filed, October 5, 1912, its plea of the general issue, the bar of the statutes of limitation applicable to plaintiff's claim, and for a further plea averred that the Interstate Commerce Commission had no jurisdiction to make the findings and order of reparation which the plaintiff seeks to enforce, and that there was before the Commission no substantial evidence to sustain its findings and order.

At the trial, the plaintiff put in evidence the report of the Commission, dated June 8, 1911 (see Record, pp. 22–73), and the order thereon of the same date, requiring the defendant to abstain from charging or receiving its present rates for the transportation of coal so found to be unreasonable, and requiring defendant for a period of two years thereafter to maintain the rates found in said report to be reasonable. Also, the supplemental report of the Commission, dated May 7, 1912, finding the reparation or damages to which the plaintiff was entitled, and the supplemental order of that date, amended by that of June 15th, as hereinbefore set out, requiring the defendant to pay to plaintiff, on or before the 1st day of August, 1912, the sums found due as and for reparation in said supplemental report.

Save the testimony of the plaintiff (Meeker), bearing upon the

charge of discrimination as to freight rates between November 1, 1900 and August 1, 1901, no evidence, other than these four papers, was offered by plaintiff at the trial. The defendant offered no testimony, except that of Mr. George W. Field, one of its counsel, who attended the hearing before the Interstate Commerce Commission and made certain calculations from Exhibits "A" and "B," offered in evidence by defendant, dividing up the shipments therein set out between different dates, to which the different statutes of limitation might apply. Plaintiff's contention was, and is, that these four papers, in the absence of any evidence on the part of the defendant, made out a prima facie case in his favor and entitled him to a recovery, as damages, of the amounts awarded by the Commission.

This was the view taken by the learned judge of the court below, in submitting the case to the jury, and a verdict was accordingly rendered in favor of the plaintiff for the aggregate sums awarded by the Commission, as reparation, which, with interest thereon, amounted to $109,280.17. To the judgment thereon, this writ of error is sued out by the defendant. Certain of the assignments challenge the constitutionality of section 16 of the Act to Regulate Commerce, on the ground that its provision, that the findings and order of the Commission shall be prima facie evidence of the facts therein stated, is unconstitutional, in that it confers judicial power upon an administrative commission, deprives the defendant of its property without due process of law, and denies to it its right of trial by jury; and also, on the ground that the provision of said section, conferring upon the Commission authority to determine and award damages to any party complaining of the violation of the act by a common carrier and to direct such carrier to pay to the complainant before a day named the sum so awarded, and declaring that, on a trial of a suit to recover such damages, the facts stated in the findings and order of the Commission shall be prima facie evidence of the facts therein stated, is not a proper exercise of the powers given to Congress to regulate commerce. The latter point was raised before this court in the case of Western New York & P. R. R. Co. v. Penn Refining Co., 137 Fed. 343, 70 C. C. A. 23. We there said:

"The constitutionality of the provisions making 'findings of fact' prima facie evidence before a jury has been challenged by sundry assignments of error, but is, we think, beyond reasonable question. The constitutional guaranty relative to trial by jury in the courts of the United States does not exclude legislative authority to effect convenient changes in the rules of evidence, involving no detriment to litigants."

In view of this decision, counsel for the plaintiff in error does not attempt a reargument of the question before this court. The question as to the other grounds of constitutionality, is disposed of by the view taken as to what may be the proper interpretation and application of the provisions of the statute. The questions raised by the assignments of error which are most material, relate to the submission of the reports and orders of the Interstate Commerce Commission, and to how far and in what respect the same are to be taken

as prima facie evidence of facts stated by them. Also, the question whether the facts of which such reports and orders are the prima facie evidence, are sufficient, in the absence of countervailing testimony by the defendant, to maintain the plaintiff's suit and claim for damages.

[1] This court has already, in a decision at this term, in the case of Lehigh Valley Railroad Co. et al. v. J. Mitchell Clark et al., 207 Fed. 717, 125 C. C. A. 235, discussed at some length the history of the legislation embodied in the Act to Regulate Commerce, and its amendments. As we there pointed out, section 14 of the original act made it the duty of the Commission to make a report in writing, which should include the findings of fact upon which the conclusions of the Commission are based, together with its recommendation as to what reparation should be made to the parties found to have been injured, "and such findings so made shall thereafter, in all judicial proceedings, be deemed prima facie evidence as to each and every fact found."

Section 16 provided for the refusal or neglect "to obey any lawful order or requirement of the Commission," by authorizing the Commission and the party interested in such order or requirement, to apply in a summary way to a Circuit Court of the United States sitting in equity, and empower such court, as a court of equity, to hear and determine the matter, etc. "And on such hearing, the report of said Commission shall be prima facie evidence of the matters therein stated." And it was provided that if it be made to appear to the court "that the lawful order or requirement of said Commission drawn in question has been violated or disobeyed," the court may issue "a writ of injunction or other proper process, mandatory or otherwise, to restrain such common carrier from further * * * violation or disobedience of such order."

From the fact that it was to a court of equity alone that resort was to be had for the enforcement of an order of the Commission, it was apparent that it was only to such ministerial orders of the Commission as could be enforced by a court of equity, that the act in this respect could apply, and that a recommendation or an award of damages by the Commission was not such an order or requirement as could be thus enforced without a violation of the seventh amendment to the Constitution, in regard to jury trials. This consideration suggested the Act of March 2, 1889 (25 Stat. 859, c. 382, § 5), amending section 16 of the original act by adding thereto the following:

"If the matters involved in any such order or requirement of said Commission are founded upon a controversy requiring a trial by jury, as provided by the seventh amendment to the Constitution of the United States, and any such common carrier shall violate or refuse or neglect to obey or perform the same, after notice, * * * it shall be lawful for any company or person interested * * * to apply in a summary way, by petition, to the Circuit Court of the United States sitting as a court of law, * * * alleging such violation or disobedience as the case may be."

Then, after providing for a jury trial, the amendment concludes:

"At the trial, the findings of fact of said Commission, as set forth in its report, shall be prima facie evidence of the matters therein stated."

The distinction thus clearly made between reparation and non-reparation cases, is made still more clear in the so-called "Hepburn Act" of 1906, in which section 14 was amended so as to read, as follows:

"That whenever an investigation shall be made by said Commission, it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of the Commission, together with its decision, order, or requirement in the premises; and in case damages are awarded, such report shall include the findings of fact on which the award is made."

This distinction was still further emphasized by so amending section 16 as to provide that, where, after hearing on a complaint, the Commission should determine that complainant is entitled to an award of damages, it

"shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before the day named. If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant * * * may file in the Circuit Court of the United States for the district in which he resides, * * * a petition setting forth briefly the causes for which he claims damages, and the order of the Commission in the premises. Such suit shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the Commission shall be prima facie evidence of the facts therein stated."

After other provisions, the section, as amended, further provides (the italics being ours):

"If any carrier fails or neglects to obey any order of the Commission, *other than for the payment of money*, and while the same is in effect, any party injured thereby, or the Commission in its own name, may apply to the Circuit Court in the district where such carrier has its principal operating office, * * * for an enforcement of such order. Such application shall be by petition, which shall state the substance of the order and the respect in which the carrier has failed of obedience, and shall be served upon the carrier in such manner as the court may direct, and the court shall prosecute such inquiries and make such investigations, through such means as it shall deem needful in the ascertainment of the facts at issue or which may arise upon the hearing of such petition. If, upon such hearing as the court may determine to be necessary, it appears that the order was regularly made and duly served, and that the carrier is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction, or other proper process, mandatory or otherwise."

Thus, the inherent and obvious distinction between reparation and non-reparation cases is clearly recognized by Congress. It could hardly be otherwise than that such recognition should be made. The great purposes of the act are largely accomplished by the administrative control given to the Commerce Commission over all carriers, as to interstate commerce, and that administrative control is made efficient by the peculiar jurisdiction of a court of equity, to which the Commission or a party interested may apply for the enforcement of its orders. In such cases, the whole record of the investigation by the Commission is before the court, and the only matter to be determined is that the order made by the Commission is a lawful order; that is, made within the scope of the authority conferred by Congress, and upon a full hearing of the parties, with the opportunity accorded of

adducing testimony and having it considered. I. C. C. et al. v. Louisville & Nashville R. R. Co., 227 U. S. 88, 33 Sup. Ct. 185, 57 L. Ed. ——, lately decided by the Supreme Court of the United States.

When we come, however, to a reparation case, we encounter at once, not the question of making efficient the orders of the Commission as an administrative body, and of enforcing its proper control over interstate commerce, but the right of an individual plaintiff to recover compensation from the defendant for damages alleged to have been actually incurred by reason of such defendant's unlawful conduct. We are dealing, not with governmental control over those engaged in a quasi public employment, but with a personal controversy, which, under our traditional institutions and constitutional system, can only be determined, as other personal controversies of the kind are determined, by a jury trial at common law.

The right to a jury trial having thus been preserved by the provisions of the act above referred to, under them "the parties are entilted," as said by us in Western New York & P. R. R. Co. v. Penn Refining Co., supra,

"to an impartial trial by jury, so conducted as to accord to them in full measure the enjoyment of their constitutional right. The procedure contemplated by the act and, unless waived, required by the Constitution, is jury trial, accompanied with the usual safeguards furnished by a proper application of the principles of evidence and the proper submission of the case to the jury."

This right of trial by jury is not granted, as of grace, by the act, but is a constitutional right of which the defendant cannot be deprived. The consistency and harmony of the reparation proceedings, as authorized by the act, with the administrative features thereof, are, however, as pointed out by the Supreme Court in Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co., 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas. 1075, maintained, by Congress having made, in the exercise of its legislative power as to the law of evidence, the "findings and order of the Commission" "prima facie evidence of the facts therein stated." In all other respects, a suit under the act shall proceed "like all other civil suits for damages." We cannot give less than full meaning and effect to this language. What may be the facts, or classes of facts, to which this provision of the act applies, must be the important question in this, as in other cases, for the determination of the court. As under the decision in the Abilene Case, the literal language of the act, in allowing a complainant as to all matters, to bring an independent common-law action for damages, cannot be reconciled with the general scope of the act, or with other particular provisions thereof, a suit for damages must in all cases calling for an exercise of the discretion of the administrative and rate-regulating body, be founded upon a previous application to and investigation by the Commerce Commission, and instituted with reference to "rights recognized in or to duties imposed by the act." We think, therefore, it clearly follows from the premises:

[2] (1) That the finding of the Commission as to the reasonableness, or otherwise, of the rate charged by the carrier in interstate

commerce, is an administrative function properly and constitutionally delegated by the legislative power to the Commission, and is, if lawfully made, conclusive. If such finding of the Commission is, that a given rate charged by a carrier in interstate commerce is unreasonable, it is as if the unreasonableness of such rate were fixed by the statute. The lawfulness of such finding is subject to judicial inquiry only in the respects above referred to.

[3] (2) The finding by the Commission that a given rate is unreasonable, while pertinent to the issue, in that it establishes a violation of the act, is not decisive of the question of liability for damages under section 8, in such a case as the present, either prima facie or otherwise.

[4] (3) The pertinency and evidential weight and value of the facts, as to which the findings and order are prima facie evidence, are for the determination of the court and jury, as in other civil causes. They may or may not make out a prima facie case for the plaintiff. The importance of the exceptional privilege thus conferred upon the plaintiff, of not being required to prove, in the first instance, the facts found by the Commission, makes it the more necessary that the court should point out to the jury what are and what are not such findings. The imperative command of section 14, that in case damages are awarded, such report shall include the findings of fact on which the award is made, evidently contemplated a distinct enumeration of such findings by the Commission, with reference to their proposed use in a jury trial, and evidently with this understanding, the original rule of the Commission was made, that

"upon the final submission of the case to the Commission, either party may submit proposed findings of fact for the consideration of the Commission, which findings must embrace only the material facts of the case supposed to be established by the testimony."

No function of a trial judge in such a case could be more exigent than that of pointing out to a jury, in a case where no separate and distinct findings of fact had been made in the report of the Commission, what were properly to be considered such findings. We can only reiterate what was said by us in the Penn Refining Company Case, supra:

"While not expressing the opinion that findings of fact even when mixed with incompetent matter should in all cases be excluded, we hold that, if the same be received, the court should clearly separate and distinguish before the jury the findings of fact from the incompetent matter, and direct that the latter be * * * disregarded. Unless this course be pursued, the parties are deprived, at least in part, of the benefits and safeguards intended to be secured to them under the constitutional guaranty of trial by jury."

It will be remembered that the only evidence adduced by the plaintiff in support of his claim for damages at the trial, consisted of the four documents to which we have above referred, viz.:

(1) The original report of the Commission, dated June 8, 1911, occupies 50 printed pages of the record. In this report, the Commission find that the complainants have sustained the allegation of unjust discrimination under the second section of the act, and that reparation,

with interest from August 1, 1901, will be awarded on this account. At the close of their report, they find, as follows:

"After careful study of defendant's exhibits relating to tonnage and cost of movement, as well as painstaking analysis of defendant's voluminous exhibits, respecting its past and present financial condition, we are of opinion and so find that defendant's rates for the transportation of coal from the Wyoming region to Perth Amboy * * * are unreasonable, so far as they exceed"

a certain amount. (This finding, as defendant contends, is not a finding that the rates in effect from August 1, 1901, to July 17, 1907, were unreasonable, but that the then present rates, as they existed at the date of the report, were unreasonable.) The opinion is then expressed that reparation should be awarded upon the basis of the rates found in said report to be reasonable.

(2) This report is followed by an order of the same date, commanding the defendant to "desist, on or before the 15th day of August, 1911, and for a period of two years thereafter, from charging or demanding its present rates, and that defendant be required to establish, on or before said date, and maintain for a period of two years thereafter, rates not in excess" of the rates therein specified.

(3) A supplemental report, made by the Commission, May 7, 1912, which states that the original report disposed of all the questions at issue, except the claim for reparation, and that the case was held open for further information regarding that feature. It then states that a further hearing had been held and complainant had presented exhibits showing the total number of tons of each variety of coal shipped and the amount of reparation due on the amount of such shipments. They then say that in their original report they had found that the rates charged complainant for transportation of coal during the period from November 1, 1900, to August 1, 1901, were unjustly discriminatory to an extent named, and that the rates in effect from August 1, 1901, to July 17, 1907, were unreasonable, so far as they exceeded rates established as reasonable by the Commission. This latter reference to the original report is, as claimed by the defendant, inaccurate. They then say that, on the basis of their conclusions in the former report, and upon consideration of the evidence adduced at the hearing upon the question of reparation *(which is nowhere set out)*, they find, first, the number of tons of the various sizes of coal shipped by complainant over defendant's road from November 1, 1900, to August 1, 1901, and the amount of the charges thereon, and that complainant has been damaged to the extent of the difference between the amount which he did pay and the amount he would have paid had he had the benefit of the rates applied by defendant to similar shipments of the Lehigh Valley Coal Company. Second, they find the number of tons shipped by plaintiff over defendant's road, from August 1, 1901, to July 7, 1907, and the charges paid thereon, "at the rates found to have been unreasonable"; and that complainant has been damaged to the extent of the difference between the amount which he did pay and the amount he would have paid at the rates found reasonable.

(4) By the supplemental order issued on the same day, to wit, May 7, 1912, and amended June 15, 1912, which we have heretofore quoted

in extenso, the defendant is required to pay, as reparation, to the plaintiff the amount found to have been unjustly discriminatory, and also the amount charged by said defendant over and above the amounts found to be reasonable by the Commission.

As to these documents thus admitted in evidence, it is apparent that the requirement of section 14, that "in case damages are awarded, such report shall include the findings of fact on which the award is made," has not been complied with by any express findings of fact in the supplemental report of May 7, 1912, in which the award of damages against the defendant is made; that such findings of fact, if any, must be looked for in the voluminous pages of the original report filed June 8, 1911, to which reference is made in the supplemental report; and that in the said original report, there are no findings of fact, as such, and they must be gathered, if gathered at all, from a mass of recited evidence, statements, opinions, and conclusions of the Commission, all of which were irrelevant to an award of actual pecuniary damage.

[5] The assignments of error are numerous, but, for the purposes of this case, we may confine our attention to those which are founded upon the admission by the court, over the objection of the defendant, of these four papers, as evidence before the jury, without discrimination on the part of the court as to the evidential value of the opinions, statements, arguments and conclusions contained therein; to those upon the failure of the court to clearly separate and distinguish, for the benefit of the jury, the findings of fact from the incompetent matter contained in such reports, and to direct that the latter be wholly disregarded; and to those founded upon the portions of the charge of the court, in which the jury are in effect told that the award of damages made by the Commission against the defendant, in the orders of reparation pursuant to its report, was, in the absence of controlling testimony on the part of the defendant, binding upon the jury.

The reparation report of May 7, 1912, contains no findings of fact, but merely refers to the original report of June 8, 1911, "as disposing of all the questions at issue, except the claim for reparation," and is silent as to the information and evidence that may have been adduced before it relevant to that claim. The jury would therefore be compelled to examine that voluminous report to discover for themselves whether it contained any findings of fact bearing upon the question as to what actual damage had been suffered by the plaintiff, by reason of the unlawful conduct of the defendant. Various matters may have entered into the determination of the question, whether actual damage had been suffered by the plaintiff. It is quite conceivable that, though, in the performance of its administrative function, the Commission finds a certain rate to be discriminatory or unreasonable and orders such rate to be changed in that regard, no actual pecuniary damage has resulted therefrom to the particular complainant before it. As said by Mr. Commissioner Clements in a public address:

"It often happens, in the attempt at reparation for wrongs accomplished, that the party most injuriously affected has no standing in law to claim reparation, for the reason that he was not the shipper and had no dealing with the carrier—he may have been the producer, consumer, or the dealer, and yet the

price at which he sold or bought may have been so affected that ultimately he had to bear the burden of the increased rate, although it was paid directly, in the first instance, by the shipper."

The injustice must be apparent, of permitting an individual shipper, after procuring, upon his complaint, a reduction of rate for the future, in the interest of the public generally, to secure for himself, by way of reparation, the difference between the new and the old rate, which has already been charged to and paid by the consumer.

The contention of the plaintiff, sanctioned by the court below, carried to its logical conclusion, is, that the finding of an unreasonable rate and the award by the Commission of damages in the precise sum representing the difference between such rate and that declared to be reasonable, constitutes a prima facie case against the defendant, so that the suit brought by the plaintiff is, in effect, a suit to recover a penalty in which the whole burden of proof rests upon the defendant. We are not prepared to agree that this is a suit to recover a specific penalty prescribed by law, but is a suit, as described by the statute, to recover damages, in which the causes for which plaintiff claims damages must be set forth, and to be proceeded in like other civil suits for damages.

The learned counsel for the plaintiff has not pointed out in his brief, nor claimed in his oral argument, that there are any findings of fact upon which the award of damages was made by the Commission, except its conclusion as to the existence of a discriminatory charge between 1900 and 1901, and of an unreasonable charge between 1901 and 1907, and those findings of fact and circumstances tending to establish the same. A careful reading of the 50 pages of this report does not disclose any specific findings of fact bearing on the award of reparation, other than the undisputed tonnage shipped by complainant. The report is occupied entirely with a discussion of the evidence adduced before it, on the charges of discrimination and of unreasonableness.

Granting, however, that these papers, including this long report in which the findings of fact alone are to be looked for, were admissible, as has been already indicated, it was clearly the duty of the court below to point out such portions of the voluminous record as alone should be considered findings of fact, within the meaning of section 16 of the act. We think in this respect the court has failed to assist the jury in the proper conduct of the case, to the detriment of the defendant. It can hardly be denied that such instructions were not only due from the court to the jury, but that without them, these papers, including this voluminous report of the Commission, which in itself constituted a fair sized book, should not have been admitted. The record discloses the fact that, when this report of June 8, 1911, was offered in evidence, it was objected to by the defendant, on the ground that it contained no findings of fact, as required by the statute, or which are material or relevant in a reparation suit. Counsel for plaintiff said in reply:

"There are certain findings of the Commission in this case, if that point is made, which perhaps your honor will have to guard in telling the jury what

part of this report to consider, and I will prepare and submit to your honor such a point for charge, striking out such points as are argumentative or historical, and confining the jury's consideration to such findings of fact as the Commission may make."

Upon further objection by counsel for defendant, on the ground that

"the report contained many statements purporting to be statements of evidence in the hearing before the Interstate Commerce Commission, arguments, opinions, and conclusions, which the statute does not purport to make admissible as prima facie evidence,"

counsel for plaintiff said in repely:

"I would suggest—and this is only a suggestion—that your honor say that you will control the effect of this report by a proper charge to the jury, because there are certain statements of evidence, statements of an historical character, which I think under the cases, the court should control in submitting the case to the jury, and direct their attention to the facts found in the report."

The Court:

"Then your idea is simply to offer the report in evidence, for the purpose of proving that there was an order made, and all relevant material in support of that evidence?"

Counsel for plaintiff:

"Yes, sir."

The Court:

"The court will, of course, indicate to the jury what of the report is relevant."

After this very significant colloquy, the report was admitted in evidence, and afterwards, at the close of the testimony, the record states that counsel for the defendant "read to the jury what he stated to be material portions of said exhibits." It is not stated, however, in the record, what portions were so read; and we look in vain for any directions by the court to the jury in regard to this important matter.

The following extracts from the charge indicate the theory upon which the court below submitted the case to the jury, and the attitude of the court towards these reports and orders of the Commission:

"It is objected here, gentlemen of the jury, that these reports made by the Commission, upon which this suit is based, are not in accordance with the requirements of this act and, therefore, you should find for the defendant. But I instruct you, gentlemen of the jury, that they are, in the judgment of the court, in accordance with the requirements of this section. They state the conclusions as required by the act, and they state the findings of fact upon which the award is based, and they make that award in the sums that I have mentioned, upon sufficient findings of fact to sustain this suit."

* * * * * * * * * *

"In the presentation of this claim to the court and the jury, the act of Congress *gives the report* a certain character as evidence. Congress, while it authorizes the Interstate Commerce Commission to investigate these alleged grievances and to ascertain whether a shipper has been injured and in what amount, and to award what, in their judgment, is a proper amount, yet requires that, if it is not paid by the defendant, the defendant shall have its

day in court before a jury, for the purpose of ascertaining whether or not it is liable, as found by the Interstate Commerce Commission, in accordance with the forms of procedure directed by the Constitution. But in that proceeding, the suit is *on the report* of the finding of the Interstate Commerce Commission, and their finding is made *prima facie* evidence of the correctness *of the amount the plaintiff is entitled to recover*, and, in a suit on an award of the Interstate Commerce Commission, the plaintiff, when it comes into court, must show that there was such a complaint made before the Interstate Commerce Commission, must show what the Interstate Commerce Commission did by way of its conclusion and award, and that it has not been paid, *and that makes its prima facie* case of its right to claim." (The italics are ours.)

There is no attempt here, or elsewhere in the charge, to separate from the mass of statements in the report what might be considered findings of fact, or to instruct the jury that the statute, in making such findings prima facie evidence of the facts stated, leaves the evidential value of such facts to the jury. On the contrary, as will be seen in the above extracts from the charge, the court gave the jury to understand that the report and findings of the Commission as to discrimination and unreasonableness, and the award of damages made thereon, were prima facie evidence of the *plaintiff's case* and of the *liability* of the defendant, and conclusive upon the defendant, unless he could rebut the same. In this, we think the court was clearly in error. The statute, in conformity with the constitutional requirement, has provided that the defendant can only be mulcted in damages by the verdict of a jury rendered in a suit, as at common law, proceeded in "in all respects like other civil suits for damages." The statute says that such facts as are stated in the findings or order of the Commission need not be proved in the suit for damages, but that such findings or order shall be prima facie evidence of the same, for whatever they may be worth. In other words, the statute makes the finding or order prima facie evidence of certain facts, but it does not make, or attempt to make, such facts prima facie evidence of anything.

Since the hearing and determination of this case, as also of Lehigh Valley Railroad Co. v. J. Mitchell Clark et al., 207 Fed. 717, 125 C. C. A. 235, the Supreme Court has promulgated an opinion and decision in Pennsylvania Railroad Co. v. International Coal Mining Co., 230 U. S. 184, 33 Sup. Ct. 893, 57 L. Ed. 1446. This decision bears directly upon some of the fundamental questions involved in the case now under consideration, as it did in those involved in the Clark Case, above referred to. On the vital point, whether in this suit, "like other civil suits for damages," actual damage must be proved, we again quote the language of Mr. Justice Lamar:

"There were many provisions of the statute for imprisonment and fines. On the civil side, the act provided for compensation—not punishment. Though the act had been held to be in many respects highly penal, yet there was no fixed measure of damage in favor of the plaintiff. But, as said in Parsons v. Railway, 167 U. S. 460 [17 Sup. Ct. 892, 42 L. Ed. 231], construing this section (8), 'before any party can recover under the act, he must show, not merely the wrong of the carrier, but that that wrong has in fact operated to his injury.' Congress had not then and has not since given any indication of an intent that persons not injured might, nevertheless, recover what, though called damages, would really be a penalty, in addition to the penalty payable to the government."

After referring to quite a number of cases relied upon by plaintiff, Mr. Justice Lamar says they

"do not support the proposition, that damages can be recovered without proof of what pecuniary loss had been suffered as a result of the discrimination."

It hardly needs to be pointed out, as we did in the Clark Case, that the ratio decidendi of the Supreme Court does not differ from that applicable to the present case. The Supreme Court also distinctly decides that, in the absence of proof of actual damage to that extent, the amount of the rebate charged and proved to have been made by defendant, cannot be recovered as damages, and that it can never be made the measure of the damage to which plaintiff is entitled. No more in this case can the difference between what is found by the Commission to be the unreasonable tariff rate and that fixed as a reasonable one, be made the measure of the damage that the plaintiff has suffered. As pecuniary damages are neither alleged in the pleadings nor proved in the trial, the plaintiff made out no case upon which recovery of damages could be had.

For the reasons above stated, we think the judgment below should be reversed, with directions for a venire de novo.

There was a second complaint made to the Interstate Commerce Commission by defendant (Meeker), in his own name, dated April 13, 1910, pending the proceeding in his first complaint filed July 17, 1907. In the former complaint, as we have seen, the Commission were dealing with the question of the unreasonableness of the rates on anthracite coal from the Wyoming region to Perth Amboy, between August 1, 1901, and July 17, 1907, whereas the second complaint dealt with the same charges or rates between July 17, 1907, the date of the filing of the first complaint, and April 13, 1910. The supplemental report of the Commission, dated May 7, 1912, was a blanket report and covered both complaints. As to the later case, the report, after dealing with the former, said:

"With the exception of the reparation features, the issues involved in No. 3235 have been passed upon by the Commission in No. 1180. The latter case covered the period from November 1, 1900, to July 17, 1907, while the instant case is designed to secure reparation upon shipments which move between July 17, 1907, and April 13, 1910. The petition in the present case, therefore, resolves itself into a prayer for reparation on shipments moving subsequent to the period covered by the original report, on basis of the conclusions announced in that report. * * * The former case was filed with the Commission within one year from the passage of the law of June 29, 1906, and consequently was not limited to causes of action that accrued within two years prior to the filing of the complaint. The present proceeding, however, was instituted more than one year subsequent to the passage of that law, and is therefore subject to the two year limitation of the statute. Complainant's prayer for reparation on shipments moving more than two years prior to the filing of the complaint in this case, must be denied.

"On basis of our decision in No. 1180, upon consideration of the evidence submitted at the hearing of the present case regarding the amount of reparation due complainant,"

the Commission find that the rates exacted by defendant during the two years prior to the filing of his last complaint, were unreasonable to the same extent as found in the report as to the former period from

August 1, 1901, to July 17, 1907. The report in this latter case does not purport to include the statements and findings of the original report, or of the supplemental report in regard to the former case. It merely makes a finding of unreasonableness on the basis of their decision in No. 1180. How far it is competent for the Commission to proceed upon findings and evidence in a former and distinct case, by merely referring to the same, need not now be decided. The suits in the court below, as to both cases, were tried and submitted to the jury together, upon the same instructions as to the prima facie character of the report and the award. Therefore, what has been heretofore said in regard to the former case, is applicable to the latter, and need not be repeated.

The judgment, therefore, in the second case must also be reversed, with directions for a venire de novo.

[6] The second paragraph of section 16 of the act concludes as follows:

"All complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not after, and a petition for the enforcement of an order for the payment of money shall be filed in the Circuit Court [or state court] within one year from the date of the order, and not after: Provided, that claims accrued prior to the passage of this act may be presented within one year."

The manifest intention of Congress here, as in all statutes of limitations, was to prevent the accumulation of claims until they were stale, and to compel those who felt themselves aggrieved by the rates exacted by interstate carriers, to use due diligence in availing themselves of the remedial provisions of the act. It surely was not the intent of the amendment passed June 29, 1906, that claims prior to that date which had accrued as far back as 1887, might be presented to the Commission, provided only they were so presented within one year after the passage of the amending act of 1906. The evident purpose of Congress was to cut off all claims for reparation more than two years old. In order, however, to prevent those whose accrued claims were two years old at the time of the passage of the amending act, from being taken by surprise and put at a disadvantage, as compared with those whose claims had accrued less than two years before the passage of the act, or with those whose claims having accrued after the passage of the act had full notice of the time within which they must be prosecuted, Congress gave a year's time within which claims accruing before the passage of the act might be presented to the Commission. It would be a harsh construction, however, doing violence to what seems to us the evident intent of Congress, to say that, in giving this time, it did not mean to preserve the two years' limitation, both as to claims before and after the act. We conclude, therefore, that the Commission in this case had no jurisdiction to entertain a claim of the shipper accruing prior to July 17, 1905.

On Rehearing.

The able and interesting argument at the rehearing in this case has challenged the careful reconsideration by the court of the grounds

upon which were based the conclusions announced in their original opinion.

We had already, at the same term, discussed very fully the Interstate Commerce Act of 1887, with the amendments of 1889 and 1906, relevant to the questions now presented, in the case of the Lehigh Valley Railroad Co. v. J. Mitchell Clark et al., 207 Fed. 717, 125 C. C. A. 235. We therefore considered it unnecessary to repeat that discussion and analysis of the act and its amendments in the opinion filed in the present case, though we applied the principles of that decision thereto.

With this reference to our opinion in the Clark Case, we confine ourselves to what seem to us the crucial questions raised by the petition for, and argument at, the rehearing.

Premising what we have before said, that the provisions of the act, granting a right of action to shippers for damages incurred in consequence of violations of the act by the interstate carrier, while important, are incidental and not primary, in the scheme of the act for the control and regulation of the actual operation of interstate commerce, in the general interests of the public, let us again consider the nature and scope of such right, as disclosed by the language and general purposes of the statute creating it.

The learned counsel for the defendants in error, in his argument at the rehearing, contended with much insistence that the act, in denouncing unreasonable rates and creating a liability to the shipper therefor, was merely declaratory of the common law, and in support of this proposition, cites the following language in the opinion of Mr. Justice White, in the Abilene Cotton Oil Case, 204 U. S. 426, 436, 27 Sup. Ct. 350, 353 (51 L. Ed. 553, 9 Ann. Cas. 1075):

"Without going into detail, it may not be doubted that at common law, where a carrier refused to receive goods offered for carriage * * * except upon the payment of an unreasonable sum, the shipper had a right of action in damages. It is also beyond controversy that when a carrier accepted goods without payment of the cost of carriage or an agreement as to the price to be paid, and made an unreasonable exaction as a condition of the delivery of the goods, an action could be maintained to recover the excess over a reasonable charge. And it may further be conceded that it is now settled that even where, on the receipt of goods by a carrier, an exorbitant charge is stated, and the same is coercively exacted, either in advance or at the completion of the service, an action may be maintained to recover the overcharge."

From this it was argued that (we quote from defendant in error's supplemental brief):

(1) "The measure of damage was clearly the difference between the unreasonable rate paid and the reasonable rate. (2) That all that the shipper had to establish, consequently, was the amount of the charges which he had paid, and what the reasonable charge would have been. (3) Having established these facts, the shipper was entitled, *as a matter of law*, to recover the difference between the two rates—that is the overcharge."

These propositions constitute the gravamen of defendant in error's whole argument.

In the case quoted from, the Supreme Court was dealing with a judgment in a state court, where suit had been brought to recover damages from the defendant company by reason of the exaction of an alleged unjust and unreasonable rate, which exceeded in the aggregate,

by the sum sued for, an alleged just and reasonable charge. There had been no application to, or finding by, the Interstate Commerce Commission, in regard to the unreasonableness of the rate. Mr. Justice White conceded these common-law rights of action, but proceeded to show that they were repugnant to the provisions of the Interstate Commerce Act, which was intended "to afford an effective and comprehensive means for redressing wrongs resulting from violations of the act," and that a shipper cannot maintain an action at common law for excessive and unreasonable freight rates exacted on interstate shipments, where rates charged had been duly fixed by the carrier according to the act, and not found to be unreasonable by the commission. We think this whole opinion tends to emphasize the distinction between the common law rights of action referred to, and the right of action created and defined by the act. A situation where the rates paid were the rates fixed by the act, as the only legal rates that could be demanded or paid, even though those rates are declared afterward by the Commission, in the performance of its administrative function, to be unreasonable, differs essentially from a situation where an *illegal* rate is, in the first instance, coerced or *extorted* by the carrier. The tariff rate paid by the shipper was the legal rate, any departure from which is made by the statute a misdemeanor and punishable by fine. There is consequently no "overcharge" to be recovered as such, as in the cases cited at common law, and no coercion except that of the law. It is obvious that, even though the statute were silent as to the measure of damage applicable to the first situation, that measure could not justly be the same as in the second. That section 22 does not help the argument of the defendant in error in this respect, is shown by Mr. Justice White, when he further says:

"It is insisted that, however cogent may be the views previously stated, they should not control, because of the following provision contained in section 22 of the Act to Regulate Commerce, viz., 'Nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies.' This clause, however, cannot in reason be construed as continuing in shippers a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act."

We repeat that this decision of the Supreme Court so far from sustaining the contention of the defendant in error, that the Interstate Commerce Act was merely declaratory of the common law, and that the common law measure of damage was applicable to the liability created by section 8 of the act, clearly distinguishes the liability at common law, as it existed in the cases cited by Mr. Justice White, from that created by the act for every violation of its provisions. We turn to the pertinent provisions of the act.

After requiring that all charges by common carriers for transportation shall be just and reasonable, and inhibiting unjust and unreasonable charges for such service, prohibiting rebates and unreasonable preferences, and declaring the same to be unlawful, the statute, in section 8 thereof, *and there alone,* creates the liability with which we are here concerned. We again quote from that section:

"That in case any common carrier subject to the provisions of this act shall do * * * any act, matter, or thing in this act prohibited or declared to be unlawful, or shall omit to do any act * * * in this act required to be done, such common carrier *shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act.*" (The italics are ours.)

The learned counsel for the defendant in error seems to argue that this statute creates a *general* liability, independent of any relativity, limitation or qualification, as soon as a violation of the act is shown. That this is not so, is apparent. It is not a *general* liability that is imposed by the act, but a particular liability to the person injured "for the full amount of damages sustained in consequence of any violation of the provisions of the act." The liability thus defined is the only civil liability anywhere imposed, and no other or different civil liability can attach itself to *any* violation of the act. The liability thus imposed being the same for all violations of the law, without exception, that liability, as defined by the statute, is to the "person or persons injured for the full amount of damages sustained in consequence of *any* such violation of the provisions of this act." We cannot avoid the plain and exigent meaning of this language. It is impossible, in view of it, to attribute to Congress an intention to apply it to only a portion of the offenses against the act.

The logic of the situation, as recognized by the decisions of the Supreme Court in the Abilene and other recent cases, would seem to be, that a civil suit for damages may be brought under sections 8 and 9 in the District Court of the United States, for any violation of the act; that, if the violation be a simple disobedience of a specific requirement of the statute, whether of omission or commission—such, for instance, as giving a rebate—nothing more is required than to prove that specific act, and no finding of the Commission is necessary to the jurisdiction of the court; but, where the illegality of the act charged depends upon whether it be reasonable or unreasonable, the option given by section 9 cannot be literally interpreted, as the determination of this issue calls for an exercise of the discretion of the administrative body. When that administrative function has been performed, and the rate complained of has been found to be unreasonable or unjust, such finding is conclusive, whether it relate to past or present rates or practices. As said by Mr. Justice Lamar, it is as if the reasonable rate or practice was established in the statute itself. It would then only be necessary to prove in court this finding of the Commission, that such a specific act or practice was unreasonable, and therefore unlawful under the act, just as it was only necessary, without any finding of the Commission to that effect, to show that a specific rebate has been given that was declared unlawful by the act itself. The further procedure in the case supposed, as indicated by the act, must be in all respects "like other civil suits for damages," except that the plaintiff may, in proving his pecuniary loss or damage, in consequence of a violation of the act by the defendant, use the facts stated in any finding or order of the Commission in support of his claim, without further proof of such facts, supplementing the same by other evidence as, in his judgment, the exigence of the case may require.

Referring to a contention in the International Coal Company Case, that a suit for damages, occasioned by rebating, could not be maintained without preliminary action by the Commission, Mr. Justice Lamar, in the recent Mitchell Case, said:

"This contention was overruled, and it was held that, for doing an act prohibited by the statute, the injured party might sue the carrier without previous action by the Commission, because the courts could apply the law prohibiting a departure from the tariff to the facts of the case. But where the suit is based upon unreasonable charges or unreasonable practices there is no law fixing what is unreasonable and therefore prohibited. In such cases the whole scope of the statute shows that it was intended that the Commission and not the courts should pass upon that administrative question. When such order is made it is as though the law for that particular practice had been fixed, and the courts could then apply that order, not to one case, but to every case—thereby giving every shipper equal rights and preserving uniformity of practice. Section 9 gives the plaintiff the option of going before the Commission or the courts for damages occasioned by a violation of the statutes. But since the Commission is charged with the duty of determining whether the practice was so unreasonable as to be a violation of the law, the plaintiff must, as a condition to his right to succeed, produce an order from the Commission that the practice or the rate was thus unreasonable and therefore illegal and prohibited."

From this illuminating view of the requisite procedure under the act, harmonizing as it does its different provisions and "giving every shipper equal rights and preserving uniformity of practice," it would seem that all other shippers than the complainant might bring their several actions in the District Court, "for the full amount of damages sustained in consequence of" the same violation of the act, without any further finding by the Commission. It having once been established what particular conduct or practice of the carrier was illegal, it would only be incumbent on a plaintiff to show the damage, if any, sustained thereby. No award of reparation, therefore, would be necessary in such cases to the jurisdiction of the court, the suits being cognizable under sections 8 and 9, as in the case of suits for damages occasioned by rebates or other specific violations of the act.

From this it seems irresistibly to follow, that all shippers prosecuting suits for damages "sustained in consequence of any violation of the provisions of the act," are on the same footing, whether the violation be a specific act made illegal by the statute, or one in which the illegality of the act depends upon the finding of fact by the Commission, that the act or practice complained of is unreasonable or unjust. In like manner it follows that the measure of damages sustained by a shipper in consequence of any violation of the act, must be the same in all cases. We find no authority in the act itself, or in the decisions of the Supreme Court, for applying a different measure of damage in the case of any violation of the act, than that established by the eighth section, viz., "the full amount of damages sustained" by reason thereof. To hold that, in one case actual damage must be proved, and in the other not. introduces a confusion in the administration of the law, for which the only justification must be the express and mandatory requirement of the statute, or the express and controlling decision of the Supreme Court. The measure of the statute is thus stated by the Supreme Court in the International Coal Mining Case:

"The statute gives a right of action for *damages* to the *injured* party, and by the use of these legal terms clearly indicated that the damages recoverable were those known to the law and intended as compensation for the injury sustained. It is elementary that in a suit at law both the fact and the amount of damage must be proved. And although the plaintiff insists that in all cases like this the fact and amount of the pecuniary loss is matter of law, yet this contention is not sustained by the language of the act, nor is it well founded in actual experience, as will appear by considering several usual and everyday instances suggested by testimony in this record."

This statement of the Supreme Court is general, and is applicable to any and all cases where damages are sought by one claiming to have been injured by a violation of the act. It would seem to dispose of the contention of the defendants in error, referred to above and approved by the court below, that "the shipper was entitled as matter of law to recover the difference between the two rates," that is, the tariff rate charged to the shipper, and the lower rate found to be reasonable by the Commission. Herein is the essential vice of defendant in error's argument, that the fact and amount of pecuniary loss in a case like the present, is *matter of law,* and *not of fact* to be determined by the jury. It does not help the matter that the defendants in error argue that the rate charged having been conclusively found by the Commission as unreasonable, the award of the difference between that rate and the rate found to be reasonable is only prima facie evidence of the liability of defendant for the amount so awarded. The act makes nothing prima facie evidence of the *liability* created by section 8. The prima facies mentioned in section 16 is attached to the *facts* stated in the finding and order of the Commission, which facts may or may not be sufficient to establish that liability.

Section 16 of the original act has been so amended as to meet the objection that was made soon after its enactment, that in reparation cases, the order of the Commission could not be enforced by a summary proceeding in a court of equity, as administrative orders were enforced, and that the liability for the damages actually sustained by a shipper, by reason of a violation of the law, could, conformably to the seventh amendment of the Constitution, only be enforced, as are other liabilities of that kind, by a suit at common law. This recognition by Congress of the necessity of conforming to the requirements of the seventh amendment, is, of course, inconsistent with any interpretation of the ninth section, from which it could be inferred that a person claiming to be damaged by any common carrier, might "elect" to pursue his claim for damages before the commission, as his final and efficient remedy, and procure an award for the payment of the same, enforceable as such in a court of law, as an administrative order is enforceable in a court of equity. The successive amendments, by which section 16 was brought into its present shape, attest the earnest purpose of Congress to meet the situation. Suits to enforce the liability created by section 8 were made available to the person injured in all cases, not only where the violation of the statute was an act or practice denounced as illegal by the law itself, but also where such act or practice was only made illegal by the finding of the Commission.

Sections 13 and 15 having provided that the Commission was au-

thorized, either upon complaint or upon its own initiative, to declare, upon investigation, any rates or practices unjust or unreasonable, section 16 provided for a case where, after the complaint and investigation, an award, or, as it was called in the original act, a recommendation, of damages was made by the Commission. If not complied with by the defendant within a time specified, the complainant was authorized to file in a Circuit (District) Court of the United States, or in any state court of general jurisdiction, a petition setting forth briefly the causes for which he claims damages and the order of the Commission in the premises. "Such suit in the Circuit Court of the United States shall proceed in all respects like other civil suits for damages." This is in effect authorizing in the special case described a common-law suit for damages, as contemplated by sections 8 and 9, in all cases where damages are claimed consequent upon a violation of the law.

It is true, that the law makes an exception to the ordinary rule of evidence in such cases, by providing that facts stated in the findings or order of the Commission need not again be proved by the plaintiff, the finding and order being made prima facie evidence of such facts. Such facts may or may not be relevant to the question of the liability for, or amount of, damages claimed. Their evidential value in this respect is for the court and jury trying the case. This prima facies of the facts found is an advantage of considerable moment to the plaintiff. It is an expressed exception to the ordinary rule of evidence, and should not be extended by implication. It must be confined to the precise meaning of the language of its enactment. If the intent of the legislative mind had been to go further and make, not only the findings of fact and order prima facie evidence of the facts stated, but also the conclusions of the Commission *on* facts, prima facie evidence of the *liability* of the defendant for the amount of damages stated in the award, such intent should and would have found expression in the act. We are not to impute to Congress such an intention so violative of the fundamental rights of the parties to a suit at common law, and of the express guaranty of the Constitution in that regard. If more were wanted, we might refer to the language of section 14, which emphasizes the distinction between the "conclusions" of the Commission and "the findings of fact on which the award is made."

The distinction between reparation and non-reparation cases, so anxiously made by Congress, in order to conform to the spirit of the seventh amendment, would be practically nullified, if, in prosecuting a suit for damages actually sustained by reason of a violation of the law, the liability for such damages, and the amount thereof, as found by the Commission, must be conceded in the first instance. Is a defendant to be called upon, practically to prove a negative, and show that the plaintiff was not damaged, or that the amount claimed was less than that stated by the Commission? These facts, or the facts upon which they depend, are all peculiarly within the knowledge of the plaintiff, and it is fundamental that neither party to a suit should be required to prove or disprove what is peculiarly within the knowledge of the opposite party.

Unwarranted as this contention may be, that the findings and order of the Commission are prima facie evidence, not only of the facts therein stated, but of the conclusions of the Commission in regard to the very subject-matter in litigation, it is also still more unjust in these cases, because if sustained, it practically and substantially makes the award of the Commission, not only prima facie, but conclusive evidence of the plaintiff's case.

The theory of the case, as presented by the defendants in error in their pleadings, as well as at the trial, and adopted by the court below, is that the suit was brought upon the award, *qua* award, instead of having been brought "to enforce a cause of action given by this section (section 8) to any person injured." It was brought "to recover what, though called damages, would really be a penalty." In accordance with this theory plaintiff's contention logically follows that, when the Commission finds that the rates charged were unreasonable, and what the reasonable charge should have been, the establishment of these facts entitles the shipper, as matter of law, to recover the difference between the two rates. In the present case, we have the unquestioned finding of the Commission, that the rates charged were unreasonable, and that a certain lower rate was reasonable, and the difference between the two was expressly and avowedly awarded as damages to the plaintiff. Defendants in error contend and the court below states that the so-called facts, when shown at the trial, constitute a prima facie case for the plaintiff. If, however, the difference between the two rates is, as matter of law, the measure of damage sustained by the plaintiff, it is not only prima facie but conclusive evidence upon court and jury of the injury of the plaintiff and of the amount of damage to which he is entitled. Grant the premise, that plaintiff is entitled to recover, as matter of law, the difference between a reasonable and unreasonable rate found by the Commission, and that the suit is for the recovery of that difference, as awarded by the Commission, the logical conclusion is, as stated by the defendants in error and the court below. This "logical conclusion," however, is a reductio ad absurdum, and therefore shows the falsity of the premises upon which it is founded.

Congress admittedly, by its successive amendments to the act of 1887, sought to conform to the requirement of the seventh amendment, by providing that, where the matters involved were founded upon a controversy requiring a trial by jury, such a trial should be accorded. Can it be doubted that the parties, therefore, are entitled to a real trial by jury, so conducted as to accord to them in full measure the enjoyment of their constitutional right? If so, how wide of the truth is the contention that this right has been enjoyed by the defendant in the present suit?

We have already quoted one form in which the theory of the case is stated by the plaintiff below. In another place in his supplemental brief, it is thus stated:

"At common law, a shipper who had been charged unreasonable rates could recover the overcharge; and, under the statute, as soon as the Commission

had determined that there had been an overcharge, the shipper could recover in the same way, although, of course on the trial the carrier was at liberty to disprove, if it could, the fact of the overcharge established prima facie by the finding and order of the Commission."

The "overcharge," as has been before stated in the same brief, can be nothing else than the difference between the reasonable and the unreasonable or tariff rate. How can the carrier be said to be "at liberty" to disprove that arithmetical fact? This difference, according to the theory of the court below,—though its payment has neither been "extorted" or "coerced," except by the law,—is the damage to which the plaintiff is entitled as a matter of law. Though stated to be prima facie, it is really, according to that theory, conclusive as to the injury of the plaintiff and the amount of his damage.

We need only for a moment compare this theory of a suit for damages with that which is established by the act itself. The sixteenth section nowhere says that the report, findings or order of the Commission are prima facie evidence of the liability of the defendant, or of the amount of such liability. It only says, and we must again recur to its exact language, that the findings and order of the Commission "shall be prima facie evidence of the facts therein stated." But clearly, such facts are not made prima facie evidence of anything. Their evidential value is for the court and jury to determine. They may or may not be sufficient to make a prima facie case, or they may, in the opinion of the court or jury, be of any other greater or less degree of probative force. These facts can be no other than those referred to in the fourteenth section, where it provides that, after an investigation, the committee shall make a report, "which shall state the conclusions of the Commission, together with its decision, order, or requirement in the premises; *and in case damages are awarded, such report shall include the findings of fact on which the award is made.*"

In view of this, it would seem almost an abuse of language to say that the "facts," of which the findings and order of the Commission are prima facie evidence, include the conclusions arrived at by the Commission, as to the injury of the plaintiff and the amount of damages sustained. The measure of damage is not fixed by the statute to be the difference between a reasonable and an unreasonable rate, as a matter of law or otherwise. On the contrary, the eighth section declares that the "common carrier" in this case, as in all others, "shall be liable to the person or persons injured for the full amount of damages sustained in consequence of *any* violation of the provisions of the act." What those damages may be, is a question of fact to be determined by the jury, and not a question of law. That is distinctly decided by the Supreme Court in the International Coal Mining Case. This is the measure of damage established by the act itself, and must be conformed to in a case like the present. The language of the eighth section makes the measure of damage therein prescribed applicable to *every* violation of the act. Nor has the Supreme Court in any case decided otherwise. Its reasoning as to the measure of damages established by the eighth section, is also applicable to *every* violation of the

act,—to one that depends for its illegality upon a finding of the Commission, as well as to one where such finding is unnecessary. The argument to the contrary is largely technical, and tends to make a mockery of the right to a jury trial and to defeat the just purposes of the act in that respect.

We conclude by quoting again the language of the Supreme Court in the International Coal Company Case, after referring to what was said by that court in Parsons v. Railway:

"Congress had not then and has not since given any indication of an intent that persons not injured might, nevertheless, recover what though called damages would really be a penalty, in addition to the penalty payable to the government."

Our opinion, therefore, already filed, with certain modifications in the text thereof, will stand as the opinion of the court in this regard.

For obvious reasons, we have made no distinction between the count for the recovery of damages for discriminatory rates and that for unreasonable rates, and therefore have not referred to the former in the plaintiff's petition, complaining of discriminations alleged to have been practiced by the plaintiff in error during the period from November, 1900, to August, 1901, although the counsel for defendants in error says in his brief at the rehearing:

"There is a wide distinction between the two causes of action."

But it is argued that, inasmuch as, upon application of the plaintiff, a discrimination was found by the Commission to have been practiced by the defendant, and reparation therefor awarded, in the amount of the difference between the tariff rate charged and the low rate collected from other shippers, that award was prima facie evidence of the damage sustained by the plaintiff. So that, according to this argument, even in rebate cases there is a class, consisting of those in which the Commission has intervened and made an award, to which the measure of damage established by section 8 for *every* violation of the law, does not apply.

Defendants in error also urge that this court was in error in its interpretation of the second paragraph of section 16 of the act, providing that

"all complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not after, and a petition for the enforcement of an order for the payment of money shall be filed in the Circuit Court [or state court] within one year from the date of the order, and not after: Provided, that claims accrued prior to the passage of this act may be presented within one year."

We have carefully reconsidered the opinion we have already expressed as to this provision of the sixteenth section of the act, in the light of the able argument of counsel for defendants in error. We are not convinced, however, that we have misconceived the true meaning and spirit of that provision, and therefore adhere to our judgment, that the court below was in error in instructing the jury that

"there is no statute of limitation which bars the recovery of the plaintiff for either of the amounts presented in this suit."

The assignments of error in this respect, therefore, must be sustained, and for these reasons and those heretofore stated, the judgment below must be reversed, and a venire de novo awarded.

BOSTON ELEVATED RY. CO. v. PAUL BOYTON CO.

(Circuit Court of Appeals, First Circuit. December 19, 1913. On Petition for Rehearing, April 3, 1914.)

No. 974.

1. ACTION ON THE CASE (§ 4*)—NATURE OF ACTION—CONSTRUCTION OF DECLARATION.

A declaration, alleging a lease of ground by defendant to plaintiff, defendant's wrongful entry thereon, and expulsion of plaintiff before the expiration of the term, and the subsequent continued exclusion of plaintiff during the remainder of the term with consequent damage to plaintiff, *held* to state a cause of action of trespass on the case under the Massachusetts practice in which plaintiff might recover indemnity for loss of the right to use and occupy the premises during the remainder of the term.

[Ed. Note.—For other cases, see Action on the Case, Cent. Dig. §§ 42–46; Dec. Dig. § 4.*]

2. LANDLORD AND TENANT (§ 180*)—WRONGFUL EVICTION—EVIDENCE—SUFFICIENCY.

Evidence considered, in an action on the case to recover damages for the alleged wrongful entry upon and eviction of plaintiff from premises which it held as tenant, and *held* sufficient to establish plaintiff's possession at the time of the entry.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 715–729; Dec. Dig. § 180.*]

3. ESTOPPEL (§ 68*)—EQUITABLE ESTOPPEL—INCONSISTENT POSITIONS IN JUDICIAL PROCEEDINGS.

Where, from the admitted facts in an action to recover damages for the alleged wrongful entry upon and eviction of plaintiff from certain premises of which it was tenant, it appeared that defendant had leased the premises to plaintiff for a term of five years, and that during such term and on the day alleged in the declaration defendant entered upon and took possession of the premises for the expressed purpose of terminating the lease under its terms for breach of a condition which plaintiff could only have committed if in possession, evidence relied upon by defendant to justify its entry *held* to estop it from claiming at the trial that plaintiff was not in possession when the re-entry was made.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 165–169; Dec. Dig. § 68.*]

4. EVIDENCE (§ 357*)—COPY OF LETTER—COMPETENCY.

A copy of a letter not shown to have been sent or received *held* not admissible to prove a statement made therein which was at most only the opinion of the writer.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1492–1499; Dec. Dig. § 357.*]

5. EVIDENCE (§ 546*)—COMPETENCY OF EXPERTS—DISCRETION OF COURT.

Upon the question of the value of the unexpired term of a lease for premises upon which plaintiff as tenant had built amusement chutes, it was within the discretion of the court to admit as expert testimony, to be considered with other testimony, the opinions of witnesses who, al-

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

though not familiar with the value of real estate in the vicinity, were experienced in building and conducting such chutes as places of public amusement.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2363; Dec. Dig. § 546.*]

6. LANDLORD AND TENANT (§ 180*)—ADMISSIBILITY OF EVIDENCE—BREACH OF LEASE.

Upon the question of the value of the unexpired term of a lease of premises upon which chutes for public amusement purposes had been built and operated during the two previous seasons, it was not error to admit evidence tending to show the receipts, expenses, and net profits of the business during such seasons as an element to be considered by the jury.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 715–729; Dec. Dig. § 180.*]

7. CORPORATIONS (§ 559*)—EFFECT OF APPOINTMENT OF RECEIVER FOR PLAINTIFF—PENDING SUITS.

The appointment of a receiver for a plaintiff corporation pending a suit did not abate the action, nor was it error to permit it to proceed in plaintiff's name, where the receiver did not ask to intervene, and no motion was made to have him substituted as plaintiff.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2241–2252, 2259; Dec. Dig. § 559.*]

In Error to the District Court of the United States for the District of Massachusetts; Clarence Hale, Judge.

Action at law by the Paul Boyton Company against the Boston Elevated Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Thomas Hunt, of Boston, Mass. (Gaston, Snow & Saltonstall, of Boston, Mass., on the brief), for plaintiff in error.

Hugh W. Ogden, of Boston, Mass. (Samuel J. Elder and Whipple, Sears & Ogden, all of Boston, Mass., on the brief), for defendant in error.

Before DODGE, Circuit Judge, and ALDRICH and BROWN, District Judges.

DODGE, Circuit Judge. This suit was brought in March, 1899, in the Circuit Court. As originally brought, the plaintiffs in it were the Grace & Hyde Company and the Paul Boyton Company for the Grace & Hyde Company's use and benefit. A judgment for the plaintiffs entered February 3, 1900, was reversed on the defendant's exceptions by this court December 3, 1901, 112 Fed. 279, 50 C. C. A. 239. After the mandate, the declaration was amended by making the Paul Boyton Company sole plaintiff, and also by substituting a single count for the two counts contained in the declaration upon which the case first went to trial. A demurrer to the amended declaration was overruled in July, 1906.

At the second trial, in November, 1907, there was again a verdict for the plaintiff. Judgment was entered on this verdict in March, 1912, and the case is again here on the defendant company's exceptions. The defendant, here plaintiff in error, will be hereinafter referred to as the "defendant," and the Paul Boyton Company, here defendant in error, as the "plaintiff."

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

The West End Street Railway Company, which may be regarded as identified with the defendant for the purposes of this case, leased a tract of land in Boston to the plaintiff for five years from February 1, 1896. The amended declaration alleges that on May 24, 1898, the defendant wrongfully and unlawfully entered upon the leased premises, expelled the plaintiff from them, took possession of them, and refused possession, use, and enjoyment of them to the plaintiff at all times thereafter. This is the violation of its rights whereof the plaintiff complains and for which it seeks to recover damages. Its writ describes the action as an action of tort.

The objection raised by demurrer was that the declaration did not allege the plaintiff to have been in possession of the premises at the time of the alleged entry and trespass. The court held in overruling the demurrer, as appears from the opinion dated July 17, 1906, that although ownership of the premises at the time in any one had not been directly stated, yet it sufficiently appeared from the facts stated, as against the defendant, that the close was the plaintiff's. The court also held that an allegation of possession in the plaintiff was unnecessary if there was a sufficient allegation of its ownership, though possession would have to be proved. The court regarded the declaration as too loosely drawn and as leaving too much to inference, and suggested that, if it was to be further amended by being made more definite, the amendment should be then made. None has been made, however, nor has the overruling of the demurrer been assigned as error. The second trial was upon the amended declaration as it stood, notwithstanding the court's suggestions.

The Massachusetts system of pleading includes all actions of trespass and trespass on the case in the category of "actions of tort." If there is a remedy for the wrongs complained of in the declaration otherwise than by an action of contract, the remedy must be according to some one of the forms of action just referred to, and to whichever of them it may correspond it will be an action of tort under Massachusetts laws.

[1] 1. The defendant insists that the declaration states only an action of trespass q. c. f., that it alleges "a direct, unlawful entry upon real property, without more"—"merely that there was a direct, momentary, unlawful entry, and no more." But, however open to criticism in some respects, we think the allegations of the declaration such that they cannot fairly be taken in a sense so limited. After alleging the lease of the premises to the plaintiff, and the erection by it of certain structures thereon in accordance with the lease, and the use of these structures by it while in possession as tenant under the lease, the declaration continues thus:

"On or about the twenty-fourth day of May, 1898, and while there was an unexpired balance of term of two years and a half, the defendant wrongfully entered into and upon said premises and expelled the plaintiff from occupation thereof, and itself took possession of said premises and all structures which had been erected thereon by the plaintiff, and has ever since declined and refused to permit the plaintiff to come upon said premises or have the use or enjoyment thereof, or there conduct its profitable business in the management and operation of said amusement and exhibition."

And it then claims, as special damages, that the plaintiff has thereby lost benefits and profits which would have accrued to it from its occupation and use of the premises and of the structures erected on them under the lease, and would continue to suffer such loss until the lease expired. The action, as has appeared, was brought before the expiration of the term.

We cannot agree with the defendant that such a declaration must be regarded as based wholly on the injury to the plaintiff's possession involved in a direct, momentary, unlawful entry upon the premises. Not merely the defendant's unlawful entry, but also its assumption and maintenance of possession, its eviction of the plaintiff thereby, and the subsequent continued exclusion of the plaintiff are complained of. For such an unlawful expulsion of the plaintiff from possession as tenant, followed by continued exclusion from such possession and resulting in consequential damage to the plaintiff, we see no reason to believe that an action on the case would not be a proper remedy; notwithstanding that on the same facts trespass q. c. f. might have been brought, or an action of contract upon the covenants in the lease. Instances are not wanting wherein such actions in tort for consequential damages, by tenant against landlord, and based upon unlawful eviction or exclusion during the term of the lease, have been sustained, without regard to the rules applying when the injury to be redressed is a mere momentary invasion of the plaintiff's possession and the action therefore strictly one of trespass q. c. f. See Ashley v. Warner, 11 Gray (Mass.) 43; Snow v. Pulitzer, 142 N. Y. 263, 36 N. E. 1059; Gildersleeve v. Overstoltz, 90 Mo. App. 518; Chapman v. Kirby, 49 Ill. 211; Allison v. Chandler, 11 Mich. 542.

A similar view of one count in the original declaration was suggested by this court upon the former writ of error in this case. Boston Elevated, etc., Co. v. Grace & Hyde Co., 112 Fed. 279, 285, 50 C. C. A. 239. The count there referred to was, in all respects material for the present purpose, substantially like the present amended declaration. The defendant objects to this view that the declaration does not allege any injury to the reversion or permanent damage to the property, but this is not a valid objection unless it be true that the facts alleged entitle the plaintiff to recover for a direct, momentary, unlawful entry only, and such damages only as it sustained by a momentary disturbance of its occupation. We find no controlling authority and no controlling reason in principle which obliges us to hold that unless it sues on the covenants in its lease, or first resorts to a real action for recovery of its possession, it is debarred from recovering indemnity for its loss of that right to use and occupy the premises during the remainder of the term, upon which it was entitled to rely. We find no conclusive reason why it may not treat the landlord's entry and subsequent occupation as having terminated the lease, and, if the termination was wrongful, obtain indemnity in an action of tort. We therefore overrule those exceptions which complain of refusals to instruct that the declaration stated no cause of action in case, that there could be no recovery in tort without proof of injury to the reversion, and that there was no evidence of such injury. As will appear, other ex-

ceptions to instructions given or refused upon the subject of damages must be, for similar reasons, disposed of in the same manner.

[2] 2. But, although we regard the plaintiff's action as above stated and not as contended by the defendant, proof of possession in the plaintiff on May 24, 1898, is none the less necessary for its support—as was said by the Circuit Court in the opinion above referred to of July 17, 1906, overruling the demurrer. The next inquiry is whether or not the defendant can complain of the ruling at the trial that the fact of such possession was established by the evidence.

The defendant proceeded, after its demurrer was overruled, to answer the amended declaration on August 10, 1906. This answer contained, besides a general denial, an express denial that the plaintiff was in possession on May 24, 1898. But it set up also, in its fifth paragraph, an affirmative defense, as follows:

That before the lease mentioned in the declaration the defendant was owner, seised in fee, and in possession of the premises.

That being so seised it made a lease of them to the plaintiff as tenant thereof.

That this lease was upon condition that the plaintiff should maintain during the term certain structures and an exhibition on the premises, continuous while the weather in each year permitted.

That the lease further provided that upon failure to maintain such continuous exhibition the lessor might enter while neglect to maintain it continued and repossess the premises as of its own estate.

That during the term the plaintiff failed to maintain such continuous exhibition.

That thereupon the defendant had the right while such default continued to enter immediately and so repossess itself of the premises without being guilty of trespass, and that such an entry would determine the plaintiff's lease.

And in the next (sixth) paragraph of the answer it was further set up that on May 24, 1898, the plaintiff and the person then having lawful possession of the premises requested and invited the defendant so to enter.

To a supplemental answer later filed, setting up another affirmative defense, and the plaintiff's replication thereto, no special reference is necessary for the present purpose. Upon the issues thus presented the case went to trial.

At the trial, as the present bill of exceptions sets forth, certain facts were admitted by the parties. It was admitted, among other things, that the defendant's entry upon the premises, a justification whereof was set up as above in its answer, was made on May 24, 1898, under circumstances appearing, as the exceptions state, "in detail below." Further on in the exceptions, uncontradicted evidence on the defendant's behalf is found, to the effect that its treasurer made this entry, under instructions from its president, and that in making it he declared that he "took possession under forfeiture of the lease;" also that, having thus entered, the defendant immediately sent the written notice to the plaintiff dated May 24, 1898, which is quoted in full in the former opinion of this court. 112 Fed. 280, 50 C. C. A. 239. This notice was

directed to the plaintiff alone, and expressly stated to it that the entry had been made in accordance with the provisions of the lease, for breach of the conditions thereof, and that by the entry the defendant had terminated the lease and the term thereof. The making of the lease referred to, dated January 1, 1896, a copy whereof is annexed to the declaration, was another fact admitted at the trial, as was also the making of the written agreement between the plaintiff and the Grace & Hyde Company, dated January 8, 1896, and being Exhibit 7, annexed to the exceptions.

At the trial, notwithstanding its entry and notice thus admitted, the defendant contended that the plaintiff's possession of the premises at the time of the entry had not been proved, or was, at least, a question for the jury. The court ruled, as matter of law, that the plaintiff was in possession at the time, and that by its entry the defendant terminated the plaintiff's lease. The defendant complains that this was error. It insists: (1) That there was no evidence that the plaintiff ever took or had possession under the lease; (2) that, on the contrary, the evidence showed the Grace & Hyde Company to have taken possession of the premises before February 1, 1896, when the term under the lease began, by virtue of its agreement with the plaintiff of January 8, 1896, showed the Grace & Hyde Company to have held continuous, exclusive possession thereafter until May 19, 1898, five days before the defendant's entry, and further showed one Wallace E. Hyde to have been in exclusive possession of them during this interval of five days and at the time of the entry.

These contentions are based upon further facts admitted, or upon evidence given at the trial, regarding transactions under the agreement of January 8, 1896, between the plaintiff and the Grace & Hyde Company, regarding controversies and litigation between them arising from those dealings, and regarding various steps taken therein by one or the other of them. The further admitted facts significant in this connection may be thus described:

(1) Provisions in the above agreement of January 8, 1896 (article 3) that the Grace & Hyde Company should "have the right to obtain and hold exclusive possession and control of * * * said leased premises," and of a structure called a "chute" to be built thereon by it, until the whole amount owing to it for building the chute, etc., as agreed should be fully paid.

(2) Sworn allegations by the plaintiff in a bill in equity, brought January 4, 1898, by it against the Grace & Hyde Company in an Illinois court, that said company had been fully paid for building the chute and ought to deliver it to the plaintiff; yet had not done so, but had delivered "possession of the Boston Chute" to persons unknown; also that said premises were neither in its possession nor in the possession of the Grace & Hyde Company, but had been turned over to persons unknown by the latter company.

(3) Sworn allegations by the plaintiff in an amended bill, filed in the same case May 5, 1898, that the Grace & Hyde Company still refused to "surrender possession of said chutes" to it; and, in a supplemental bill, filed on the same day, that the Grace & Hyde Company

"retook possession of said Boston Chute" on or about March 1, 1898, from a tenant to whom it had leased them, had since "maintained and asserted exclusive possession and control thereof," and had "given out" that certain persons were the plaintiff's agents and managers; also that Wallace E. Hyde, one of said persons, had taken possession of the same, and that he and the Grace & Hyde Company had "held possession of said chute" since January 4, 1898.

(4) An order by the Illinois court May 9, 1898, not appearing to have been vacated or modified, appointing a receiver for two "chute properties" described in the bill, one of them the chute here in question, and directing that possession of them be surrendered to said receiver by the Grace & Hyde Company, Wallace E. Hyde, William Grace or their representatives.

(5) Allegations by the plaintiff in a bill in equity brought by it against the Grace & Hyde Company and others, in a Massachusetts court, May 28, 1898, four days after the defendant's entry, that the Grace & Hyde Company had leased the "Boston Chute and grounds" to persons unknown, and neglected and refused to give the plaintiff possession of said chute; that it had subsequently refused to deliver possession thereof to the Illinois receiver, but had put Hyde in possession thereof as its agent; and that Hyde, as such agent, had refused to deliver possession thereof; that the "Boston Chute" had been attached in a suit brought by Hyde against the plaintiff by a deputy sheriff, who held possession thereof and refused to deliver it to the receiver; also that the plaintiff and the receiver were excluded from said chute by the defendants named in the bill.

Of the evidence given at the trial and relied upon by the defendant in support of its above contentions, the significant features may be stated as follows:

Calkins, secretary and treasurer of the plaintiff company during May, 1898, and the person appointed as above by the Illinois court receiver of its property, called by the defendant, testified that the plaintiff company was not in actual physical possession of the premises during that month; that attempts made by him to get such possession during the month did not succeed; that at one such attempt, made by him on May 13, 1898, in company with N. P. Dodge, acting as counsel for the plaintiff, Wallace E. Hyde was found to be in possession of the premises and ordered them off; that Hyde was not then in the plaintiff's employ and did not represent it; that Hyde purported at the time to hold such possession, first, on behalf of the Grace & Hyde Company, then on his own behalf, claiming to have purchased the Grace & Hyde Company's interest.

N. P. Dodge, counsel for the plaintiff company in May, 1898, also called by the defendant, confirmed Calkins' testimony as to what happened at the premises May 13, 1898, and stated further that he had never succeeded in obtaining actual possession of the premises for the plaintiff company or for its receiver.

Silsby, a deputy sheriff, called by the defendant, testified that under a state court writ dated May 18, 1898, in an action of contract by Wallace E. Hyde against the plaintiff, he attached the chutes and all the

property inside the enclosure on the premises; that this attachment was taken off on May 26th and discharged; that he found Wallace E. Hyde there, and saw him there several times while the attachment continued, in actual charge and physical control of the premises.

There was testimony by William Grace, president of the Grace & Hyde Company, called by the plaintiff, that his company had, at the end of 1897, been repaid all that was due it for constructing the chutes under the agreement of January 8, 1896; that Wallace E. Hyde was its local manager in Boston and represented it in the operation of the chutes; that it directed Hyde by telegram, on May 19, 1898, to turn over the property known as the Boston Chute to the representative of the receiver appointed in Illinois; that after that date it had no representative in Boston and carried on no business at the Boston Chute.

It appeared that Wallace E. Hyde alleged under oath, in a bill of equity filed in the superior court by him against the plaintiff, on May 23, 1898, that he was in possession of the premises, claiming to hold them under the terms of the defendant's lease to the plaintiff and by reason of his ownership in the chute and its appurtenances; and also alleged himself to be equitable owner of them, maintaining possession against the Illinois receiver, except so far as the sheriff held possession under the above writ of attachment.

We are unable to find in the facts or evidence thus relied upon sufficient reason for holding that the ruling now under consideration was wrong.

It stood admitted at the trial, as it did not upon the pleadings, that the defendant had leased the premises to the plaintiff, and had done this by the lease which the declaration set forth—a lease providing, among other things, that there should be no assignment or subletting without the defendant's consent.

Whatever the effect of the plaintiff's agreement with the Grace & Hyde Company, as between the parties to it, it is clear, as this court has once held (112 Fed. 285, 286, 50 C. C. A. 239), that it neither created nor contemplated a subtenancy, and negatived the conveyance by the plaintiff of any immediate interest in the leasehold; so that whatever the Grace & Hyde Company did under it on the premises must be regarded, as against strangers to that agreement, as done for the plaintiff, and its occupation or "possession" of the premises as, in legal effect, that of a manager or agent for the plaintiff. Nor is this any the less true because the terms of the agreement were that the Grace & Hyde Company should have "exclusive" possession. Whatever the terms used in the agreement to describe it, the right which that company took by agreement could have been nothing more than a right to require the plaintiff to keep a promise that it would not interfere nor permit interference with the company's exclusive control and management of the chutes, while the company's occupation under the plaintiff continued. Such a right presupposed possession in the plaintiff as tenant. We find nothing, therefore, in any of the allegations or admissions made or testimony given for the purposes of the controversy between the parties to the agreement regarding their rights under it, which would have justified a finding that the plaintiff was out of possession, in the sense required for the purposes of this case.

There was nothing in the evidence indicating that any one had ever been, for any purpose, substituted for the plaintiff as the defendant's tenant under the lease, or as the person liable to the defendant either for the monthly rent reserved, or for the performance of the tenant's other covenants under the lease.

No change whatever in this state of affairs from the time of making the lease on January 1, 1896, to the defendant's entry on May 24, 1898, could be inferred from the evidence. The defendant's supplementary brief expressly disclaims the contention that the lease had ever been abandoned.

[3] It stood admitted at the trial, as it had not on the pleadings, that the defendant did in fact assume on May 24, 1898, to enter for the sole purpose of terminating the lease by its entry, and, as part of the steps it took to effect such termination, to notify the plaintiff that it had made the entry, and had made it for breach of conditions to be performed by the plaintiff. And the defendant stood committed by its answer, to the claim that the only breach of these conditions relied on to justify the entry consisted in the fact that the plaintiff had failed to maintain the continuous exhibition which the lease required. The defendant's entry having been, by its own admission, made, and made for the sole purpose of taking advantage of something which the plaintiff had failed to do, and of something which it could only have done if it had possession of the premises, we think it cannot now expect us to hold the trial court in error for refusing to permit it, at the same time, to ask the jury for a finding that the plaintiff then had no possession of the premises at all, and could not, therefore, have committed the very breach of condition of which the defendant assumed to take advantage by its entry. At the trial, however it might have been on the pleadings, the two positions were inconsistent, and it was for the court to say upon which the defendant should go to the jury.

"Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and a different consideration." Railway Co. v. McCarthy, 96 U. S. 258, 267 (24 L. Ed. 693).

3. Whether or not there had been a breach of the conditions referred to, justifying the defendant's entry, was submitted to the jury. The defendant complains of refusals to direct a verdict for it upon this issue, or to rule either that Hyde was authorized to admit persons to the premises, or that, if he was in possession and control of them as the plaintiff's agent at the time of the entry, the defendant could not be liable for an entry made at his invitation and request. We cannot find anything in the evidence which would have warranted a finding either that the Grace & Hyde Company was ever capable of authorizing Hyde to surrender the plaintiff's possession as tenant under the lease to the landlord, or that Hyde had any authority regarding the premises beyond that which the Grace & Hyde Company could give him, or that the plaintiff ever authorized Hyde either expressly or by implication, so to surrender its possession. If none of these things could have been found, it could make no difference whether or not he had authority to "admit persons" upon the premises, nor could any invitation by him to

the defendant to enter because of a breach of the conditions, or any admission by him that there had been such a breach, have bound or estopped the plaintiff.

[4] Henry Wheeler, called by the defendant, a member of the Boston bar, who had acted for the plaintiff in its above controversy with the Grace & Hyde Company, produced from the letter book of his firm a copy of a letter dated May 20, 1898, which, according to his testimony, formed part of his correspondence with Chicago counsel for the plaintiff, about the then pending litigation. It contained statements tending to show the weather at or before the date of the letter to have been such that the exhibition which the plaintiff was to maintain should have been open May 15, 1898. The copy offered by the defendant was excluded. Of its exclusion, the defendant clearly has no right to complain. Not only was there no express proof of the sending or receipt of the letter itself, but it was, at most, a statement of the witness' opinion, communicated between counsel acting on the same side of a pending suit. The witness was allowed to use the copy to refresh his recollection in testifying. The defendant cannot say it was in any way prejudiced by the ruling that the copy was not by itself admissible.

4. The measure of damages, as the court ruled at the trial, was to be the value to the plaintiff of the unexpired term of the lease, which, on May 24, 1898, had until February 1, 1901, to run. Of this instruction, we think, for the reasons stated, that the defendant has no right to complain. It is clear from what has been said that we consider the court to have been right in refusing to rule that nominal damages only could be recovered.

[5] Four witnesses were allowed, against objection, to give their opinions of the value of the lease for the above unexpired period. The objection was that they were not sufficiently qualified as to the values of Boston real estate. None of them lived in Boston, all were of Chicago, and their qualifying experience appears to have been rather in building chutes and conducting them as places of public amusement, than as dealers in real estate, whether in Chicago or elsewhere. But while these premises had been held by the plaintiff as tenant under the lease, they had been fitted up, at much expense to it, with chutes and their appurtenances; and their fair value to whoever might be entitled to use them for the remainder of the term might well have depended much on the fact that they were so equipped for the special and peculiar use thus contemplated, as one of the elements entering into that value. Upon the qualification of witnesses offered as experts, the trial court is entitled to pass in its discretion. In admitting the opinions of the witnesses referred to, we cannot say that the limits of that discretion were exceeded. The jury were instructed that the value of the premises for use as a place of amusement was only one of several alleged elements of value, all of which were to be considered.

Evidence was admitted, against objection, to show the value of the structure on the property, the amount expended in permanent improvements during 1897, and the desirability of the situation for amusement purposes. All these matters we think the jury were rightly allowed to take into account, in determining the fair value of the leasehold interest in question, as possible elements of that value.

[6] Testimony was admitted, against objection, tending to show the receipts, expenses and net profits of the business conducted on the premises, after they had been fitted up as above, during the period of their operation in 1896 and 1897 by the Grace & Hyde Company as a place of public amusement. The defendant's objection is that the profits of such a business are highly speculative and conjectural, and that they have no necessary or probable connection with the value of a leasehold interest of the premises whereon the business is conducted. Of course the amount of such previous net profits could not of itself be allowed to determine the value of such an interest, but in view of the fact that the business was that for which the premises had been expressly adapted, for which they stood ready when the plaintiff was deprived of them, and for which they had been used in previous seasons, we are unable to say that the court was wrong in permitting the jury to consider them as an additional element entering into the estimate to be made. We can hardly doubt that intending lessors or lessees would so consider them in dealings contemplating an agreement involving the same question of value. The jury were carefully instructed in regard to the various contingencies which might affect a business such as that from which these profits resulted, and were cautioned to make due allowance therefor. Under the instructions they cannot have supposed themselves authorized to compensate the plaintiff for any loss of net profits as such. See Allis Co. v. Columbia, etc., Co., 65 Fed. 52, 57, 58, 12 C. C. A. 511; Dexter v. Manley, 4 Cush. (Mass.) 14, 27.

We find no error, therefore, in the instructions given upon the question of damages.

5. There are two assignments of error which go to the plaintiff's capacity to maintain the suit.

(1) The last piece of evidence offered by the defendant at the trial was a certificate by the Illinois Secretary of State that a paper annexed was a true copy of an order made by him July 1, 1903, in pursuance of an Illinois statute recited, purporting to declare the plaintiff's charter canceled for its failure to make an annual report due in February, 1903, and pay the required fee of $1 thereon. The court excluded this, on the ground that it could not affect the maintenance or prosecution of the suit, and for other reasons not specified. In view of the Illinois statute referred to, and of People v. Rose, 207 Ill. 352, 69 N. E. 762, we cannot agree with the defendant that the certificate was of itself proof that the plaintiff had no corporate existence. The defendant offered nothing beyond it; and we think also, although the pleadings raised the issue, that the court might well have refused, in its discretion, to permit the question to be raised before the jury in the manner attempted, for the first time, when the end of so long a trial had been so nearly reached.

[7] (2) The defendant's supplemental answer alleged the appointment, on August 9, 1899, some months after this suit had been begun, by an Illinois court of competent jurisdiction, of a receiver to take possession of all the plaintiff's property and rights of action, also the due qualification of the receiver. It also alleged that the plaintiff was without right to prosecute the suit, that such right was vested in the

receiver, and that he could not prosecute without leave of the court. The alleged appointment was admitted by a replication which alleged that the Illinois receiver had obtained auxiliary appointment as receiver of the plaintiff's assets in Massachusetts, was duly authorized to prosecute and had authorized its prosecution by the plaintiff's attorney of record. The defendant does not appear to have controverted what the replication alleged, but it asked a ruling that "Mr. Wheelock, as receiver, cannot prosecute or maintain this action." This was refused. We cannot hold the refusal prejudicial error. The suit did not abate by the appointment of a receiver for the plaintiff's rights of action while it was pending. The receiver had not asked to intervene, nor had the defendant moved to have him substituted as plaintiff. The question of his right to maintain the action, as receiver, in the jurisdiction of a court other than that of his appointment did not arise. See Missouri, etc., Co. v. Bank, 77 Fed. 117, 122, 23 C. C. A. 65.

We find no other assignments of error requiring to be specifically dealt with. All are in effect disposed of by the conclusions stated above.

The judgment of the District Court is affirmed, with interest, and the costs of the appeal.

On Petition for Rehearing.

PER CURIAM. The evidence at the trial failed, in our opinion, to show that the plaintiff had ever lost its possession as tenant under the leases. The justification attempted by the defendant of its entry to terminate the lease was based upon an alleged neglect and omission on the plaintiff's part to keep its agreement in the lease that "its exhibition" should be "continuous while the weather of each year permits." The defendant relied for that purpose upon evidence that no exhibition was maintained during part of 1898 while the weather did permit, and upon a claim that it was entitled to rely upon statements to that effect of Wallace E. Hyde, as "manager" of the exhibition. No claim appears to have been made at the trial that the entry was justifiable because, for want of possession in the plaintiff, no exhibition maintained, whatever the weather, could have been its exhibition.

But the defendant is in error in assuming that what is said in our opinion as to the inconsistency of its contentions was the controlling reason for overruling its exception to the ruling of the trial judge upon the question of possession. Even if we should accept the contention that there is no such inconsistency, this would not affect our opinion that the plaintiff entered into possession under the lease, and that there could be inferred from the evidence offered by the defendant no substantial change of affairs in this respect from the time of making the lease to the defendant's entry on May 24, 1898.

The defendant cannot now say that the excluded certificate from the Illinois Secretary of State might have been followed and supplemented by further evidence tending to disprove the plaintiff's corporate existence, in view of the fact that the record shows no offer of any such evidence at the time, and no suggestion of a desire to offer any.

The petition for rehearing is therefore denied.

POSTAL TELEGRAPH-CABLE CO. OF WASH. v. NORTHERN PAC. RY. CO.

(Circuit Court of Appeals, Ninth Circuit. March 9, 1914.)

No. 2268.

1. EMINENT DOMAIN (§ 200*)—PROCEEDINGS TO ASSESS COMPENSATION—BURDEN OF PROOF.

Under the law of Washington, the petitioner in a condemnation suit has the burden of showing the reasonable value of the easement sought to be appropriated and the damages or absence of damage to the remainder of the property.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 540; Dec. Dig. § 200.*]

2. EMINENT DOMAIN (§ 195*)—PROCEEDINGS TO ASSESS COMPENSATION—PLEADINGS.

Under the law of Washington, the defendant in a condemnation suit need not file an answer, but may show the value of the land taken and the damages which he will sustain, without pleading the facts on which he relies.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 524; Dec. Dig. § 195.*]

3. TRIAL (§ 63*)—ORDER OF PROOF—REBUTTAL—PROCEEDINGS TO ASSESS COMPENSATION.

Where, in a proceeding to condemn an easement for a telegraph line along a railroad right of way, petitioner's witnesses who testified as to defendant's damages were cross-examined as to the additional expense in clearing the right of way of brush necessitated by such line, thus advising the petitioner of the nature of defendant's claim for damages, the court did not abuse its discretion in refusing to permit the petitioner to introduce evidence in rebuttal on this question, as, under the law of Washington placing the burden on petitioner to prove the damages, this was a part of its case in chief.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 151-153; Dec. Dig. § 63.*]

4. TRIAL (§ 67*)—ORDER OF PROOF—REBUTTAL.

Neither party after he has rested can, as a matter of right, introduce further testimony which may properly be considered testimony in chief, and whether he will be permitted to do so is in the sound discretion of the court.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 157; Dec. Dig. § 67.*]

5. EMINENT DOMAIN (§ 222*)—PROCEEDINGS TO ASSESS COMPENSATION—INSTRUCTIONS.

In a proceeding to condemn an easement for a telegraph line along a railroad right of way, where defendant introduced evidence to show that the expense of keeping the right of way free from brush, grass, etc., would be increased by such line, and there was undisputed evidence that brush would grow from six to ten feet in a single season, and that it was necessary to clear it upon portions of the right of way every year, an instruction that the statutes of the state imposed no duty on the company to cut or burn brush on the right of way, or keep it free from grass, brush, etc., was properly refused, as it was entirely immaterial whether there was such a statutory requirement; the necessity arising from the nature of the situation, and it being undisputed that, irrespective of the statute, the company was required to keep the right of way clear of brush.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig §§ 562-567; Dec. Dig. § 222.*]

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

6. EMINENT DOMAIN (§ 222*)—PROCEEDINGS TO ASSESS COMPENSATION—INSTRUCTIONS.

In a proceeding to condemn an easement for a telegraph line along a railroad right of way, where an instruction, that the law required the railroad company to use reasonable diligence in keeping its right of way free from inflammable material, and that if it failed to do so and damages resulted therefrom it was liable, that if it was necessary or desirable to prevent fires in the operation of trains or for any other necessary or appropriate railroad use or purpose the expense thereof was chargeable to the petitioner if the necessary expense would in any material or substantial degree be increased by reason of the telegraph line, which additional expense might be considered in arriving at the verdict, was not excepted to, but was accepted as correctly stating the law, the refusal of an instruction that the statutes of the state imposed no duty on the company to cut or burn brush on the right of way or keep it free from grass, brush, etc., was not error.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 562–567; Dec. Dig. § 222.*]

7. EMINENT DOMAIN (§ 111*)—COMPENSATION—ELEMENTS.

If the necessary expense of keeping a railroad right of way free from inflammable material to prevent fires or for any other necessary or appropriate railroad use or purpose would in any material or substantial degree be increased by a telegraph line on such right of way, such additional expense was a proper element of compensation for the use of the right of way by the telegraph company.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 294, 298; Dec. Dig. § 111.*]

8. EMINENT DOMAIN (§ 222*)—PROCEEDINGS TO ASSESS COMPENSATION—INSTRUCTIONS.

In a proceeding to condemn an easement for a telegraph line along a railroad right of way in which the railroad company introduced evidence to show that the expense of keeping the right of way free from brush would be increased by such telegraph line, an instruction, that the railroad company owed the telegraph company no duty to cut or remove such brush immediately surrounding the poles unless necessary for the safe and proper operation of trains or to prevent the spread of fires, was properly refused; the question being whether the presence of such line would add to the burden of keeping the right of way free from brush, and not whether there was any duty owing the telegraph company to keep it free from brush.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 562–567; Dec. Dig. § 222.*]

Ross, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Northern Division of the Western District of Washington; Clinton W. Howard, Judge.

Condemnation proceeding by the Postal Telegraph-Cable Company of Washington against the Northern Pacific Railway Company. To review the judgment, the petitioner brings error. Affirmed.

The plaintiff in error was the petitioner in the court below in condemnation proceedings to establish its right to locate, maintain, and operate a telegraph line upon and along the right of way of the defendant in error, under the authority of the statutes of Washington, which gives to telegraph companies the right of eminent domain and require railroad companies to allow telegraph and telephone companies to construct and maintain telegraph lines on and along their rights of way. In the petition it was alleged that the poles and wires would be so constructed and maintained as not to interfere with the

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

ordinary use or travel of the railroad company, and the prayer of the petition was that a jury be impaneled to ascertain and determine the compensation to be paid to the defendant, irrespective of any benefit to be derived by it from the said telegraph line. Upon the evidence submitted before the jury a verdict was returned for the defendant in the sum of $15,000. Thereupon judgment was entered.

Hughes, McMicken, Dovell & Ramsey, of Seattle, Wash., for plaintiff in error.

C. H. Winders, of Seattle, Wash., for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). [1-4] Error is assigned to the ruling of the trial court in excluding certain testimony offered in rebuttal by the plaintiff in error. The testimony was excluded on the ground that it was part of the petitioner's case in chief, and not proper rebuttal testimony. It is not disputed that the law of Washington places upon the petitioner in a condemnation suit, such as this, the burden of showing the reasonable value of the easement sought to be appropriated, and the damage or absence of damage to the remainder so as to present the evidence of the compensation that should be paid to the defendant. The law of that state does not require the defendant in such a suit to file an answer, and he may show the value of the land taken and the damages he will sustain without having presented in any pleading the facts on which he relies. State ex rel. Ami Co. v. Superior Court, 42 Wash. 675, 85 Pac. 669; Tacoma v. Wetherby, 57 Wash. 295, 106 Pac. 903. In pursuance of that law, the defendant herein filed no answer to the petition. Assuming the burden thus imposed upon it by the statute, the plaintiff in error called witnesses to answer the question:

"What damage or diminution in the value of the use of this right of way by this railway company, or its successors in interest, in the use and operation of the right of way for any railway purpose, would be occasioned or is occasioned by the appropriation of the right to construct and maintain a telegraph line as proposed in this petition?"

The witnesses answered that the damages would be merely nominal. The two principal witnesses were cross-examined by the defendant in error, and were interrogated as to the additional expense which the telegraph poles and line would add to the expense of clearing the right of way of the railroad company of brush. One of them testified that he could not answer as he had not taken into consideration the question of such added expense. The other testified on cross-examination that the presence of telegraph poles would not add any appreciable amount to the expense of keeping the right of way clear of brush. By the cross-examination of these witnesses the plaintiff in error was distinctly advised of the nature of the defendant's claim for damage; as much so as if there had been an answer setting up such elements of damage to the right of way. The plaintiff in error had the opportunity then to offer testimony in chief to show, if it could, that the presence of the telegraph poles on the right of way and the wires attached thereto would not add to the expense of keeping the right of way clear of brush, and such testimony was a part of its case in chief and was as

available to it then as it was after the defendant in error rested. The plaintiff in error was not taken by surprise, therefore, when the defendant in error offered testimony tending to prove that the presence of poles and wires on the right of way appreciably enhanced the cost of clearing and keeping clear the right of way. When, after the defendant in error had closed its testimony and rested, the plaintiff in error again approached the subject of the expense of clearing the right of way of brush, it was offering evidence which should have been offered in chief, and there was no abuse of discretion in the ruling of the court that the evidence so offered was part of the case of the plaintiff in error in the first instance, and was not proper rebuttal. The rule is thus expressed in 38 Cyc. 1356:

"After he has rested, neither party can, as a matter of right, introduce any further testimony which may properly be considered testimony in chief. The strict rule is that he must try his case out when he commences, and cannot divide his evidence and give part in chief and part in rebuttal. Any relaxation of this rule is but an appeal to the sound discretion of the court."

See, also, Marande v. Texas & P. Ry., 124 Fed. 42, 46, 59 C. C. A. 562; Mitchell v. City of Boston, 215 Mass. 150, 102 N. E. 127; Stewart v. Smith, 111 Ind. 526, 13 N. E. 48.

[5-7] Was there error in giving or refusing instructions? The whole case before the court and jury resolved itself into the inquiry: How much injury would the railroad company sustain, if any, by reason of the presence upon its right of way of the proposed telegraph poles and wires? It is said that the court erred in refusing to instruct the jury that the statutes of the state of Washington do not impose any express duty upon a railroad company to cut or burn the brush growing upon its right of way, or to keep the same free from grass, weeds, brush, or trees. It was not error to refuse that instruction and this for two reasons, either of which is sufficient. In the first place, it was entirely immaterial whether or not there was such a statutory requirement. It was not disputed that irrespective of any such statute the railroad company was required to keep its right of way clear of brush. It was shown by the undisputed testimony that on the right of way of the defendant in error brush will grow from six to ten feet in a single season, and that upon portions thereof it was necessary to clear the brush every year. The testimony presented to show such necessity was pertinent to the issues and was received without objection. The necessity was one not created by statute, but by the very nature of the situation. In the second place, it was not error to refuse such instruction for the reason that the plaintiff in error took no exception to the charge in which the court instructed the jury as follows:

"You are instructed that the law requires a railway company to use reasonable diligence in keeping its right of way cleared from inflammable material, and that, where it fails to do so and damage results therefrom, the railway company is liable; and if you should find from the evidence that it is necessary or desirable for the railway company, in order to prevent the setting out and spreading of fires, in the operation of its trains, or for any other necessary or appropriate railway use or purpose, the expense thereof should be chargeable to the petitioner here in this proceeding; provided, however, that the necessary expense thereof would in any material or substantial de-

gree be increased by reason of the construction and maintenance of the proposed telegraph line upon said right of way, such additional expense, if any, may be considered by you in arriving at your verdict."

This instruction was accepted as correctly stating the law applicable to the issues. It expressed the law of Washington as it is found in the opinion of the court in Fireman's Fund Ins. Co. v. Northern Pacific Ry., 46 Wash. 635, 91 Pac. 13.

[8] Nor was there error in the refusal of the court to instruct the jury, as requested by the plaintiff in error, that the railway company would owe no duty to the telegraph company to cut or remove such brush or undergrowth immediately surrounding the poles of the latter company unless the jury believed from the evidence that the cutting of such brush or undergrowth would be necessary for the safe and proper operation of the railway trains and business or to prevent the spread of fires. There was nothing in the evidence to which this requested instruction was applicable. No question was, or could have been, at any time presented of any duty of the railway company to the telegraph company to cut or remove brush, and to have given the requested instruction would have been to divert the attention of the jury from the real question in issue. It may be conceded, as argued, that the obligation imposed upon a railroad company to keep its right of way free of brush or other material likely to cause damage by fire is not to be taxed against one who in no way adds to that burden, but that proposition was wholly aside from the issues and the evidence in the case. But a single question was presented for decision, and that was whether the presence of the telegraph poles and wires would add to the burden of the duty imposed upon the railroad company. If it did add to that burden, clearly it was proper that the expense of bearing the added burden should be assessed against the telegraph company, which for its own benefit caused it. It was to the question of this added burden that all the testimony was directed, and it was because the jury found there was such an added burden that they returned their verdict against the petitioner. The instructions of the court to the jury clearly and properly presented the single issue which was involved, and the attention of the jury was confined to the consideration of the additional expense, if any, which the railroad company would incur in clearing its right of way of brush by reason of the presence of the telegraph poles and lines upon its right of way; and the jury were, in substance, instructed to consider the obligation to clear that right of way as one resting upon the railroad company for its own benefit, and not for the benefit of any other person or corporation.

We find no error.

The judgment is affirmed.

ROSS, Circuit Judge (dissenting). The defendant in error being the owner of a right of way between the city of Seattle and Sumas in the state of Washington, a distance of about 120 miles, over which it operates its line of railway, the plaintiff in error commenced this proceeding in the court below to condemn a right on and over the railway

right of way upon which to maintain and operate a telegraph line, which it was authorized to do by virtue of the laws of that state.

In its petition for such condemnation the telegraph company alleged, among other things:

That its line "will at all times hereafter be constructed and reconstructed of the best material and by the most approved methods of construction, and will consist of a single line of poles not less than 20 nor more than 30 feet in length, including length underground except at highways or where obstructions exist, where the poles will be of such a height as may be required by statute, or necessary because of physical conditions existing, or to protect other wires or structures rightfully upon the said right of way. That the poles will be about 10 inches in diameter at the base, planted from 4 to 8 feet in the ground, according to the length of the poles, and in such positions upon said right of way as safe and proper construction permit; the poles to be placed upon that portion of said right of way between a line 5 feet from the outer edge thereof and a line 25 feet from the center of the main track, except where the right of way may be less than 60 feet in width, or where the location of the main track upon the right of way, or the location of buildings, tracks, or other improvements or obstructions upon the right of way may make it impossible to place the poles upon that portion of the right of way above described, in which event the poles will be placed upon the most practicable remaining portion of the right of way consistent with the safe and proper construction of said telegraph line, such portion of said right of way to be designated by said railway company or its lessees, so as not to interfere with the ordinary travel or use of said railroad. That the poles will be set about 165 feet apart, making a total of 32 to 35 poles to the mile, excepting at sharp angles, where they may be not less than 75 feet apart, and around curves, where they may be from 117 to 131 feet apart; the poles to be equipped with cross-arms about 10 feet long, at or near the top of the poles, fastened at about the middle of the cross-arms to the poles, and along and upon said cross-arms or poles, or upon said cross-arms and poles, will be strung a sufficient number of wires to transact such business as will be given to the telegraph company by the United States government and the public. That said line of poles and wires will be so constructed, maintained, and operated as not to interfere with the ordinary travel or use of said railroad.

"This petitioner further avers that the only lands that will be actually taken or occupied by it by virtue of this proceeding will be about one square foot for each pole; that the space between the poles and under the wires can be used by said railway company or its lessees for all purposes for which it has heretofore been used; that wherever it becomes necessary for said telegraph line to cross said right of way the said crossing will be made by having its poles at such crossing so erected and its wires so insulated and strung so high above said railroad track as to prevent any injury to or interference with the employés or property of the said railway company. And this petitioner further stipulates that its said telegraph line will not interfere with any other telegraph or telephone line now rightfully upon said right of way; that if at any time the said railway company, its successors or lessees, shall require for railroad purposes the immediate use of any of the land occupied by said telegraph line, then and in that event, upon reasonable notice in writing, this petitioner will, at its own expense, remove its line to some other place, to be designated by said railway company, adjacent thereto, on said right of way, so as not to interfere with the use of said right of way for railroad purposes; that said telegraph line will not be erected on any embankment or slope or any cut of said right of way, without the consent of said railway company, and, if at any time said railway company or its lessees shall require its entire right of way for railroad purposes at any point, the telegraph company will at such point or points remove its line entirely off said right of way."

The question as to what the telegraph company should be required to pay the railway company for the right thus sought came on for trial in the court below before a jury, resulting in a verdict in favor

of the railway company for $15,000, upon which verdict a judgment was entered giving the telegraph company the right sought upon the payment to the railway company of that sum, with costs. The case is brought here by the petitioning company by writ of error.

It shows that when the proceeding was instituted the railway company had an exclusive right to use the strip of land constituting its right of way for railroad purposes. To the extent that that exclusive right of enjoyment for railroad purposes was diminished in value by subjecting its right of way to that sought by the telegraph company, and the extent to which the establishment and maintenance of the telegraph line on the railway right of way might be properly said to add to the railway company's burdens, were the only questions to be determined by the jury.

In the state of Washington, where this case arose, it is the established rule that he who seeks condemnation of another's property must affirmatively show the reasonable value of the thing sought to be taken. Bellingham Bay, etc., R. Co. v. Strand, 4 Wash. 311, 30 Pac. 144. In assuming that burden the petitioner below introduced witnesses who testified to the effect that the value of the railway company's right of way for railroad purposes would not be diminished by the additional servitude to be created by the construction and maintenance of the proposed telegraph line, under the stipulations of the petition. The defendant to the proceeding introduced testimony to the effect that the construction and maintenance of such telegraph line on the railway company's right of way would impose upon the latter company an additional annual expense in cutting, piling, and burning the undergrowth thereon; its engineer of maintenance, Perkins, testifying among other things, as follows:

"The added expense has not been made an exact matter of record by bookkeeping, but I would estimate from my general knowledge of the line in question, and of the nature of it, that the specific and general items that add to the cost of the maintenance on that line by reason of the presence of a pole line would make an annual amount of about $15 per mile. Q. Explain to the court and jury how you arrive at that figure. A. I am taking into consideration the added cost of clearing the right of way from brush; the added cost by reason of the particular items of clearing and pulling the brush and inflammable material away from poles, to protect them from destruction by fire; the added cost by reason of the presence of poles between and adjacent to tracks, in the way of acting as obstructions to the handling of ties and tie renewal; the added cost by reason of the protection and care that is needed in the burning of old ties, and needed in order to protect the poles from fire and to protect the wire lines from damage; the added cost by reason of delays that occur in connection with construction, in waiting for poles to be moved; and the actual loss of the use of a certain amount of team track capacity by reason of poles being located beside team tracks and thereby preventing the use of a certain part of the team track, which is worth a certain amount of money to us, and to some extent the added risk by reason of poles being in close proximity to tracks and endangering the employés and others in connection with the operation of trains."

And its witnesses F. M. Smith and W. H. Gale testifying, among other things, as follows:

F. M. Smith:

"Well, it would increase the cost of maintenance in several ways. Places where our right of way is narrow, it would doubtless increase the cost of

burning the old ties; that is, moving them to a place where sufficient clearance could be obtained from the wires so that we could burn them without injuring the wires and also in unloading our ties or piling them up; and in places where the brush is rather heavy in the cutting of the brush, we would have to pile the brush back from the poles and from under the wires so that when the slashing was burned it would not destroy the poles and the wires, and we have at various times when we do this burning to station men along to watch the burning so that the poles would not catch and burn up. And this labor represents dollars and cents and probably would increase the cost of maintenance considerably. In some certain sections in this burning and slashing probably it would increase the cost from $12 to $15 per mile, and in the handling of our ties for burning narrow strips of right of way such as we have from Fremont to Bothel it would run into considerable money in a year, depending on the number of ties we put in. It would increase the cost probably one or two cents a tie for the handling. I have figures showing about one cent for the extra handling on account of finding a proper place to burn them."

W. H. Gale:

"We have right of way on a part of our track that we have no poles on, and if we go once a year and cut that brush we can cut it irrespective of where it falls. We can let it fall anywhere except next to the fences. When the men are cutting brush they let it fall away from the fence. We do not make any pretense of piling the brush to burn it because it dries out better, and after we come to burn it we can get a better burn, because it burns every weed on that right of way. It is our desire always, when we burn it—it not only helps to burn the brush, but it sets it back by burning the roots, and where you have a line of poles you have to protect those poles by cutting around the poles and throwing the stuff back a sufficient distance to save the poles. We have always done it. That has been the practice, and it is quite an item when you come to clear a right of way to clear away and keep it away and save the poles while you are burning it. Q. About how much a mile, Mr. Gale? * * * A. I would say at least $10 or $12 per mile, easily, for the difference in pulling away the brush. There have been a great many of the telegraph company's poles on fire at one time or another. The matter of extinguishing the fires requires labor. I never knew the telegraph company to furnish men to watch the poles or pull back the brush when they are burning, or to clear any of the right of way except to chop down a few of the tops which might be reaching up to the lower wires. We have to cut it off again just the same and it takes more work to do it."

The plaintiff in error sought to rebut this testimony of the railway company by several witnesses, but the trial court rejected the offer upon the ground that the testimony should have been given in chief, to which ruling the plaintiff in error reserved an exception.

No such cause of damage appears to have been pleaded by the railway company; indeed, it has been held that the clearing of such a right of way and the burning or other disposition of the brush and other obstructions thereon is not to be considered in assessing such damages for the reason that such expense is incurred, not as a result of the construction of the line of telegraph, but because necessary to the railway company in the safe conduct of its own business. Atlantic Coast Line R. Co. v. Postal Telegraph-Cable Co., 120 Ga. 268, 48 S. E. 19, 1 Ann. Cas. 734. However that may be, I am of the opinion that the plaintiff in error was entitled to rebut the evidence given by the railway company upon the subject.

The state of Washington has this statute:

"Every one clearing right of way for railroad, wagonroad or other road, shall pile and burn on such right of way all refuse timber, slashings, choppings

and brush cut thereon, as rapidly as the clearing or cutting progresses, and the weather conditions permit, or at such other times as the forester, or any of his assistants, or any warden, may direct, and before doing so, shall obtain a permit." Sessions Laws 1911, p. 634.

As will be observed, this statute does not expressly require a railroad company to keep its right of way free of brush and other like obstructions, and the plaintiff in error requested the trial court in this case to instruct the jury as follows:

"You are further instructed that the statutes of the state of Washington do not impose any express duty upon the defendant railway company to cut or burn the brush growing on its right of way, nor to keep the same free from grass, weeds, brush, or trees; neither does it impose any such express duty upon the telegraph company. If, however, the defendant railway company does clear its right of way of timber, slashings, choppings, and brush, then it is made its duty under the laws of this state, as rapidly as the clearing or cutting progresses and the weather conditions permit or at such times as the forester or any of his assistants, or any fire warden, may direct, to obtain a permit and to pile and burn the same on such right of way."

The court refused to give this instruction, to which exception was taken by the plaintiff in error, and gave to the jury, among others, the following:

"The law requires a railway company to use reasonable diligence in keeping its right of way clear from inflammable material, and that where it fails to do so and damage results therefrom, the railway company is liable"—to which latter instruction the plaintiff in error also excepted.

The direct effect of the refusal of the request of the petitioner for the above instruction respecting the clearing of the right of way, and the giving of the last one above quoted, was to tell the jury that the cost to the railway company of keeping its right of way free of such material was properly chargeable as damages against the petitioner for the right of way sought by it, regardless of whether such clearing would or would not be made necessary or proper by the construction and maintenance of the telegraph line, and to what extent, if at all. And this was emphasized by the refusal of the court (to which refusal the petitioner also excepted) to give this requested instruction:

"You are further instructed that, if you believe from the evidence that the clearing of brush and other undergrowth immediately surrounding the poles of the telegraph company would require additional time and expense, then the defendant railway company will owe no duty to the telegraph company to cut or remove such brush and undergrowth, and it need not incur such additional expense unless you believe from the evidence that the cutting of such brush or undergrowth immediately around said telegraph poles would be necessary for the safe and proper operation of defendant's railway trains and business or to prevent the spread of fires from the said railway across its right of way to adjoining land."

Certainly the duty imposed by law upon a railroad company to keep its right of way free of brush or other material likely to cause damage is not to be taxed against any other party who in no way adds to the burden, but is imposed upon the company owning the right of way, as a duty owing to the public and for the protection of those injured by its neglect. Chicago, Burlington, etc., R. Co. v. Chicago, 166 U. S. 226, 254, 17 Sup. Ct. 581, 41 L. Ed. 979, and authorities there cited.

I am of the opinion that the plaintiff in error was clearly entitled to show, if it could, that the construction and maintenance of its telegraph line on the right of way of the railway company would not add to any burden imposed by law upon the latter company to keep its right of way free of brush and other like obstructions, or, if at all, to what extent. Chicago, etc., R. Co. v. Phelps, 125 Ill. 482, 17 N. E. 771; Hartshorn v. Illinois, etc., Ry. Co., 216 Ill. 392, 75 N. E. 122.

From what has been said, I think the judgment should be reversed, and the cause remanded to the court below for a new trial, and therefore dissent from that given here.

THE FULLERTON.

(Circuit Court of Appeals, Ninth Circuit. February 2, 1914.)

No. 2262.

1. ADMIRALTY (§ 118*)—REVIEW ON APPEAL—FAILURE OF TRIAL COURT TO FIND FACTS.

Where a court of admiralty omits to find facts which are material to the issues in a case, although they are proved by the evidence, the case is reviewable by an appellate court on the facts unaffected by any finding of the trial court.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 758–775, 794; Dec. Dig. § 118.*

Appealable orders and decrees in admiralty, see note to In re Oceanic Steam Navigation Co., 124 C. C. A. 348.]

2. COLLISION (§ 22*)—ACTION FOR COLLISION—DEFENSES—INEVITABLE ACCIDENT.

A vessel cannot be exonerated from fault for a collision on the ground of inevitable accident, where the other vessel was clearly not in fault, unless it is shown that those in charge of her navigation endeavored by every means in their power, with due care and caution and a proper display of nautical skill, to prevent the collision.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 19; Dec. Dig. § 22.*]

3. COLLISION (§ 71*)—MOVING AND ANCHORED VESSEL—EXCESSIVE SPEED IN FOG.

The car ferryboat Transit, which ran daily but at irregular intervals between Oakland Mole and Mission Bay slip in San Francisco harbor, at night and in a dense fog, came into collision with the barkentine Fullerton in the anchorage grounds in Mission Bay, where she had been lying for about three months, several hundred feet out of the fairway of the Transit, as was known to the master of the latter. The Fullerton was properly lighted and was sounding her fog bell. The master of the Transit did not know where he was, and those on board did not see the lights of the Fullerton or hear her bell until too late to stop. The master testified that she was going at a speed of 7 miles an hour "more or less," and when moving at such speed she could not be stopped within less than 800 feet. *Held*, that the collision could not be attributed to inevitable accident, but was due to the fault of the Transit in moving at a speed which was excessive and negligent under the circumstances.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 101; Dec. Dig. § 71.*]

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

4. COLLISION (§ 100*)—VESSEL NAVIGATING SAN FRANCISCO HARBOR—EXCESSIVE SPEED IN FOG.

A speed of 7 miles an hour in the harbor of San Francisco at night and in a dense fog is excessive.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 213–215; Dec. Dig. § 100.*

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

Appeal and Cross-Appeal from the District Court of the United States for the First Division of the Northern District of California; Frank S. Dietrich, Judge.

Suit in admiralty for collision by the Southern Pacific Company, as owner of the car ferryboat Transit, against the barkentine Fullerton (the Mission Transportation & Refining Company, claimant), and cross-libel. Decree dismissing both libel and cross-libel, and both parties appeal. Reversed and remanded.

In September, 1909, the Fullerton, a four-masted barkentine 235 feet in length belonging to the appellant herein, was anchored off Mission Bay slip in San Francisco harbor, and she remained so at anchor until December 13, 1909, when at about 11:25 p. m. in a dense fog the Transit, a freight car ferryboat operated by the appellee, collided with her. The Transit at the time of the collision was on one of her trips from Oakland Mole for the Mission Bay slip loaded with freight cars. She had passed the Fullerton on three or four, and sometimes many more, trips per day while the latter was at anchor. On the evening of the collision the Transit had left the Oakland Mole at 5:43 p. m. and arrived at the Mission Bay slip at 6:27. She left the slip at 7:14 and arrived at the Oakland Mole at 7:52. She left the mole again at 8:01 and arrived at Mission Bay at 8:40. At 9:30 she returned to Oakland, arriving there at 10:24. She left again at 10:53, and it was on this return trip that she ran into the Fullerton. Shortly after she started on that trip a dense fog set in. She proceeded at a speed of seven knots an hour, "perhaps more, perhaps less," according to the testimony of her master. Twenty-two or twenty-three minutes after leaving Oakland a fog bell was heard directly ahead of the Transit, and it was taken to be the bell on the Mission Bay slip. Shortly thereafter a lookout on the Transit reported the Fullerton's light. The master, who was in the pilot house steering the Transit, looked up from the compass, and, seeing the Fullerton's light, gave the signal to go full speed ahead and put the helm hard aport, aiming to cross the Fullerton's bow. Looking again, he saw there was no chance of avoiding a collision and, hearing the first officer, who was looking out of the pilot house window, say, "Stop her, Captain!" he rang the stop bell, but was unable to avoid the collision.

A libel was filed by the appellee against the Fullerton, and a cross-libel was filed by the appellant against the appellee, and the evidence was mostly taken in open court. The trial court held that the collision was due to an inevitable accident; if not that, to an inscrutable fault. Both parties have appealed.

Edward J. McCutchen, Ira A. Campbell, and McCutchen, Olney & Willard, all of San Francisco, Cal., for appellant and cross-appellee.

Louis T. Hengstler and J. E. Foulds, both of San Francisco, Cal., for appellee and cross-appellant.

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

GILBERT, Circuit Judge (after stating the facts as above). [1] The court below, upon conflicting evidence, the value of which de-

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

pended upon the credibility of witnesses who were heard in open court, found that at and prior to the time of the collision the Fullerton's bell was being rung in the manner required by the rules. That finding, upon well-settled principles, may be taken as conclusive, since there is no showing that it is against the decided weight of the evidence. It was conceded that the Fullerton's anchor lights were up and were burning brightly. But the court made no finding as to the speed of the Transit, the darkness of the night, the density of the fog, or the precautions taken on board the Transit to prevent the collision. The court disposed of these questions by saying:

"While there are some features of the testimony which if detached tend to show a want of care in the navigation of the Transit immediately prior to the collision, considering the entire record I am inclined to the view that such a conclusion is not warranted."

In so disposing of the allegations in the libel against the appellee, the court omitted to find facts which were material to the issues and which were proven by the evidence, and the case comes here for review upon the facts, so far as they concern the conduct of the officers in command of the Transit, unaffected by any finding of fact of the court below. The E. A. Packer, 140 U. S. 360, 11 Sup. Ct. 794, 35 L. Ed. 453; The City of New York, 147 U. S. 72, 13 Sup. Ct. 211, 37 L. Ed. 84.

It is not disputed that when the Fullerton was anchored in September she was placed within the permitted anchorage ground and at a point from 1,000 to 1,500 feet south of the north boundary line thereof. It is contended by the appellee that three or four days before the collision a gale from the southwest, which at its maximum was 33 miles and 13.2 miles at the average, had shifted her position to the northward, so that she then lay within the Transit's fairway. The appellee did not make such an allegation in its libel, but alleged that at the time of the collision the Fullerton was anchored at a point near the Transit's fairway. The contention that the Fullerton's position was shifted is not sustained by the evidence; for, although the witnesses for the appellant do not agree as to the precise point of her anchorage as measured from the shore line, they substantially agree in placing her at least 1,000 feet away from the north line of the permitted anchorage zone, and their evidence is corroborated by the testimony of the master of the Transit, who, while he testified that the Fullerton had shifted her position, stated that shortly thereafter and before the collision he took bearings on her new position from the Mission Bay slip and found that she lay east northeast from that point, "perhaps 1,000 yards off shore. I don't know how far." The line of the bearing so taken, if extended 1,000 yards, would place the Fullerton more than 1,000 feet south of the north line of the anchorage ground, and if extended a greater distance it would place her still farther away from that line. The Fullerton was 235 feet in length, and she was well equipped with heavy anchors, her port anchor weighing something over 5,000 pounds and her starboard anchor 4,500 pounds, and both anchors were out when gales were blowing. The Transit's fairway opposite the point where the Fullerton was anchored was 4,500 feet wide. At no time had com-

plaint been made either by the harbor commissioners or by the officers of the Transit that the Fullerton was not anchored in a proper place. Other vessels were anchored within a quarter of a mile of her. She being thus properly anchored with bright riding lights up and her fog bell ringing, no fault can be imputed to her as contributing to the collision.

[2] The court below held that the collision was the result of inevitable accident. In collision cases the accident is said to be inevitable when it is not possible to prevent it by the exercise of due care, caution, and nautical skill. The term is usually applied to collisions caused by a vis major or by the intervention of other vessels or floating ice, or a severe snowstorm or the disablement of the steering gear. In The Mabey and Cooper, 14 Wall. 204, 215 (20 L. Ed. 881) the court said:

"Inevitable accident, as applied to a case of this description, must be understood to mean a collision which occurs when both parties have endeavored, by every means in their power, with due care and caution, and a proper display of nautical skill, to prevent the occurrence of the accident, and where the proofs show that it occurred in spite of everything that nautical skill, care, and precaution could do to keep the vessels from coming together."

[3] The Fullerton being without fault, the question arises whether the officers in charge of the Transit endeavored by every means in their power, with due care and caution, and a proper display of nautical skill, to prevent the collision. The fact of the collision cast upon the appellee the burden of proof of showing that the Transit was without fault, for the officers of the Transit were well aware of the position of the Fullerton, having passed her many times in the three months during which she had been at anchor. Once or twice they had passed within 100 feet of her. At other times their course had run as far as a mile north of her. In The Virginia Ehrman, 97 U. S. 309, 315 (24 L. Ed. 890) the court said:

"Vessels in motion are required to keep out of the way of a vessel at anchor, if the latter is without fault, unless it appears that the collision was the result of inevitable accident; the rule being that the vessel in motion must exonerate herself from blame, by showing that it was not in her power to prevent the collision by adopting any practicable precaution."

See, also, The Oregon, 158 U. S. 186, 15 Sup. Ct. 804, 39 L. Ed. 943.

We think the Transit was at fault in not coming to a stop and ascertaining the position of the bell which was heard shortly before the collision, and that the bell which was heard was the Fullerton's fog bell, notwithstanding that all the Transit's witnesses testified that the bell which they heard was the bell established by the appellee on the Mission Bay slip to guide the Transit in locating the slip in foggy weather, and that they did not hear the Fullerton's bell before the collision. The master of the Transit testified that a bell was heard 22 or 23 minutes after he had left the Oakland Mole. The fastest trip of the Transit across the bay that night, which must have been at full speed, for it was before the fog set in, was made in 38 minutes, and the average trip that night was 43¾ minutes, so that the bell must have been heard while the Transit was at least 15 minutes distant from the Mission Bay

slip, and if, as the master testified, the Transit was going at a reduced speed, he must have heard the bell when the Transit was about halfway across or a mile and a half from the Mission Bay slip. He testified that he usually heard it when he was 6 or 7 minutes, which would be a half a mile, away from the slip. There was no testimony that it was ever heard any farther away. The bell on the slip was placed in a box which was closed in the rear, with a sounding board behind it, and a flare out in front pointing, not toward the Oakland Mole, but directly out from the slip, and the sound therefrom was projected on a direction at a considerable angle from the Transit's fairway.

It is true that the Transit's witnesses testify that they recognized the bell which they heard and that they knew it was the Mission slip bell. Accustomed as they were to the sound of the bell, which was placed there for their guidance, their testimony is entitled to considerable weight. They did not testify, however, that they recognized the bell from any peculiarity of tone, but from the manner in which the strokes were made; that the bell on the slip was mounted and swung as a locomotive bell, while a fog bell on a ship is struck with a quick, jerky motion. The watchman on the Fullerton testified that the Fullerton's bell was struck by means of a rope attached to the upper end of the clapper, and that he usually rang it by striking the clapper against one side of the bell only. We think that the belief which the Transit's witnesses had that it was the Mission slip bell which they heard was very probably induced by the fact that they were not listening for the Fullerton's bell and not expecting to hear it. They all agreed in testifying that they had no thought of the Fullerton, that they believed that the Transit was proceeding on a course so far to the north of the position of the Fullerton that they need not expect to hear her bell. It seems impossible that they could have heard the bell on the slip in view of its distance from them; and when they heard a bell directly ahead of the course which they were pursuing, if it was indeed the Mission slip bell, they should have known they were far away south from where they thought they were and that they were within the permitted anchorage zone and approaching the position where the Fullerton lay. None of them testified that he heard the bell on the slip after the collision, and the master testified that he did not hear it thereafter. He added that he lost the Mission slip bell after the collision, "We drifted away from it and lost the sound."

[4] But whether or not the Transit was at fault in the particular matter just considered, we think she clearly was at fault in proceeding at a speed of 7 knots, "more or less," at night in a dense fog in the harbor of San Francisco. In The Pennsylvania, 19 Wall. 126, 134 (22 L. Ed. 148), the Supreme Court quoted with approval what was said by the Privy Council in the case of The Europa (Jenkin's Rule of the Road at Sea, 52):

"This may be safely laid down as a rule on all occasions, fog or clear, light or dark, that no steamer has a right to navigate at such a rate that it is impossible for her to prevent damage, taking all precaution at the moment she sees danger to be possible, and, if she cannot do that without going less than five knots an hour, then she is bound to go at less than five knots an hour."

The court added:

"We do not think the evidence shows any necessity for such a rate of speed as the steamer maintained. It is true her master, while admitting she was going seven knots, states that he don't consider she could have been steered going slower—could not have been steered straight. And two other witnesses testify that, in their opinion, she could not have been navigated with safety and kept under command at a less rate of speed than seven miles an hour. These, however, are but expressions of opinion based upon no facts. They are of little worth. And even if it were true that such a rate was necessary for safe steerage, it would not justify driving the steamer through so dense a fog along a route so much frequented, and when the probability of encountering other vessels was so great."

Similar views as to the speed of vessels in a fog have been expressed by the Supreme Court in other cases. In The Martello, 153 U. S. 64, 14 Sup. Ct. 723, 38 L. Ed. 637, a speed of 5½ to 6 miles an hour in going out of the harbor of New York was held excessive. In The Chattahooche, 173 U. S. 540, 19 Sup. Ct. 491, 43 L. Ed. 801, seven miles off Nantucket Shoals was held excessive; and in The Colorado, 91 U. S. 692, 23 L. Ed. 379, "five or six" miles on Lake Huron was condemned as excessive. In The Nacoochee, 137 U. S. 330, 11 Sup. Ct. 122, 34 L. Ed. 687, a steamship was held responsible for a collision on the high seas when proceeding in a fog at the rate of 7 knots per hour. In the opinion in that case Mr. Justice Blatchford said:

"She was bound, therefore, to observe unusual caution, and to maintain only such a rate of speed as would enable her to come to a standstill, by reversing her engines at full speed, before she should collide with a vessel which she should see through the fog."

Similar cases are: The H. F. Dimock, 77 Fed. 226, 23 C. C. A. 123; The Louisburg, 75 Fed. 424, 21 C. C. A. 424; The Kentucky (D. C.) 148 Fed. 500; Pennell v. United States (D. C.) 162 Fed. 64; The Tennessee (D. C.) 181 Fed. 287; The Catalonia (D. C.) 43 Fed. 396; The Bailey Gatzert (D. C.) 170 Fed. 101; The Manistee, 7 Biss. 35, Fed. Cas. No. 9,028; The Eleanora, 17 Blatchf. 88, Fed. Cas. No. 4,335.

The Transit was a vessel broad of beam, 325 feet long, and owing to the construction of her engines she could not, when proceeding at a speed of seven knots, be stopped in less than 800 or 900 feet. She did not answer her rudder very quickly. Her highest speed was 11 knots. The contention is made that at a speed of less than 7 knots she would have lost steerageway, but this is not sustained by the testimony. The master's testimony was as follows:

"Q. I am asking you about the lowest speed you can keep steerageway. A. I have never found out going on the reversed bell. Q. As a matter of fact, can't you maintain steerageway at three knots? A. No, sir. Q. Why not? A. On account of one rudder. Q. What does she need, more rudders? A. One rudder is sufficient. I have been running over 35 years at that average speed. Q. Don't you think she would maintain steerageway at four knots? A. No, sir; but, as I said before, I do not know the exact amount of knots. I know when she is going slow, and we do not keep a log as you do in deep water ships, we run there under slow or fast bell. Q. You cannot tell me in knots how slow that vessel can go and still maintain steerageway? A. No, sir."

The argument is made that the speed of the Transit did not contribute to the accident, that the collision would have occurred even if she had proceeded at a speed of three or four knots per hour, for the reason that the fog was so thick that the men on the Transit could not discover the Fullerton's lights until it was too late to avoid a collision. The same argument might be made if the Transit had been going at her highest speed. The argument is not convincing. It is true that the witnesses on the Transit testified that they did not see the lights on the Fullerton until the Transit was within 200 feet of her, but the night watchman on the Fullerton testified that he saw the Transit's lights when that vessel was about three ship lengths away. He said:

"I heard the Transit approaching, what I believed to be the Transit from her whistle. I kept trying to look out for her, and kept striking the bell in between the whistles when I had a chance so as to give somebody on her a show to hear it. It was not very long after I heard her whistle that I saw the loom of her lights through the fog, and when she was about three ship lengths away I could see both of her range lights, one immediately after the other."

If the Transit had been proceeding at three or four knots an hour, the men on board of her would have had more time in which to hear the Fullerton's bell, the sound of which was, no doubt, obscured by the noise of the Transit's paddle wheels, machinery, and fog whistle, and the collision would probably not have occurred. Where the noise created by the passage of a vessel through the water by the working of her machinery, or otherwise, is sufficient to prevent the sound signals of another vessel from being heard, it becomes her duty to stop occasionally and listen, or to slow down to such degree of speed that the noise of her own passage through the water will not interfere with her ability to hear the approach of others. Spencer on Marine Collisions, § 48. In The Oregon (D. C.) 27 Fed. 751, it was said:

"If, instead of driving through a fog as dense as then prevailed, the steamer had stopped, even for a few moments, the noise of the machinery having ceased, the fog horn of the Mott would probably have been heard."

In The Eleanora, Judge Blatchford said:

"If the steamer had been going at less speed, or had gone ahead a short distance and then stopped still and listened, and thus made her speed, or her passage from point to point through the intervening space, and not merely her running rate while in forward motion, that 'moderate speed' which the statute requires, it is quite apparent that, blowing her whistle continually, at proper intervals, the blast would have been heard by the schooner and answered by the fog horn over the starboard side of the schooner, in sufficient season for the steamer to have stopped and backed, and be brought to a standstill, before reaching the schooner. Therefore the steamer was at fault as to her speed."

The appellee cites the case of Wright & Cobb Lighterage Co. v. New England N. Co. (D. C.) 189 Fed. 809, in which Judge Holt remarked:

"Ferryboats cannot tie up in a fog. Public interests require that they should make their regular trips even in very thick fogs."

In that case it was held that a ferryboat was not negligent for navigating in the early morning in a fog so dense that other vessels could be seen but for very short distances, and was not in fault for colliding with a car float alongside a dock, which had been moored with two others off the end of the pier, and against which the ferryboat was drifted by the tide while waiting a clear entrance to her slip. The considerations that controlled the decision were that the captain, a licensed pilot of long experience, was at the wheel, that he had a lookout with him in the wheelhouse and another on deck forward of the gates, that he proceeded slowly, sounding fog signals, and was obliged to stop while another ferryboat landed, that he knew substantially where he was, that he could hear the big bell rung in fogs off the ferry entrance, that the trip in question was the first trip of his boat since about midnight, that he did not know that in the meantime the car floats had been moored off Pier 5, and that the court was of the opinion that no bell had been rung on the tugs which had the barges in charge.

The facts in that case distinguish it from the case at bar. The Transit was not a passenger ferryboat with a regular time schedule, but a freight car ferryboat running irregularly. The master knew where the Fullerton lay at anchor. He was out of his fairway and did not know where he was. He was proceeding at a speed which by the decided weight of authority was excessive. His vessel did not respond quickly to the rudder, and his engines were of such construction that at the speed of 7 knots she could not be stopped in less than 800 feet and could not at any speed be immediately reversed from ahead to full speed astern. Cases in point are The D. S. Gregory, 6 Blatchf. 528, Fed. Cas. No. 4,102; The Bedford, 5 Blatchf. 200, Fed. Cas. No. 1,216; The Rockaway (D. C.) 19 Fed. 449; Id. (C. C.) 25 Fed. 775. It follows that the appellee is answerable for the damage to the Fullerton by reason of the collision.

The decree is reversed, and the cause is remanded to the District Court for further proceedings.

ALASKA S. S. CO. v. INLAND NAVIGATION CO.

(Circuit Court of Appeals, Ninth Circuit. February 2, 1914.)

No. 2276.

COLLISION (§ 133*)—SUITS FOR DAMAGES—DAMAGES—TOTAL LOSS OF VESSEL.

In case of the total loss of a vessel in collision, solely through the fault of the other vessel, the measure of damages recoverable by her owner is her market value where she has such a value and it can be shown. If she was of an ordinary type of construction, in general use, and for which there was a market, the measure of her value is the price at which she could have been sold in the market, which may be shown by the opinions of competent witnesses, and her original cost with a deduction for depreciation may only be resorted to as fixing her value where a market value cannot be shown.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 287; Dec. Dig. § 133.*]

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

Appeal from the District Court of the United States for the Northern Division of the Western District of Washington; Clinton W. Howard, Judge.

Suit in admiralty for collision by the Inland Navigation Company, as owner of the steamship Telegraph, against the steamship Alameda; the Alaska Steamship Company, claimant. Decree for libelant, and claimant appeals. Reversed.

It is alleged in the libel filed by the Inland Navigation Company that on the night of April 25, 1912, while its steamship, the Telegraph, was lying at her berth in good safety on the north side of the Colman Dock in the city of Seattle, Wash., the steamship Alameda, through the gross negligence of the crew of her engine room, and in direct violation of the orders of her master, was driven at great speed head on against the south side of the Colman Dock, and completely through said dock, and the stem of said steamship Alameda was driven into the side of the hull of the said steamship Telegraph causing the latter to sink and founder; that as a result of said collision and of the ramming and sinking of said steamship Telegraph she became and was a total loss; that said collision, ramming, and sinking of said steamship Telegraph was without any fault, neglect, or wrongful act on the part of said steamship Telegraph or any of her officers or crew, but was due wholly to the fault of the said steamship Alameda.

The libelant further alleged that said steamship Telegraph immediately prior to the time of said collision was of the value of $55,000; that as a result of said collision and sinking she became of no value whatsoever; and that the libelant was thereby damaged in the sum of $55,000.

In the answer filed by the respondent the allegations of the libel with respect to the circumstances surrounding the collision between the steamships Alameda and Telegraph were not denied, nor did the respondent deny liability for the damages sustained by the Telegraph. But the respondent did deny that the steamship Telegraph immediately prior to the time of said collision was of the value of $55,000, and further denied that the libelant, as a result of said collision and sinking of its steamship, the Telegraph, had been damaged in that sum.

The cause was referred to a United States commissioner for the taking of testimony. The testimony was returned into court by the commissioner, and thereafter a final decree was entered by the court below in favor of the libelant and against the respondent for the sum of $45,000, from which final decree the respondent has appealed to this court.

W. H. Bogle, Carroll B. Graves, F. T. Merritt, and Laurence Bogle, all of Seattle, Wash., for appellant.

Ira Bronson and J. S. Robinson, both of Seattle, Wash., for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge (after stating the facts as above). Neither the pleadings nor the evidence in this case raise any issue with respect to the liability of the appellant for the damages suffered by the appellee through the loss of its steamship, the Telegraph. It is admitted by the appellant that the sinking of the Telegraph was caused by negligence and fault on the part of the Alameda, and it is also admitted by the appellant that by reason of such sinking the Telegraph became and was a total loss.

But the contention of the appellant is that the court below erred in finding and decreeing that the value of the steamship Telegraph at the time of her loss was the sum of $45,000, or any sum in excess of the sum of $25,000. The amount which the appellee is entitled to recover

as the value of the Telegraph at the time she was sunk by the Alameda is the only question we are called upon to determine.

In fixing the sum of $45,000 as the value of the Telegraph at the time she was sunk, the court below proceeded upon the theory of original cost, allowing for the difference of her upkeep and the natural fair depreciation of her hull, engines, house, and equipment. It is insisted by the appellant that the court erred in adopting this method of computation; that the rule of market value should have been followed; that the testimony showed that there was a market for vessels of the type of construction of the Telegraph; that the testimony further established the fact that the market value of the Telegraph at the time she was sunk would not have exceeded $25,000; and therefore the rule of market value should have been adopted by the court in fixing the value of the Telegraph at the time she was sunk. The appellee contends, on the other hand, that, under the circumstances of this case, the market value of the vessel did not measure the damage.

1. That a ship may have a market value, and that such market value, if made to appear, must be used as the basis for computing the amount of damages with which the owner of a negligent vessel is chargeable in a case where, through such negligence, another vessel has been sunk and the owners thereof have sustained a total loss, is a rule laid down by all writers on maritime law.

In Lowndes, Admiralty Law, p. 140, the method of computing the damage to persons who have suffered loss by reason of a collision resulting from faulty conduct on the part of the other ship is stated in the following terms:

"The general principle governing the computation of damages is that the sufferer by a collision which is the result of wrongdoing, whether negligence or mistake, is entitled to 'restitutio in integrum'; he is, so far as practicable, to be restored to the same pecuniary position as if no collision had taken place. * * *

"In the case of a ship totally lost, the owner is entitled to recover the actual value, and this is defined in the admiralty courts to be her market value; that is to say, the gross sum for which she might have been sold immediately before the collision."

In support of this rule the author cites the decision of Dr. Lushington, in the case of The Clyde, Swabey, p. 23. In that case the celebrated admiralty judge said:

"* * * Wherever damage is done by one vessel to another, the parties are to be restored into the same state as they were before the accident; that is to say, they are to have the full value of the property lost; restitutio in integrum is the leading maxim. The value is the market price at the time of the destruction of the property, and the difficulty is to ascertain what would be its market value. * * * In order to ascertain this, there are various species of evidence that may be resorted to; for instance, the value of the vessel when built. But that is only one species of evidence, because the value may furnish a very inferior criterion whereby to ascertain the value at the moment of destruction. The length of time during which the vessel has been used, and the degree of deterioration suffered, will affect the original price at which the vessel was built. But there is another matter infinitely more important than this—known even to the most unlearned—the constant change which takes place in the market. It is the market price which the court looks to, and nothing else, as the value of the property. It is an old saying, 'The worth of a thing is the price it will bring.'"

In the nature of things, the market for ships is different from the market for more numerous articles of lesser value; nor is the market value of a ship so readily ascertainable as the market value of an article of merchandise whereof daily sales are made and daily prices quoted. And with ships, as with other articles, one might have a peculiar value—a value above that which it would ordinarily have—on account of its adaptability for a special purpose, or on account of possession of some extraordinary qualification, as that of speed. This rule, with the exception, is stated by Roscoe, in his work on Damages in Maritime Collisions, as follows (page 24):

"When a vessel is totally lost by a collision with another vessel, which was caused by the negligence of those in charge of such other vessel, in order to place * * * the owner of the innocent ship as nearly as possible in the same position as he was before the collision, he should recover from the owner of the wrongdoing vessel the value of the lost ship. In most cases this value is the market value, having regard to the age, character, and condition of the ship. 'It is the market value which the court looks to, and nothing else, as the value of the property. It is an old saying: "The worth of a thing is the price it will fetch." ' Dr. Lushington, in The Clyde, 2 Swa. 25. Market value must, however, be distinguished from anything like a forced sale value, for the value for the purposes of compensation is that which a willing seller and a willing purchaser would place upon a ship. While also the above statement of Dr. Lushington, as well as the adage, may be admitted to be correct generally, it is obvious that some vessels may have a value peculiar to themselves, having regard to their use, or the position or occupation of the owner. Therefore, if either owing to the absence of a market, or the peculiar or special character of her trade or work, the lost ship cannot fairly be valued at a market price, then the basis of assessment is the value of the vessel to her owners as a going concern."

In Marsden's Collisions at Sea (6th Ed.) p. 101, it is said:

"If the ship is totally lost, the owner is entitled to recover her market value at the time of the collision. * * * Where the ship is of a special construction or character, and although of special value to her owner, has little or no market value, damages must be estimated by considering what is her value to the owner as a going concern at the time she was lost. Her original cost, her condition at the date of her loss, money spent in upkeep, and her past earnings, have all to be considered."

In the Treatise on the Law of Maritime Collisions, by Herbert R. Spencer, we find the following (section 200):

"Restitution is the rule in all cases where repairs are practical, and compensation when the loss is total. The measure of damages in case of total loss is the market value of the vessel at the time of the collision, together with its cargo and freight, and such other losses as are a direct result of the collision. The market value of the vessel, and not its real or intrinsic value or cost of construction, is ordinarily the measure of damages. The recovery is limited to the market value, and damages in excess of such value may not be assigned by reason of additional value to the owner, owing to peculiar fitness for the trade in which it is engaged, or otherwise; nor is the market value to be determined by what the owner would have been willing to take for the vessel, but it is the amount for which the vessel would have sold in the open market. * * *

"When the conditions are such that no market value can be shown where there is no market value, or, if shown, it is so manifestly disproportionate to the intrinsic value of the vessel that to order a sale at such a price would be a hardship, the court may adopt as the value of the ship the cost of construction with proper deduction for the deterioration in its value from the time of construction; especially may this method be resorted to if the vessel is but recently built."

In Dobree v. Schroder, 2 My. & Cr. 489, the High Court of Chancery of England had before it the question of the value of a vessel under the act of Parliament limiting the liability of a shipowner for any damage done by his ship to any other vessel. The case was one of a collision where a ship had been run down and sunk by a steam vessel. The question was as to the value of the vessel causing the loss of the ship. The accident occurred on the 3d day of November, 1831. The Vice Chancellor had referred the case to the master to ascertain what was the value of the offending vessel at the date of the accident. The master proceeded to find the value of the vessel upon evidence of her original cost, her age at the time of the accident, and her estimated value upon an inspection made in July, 1833. This valuation was brought before Lord Chancellor Cottenham by way of appeal. The argument on the appeal turned upon the question whether the value of the vessel causing the loss was to be ascertained by taking the cost price and then making deductions from that price for wear and tear calculated at certain rates; or by evidence as to the price at which she could have been sold in the market at the time of the accident. This is the identical question of value involved in the present case. The Lord Chancellor in discussing this question said:

"The object of the act of Parliament was to provide that the owners of the vessel should not be liable beyond the value of the property engaged in the adventure at the time at which the accident happened; that is, the value which the property occasioning the loss or injury was capable of producing. In the common acceptation of the term, the value is the price which the property would fetch."

The Lord Chancellor, after discussing the case, concluded that the proper valuation was the market value at the time of the accident, and that the method of value followed by the master, namely, cost price less deduction for wear and tear, was upon the wrong principle.

In the case of The Colorado, Fed. Cas. No. 3029, this English case was referred to as authority in a case involving the question of the value of a vessel which had been sunk in a collision and had become a total loss. The court held that:

"The correct rule upon this subject, when the vessel is a total loss, seems to be that the market value of the vessel just before the collision is the proper measure of damages; that the best evidence of such value is the opinion of competent persons who knew the vessel shortly before she was lost; and that the next best evidence is the opinion of persons conversant with shipping and the transfer of vessels. There are, of course, exceptions to this rule, as when the vessel lost, from some peculiarity of construction in order to adapt her to some special purpose out of the usual course of shipping, precludes there being any market value for her. An instance of this may be when a vessel is built for a special trade requiring peculiar and unusual conditions in her construction. In such a case, for want of a better criterion of value, cost of construction or purchase price, with a deduction for depreciation by ordinary wear and age, may be resorted to. See Lowndes, Coll. 141–146. But the present case does not fall within the exception. The commissioner had before him both classes of evidence stated in the rule, and, although the evidence may be open to criticism in some respects, I think it was amply sufficient to justify the finding."

This case was taken on appeal to the Circuit Court of the United States, and then to the Supreme Court of the United States. The Colorado, 91 U. S. 692, 23 L. Ed. 379. In both courts the decree of the District Court was affirmed, but without any discussion of the question of value of the lost vessel.

In The Granite State, 70 U. S. (3 Wall.) 310, 18 L. Ed. 179, the question was as to the value of "an old and pretty rotten barge" sunk by the steamer Granite State. The statement of the case contains the following recital:

"The commissioner fixed the value of the barge at $850, assuming apparently that she was worth this sum to her owners; though he stated that having been built for a special and unusual purpose, and being unlike every other sort of craft used in the port of New York, he had difficulty in forming any estimate. The difficulty, in truth, was obvious; some witnesses swearing that the boat was not worth having for a gift, others that she was worth $8 or $10, and others that in her former condition she could be made practically very useful. There was conflict in the testimony here as in the other part of the case. This report was set aside, and a new estimate directed. On new evidence the commissioner gave $150 more. This report, too, was set aside, and a third reference ordered; the court directing the commissioner to consider the actual cost of raising and repairing the barge and so putting her as near as could be into her former state. A report made on this basis was confirmed."

What that report was, as to the value of the barge, does not appear in the case as reported; but the rule as followed by the District Court was held by the Supreme Court to be the correct rule under the circumstances of the case. There does not appear to have been any evidence as to the market value of the barge. In commenting upon this feature of the case the court said:

"There seems to have been some controversy in the District Court as to the measure of damages. No less than three different reports were made by the master on the subject. * * * There cannot be an establishd market value for barges, boats, and other articles of that description, as in cases of grain, cotton, or stock. The value of such a boat depends upon the accidents of its form, age, and materials; and, as these differ in each individual, there could be no established market value. A person may make considerable profits by the use of an old hulk of little value in the market for vessels. His loss cannot be measured by the ratio of her profits, as he might supply himself with another at a much cheaper rate. But when the injured vessel is not a total loss, and is capable of being repaired and restored to her original situation, the cost necessary to such repair cannot be said to be an incorrect rule of damages."

The appellee cites this case in support of the rule followed by the court below, but it is manifestly not applicable. The broad statement that "there cannot be an established market value for barges, boats, and other articles of that description" must be considered with respect to the character of the barge in question. It was stated to be a "rotten hull." It must also be considered with the qualification, "as in cases of grain, cotton, or stock." It must also be considered in connection with the further qualification that the injured barge was not a total loss, but was capable of being repaired and restored to her original situation. The rule in such case, where there is no evidence as to market value, and the loss was not total, cannot be followed where the loss is total and there is evidence as to market value.

In the subsequent case of The Baltimore, 75 U. S. (8 Wall.) 377, 19 L. Ed. 463, the Supreme Court followed the rule of market value. Mr. Justice Clifford, delivering the opinion of the court in that case, said:

"* * * If the vessel of the libelants is totally lost, the rule of damages is the market value of the vessel (if the vessel is of a class which has such value), at the time of her destruction."

No case has been called to our attention where the court has since modified or changed that rule.

See, also, The New Jersey, Fed. Cas. No. 10,162; La Normandie, 58 Fed. 427, 431, 7 C. C. A. 285; The Pennsylvania, Fed. Cas. No. 10,948; The Hamilton (D. C.) 95 Fed. 844, 845; The Lucille (D. C.) 169 Fed. 719, 721; The Utopia, 16 Fed. 507, 509.

These authorities admit of no doubt. In the ascertainment of the value of a vessel, in case of a total loss, the rule of market value must be adopted, if there is a market for such vessel and the market value thereof be made to appear, unless the vessel falls within the exception which we have noted.

2. But it is contended by the appellee that the rule of market value cannot be applied to the case now before this court for the reason that the Telegraph was in a class by herself by reason of the fact that she was possessed of extraordinary speed; and for the further reason that the evidence showed that there was no market for a vessel of her type of construction. Their claim is that the only fair method by which the value of the Telegraph could have been ascertained was by testimony showing the original cost of construction, less a proper allowance for depreciation. And in support of this claim they proceeded to introduce testimony showing the original cost of construction of the Telegraph and the percentage of depreciation of the various parts of their steamship during the nine years she had been in operation.

It appears from the record that the Telegraph was a passenger steamer of the stern wheel type, having a length of about 153 feet, a width of about 27 feet, and a depth of 8 feet; that she was built at Everett, Wash., in 1903, at a cost of about $75,000. After a careful consideration of all of the testimony introduced by the respective parties, we are not prepared to agree with the appellee that the testimony showed that the Telegraph was in a class by herself by reason of the fact that she was possessed of extraordinary speed. It is true, one of appellee's witnesses testified that the Telegraph was "the fastest stern-wheeler in the word"; but the record is replete with testimony tending to show that such was not the case. Barney Dionne, a witness on behalf of the appellant, testified that he was chief engineer of the Telegraph for about 3½ years; that he had got out of the Telegraph all of the speed she ever made, and the best she could make was between 18 and 19 statute miles per hour; that the Telegraph was not the fastest stern-wheel vessel ever constructed; that he knew that the Telephone and the Bailey Gatzert (both stern-wheel steamships operating on and in the vicinity of Puget Sound) could run faster than the Telegraph under the same conditions; that he had seen the Telephone catch up with the Telegraph when he was driving the latter at her best, showing

the Telephone to be faster; that he had been chief engineer of the Bailey Gatzert for five years, running on the Willamette and Columbia rivers; that he had run the latter vessel over the same course as he had run the Telegraph and had beaten the best time the Telegraph could or did make. Capt. Arthur Riggs, a witness for the appellant, testified that he was master mariner of the steamer Telegraph in 1905 and 1907; that he had operated the Telegraph at her full speed; that the maximum speed of the Telegraph under ordinary conditions was between 18 and 19 miles an hour; that he did not think it was correct that the Telegraph was the fastest stern-wheel vessel ever constructed; that he thought the Telephone was capable of making greater speed; that he judged this from her performance on the river while she was at Portland; and that he had seen her operate along with the Telegraph many times. Other witnesses on behalf of the appellant, whose testimony of this point we do not deem it necessary to review, testified substantially to the same facts, and we think there can be no doubt but that there was nothing in the speed of the Telegraph calculated to place her value above the value of other steamships of similar type of construction.

Nor can we agree with the appellee that it appears from the record that there was no market for a steamer of the type of construction of the Telegraph, and that such market not being shown, and a market value for her made to appear, the rule of market value could not be applied as a fair method of computing her value at the time she was sunk; and therefore her value could only be proven by other circumstances, such as cost of construction, less a proper allowance for depreciation. In this connection it must be remembered that the Telegraph was one of a numerous class of stern-wheel steamers which are operated for the carriage of freight and passengers upon and in the vicinity of Puget Sound, the Willamette river, and the Columbia river, and between Portland and Astoria; and that steamers of a similiar type of construction are also operated on the Bay of San Francisco and upon the rivers tributary thereto. The construction of the Telegraph was in no respect an innovation in the art of shipbuilding. It appears from the record that the Telegraph could have been used on any of the routes and at any of the places above named. It also appears that stern-wheel vessels of the general type of construction of the Telegraph were frequently bought and sold for use on Puget Sound and other places along the coast where vessels of the stern-wheel type could be utilized. Capt. Gibbs, agent and surveyor for the San Francisco Board of Marine Underwriters, testified that there were several routes on which a vessel like the Telegraph could have been operated; that he had known of several sales of stern-wheel vessels similar to the Telegraph; that the Telephone was sold in Portland, Or., for use on San Francisco Bay, for $24,800; that the steamer Charles R. Spencer, a vessel similar to the Telegraph, was sold for $20,000; that it would appear that there must be a market for this kind of vessel; and that in his opinion the fair reasonable market value of the Telegraph before she was sunk was about $25,000. George N. Skinner, a witness on behalf of the appellant who had been

engaged in the lumber and transportation business in Seattle, Wash., for about seven years, testified that the Telegraph could have been used on the Columbia river and on the Willamette river, on Puget Sound, or on San Francisco Bay; that the Telegraph had been in service all the time she had been on the Sound; that he himself had tried to buy her after the collision with the Alameda and after she had been raised; that she had been offered to him, rebuilt and in as good condition as it was possible to put her, for $19,000. Capt. T. W. Spencer testified that he had sold his steamer the Spencer, in 1911, at a voluntary sale, for $25,000; that the Spencer was at that time nine years old and a larger boat than the Telegraph; and that he considered the Spencer at the time of her sale to be the "speediest" boat on the river. C. W. Cook, Pacific Coast manager of the American-Hawaiian Steamship Company, testified that the Telegraph could have been used in the passenger business on the Columbia river and perhaps at San Francisco; that he considered the reasonable market value of the Telegraph about $20,000. Joseph Supple, owner of a shipyard at Portland, Or., testified that there was at the time and place the Telegraph was sunk a market for stern-wheel vessels of normal practical type that could be used for towboats or freight boats or passenger boats, or all combined; that there was then a ready sale at fair prices for such boats; that the Telegraph was a peculiar type of boat, built only for passengers, and not fit for towing or carrying freight; that the demand for her would be best for a strictly passenger run; that a large number of stern-wheel vessels had been bought and sold at Portland, where there was always a market for such vessels; and that stern-wheel vessels were being bought and sold all the time, and new ones are being constructed on the coast. Marcus Talbott, general manager for the Port of Portland Commission, testified that he had bought and sold stern-wheel vessels at Seattle and at other places where the Telegraph could have been taken and used; that at the time the Telegraph was sunk there was a market at Seattle for the Telegraph and vessels of her kind and type; and that the fair, reasonable market value of the Telegraph at the time and place she was sunk would not exceed $25,000; that, while the market at Seattle was not an active one, still in his judgment there would have been competitive bids; that he knew of various sales of stern-wheel vessels; that the State of Washington had sold for $17,000; that the Capitol City had sold for $17,000; that the Telephone had sold for $24,500; that the sales of these vessels were not forced; and that each of these vessels was much larger than the Telegraph and carried more passengers and a larger amount of freight.

The testimony of these witnesses was, we think, sufficient to establish the fact that there was a market for the Telegraph and that her value in such market would not have exceeded $25,000. But the testimony finds further support in the fact that in 1910 the appellee purchased the Telegraph and the City of Everitt (another stern-wheel steamer of the same general type of the Telegraph, but smaller), together with the good will of the route upon which said steamers were being operated at that time, for the sum of $55,000. And in connec-

tion with this transaction it appears from the testimony of Capt. Scott, who owned both of said boats and said route at the time of their purchase by the appellee, that the Telegraph had been built in 1903 and the City of Everitt about 1900; that at the time of their sale to the appellee in 1910 they were both sound, good boats, and had depreciated in value but very little. It also appears from the undisputed testimony of Capt. Joshua Green, president of the appellee corporation, that the Telegraph was not insured at the time she was sunk, but that prior to that time the Telegraph and the City of Everitt had each been insured in the sum of $27,500.

In view of this testimony, we think the court below erred in basing the value of the Telegraph at the time she was sunk on the theory of original cost, less a percentage for depreciation. We are of opinion that the evidence was sufficient to justify the court below in finding that there was a market for a vessel of the character of the Telegraph in Puget Sound, at the time of the accident, and that her value in such market at that time was $25,000.

The decree of the court below will, accordingly, be reversed, with directions to enter a decree in favor of the appellee for the sum of $25,000. Costs in this court in favor of the appellant.

AMERICAN-PACIFIC CONST. CO. v. MODERN STEEL STRUCTURAL CO.†

(Circuit Court of Appeals, Ninth Circuit. March 9, 1914.)

No. 2272.

1. CONTRACTS (§ 39*)—PROPOSALS AND ACCEPTANCE—WHEN COMPLETED CONTRACT.

The proposal constituting a part of a contract provided for the furnishing by plaintiff in accordance with drawings and specifications furnished by S. of the structural steel and iron and reinforcing steel with specified exceptions for a theater and office building at a specified location to be delivered within specified periods after plaintiff's receipt of approved working detail drawings signed by S., for $77 a ton. The specifications recited that S. was under contract with the architect to furnish those parts of the plans and specifications relating to the iron and steel frame and reinforced concrete work, described the building as 145 by 120 feet, 8 stories high above the sidewalk, with a basement 20 feet and 3 inches below the ground, and gave the general plan of construction, the kind of material required, and the character and finish thereof in minute detail. The specifications were the same specifications forming a part of the contract between defendant and the owner of the building. *Held*, that the proposal and acceptance constituted a completed contract, though the entire drawings for the building were never furnished by S.; it being apparent that it was contemplated that S. should work up the drawings from the general plans drafted by the architect and that it was not contemplated that they should have been made and completed prior to the making and acceptance of the proposal.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 156–159; Dec. Dig. § 39.*]

2. CONTRACTS (§ 40*)—REFERENCE TO OTHER PAPERS—SPECIFICATIONS.

Where the specifications forming a part of a contract were identified therein by their initialing by one of the parties, this was tantamount to

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

† Rehearing denied May 25, 1914.

attaching them to the contract and rendered the contract equally definite and certain.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 155; Dec. Dig. § 40.*]

3. SALES (§ 369*)—BREACH OF CONTRACT—REMEDIES OF SELLER.

Where defendant broke a contract by which plaintiff was to furnish and fabricate the structural steel and iron for a building by directing plaintiff to discontinue the further fabrication thereof, and by refusing to allow plaintiff to proceed, plaintiff was not required to split up its demand and sue for the steel already fabricated, shipped, and delivered, as for material sold and delivered.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1083, 1084; Dec. Dig. § 369.*]

4. SALES (§ 383*)—BREACH OF CONTRACT—SUFFICIENCY OF EVIDENCE.

In an action for breach of a contract to furnish and fabricate the structural steel and iron for a building by the buyer, evidence as to the manufacture and delivery of 39¼ tons of steel and iron, and that the steel and iron contracted for would amount to about 1,500 tons, and that plaintiff had provided for the purchase of steel sufficient therefor and made the necessary preparations to fabricate the entire quantity, placed before the jury sufficient data on the question of damages to support a recovery.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1097; Dec. Dig. § 383.*]

5. SALES (§ 379*)—ACTIONS—ISSUES, PROOF, AND VARIANCE.

In an action for breach by the buyer of a contract for the furnishing and fabrication of the structural steel and iron for a building, there was no variance between the complaint which alleged the agreed amount to be delivered as 1,500 tons and evidence tending to show that the amount would aggregate about 1,500 tons; the exact amount not being ascertainable until it was fabricated and weighed.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1094; Dec. Dig. § 379.*]

6. ARBITRATION AND AWARD (§ 8*) — AGREEMENT TO ARBITRATE — EFFECT ON RIGHT OF ACTION.

A provision in a contract that in case any difference of opinion should arise in relation to the contract, or the work to be or that had been performed, such difference should be settled by arbitration, fell within the general rule that an agreement to refer a case to arbitration will not be regarded by the courts and that they will take jurisdiction notwithstanding such an agreement.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. § 29; Dec. Dig. § 8.*]

In Error to the District Court of the United States for the First Division of the Northern District of California; Wm. C. Van Fleet, Judge.

Action by the Modern Steel Structural Company against the American-Pacific Construction Company. Judgment for plaintiff, and defendant brings error. Affirmed.

This is an action to recover damages for breach of an alleged contract for the fabrication and delivery of certain structural steel. The complaint alleges, in effect, that on or about the 19th day of January, 1907, plaintiff and defendant entered into a contract by the terms of which plaintiff agreed with the defendant to furnish material and to fabricate all the structural steel and iron required by the plans and specifications for a new building to be erected by the defendant for the Richelieu Realty Syndicate, known as the Columbia Theater, at the southeast corner of Geary street and Van Ness

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

avenue, in the city and county of San Francisco, and to deliver said material when fabricated to the defendant, f. o. b. cars, San Francisco, Cal., at the agreed price of $77 per ton.

The plaintiff owned and operated a factory for fabrication of structural steel and iron at Waukesha, Wis., and the structural steel and iron for this building were to be fabricated at its factory and shipped to the defendant at San Francisco. It is alleged that, after plaintiff had fabricated and shipped the defendant 39¼ tons of steel and iron, defendant directed plaintiff to discontinue work under the contract, and has since refused to permit plaintiff to proceed therewith, and damages are claimed in the sum of $35,164.17 for the breach of the contract.

The contract in question consists of a proposal in writing on the part of the plaintiff and an acceptance on the part of the defendant. The terms of the proposal, in so far as they are concerned for present inquiry, are as follows:

"We propose to furnish you in good order the following described structural material, constructed in a workmanlike manner, described as follows and in accordance with drawings furnished by Jos. D. Smedberg and specifications also furnished by Jos. D. Smedberg, standard specifications to govern, identified with marks.

" 'Copy #1,' initialed, 'S. E. H. 12/30/06,' except as noted under 'Remarks' on sheet #2 attached.

"Namely, the structural steel and iron and reinforcing steel (except the grillage beams, bolts, separators, and column bases mentioned on page 3 of specifications referred to above), for the Richelieu Realty Syndicate Theater and Office Building, known as the Columbia Theater; Location—Southeast corner of Van Ness Ave. & Geary St., San Francisco, Cal.

"Delivery, as follows: That portion indicated by Mr. Smedberg, shown within red lines on blueprint 3-S, 4-S, 7-S, dated by us on the back of print as received Dec. 31, and 8-S, dated by us on the back of print as received Jan. 3, 1907, required to begin erection of steel work on stores, to be shipped from our shop 30 days from our receipt of approved working detail drawings, signed by Mr. Smedberg.

"Balance of steel shipments to be 60 to 90 days from our receipt of balance of approved working detail drawings, signed by Mr. Smedberg. * * *

"Price to be seventy-seven ($77.00) dollars per ton. Freight allowed to San Francisco, Cal. Correct figured weights of steel to govern amount of sale and all steel work to be accepted at our works by Mr. Smedberg, or his authorized agent.

"Terms of payment as follows: 30 days net cash from date of invoices."

The specifications referred to in the proposal, together with the preamble, in so far as it is necessary to set them forth here, are as follows:

"In order to understand the business relations involved in the following specifications, some explanation of them is necessary.

"Mr. Joseph D. Smedberg, the consulting engineer, is under contract with Mr. Frank T. Shea, architect, to furnish those parts of the plans and specifications for the building which relate to the iron and steel frame and reinforced concrete work.

"He is also under contract with the Richelieu Realty Syndicate to supervise the inspection, to superintend the erection of the steel frame work, to check all bills rendered by the contractors for this portion of the work, and, in general, to see that all the contracts relating to this part of the building are faithfully fulfilled. The contract for the iron and steel work will be let on a pound basis erected. * * *

"General. The steel construction described in these specifications is that for a new office building and theater, southeast corner of Van Ness avenue and Geary street, San Francisco, Cal. The building is in plan 149'x120' 0", and is eight stories high above the sidewalk, with basement extending 20' 3" below ground. (Datum.)

"The plan of construction is as follows: The general plans for the theater portion of the building being incomplete still, the intention is to erect the office building portion first and especially rush work on the first section columns, first and second story beams and sidewalk beams. Open holes in columns, beams and girders for connecting theater cantilevers, etc., will be

drilled in the field, as arrangement of theater framing cannot be determined accurately at present, and this method will not delay any portion of the office building construction, due to lack of information regarding connection. * * *

"Specifications Explained:

"These specifications are supplemental to the contract already entered into for the constructional iron and steel work of this building, between the American-Pacific Construction Company, parties of the first part, and Richelieu Realty Syndicate, parties of the second part. They are the specifications referred to in the said contract, and which are to be considered a part of that contract.

"These specifications are intended to cover all the structural iron work for frame and reinforced concrete in said building. They are intended to cooperate with the drawings for the same, both those furnished by the architect, and those furnished by the engineer, as hereinafter specified, and what is called for by either is as binding as if called for by both. They are intended to describe and provide for a finished piece of work. * * *

"Drawings:

"The general dimensions, arrangements and sections required for the structural iron work herein specified are shown on the general structural iron drawings prepared and furnished by the engineer.

"The sections given are those of the Carnegie Steel Company's manufacture In general, these drawings are made to scale, but scale dimensions must never be used. These drawings, together with these specifications, are the property of the architect, to whom all copies must be returned on the completion of the work. Detail or shop drawings required by the contractor, including drawings of every part and piece of the work, with all the lists, schedules, indexes, erection plans or other directions necessary for the proper manufacture, finish and erection of the work covered by these specifications and the said general drawings will be made and furnished by the engineer."

Other specifications are set out under headings following: "Kind of Material Required," "Character and Finish of Materials," "Painting," "Inspection," "Beams," "Columns," "Riveted Girders," "Castings," "Rivets," etc.

The judgment was for plaintiff, and the defendant prosecutes error to this court.

William F. Humphrey, of San Francisco, Cal. (Lent & Humphrey, of San Francisco, Cal., of counsel), for plaintiff in error.

Seneca N. Taylor, of St. Louis, Mo., and Wright & Wright & Stetson, of San Francisco, Cal., for defendant in error.

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

WOLVERTON, District Judge (after stating the facts as above). [1] Prior to the making of the proposal and its acceptance, the parties had been in negotiation touching the subject-matter thereof in anticipation of defendant entering into a contract with the Richelieu Realty Syndicate for furnishing the iron and steel for its building and setting the same in place; and about the same time the proposal was accepted the contract for such work was entered into between these parties. The fact that such a contract was entered into has its bearing upon the question whether the alleged contract in controversy was ever legally consummated. Indeed, the specifications made part of the alleged contract are the specifications which were a part of the contract between the defendant and the realty syndicate. It is in fact conceded by the plaintiff, through its president, that the architect's original plans were incomplete at the time the alleged contract was consummated, and consequently at the time plaintiff began work fabri-

cating the steel and iron for the structure. Nor were the architectural designs for the general plan of the theater portion of the building made. The theater constituted perhaps one-half of the proposed combined office and theater structure.

Now, the strong contention of the defendant, or plaintiff in error, is that the proposal and its acceptance do not constitute a valid contract between the parties, because the drawings alluded to in the proposal were never made, nor were the specifications ever completed, and therefore there was no means of knowing or determining the character and quantity of steel to be furnished. This question is adequately raised by objections to the admission of the proposal and specifications in evidence.

The questions to be determined are whether the alleged contract is sufficiently definite and certain in its description of the materials to be manufactured and furnished, and, as it relates to quantity, whether it was susceptible of being executed in accordance with the intention of the parties. If it was, any breach in either direction would afford cause for damages.

By reference to the proposal, it will be seen that the material to be furnished is specifically described as the structural steel and iron and reinforcing steel (excepting certain items) for the Richelieu Syndicate Theater and Office Building, known as the Columbia Theater, designating its location. The specifications are even more specific in this respect. The steel construction described in these specifications is that for a new office building and theater, southeast corner Van Ness avenue and Geary street, San Francisco, Cal. The building is in plan 149x120 feet, and is 8 stories high above the sidewalk, with basement extending 20 feet 3 inches below ground. The general plan of construction is then delineated, and the kind of material required, and the character and finish thereof are specified in minute detail. So that there can be no mistake, in construing these two instruments together, touching the material to be manufactured by the plaintiff and furnished to the defendant for the construction of the theater building.

If it were not for the fact that the proposal recites that the structural material shall be in accordance with drawings furnished by Jos. D. Smedberg, and specifications also furnished by Jos. D. Smedberg, identified with certain marks, there could be no question that the general descriptions contained in these two instruments would sufficiently identify the materials to be manufactured to make the contract valid in all respects. Do these recitals render the contract indefinite?

The specifications were identified and introduced in evidence. There can be no doubt that they are the specifications alluded to in the proposal. The entire drawings for the completed building were never furnished by Smedberg. It seems to have been contemplated that Smedberg should work up the drawings for the iron and steel frame from the general plans drafted by Shea, the architect. This is apparent from the preamble of the specifications. From these general drawings the evidence shows that detail drawings for the work

were to be made in the shop and by the plaintiff, but to be approved by Smedberg.

From a construction of the proposal and the specifications as a whole, we are satisfied that it was never contemplated that the drawings to be furnished by Smedberg should have been made and completed prior to the making and acceptance of the proposal, but that such drawings should be made by Smedberg and the detail working drawings approved by him in the way of furthering the work of fabrication of the steel and iron to be furnished under the proposal. This is borne out by the stipulations contained in the proposal touching the time in which the fabricated steel and iron is required to be shipped; that is to say, from 30 to 90 days from receipt of "approved working detail drawings, signed by Mr. Smedberg."

We are of the opinion, therefore, that the drawings referred to, which were work to be furnished by Smedberg, were to state additional details touching the material to be furnished which was otherwise more comprehensively described in the contract, and we think sufficiently described so that its identification was easily and unmistakably ascertainable. It must be remembered that the proposal was to furnish steel and iron by its weight, and not to furnish any specific and predetermined pieces of given sizes and dimensions, and we believe, as previously indicated, by contemplation of the parties it was designed that the detail drawings should be taken care of in the future, and the plaintiff was to furnish the steel and iron in quantity in accordance with those details.

We are aware that the minds of contracting parties must draw together and become as one touching the subject-matter and the terms and conditions before a contract can be consummated. But in the present case that is what was done, and the purpose of the parties was defined with sufficient definiteness that there can be no mistake as to their intention touching the steel and iron to be fabricated and delivered.

[2] It is next insisted that the contract was not legally consummated because the drawings and specifications were not attached to the proposal. What we have said heretofore disposes of the proposition as it relates to the drawings. It was never intended that they should be attached to the proposal. As it respects the specifications, they were definitely and sufficiently identified by their initialing by the president of the plaintiff company. This is tantamount to attaching them to the contract, and renders the contract equally definite and certain.

[3, 4] Another objection urged is that no damage is shown under the evidence. This presents a question hardly reviewable, in view of the certificate of the trial judge settling the bill of exceptions, because it does not appear that all the testimony submitted at the trial is contained therein. Copper River & Northwestern Ry. Co. et al. v. Reeder, 211 Fed. 280, 127 C. C. A. 648, decided at this term of court. Beyond this, however, counsel presents the view that the action should have been for material sold and delivered, having reference to the 39¼ tons of steel fabricated, shipped, and delivered to the plaintiff at San Francisco, as shown by the evidence. This over-

looks the fact that the defendant breached its contract by directing the plaintiff to discontinue the further fabrication of steel and iron, and refused to allow it to proceed further in fulfillment of its undertaking. The plaintiff was not required to split up its demand, and sue in one form of action for a part and in another for a part. Indeed, if the plaintiff had sued as counsel suggest, the question might have arisen whether it thereby waived its action for breach of the contract. However this may be, there was ample testimony adduced to go to the jury upon the question of damages. Beyond the fact of the manufacture and delivery of 39¼ tons of steel and iron, there was pertinent evidence tending to show that the steel and iron contracted to be fabricated would amount to about 1,500 tons, that the plaintiff had provided for the purchase of steel in quantity to conform to this demand, and that it had made the necessary preparations in and about its mill to fabricate the entire quantity covered by the contract. The necessary data were placed before the jury presenting a question of damages for their determination. About the result as to the quantity of damages, reasonable minds might differ. But there was absolutely no question that the plaintiff, under the testimony, was entitled to some damages. So that counsel's contention on this phase of the controversy cannot be maintained.

[5] A variance is suggested between the complaint and proofs in that the complaint alleges that the agreed amount of the steel to be delivered was 1,500 tons, and that there was no proof of any contract or agreement to deliver that amount. We have already seen that there was a valid contract entered into between these parties. The exact amount of steel in tonnage was not ascertainable until the steel was fabricated and weighed. There was ample proof tending to show that the amount would aggregate about 1,500 tons. Some witnesses thought it would be much less. But there is no room for saying that the proof in this respect is a departure from the allegations of the complaint. The objection is therefore without merit.

[6] Lastly, the question is presented whether an action will lie, in view of a clause contained in the proposal for the submission of differences to a board of arbitration. The clause is as follows:

"In case any difference of opinion shall arise between the parties to this contract in relation to the contract, the work to be or that has been performed under it, such difference shall be settled by arbitration by two competent persons, one employed by each party to the contract, and these two shall have the power to name an uninterested umpire whose decision shall be binding on all parties to the contract."

This stipulation falls within the general rule laid down in Holmes v. Richet, 56 Cal. 307, 38 Am. Rep. 54, and not the exception. The general rule is, using the language of that case, that:

"An agreement to refer a case to arbitration will not be regarded by the courts, and they will take jurisdiction and determine a dispute between parties, notwithstanding such agreement."

This answers the four objections presented and insisted upon by counsel in their revised and supplemental brief, and, finding them not well taken, the judgment below will be affirmed.

SEARS et al. v. REDICK et al.

(Circuit Court of Appeals, Eighth Circuit. March 7, 1914.)

No. 3969.

(Syllabus by the Court.)

1. INJUNCTION (§ 128*)—GROUNDS — MAINTENANCE OF ACTION — SUFFICIENCY OF EVIDENCE.

In November, 1895, C. purchased a farm of 640 acres in Kansas, took the title to himself, and in December, 1895, and January, 1896, placed his wife's brother, E., who was incompetent to support his wife and family, upon it. The court below found that before closing the negotiations for the purchase a parol agreement was made between A., the daughter of E., who was a stenographer in Chicago, that C. should purchase the farm, take the title in his name, give E. and his wife a home thereon, the use of the farm and its income for their support during their lives, that A. should give up her position as stenographer in Chicago, remove to and live upon the farm with her parents, that they should manage the farm, and that she should give to them, to their needs and interests, her personal care and attention during their lives, and that at their deaths C. would convey the farm to her. The court also found that A. went to the farm in January or February, 1895, and has ever since lived there and faithfully performed her part of the contract, that her father died there in January, 1907, and that she is still performing her part of her contract and caring for her paralytic mother and the farm.

Held, the evidence sustains these findings, and the decree which enjoined the successors in interest of C. from maintaining an action of ejectment or any other claim against A. or the farm unless she fails to care for her mother was just and equitable.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 278; Dec. Dig. § 128.*]

2. FRAUDS, STATUTE OF (§ 129*)—PAROL CONTRACT TO CONVEY LAND—RIGHT TO ENFORCE.

The test of the familiar exception of a parol contract from the provision of the statute of frauds which makes a contract to convey land without a written contract or memorandum thereof signed by the party to be charged void is whether or not one of the parties to it has so changed his situation in reliance upon it that he cannot be restored to his original position and cannot be adequately compensated in damages at law so that its avoidance or breach will cause irreparable injury. If a parol contract complies with this test, it may and should be sustained and enforced in equity.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 287–292, 303, 306–308, 311, 314, 318–320, 322, 325, 326; Dec. Dig. § 129.*]

3. FRAUDS, STATUTE OF (§ 129*)—PAROL CONTRACT TO CONVEY LAND—VALIDITY.

Neither possession of the real estate nor improvements thereon under the parol contract are indispensable to its validity. They are some but not the only evidences of irreparable injury. There are others as effective, notably long and devoted service, and a radical change of occupation, location, and situation in order to render it, induced by the contract.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 287–292, 303, 306–308, 311, 314, 318–320, 322, 325, 326; Dec. Dig. § 129.*]

Appeal from the District Court of the United States for the District of Kansas; John C. Pollock, Judge.

Action by Alice Redick and others against Nathaniel C. Sears and others. From judgment for plaintiffs, defendants appeal. Affirmed.

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

Louis E. Hart, of St. Louis, Mo. (A. M. Keene, of Ft. Scott, Kan., on the brief), for appellants.

G. H. Lamb, of Yates Center, Kan., and F. H. Atwood, of Chicago, Ill. (W. E. Hogueland, of Yates Center, Kan., on the brief), for appellees.

Before SANBORN and SMITH, Circuit Judges, and POPE, District Judge.

SANBORN, Circuit Judge. This is an appeal by the successors in interest of Robert R. Clark, who died in Chicago on August 8, 1907, from a decree which enjoins them from prosecuting an action of ejectment against Alice Redick, J. R. Redick, her husband, and Fannie L. Elston, her mother, and in effect quiets the title in Alice Redick to a farm of 640 acres in Woodson county, Kan.

[1] In 1895 Robert R. Clark was a successful business man, the owner of property of the value of several hundred thousand dollars. His wife, Blanche S. Clark, was a sister of Daniel T. Elston, the father of Alice Elston, who became Alice Redick by her marriage to J. R. Redick in 1899. Daniel T. Elston had inherited a large fortune which he had squandered. His habits were convivial, and he was living in Chicago with his wife and daughter in poverty. Clark was anxious to get him away from the temptations of city life and to keep him in the country. Some years earlier Elston had lived in Woodson county, Kan., and there were several unpaid judgments against him. In November, 1895, Clark went to that county, bought for $12,800 the farm in controversy, and took the deed of it to himself. In December, 1895, he made a written contract with Elston to the effect that he would employ him as foreman for $720 per annum, and that Elston had no interest in the farm, the personal property, or crops thereon, and no right to the possession of any part of the premises, except that he was granted the use of the house thereon to live in with his family, rent free during his employment. Clark recorded the deed and this contract, furnished stock and tools for the farm, and placed Elston and his wife upon it in December, 1895, and January, 1896, where Elston lived from that time until he died on January 4, 1907, and where Mrs. Elston is still living.

In November, 1895, Alice Elston was 21 years of age, on intimate terms with her uncle and aunt, Mr. and Mrs. Clark, and frequently a guest at their home. She was a stenographer by profession and was in the employment of Lyon & Healy, music dealers in the city of Chicago, on a regular salary. In January or February, 1896, she gave up her professional employment, removed from Chicago to the farm which Clark had bought, and from that time to this has devoted her life to the care of her father and mother and this farm. She kept the accounts and made the reports to Clark of the financial operations upon the farm during the earlier years of her life there, and during the later years corresponded with and informed him about it. Her father was an incompetent spendthrift, and she labored constantly and persistently to repress his desire to spend money and run in debt, to manage the farm economically, to obtain from it a living for her parents, and to

give personal care and attention to their wants. During the last three or four years of her father's life, he was ill, and during the last year he was helpless. She nursed and tenderly cared for him during this time, and when the evidence in this case closed she was, and for many months had been, nursing and caring for her mother who was a helpless paralytic. Why did she do this? She alleged in her complaint, the defendants denied, the master and the court found, that the reason was that before closing the negotiations for the purchase of this farm a parol agreement was made between Clark and Alice Elston that he should purchase the farm, take the title to it in his own name, give to her father and mother a home thereon, the use of the farm, and the income arising therefrom for their support during their lifetime, that Alice Elston should give up her professional position, remove from the city of Chicago to and live on the farm with her parents, that they should manage and operate the farm, that she should watch and care for the interests and needs of her parents and give to them her personal care and attention during their lifetimes, and that if she did so the farm should be hers at their death and Clark should convey it to her. The master, and the court also, found that Alice Elston, now Alice Redick, had performed her part of the contract up to the time of the decree, and that if she continued to take care of her mother until her death she would have completely performed it.

The defendants complain of these findings of fact on several grounds. It is contended that the evidence does not sustain the finding that the contract was made because no witness testified that he heard it made, only one testified that he heard Clark admit it in the hearing of Alice Redick, and the testimony of that witness was inconsistent with certain letters of Alice. Alice Redick did not testify to this contract with Mr. Clark because he died before her testimony was taken and she was disqualified to do so. The evidence regarding it consists of letters of Clark and Alice written at various times during the 11 years that he lived after her service was commenced, the proof of many facts and circumstances relating to the treatment of the farm by Clark, Elston, and Alice and to her control and care of the farm and of her parents, the testimony of one witness that he heard Clark acknowledge the agreement in her presence and hearing, the testimony of two other witnesses that he told them he had made the contract with her and the testimony of five other witnesses that he informed them that the farm was to be hers on the death of her parents. Every word of the evidence on this subject which appears in the record has been carefully read, digested, and compared. No material inconsistency with the testimony that Clark acknowledged the agreement in her presence is found in her letters. On the other hand, the situation and relation of the parties when the purchase of the farm was made, their evident desires and purposes, their acts, their letters, and the testimony of the living witnesses, converge with compelling force to establish the contract. The evidence on the subject is voluminous, and no good purpose would be served by reciting it. Suffice it to say it has convinced each member of this court, as it did the master and the court below, that Clark induced Alice Elston, now Alice Redick, to give up her employment as a stenog-

rapher and the comforts, opportunities, and pleasures of the city, and to devote the best 17 years of her life to the care of an impractical spendthrift and his wife on this farm in Kansas by the offer, which he made to her and which she accepted in 1895, that he would convey the farm to her at the death of her parents if she would live with and care for them upon it as long as they lived.

It is said that the terms of the agreement are so indefinite that it may not have effect, that it does not provide what duties Alice was to perform, whether or not she was to pay the taxes on the property, whether or not she was to keep the buildings insured, whether or not she was to make the reports to Clark about the farm. But the proved contract did provide that Alice agreed to give up her position in Chicago, to live with her parents on the farm, and to take care of them as long as they lived, and that Clark agreed that as soon as they died he would convey the farm to her, and these agreements were sufficiently clear and definite to constitute a valid contract. If the agreement proved required the performance of no other duties, the payment of no taxes, and of no premiums on insurance by her then the discharge of no other duties, the payment of no taxes or insurance conditioned her right to the farm.

It is insisted that Alice Redick has not performed her part of the agreement because she did not, and Clark did, pay the taxes on the farm until he died, and in the letter which she wrote to him in December, 1905, in explanation of the fact that she had taken in her own name a policy of insurance on a barn upon the farm this sentence is found:

"I told Mr. Culver (ex county treasurer), that I just as soon it was issued in your name as it was part of agreement that we keep up taxes and insurance after first five years, when he remarked, 'Why not take it in your own name, as your uncle has informed several while here buying the place that it was for me and that by so mentioning it in policy it would make it all right.'"

But that statement is entirely too casual and indefinite to warrant a finding that it was a condition of Clark's contract with Alice Elston to convey the farm to her that she should pay the taxes on it after 1900, and it is not at all probable that it was so. He did not give to her the entire control of the money he furnished or the income derived from the farm, but left that rather to her father and relied upon her persuasion and influence over the father and her reports to him to prevent their dissipation. He made a separate written contract with her father relative to the personal property and the income to which she was not a party, and her contract was separate from that with her father and its subject was her services and her compensation, so that even if there was an agreement about the taxes it must have been dehors the agreement here in controversy, for it is improbable that Clark put this young woman on this farm without funds or the control of them and exacted of her the devotion of the best years of her life to the care of her parents whom he undertook to support, and exacted of her an agreement to pay the taxes on the farm as a part of the contract whereby he agreed to convey it to her on the death of her father and mother.

[2] Counsel for the defendants argue that the contract with Alice Redick is void under the statute of frauds because it was not in writing signed by Clark (General Statutes Kansas 1909, c. 45, § 6 [section 3838]), because she never had open and notorious possession of the farm under her contract exclusive of the possession of her father and mother, and because the evidence fails to prove that the improvements which, to the value of $1,750, the master found she had put upon the farm, were made after the death in January, 1907, of her father. Neither of these facts, however, is fatal to the contract. Counsel concede that there is an established exception to the statute which requires a writing signed by the party to be charged to sustain an agreement to convey land, under which a parol agreement, which has been partially performed by one of the parties, may be enforced in equity. But they insist that the parol agreement in this case has not been brought under the exception because Alice Redick's possession was not exclusive of her parents and because the time when she put the improvements on the place is not clearly established. Let us see.

The principle on which the exception to the statute of frauds which makes a written contract essential to a valid agreement to convey land rests, is that a court of equity will not permit the use of the statute to perpetrate a practical fraud, and the test of the exception is the answer to the question: Would the application of the statute to the parol contract inflict irreparable injury upon one who has so changed his situation in reliance upon it that he cannot be restored to his original position and cannot be adequately compensated in damages at law? If it would, the contract may be enforced in equity; if it would not, it may not be sustained.

[3] Possession of the real estate under the parol contract and improvements made thereon by the vendee are evidences, but they are neither the only nor the indispensable evidences, of such a change of situation, or of such irreparable injury. There are others as effective, and there is none more so, none that appeals to the conscience of a chancellor with more persuasive, more compelling power, than the fact that a young woman has been induced by a parol agreement to convey a tract of land to her on the death of her parents, to give up a professional position, the opportunities, comforts, and pleasures of life in a city, to live with and care for her parents and the farm on which they reside during the best 17 years of her life and during the old age, helplessness, and last sickness of her father and her mother. The value of such services cannot be satisfactorily measured in money, and, if they could be, the recovery of a large part of them would be barred by the statute of limitations Alice Redick cannot be restored to the position she was induced to surrender by the agreement to convey this land, to youth and to the opportunities, comforts, and pleasures she might have derived from the 17 years of her service. No adequate relief can be granted at law to a vendee for the avoidance of a parol contract to convey land under such circumstances. Its repudiation unavoidably inflicts irreparable injury and perpetrates a real fraud upon the vendee, and neither exclusive possession of the farm nor improvements made by her upon it are indispensable to in-

duce a court of chancery to enforce it. And this is the case that Alice Redick presents to this court. Schoonover v. Schoonover, 86 Kan. 487, 121 Pac. 485, 486, 38 L. R. A. (N. S.) 752; Svanburg v. Fosseen, 75 Minn. 350, 358, 361, 78 N. W. 4, 43 L. R. A. 427, 74 Am. St. Rep. 490, and cases there cited; Baldridge v. Centgraf, 82 Kan. 240, 244, 108 Pac. 83; Flanigan v. Waters, 57 Kan. 18, 21, 45 Pac. 56; Bichel v. Oliver, 77 Kan. 696, 700, 701, 95 Pac. 396; Edwards v. Fry, 9 Kan. 417; Baldwin v. Baldwin, 73 Kan. 39, 43, 84 Pac. 568, 4 L. R. A. (N. S.) 957.

Moreover, the proof is that Alice Redick from 1895 to the present time lived upon the farm and had all the possession of it that was consistent with the comfort of her parents, the performance of her part of the contract she had made with Clark, and the accomplishment of the object which he sought by means of his agreement with her, and that she made valuable improvements on the farm at various times while she was living upon it. On principle, in reason, and under the authorities her case falls far within the established exception to the declaration of the statute of frauds that a contract for the conveyance of land not in writing and signed by the party to be charged is void.

Finally, counsel invoke the familiar maxims that, "He who comes into equity must come with clean hands," and, "He who has done iniquity cannot have equity," and argue that a court of equity should deny her all relief because she aided in a scheme to defraud the creditors of her father. Counsel rest this argument upon these facts: When Clark bought the farm in 1895, there were unpaid judgments against Elston. Clark took and recorded the deed of it to himself and made and recorded the agreement with Elston to the effect that all the income of the farm and the personal property on it should be Clark's, that Elston should have no pecuniary interest in it, and that Elston should be Clark's foreman on a salary of $720 per annum. This agreement was made and recorded by Clark and Elston to prevent Elston's creditors from seizing the property and applying it to the payment of his debts, and, while Alice Elston was not a party to this agreement and had no actual knowledge of its terms until years after it was made, she knew before she went to Kansas that some arrangement had been made or would be made between Clark and her father to protect the farm and the personal property from her father's creditors, and after she went to Kansas she made reports to Clark for a few years of the receipts and expenditures on account of the farm and the personal property thereon with the understanding that they were made for the purpose of protecting the property from her father's creditors. Three witnesses testified that about the time Clark bought the farm he told them that Elston had about $15,000 coming to him from the estate of his mother and that he (Clark) was going to buy a ranch with it at her request and have it deeded to himself because Elston was incompetent and untrustworthy. These are all the facts, and this is all the evidence upon which the defendants rely to secure a finding that Alice Redick was guilty of the iniquity of aiding to defraud the creditors of her father. There is one unanswerable reason why they fail to establish that fact. It is that there is no evidence that Alice Redick ever knew

or heard, before this suit was commenced in 1912, of the fact, if it be a fact, that the money which Clark invested in the farm and the personal property was money coming to Elston from his mother's estate. The letters between her and Clark, and there are many of them, give no inkling of such a fact, but refer to and treat the money with which he bought the property as Clark's money, and it was a just, lawful, and wise precaution for her to do all in her power to protect this property bought, as she believed, with the money of Clark to provide a living for her incompetent father and his wife and a compensation for her long service, from the creditors of her father who had no claim upon it either at law or in equity. Moreover, she never made nor joined in any contract to defeat those creditors. There is no proof of any such intent or purpose on her part in the making of her contract with Clark. That was a mere agreement that she would render the service described in it and that on the death of her parents Clark would convey to her the farm. Under that contract Clark was bound to keep or have the farm clear of all legal or equitable claims of creditors of Elston and of all other strangers so that he could vest the title in her as he agreed. That contract was separate from Clark's agreement with Elston, and Alice Redick was not a party to that agreement and did not know its contents until long after it was made.

The truth is there is nothing in the record to sustain the claim that she was ever guilty of the intention or of the attempt to delay or defraud the creditors of her father from enforcing any equitable or legal claim they may have had against him or any legal or equitable interest in property which her father acquired or possessed, and the result is that the decree below was sustained by the evidence, was equitable and just, and it must be affirmed.

It is so ordered.

AMERICAN CAR & FOUNDRY CO. v. USS.

(Circuit Court of Appeals, Eighth Circuit. February 17, 1914.)

No. 3929.

1. MASTER AND SERVANT (§ 264*)—ACTIONS FOR INJURIES—PLEADING—CONTRIBUTORY NEGLIGENCE.

A defendant which, in pleading contributory negligence, specifically set forth in what such negligence consisted was bound thereby.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 861–876; Dec. Dig. § 264.*]

2. MASTER AND SERVANT (§ 153*)—LIABILITY FOR INJURIES—CONTRIBUTORY NEGLIGENCE.

An employé, fresh from Russian Poland, would not, in the absence of any instruction after three months' service, be presumed to know that, in loading iron on a truck, five standards should have been used on each side, though there were five holes for the standards, that a rolled plate about eight inches high should have been used against the standards instead of a piece of sheet iron three feet high, or that in piling the iron it must be held back from the side of the truck to avoid bulging; these not being matters of common knowledge.

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

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

3. MASTER AND SERVANT (§ 159*)—LIABILITY FOR INJURIES—NEGLIGENCE OF FELLOW SERVANT.

The law with reference to fellow servants is a part of the law with reference to the assumption of risk.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 318–325; Dec. Dig. § 159.*]

4. MASTER AND SERVANT (§ 201*)—LIABILITY FOR INJURIES—NEGLIGENCE OF FELLOW SERVANT.

A master is liable where his negligence, in failing to provide and maintain a safe place, contributes to the injury of an employé, notwithstanding the concurring negligence of a fellow servant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 515–534; Dec. Dig. § 201.*

Concurrent negligence of master and fellow servant, see note to Maupin v. Texas & P. Ry. Co., 40 C. C. A. 236.]

5. MASTER AND SERVANT (§ 291*)—ACTIONS FOR INJURIES—INSTRUCTIONS—CONFORMITY TO PLEADINGS.

A defendant, which specifically pleaded what it claimed constituted contributory negligence, was not entitled to an instruction that, if any act of plaintiff contributed to cause the injury, he could not recover.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1133, 1134, 1136–1146; Dec. Dig. § 291.*]

6. MASTER AND SERVANT (§ 296*)—ACTIONS FOR INJURIES—INSTRUCTIONS—CONTRIBUTORY NEGLIGENCE.

In an employe's action for injuries caused by the sides of a truck giving way and permitting iron to fall upon him, an instruction that, if any act of his in loading the truck contributed to the injury, he could not recover was properly refused, as it did not require that such act should be negligent.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1180–1194; Dec. Dig. § 296.*]

7. MASTER AND SERVANT (§ 294*)—ACTIONS FOR INJURIES—INSTRUCTIONS—NEGLIGENCE OF FELLOW SERVANT.

In an employé's action for injuries caused by iron rolling upon him from a truck, an instruction that if a fellow servant put two standards in place of five on the side of the truck, and if this caused the accident, plaintiff could not recover was properly refused, where the accident might have been caused by this in concurrence with the employer's negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1157, 1161, 1162–1167; Dec. Dig. § 294.*]

8. MASTER AND SERVANT (§ 105*)—LIABILITY FOR INJURIES—DEFECTIVE APPLIANCES.

That a turntable in an employer's plant was constructed in all respects as similar turntables used for the same purpose were usually and customarily constructed did not relieve it of liability for injuries due to defective construction.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 185–191; Dec. Dig. § 105.*]

9. MASTER AND SERVANT (§ 293*)—ACTIONS FOR INJURIES—INSTRUCTIONS.

In an employé's action for injuries claimed to have been caused by a jolt when a loaded truck was pushed from a track upon a turntable, where it was to be diverted to another track, an instruction that the absence of rails on the turntable could not justify a recovery was properly refused, as, if there were no rails, it was more important that the depression of the turntable below the rails should not be substantially greater than the width of the flanges on the wheels of the truck, and the instruction would therefore have misled the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1148–1156, 1158–1160; Dec. Dig. § 293.*]

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

10. MASTER AND SERVANT (§ 293*)—ACTIONS FOR INJURIES—INSTRUCTIONS.
In an employé's action for injuries claimed to be due to a jolt in pushing a loaded truck from a track upon a turntable, an instruction that the question was whether the turntable in its construction and make was so defective that, when the car went upon it, it fell lower, and that the jolt or jar precipitated the iron on plaintiff, and that it was for the jury to decide whether the turntable was defectively constructed, and whether, in running a heavily loaded truck upon it, it was liable to and did create a jar causing the iron to slip, did not, as claimed, authorize a finding that the turntable was defective in any particular.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1148–1156, 1158–1160; Dec. Dig. § 293.*]

In Error to the District Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

Action by William Uss against the American Car & Foundry Company. Judgment for plaintiff, and defendant brings error. Affirmed.

William R. Gentry, of St. Louis, Mo. (M. F. Watts, Edwin W. Lee, and G. A. Orth, all of St. Louis, Mo., on the brief), for plaintiff in error.

P. H. Cullen, of St. Louis, Mo. (William R. Orthwein, Thomas T. Fauntleroy, and Shepard Barclay, all of St. Louis, Mo., on the brief), for defendant in error.

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

SMITH, Circuit Judge. This was a suit for personal injuries. The defendant in error, William Uss, hereafter called the plaintiff, was born in Russian Poland, and was at the time of the trial 23 years old. When he came to this country is not shown, but he had to testify through an interpreter at the trial, as he spoke Polish. He had worked for some five months as a common laborer for the plaintiff in error, the American Car & Foundry Company, hereafter called the defendant. At first he worked in the defendant's yards, but at the end of a couple of months he was transferred to the duty hereafter described. He worked in his new place for about three months, until the time of the accident on account of which this suit is brought. The accident took place at about 9 or 10 o'clock at night. A man named Tanner was engaged in cutting iron 5 by 1⅛ inches and 30 feet long into shorter lengths, the minimum being about 2 feet and 8 inches long, with what are called shears. The plaintiff and a coemployé, Koza, were taking the iron as it came very hot from the shears and placing it upon a car or truck upon a track, and this car would then be run about 15 feet to a turntable, where it was diverted to another track and transferred presumptively to a place of further manufacture. Michael D. Conroy was the defendant's superintendent in charge of all the defendant's work in the place in question. He was on duty in the daytime. At night Charles Sindel was acting as superintendent under Conroy. Conroy swears that the shearman, Tanner, had no authority to employ or discharge employés, while plaintiff swears he had such authority. The truck in question had five holes on a side for standards, but it does

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

not appear that it ever was explained to plaintiff how many standards should be used for any given load, nor does it appear how many were usually used. Koza put up only two standards about three feet apart and placed a piece of sheet iron against them, and he and plaintiff then went to work piling the pieces of iron which had been cut by the shearman against this sheet iron. They had, either prior to any loading or at least prior to the completion of it, placed two standards upon the other side of the car. They then started with the car, drawn by a mule, for the turntable. As they drew near the latter, the mule became weary, or for some reason balked, and under direction of Tanner the men pushed the car toward the turntable, and the plaintiff went along beside the car with two blocks and put one in front of the car to prevent its passing off of the turntable, and was stooping to put the other under the rear to prevent the car from receding, when one of the standards broke or bent, and a large portion of the hot iron fell off the car onto him. At the time the front wheels were on the turntable, but not the rear wheels. It required some minutes to remove the iron from him, and he was then found badly injured from the blow and from burning. In his petition numerous grounds of negligence are alleged; but it is sufficient to say that he alleged that the defendant negligently and carelessly maintained said turntable below the level of the rails, so that the wheels of conveyances would strike said turntable and thereby jolt conveyances running on said track, and that, when said wheels and said conveyances reached said turntable, the said conveyance was abruptly jolted by the wheels thereof dropping from the straight track to the turntable, and the jolt caused the sides supporting said pieces of hot metal to give away, to the injury of the plaintiff. After some formal admissions, the answer denies the balance of the allegations of the petition, and continues: 'Further answering this defendant says that whatever injuries were sustained by the plaintiff on the occasion referred to in his petition were caused by his own negligence directly contributing thereto in this, to wit: That the plaintiff himself assisted in loading the truck or vehicle referred to in plaintiff's petition on said occasion, and negligently overloaded the same, and, while said truck was being moved, plaintiff negligently thrust a block of wood in front of one of the wheels thereof before said vehicle had stopped, and thereby caused a sudden strain to be thrown upon said vehicle and the load of iron thereon, which directly contributed to cause said load of iron to fall upon the plaintiff. Defendant also pleaded assumption of risk.

Upon the argument the company claimed the accident was due to the fact that only two standards were used in place of five; to the using of the sheet iron nearly three feet high against the standards instead of a rolled plate about eight inches high; and to the fact that the iron was piled too far over toward the side that broke, so that it bulged the standards out, while the plaintiff claims that the accident was due to the defective condition of the turntable.

[1] It must be borne in mind that the only allegations of contributory negligence are that the plaintiff assisted in loading the truck or vehicle referred to and negligently overloaded the same, and that, while

said truck was being moved, the plaintiff negligently thrust a block of wood in front of one of the wheels before said vehicle had stopped, and thereby caused a sudden strain to be thrown upon said vehicle and the load of iron thereon, which directly contributed to the injury.

The defendant, having specifically set forth in what the contributory negligence consisted, is of course bound thereby. There is no evidence that the car was overloaded. It had a capacity of 20,000 pounds, and there is no evidence that it was loaded to that capacity. Nor is there any evidence that it was negligent to place the first block before the car stopped. It quite satisfactorily appears that this was the method of stopping the car. There is therefore no evidence of the contributory negligence alleged. There is no mention in the answer as to contributory negligence in the use of two standards in place of five; to the use of a sheet iron wall in place of a rolled plate; and to the fact that the iron was piled too far over on the side on which it fell. If in fact any of these things were the cause of the accident, they would be material, but not on the question of contributory negligence in the form in which the answer was drawn.

[2] It does not appear that plaintiff had ever been instructed as to how such a car should be loaded. The mere presence of five holes in the side of the car would not necessarily admonish him that they should all be used at all times. If long pieces were to be hauled, the leverage, upon the slightest careening of the load, would have been tremendous, and, when they brought these 30-foot pieces to the shearman, it might be necessary to have five standards, while with short pieces, like those in transit at the time of the accident, two might be ample. The sheet iron used against the standards was manifestly provided by the company for some purpose, and there is nothing to show when it and when the rolled plate should be used, much less that such information had been communicated to the workmen, nor is there any evidence that they had ever been warned that in piling iron it must be held back from the side of the car to avoid its bulging therefrom. There were none of these matters common knowledge, and the plaintiff, who was a young man fresh from Russian Poland, is not to be presumed to have known after three months' service what we do not know; but the two standards were inserted three feet apart and the sheet iron placed against them by a coemployé of the plaintiff.

[3] The law with reference to fellow servants never held that the servant had imputed to him the negligence of his coemployé, but that it was not imputed to the master, and he was consequently not liable if the accident took place to one of his employés through the negligence of his fellow servant. The law with reference to fellow servants is a part of the law with reference to the assumption of risk. Northern Pacific Ry. Co. v. Dixon, 194 U. S. 338, 24 Sup. Ct. 683, 48 L. Ed. 1006. If the plaintiff was claiming because of the few standards or the use of the sheet iron instead of the rolled plate, the defense that Koza, who placed them on the truck, was a fellow servant would be complete.

[4] It was for the jury to say from the evidence what caused the accident. It said it was not the use of two standards instead of five, in the use of the sheet iron wall instead of the rolled plate, in the fact, although it was piled far over, that it would make the standards bulge,

but it was the defective condition of the turntable which caused the accident. It should be borne in mind, however, that even if this accident was in fact due to the negligence of Koza, plaintiff's colaborer, it does not follow that the defendant was not liable if the defendant negligently maintained a turntable out of proper condition, and such negligence in part caused the injury. It has been twice laid down by the Supreme Court that, if the negligence of the master in failing to provide and maintain a safe place contributes to the injury of an employé, the master is liable, notwithstanding the concurring negligence of a fellow servant of a party injured. Deserant v. Cerillos Coal Railroad Co., 178 U. S. 409, 20 Sup. Ct. 967, 44 L. Ed. 1127; Kreigh v. Westinghouse & Co., 214 U. S. 249, 29 Sup. Ct. 619, 53 L. Ed. 984.

We come now to the evidence as to the turntable. It was only five feet across and swung on a pivot in the center with four wheels or rollers under the outer side. There was no track upon the turntable. It stood necessarily somewhat below the level of the tracks approaching it and extending from it, and it was clearly necessary, if such a turntable was used, that it should be at least as much below the surface of the rails as the width of the flanges on the wheels, or they would not ride onto it with ease, otherwise the flanges on the wheels would have to climb up onto the turntable; but the evidence shows that it was not only this far below the level but there was a play allowed in the turntable, so that, when the car was in the center, it would swing on the pivot without resting or binding on the wheels or rollers. This was to avoid friction in turning the table. This was undoubtedly desirable, and the substantial question before the jury was whether the room allowed for this play was excessive. That is, was it more than reasonably necessary, and did it result in the side from which the car was coming going down upon the entry of the car to so jolt it as to endanger the safety of the load? The question is therefore one of whether there was negligence in the condition of the turntable. It was constructed so as to give down at the side where the car entered upon it from one-half of an inch to one inch and a half. Ordinarily when the car came to the turntable it was pulled on by a mule, but in this case it was started on by hand, and when the front wheels struck the near side of the turntable it went down, resulting in a very considerable jolt and the falling of the load. So far as appears, this was the first time that the plaintiff ever blocked the wheels when the car was run onto the turntable by hand. It is highly probable that, if the mule had hauled it instead of the men pushed it, it would have run on without perceptible jar or jolt. Whatever may be the fact in that connection, it appears that it never had been so jarred or jolted within plaintiff's knowledge as it was on the occasion of the accident. There was ample evidence from which the jury could rightfully find that, while it was necessary for a turntable to have some play, it had far too much, and that this caused the accident. If the failure of the defendant to exercise ordinary care to furnish safe appliances with which to work caused the accident, the plaintiff could recover, notwithstanding any negligence of his coemployé. The request for a peremptory instruction was therefore properly denied.

[5, 6] The defendant asked the court to instruct the jury that, if any act of plaintiff in loading the truck contributed to cause the injury, he could not recover. When a defendant has specifically pleaded what it claims constitutes contributory negligence, it is not entitled to such an instruction; but, not only this, the instruction did not require that any act of the plaintiff should be negligent. Of course, if the truck had not been loaded at all, no such accident could have happened. This instruction was properly refused.

[7] The third instruction asked that if Koza put two standards in place of five, and that this caused the accident, plaintiff could not recover. This instruction ignored the fact that there may be several co-operating causes of an accident, and it did not limit its effect to a case where the negligence of Koza was the sole cause of the injury. If Koza negligently put up two standards and should have put up five, and this caused the accident in concurrence with the defendant's negligence in the turntable, and but for the negligence of both the accident could not have happened, all of the elements of the instruction would be present, and yet plaintiff could recover.

The defendant sought to have the jury instructed that Tanner and plaintiff were fellow servants. That was a wholly immaterial matter, as the case was finally submitted to the jury.

[8] In another instruction asked it was sought to instruct the jury that if the turntable was constructed in all respects as similar turntables used for the same purpose are usually and customarily constructed the defendant was not liable.

It was expressly held by this court in Parker v. Cushman, 195 Fed. 715, 117 C. C. A. 71, that instructions less favorable to the defendant should not have been given at his request. That opinion was concurred in by Hook and Smith, Circuit Judges, and Marshall, District Judge. We do not say that that decision is necessarily in conflict with Canadian Northern Ry. Co. v. Senske, 201 Fed. 637, 120 C. C. A. 65, but this court, as now constituted, adheres to the decision in 195 Fed. 715, 117 C. C. A. 71, and the court below was right in rejecting this request. Wabash Ry. Co. v. McDaniels, 107 U. S. 454, 2 Sup. Ct. 932, 27 L. Ed. 605; Texas & Pacific Ry. Co. v. Behymer, 189 U. S. 468, 23 Sup. Ct. 622, 47 L. Ed. 905.

[9] Complaint is made that the court refused a request to instruct the jury that the absence of rails on the turntable could not entitle the plaintiff to recover. We do not think rails were necessary if the turntable was constructed so that it was not substantially more below the rails than the width of the flanges on the wheels; but the question was whether the turntable was so constructed that it necessarily created a serious jolt or jar when a loaded car passed on it when moved by hand power. It was the more important, if there were to be no rails, that the depression of the turntable below the rails should not be substantially greater than the width of the flanges on the wheels. It is a matter of common knowledge that the flange on a wheel is not equal to the height of the rail. This case simply required that the turntable be set higher with than without rails. The instruction asked would therefore have misled the jury.

[10] Complaint is made that the charge of the court was too broad in that, as construed, it permitted the jury to find the turntable was defective in any particular whatsoever. The particular parts of the charge referred to are as follows:

"The question at last is as to whether this turntable, its construction and its make, was so defective that, when the car loaded with iron went upon it, it fell lower, and that the jolt or jar of that car precipitated the iron upon this man. * * * If you find that the turntable was defectively constructed, and that, in running a heavily loaded car onto it, it was liable to create a jar, and that in this case it did create a jar that caused this iron to slip onto this man, then that is the question you are to decide."

We think the construction that these instructions permitted the jury to find any defect whatever is strained. These portions of the charge and others fairly submitted the case to the jury.

We find no error, and the judgment is affirmed.

PACIFIC COAST COAL CO. v. BROWN.

(Circuit Court of Appeals, Ninth Circuit. February 24, 1914.)

No. 2275.

MASTER AND SERVANT (§ 190*)—LIABILITY FOR INJURIES—NEGLIGENCE OF FELLOW SERVANT.

Conceding that, notwithstanding the statute of Washington providing that in all mines where fire damp is generated every working place shall be examined every morning with a safety lamp by a competent person and a record of such examination made, the operator of the mine is still bound to exercise such further care as the common law imposes upon him, a fire boss, one of whose duties was to make tests for gas before firing shots, was not the representative of the operator, but was a fellow servant of the miners, and the operator was not liable for his failure to make such a test before firing a shot.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 449–474; Dec. Dig. § 190.*

Who are fellow servants, see notes to Northern Pac. R. Co. v. Smith, 8 C. C. A. 668; Flippin v. Kimball, 31 C. C. A. 286.]

In Error to the District Court of the United States for the Northern Division of the Western District of Washington; Clinton W. Howard, Judge.

Action by Stanley Brown against the Pacific Coast Coal Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

Farrell, Kane & Stratton and Stanley J. Padden, all of Seattle, Wash., for plaintiff in error.

H. R. Lea, of Tacoma, Wash., for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. The defendant in error, a coal miner by occupation, brought this action in the court below against the plaintiff in error coal company to recover damages for injuries sustained

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

by him by the explosion of gas at the place in the mine where he was working, which was at breast No. 77 on the sixth level of the plaintiff in error's extensive Black Diamond coal mine, in King county, state of Washington; the complaint alleging as grounds of the action the neglect of the defendant thereto to furnish the plaintiff a safe and secure place in which to work, and, further:

"That for want of due care and attention to its duty toward the plaintiff, on or about the 17th day of September, 1910, the defendant caused Ignato Rigga, or a person of similar name, whose exact name is to complainant unknown, being then and there in the employ of the defendant as a gas tester and fire boss, and acting in due course of his employment, to ignite a fuse with the intent of blasting in said mine, in the due course of his employment as gas tester and fire boss, and at said time there was an accumulation of combustible and explosive gases in said mine, and by reason of the accumulation of said gases and by reason of the negligence, carelessness, and default of the defendant in improperly ventilating said mines, and in failing to ascertain the presence of said gases, the said gases were negligently and carelessly lighted by the said person designated as Ignato Rigga, while he was igniting the said fuse, and the gases in said mine burned and exploded and injured the plaintiff, whilst the plaintiff was in the employ of the defendant in the capacity aforesaid, and as a result of said combustion and explosion the plaintiff was greatly burned and wounded about his head, arms, and side, and had a rib broken upon his left side, as a result of a fall caused by said explosion," etc.

The answer of the company, in addition to the denials of the averments of the complaint, set up the affirmative defenses of contributory negligence on the part of the plaintiff, negligence of a fellow servant of the plaintiff, and assumption of risk, by the latter.

It appeared in evidence that the plaintiff was a young man but little past majority, and had been working in coal mines for about two years, and in this particular mine about five days, which mine was and is a gaseous one. Being such, it was, of course, the duty of the company to provide for its proper ventilation, one means of which was the erection of brattices, the purpose of which is the control of currents of air, thereby carrying away the gas. The evidence shows that a brattice was erected at the place in question 8 or 10 feet from breast No. 77, which, under ordinary conditions, was sufficient to control the air currents. The evidence in respect to the ventilation of the mine is indefinite, uncertain, and more or less conflicting.

It appears that the plaintiff, Brown, and another miner named Yeshon were put to work at the breast mentioned, in the face of which they bored certain holes, prepared the same for blasting, and then retired to a crosscut to eat their lunch; that one Righi was the fire boss of the sixth level, provided with a lamp specially designed for the detection of gas and differing in that respect from the lamps supplied the ordinary miners; and that it was the duty of Righi to make such tests before firing the shots on that level, which he only was allowed to do. Above Righi in the management of the mine was the head fire boss, from whom Righi took orders, and above him was the foreman of the mine, who in turn took orders from its superintendent, by whom the miners were employed. The evidence is that, shortly after the plaintiff Brown and his coworker Yeshon had inserted the explosives and fuses in the holes referred to and prepared them for

firing, the fire boss appeared in the crosscut where they had lunched and asked if the shots were ready, and, being answered in the affirmative, they were told to show them to him. The plaintiff replied to the effect that there was some gas there, when Righi told him, "Never mind the gas," or, "The gas is nothing," and directed that he be shown the holes, which the plaintiff and his companion miner proceeded to do. The two miners mentioned testified that Righi did not make any test with his lamp for gas, which, it appears from the testimony, was a colorless, tasteless, and odorless gas known as fire damp, while Righi testified to the effect that he did make such test. When the plaintiff showed Righi the fuse to the first shot and the latter began preparations for firing it, Yeshon left the place, but the plaintiff remained, with the result that when the first fuse was lighted by Righi the explosion occurred, inflicting the injuries for which the suit was brought.

The defendant excepted to the following instructions of the court to the jury:

"Now, if there was any neglect on the part of the defendant corporation to provide for the ventilation of the mine in which the plaintiff was at work, that is a breach of legal obligation which creates a legal liability to render compensation for the injury suffered. That is an obligation which rests upon the employer to the extent that it cannot be delegated to some one else. I mean by that the employer cannot say: 'I appoint my superintendent or my foreman to attend to that, and the failure to provide suitable ventilation is the failure of an employé—a fellow employé with the plaintiff.' The employer is not allowed to make that defense in regard to that particular duty and obligation. Whoever was placed in the position to see to the ventilation was the representative of the defendant corporation, and for the purpose of deciding the case is to be considered as the principal in the matter.

"You are instructed that the law requires that the owner, agent, or operator of a coal mine must furnish not only a reasonable safe place in which to work, but also safe appliances, and this includes the timber required with which to provide and maintain a good and sufficient ventilation to carry out dangerous gases.

"You are instructed that the duty of inspection, prevention, and removal of any accumulation of gas is imposed on the coal company. This duty is personal and cannot be delegated, and any person who for the company was engaged in an employment having as part of his duties the duty of inspection, prevention, and removal of any accumulation of gas is not a fellow servant of a coal miner with respect to the performance of that duty.

"Now, a man may be a fellow servant in the general operations of the coal mine; but, wherever he is charged with the employer's specific duty of providing for ventilation and suitable means for making the operation of the mine safe, he is not a fellow servant in the performance of those duties.

"A coal company employing such person would be responsible for all damages caused by reason of negligence in the performance of his duties in the prevention, inspection, and removal of any accumulation of gas.

"You are instructed that an employé of a coal company one of whose duties it is to test for gas in a coal mine is not a fellow servant with the coal miner so far as he is engaged in the performance of such duty."

The mine in question being a gaseous one, necessarily in working it gas was developed, of which the plaintiff, according to his own testimony, had knowledge.

It is insisted on the part of the appellant that the appellee assumed the risk of the work in which he engaged, and also that the proximate cause of the injury complained of was Righi's failure to test for gas

before lighting the fuse, and that he was the fellow servant of the appellee, for whose negligence the company was not liable.

The evidence is such that the jury might have found against the plaintiff upon the question of reasonable provisions for the ventilation of the mine, and, as the direct proximate cause of the accident was manifestly the failure of the fire boss to test for gas by means of his lamp before igniting the fuse, the real question in the case is whether the court below was right in instructing the jury as it did that he was to be regarded as the representative of the company and not as a fellow servant of the plaintiff. If the former, then manifestly the company did not furnish the plaintiff a safe place in which to work; but, if the latter, it is equally plain that the instruction was erroneous and that the judgment should be reversed.

Much reliance is placed by the appellee upon the decision of the Supreme Court of the state of Washington in the case of Costa v. Pacific Coast Co., 26 Wash. 138, 66 Pac. 398, in which it was held in effect that such a gas tester was the personal representative of the company. Under the statute of the state of Washington of 1891, that was undoubtedly so, for it provided as follows:

"The owner, agent or operator of every coal mine, whether operated by shaft, slopes or drifts, shall provide and maintain in every coal mine a good and sufficient amount of ventilation for such persons as may be employed therein, the amount of air in circulation to be in no case less than one hundred (100) cubic feet for each person per minute, measured at the foot of the downcast, the same to be increased at the discretion of the inspector according to the character and extent of the workings or the amount of powder used in blasting, and said volume of air shall be forced and circulated to the face of every working place throughout the mine, so that said mine shall be free from standing powder smoke and gases of every kind." Laws of 1891, c. 81, § 9.

There was then, therefore, in the state a statute expressly requiring all such mines in the state to be kept free from gas of every kind, which imposed upon the operator thereof the imperative duty of complying with the law. But that statute was subsequently changed by the Legislature of the state of Washington, and at the time the present case arose the statute of the state (Rem. & Bal. Code, § 7381) provided as follows:

"The owner, agent or operator of every coal mine, whether operated by shafts, slopes or drifts, shall provide in every coal mine a good and sufficient amount of ventilation for such persons and animals as may be employed therein, the amount of air in circulation to be in no case less than one hundred cubic feet per minute for each man, boy, horse or mule employed in said mine and as much more as the inspector may direct, and said air must be made to circulate through the shafts, levels, stables, and working places of each mine and on the traveling roads to and from all such working places. Every mine shall be divided into districts or splits, and not more than seventy-five persons shall be employed at any one time in each district or split: Provided, that where the inspector give permission in writing a greater number than seventy-five men, but not to exceed one hundred men may be employed in each of said splits: Provided, also, that in all mines already developed, where, in the opinion of the mining inspector, the system of splitting the air cannot be adopted except at extraordinary and unreasonable expense, such mine or mines will not be required to adopt such split air system, and the owner or operators of every coal mine shall have the right of appeal from any order requiring the air to be split, to the examining board provided for in section 7372,

and said board shall, after investigation confirm or revoke the orders of the mining inspector. Each district or split shall be ventilated by a separate and distinct current of air, conducted from the down-cast through said district, and thence directed to the up-cast. On all main roads where doors are required, they shall be so arranged that when one door is open the other shall remain closed, so that no air shall be diverted. In all mines where fire damp is generated, every working place shall be examined every morning with a safety lamp by a competent person, and a record of such examination shall be entered by the person making the same in a book to be kept at the mine for that purpose, and said book must always be produced for examination at the request of the inspector."

The requirement of the state statute, therefore, in force at the time of the present case arose, is that, in such mines as the one in question "every working place shall be examined every morning with a safety lamp by a competent person, and a record of such examination shall be entered by the person making the same in a book to be kept at the mine for that purpose, and said book must always be produced for examination at the request of the inspector," which is a far less drastic provision than that of the former act, requiring all such mines in the state "to be kept free from gas of every kind."

Conceding that, notwithstanding this specific provision of the Washington statute requiring the examination every morning by a competent person with a safety lamp of every working place in such mines and the entry in a book kept for that purpose of the result of such examination, the operator is still responsible for such further care as the common law imposes upon him, that law does not make of such an employé as Righi, in the instant case, the representative of the master; for certainly, under that law, in view of the ruling of the Supreme Court of the United States in the case of Alaska Mining Co. v. Whelan, 168 U. S. 86, 18 Sup. Ct. 40, 42 L. Ed. 390, and other decisions of that court there referred to, he must be regarded as the fellow servant of the plaintiff. See, also, the decision of this court in Davis v. Trade Dollar Mining Co., 117 Fed. 122, 54 C. C. A. 636; Browne v. King, 100 Fed. 561, 40 C. C. A. 545; and What Cheer Coal Co. v. Johnson, 56 Fed. 810, 6 C. C. A. 148.

It results that the judgment must be and is reversed, and the cause remanded to the court below for a new trial.

RIVERSIDE TP. v. STEWART.

(Circuit Court of Appeals, Third Circuit. February 16, 1914.)

No. 1789.

1. TOWNS (§ 62*)—CLAIMS—PRESENTATION TO TOWN BOARD—NECESSITY.

Act N. J. April 4, 1871 (P. L. 92), providing that it shall not be lawful for the board or council of a town or the commissioners of a county, etc., to pay or disburse public moneys to any person unless he shall have first presented a detailed bill or items or demand specifying how such bill or demand is made up, and the dates and the names of the persons to whom the amounts composing the bill were severally paid, with affidavit, etc.,

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

has no application to a disputed claim against a town for money due under a sewer construction contract.

[Ed. Note.—For other cases, see Towns, Cent. Dig. §§ 105–109; Dec. Dig. § 62.*]

2. EVIDENCE (§ 445*)—PAROL EVIDENCE—TOWNSHIP BOARD—MINUTES.

Where a township board at a regular meeting granted a sewer contractor who was present an extension of time, but the clerk, acting under directions, did not record the extension in the minutes, but at once made a note on the calendar so as to refer to it when the extension had expired, the contractor having acted under the extension was entitled to prove the same by parol in defense of a claim by the town for a penalty for delay.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2052–2065; Dec. Dig. § 445.*]

3. TOWNS (§ 24*)—ACTS OF TOWNSHIP BOARD—FAILURE TO RECORD.

Rights of a third person dealing in good faith with a municipality cannot be prejudiced by the omission of the township board to record a corporate action properly taken.

[Ed. Note.—For other cases, see Towns, Cent. Dig. §§ 34, 35; Dec. Dig. § 24.*]

4. TOWNS (§ 42*)—PUBLIC IMPROVEMENTS—EXTRAS—CONTRACT—WAIVER.

A provision of a municipal sewer contract that the contractor, in order to receive payment for extra work, must present a bill for extras accompanied by an order in writing from the engineer and the township committee, etc., was one which the township could waive and was waived by direction of the township committee and the engineer, and the contractor at a regular meeting was directed to proceed to include the extras; they saying that "their word was as good as their contract."

[Ed. Note.—For other cases, see Towns, Cent. Dig. § 77; Dec. Dig. § 42.*]

In Error to the District Court of the United States for the District of New Jersey; John Rellstab, Judge.

Action by James F. Stewart against the Township of Riverside. Judgment for plaintiff, and defendant brings error. Affirmed.

G. Dore Cogswell and Gaskill & Gaskill, all of Camden, N. J., for plaintiff in error.

Bleakly & Stockwell, of Camden, N. J., for defendant in error.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below, the plaintiff, James F. Stewart, a citizen of Pennsylvania, brought suit against the township of Riverside, a corporate citizen of New Jersey, to recover a balance alleged to be due for the construction of a sewerage system for the township under a written contract and for certain extra work in addition. The case virtually involved proofs as to the whole contract, and the taking thereof occupied two weeks. The court, with the aid of counsel, then systematized the evidence, preparing tables showing what items were conceded, what were in question, and, when in question, the respective contentions of the parties. In this way the court in its charge started with a balance of $9,683.83 in favor of the plaintiff based on a final estimate of the engineer made April 15, 1910.

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

To this were added 12 items of conceded extras aggregating $134.44, shown in schedule A. In addition to this, the plaintiff claimed $1,-084.57 for extra items shown in schedule B, which defendant contended were foreclosed and eliminated by the measurements and estimates of the engineer. The plaintiff also claimed $484.70 for materials furnished, shown on schedule C, concerning which the only dispute was as to the price. The plaintiff also claimed $7,633.75 shown in schedule D, which was for extra work not covered by the contract. It will thus be seen the aggregate of the plaintiff's claim was $19,-020.79. On the part of the defendant it was contended, inter alia, that plaintiff had never completed the contract and was not entitled to maintain his action by reason thereof, and by reason of the further fact that he had not, before suit brought, presented his claim, verified, by affidavit, to the township authorities. As to the extras, the township defended on the ground that they were not authorized in writing as provided by the contract. The township further claimed to offset plaintiff's claim by $10,725, being for the plaintiff's alleged delay of 429 days at the rate of $25 per day, the sum stipulated in the contract for delay in completing the work. The defendant also claimed a credit of $395.94, being the difference between $1,257.94, which the defendant claimed, and $862, which plaintiff allowed and credited for certain articles supplied by defendant. The defendant also claimed $2,352.87 for certain sand, which sand each party averred the other was bound to furnish. Against the imposition of the penalty of $10,725 the plaintiff defended on the ground that such delay as there was, was not a delay of anything provided for in the contract, but grew out of the extra work the defendant authorized, and that the defendant duly authorized an extension of the contract date of performance. The jury found a verdict for plaintiff of $13,630. On entry of judgment thereon for such sum, with interest, in all $15,-470.39, defendant sued out this writ.

Under the charge of the court, the facts of the substantial performance of the contract by the plaintiff, that the extras were ordered by the township committee, in their corporate capacity, that they waived the contract requirement of written authorization and also waived and extended the contract date of performance, have all been settled in favor of the plaintiff by the verdict. The writ of error raises, however, certain questions of law to which we now turn.

[1] The first question challenges the right of the plaintiff to maintain this suit. The New Jersey Act of April 4, 1871 (P. L. 92), provides:

"That it shall not be lawful for the board of chosen freeholders, or the township committee, or common council, or commissioners of any county, city, township, town or borough in this state to pay or disburse out of any of the moneys of the said county, city, or town, or township, or borough, to any person, unless the person claiming or receiving said moneys shall first present to the party or parties paying any such moneys a detailed bill of items or demand, specifying particularly how such bill or demand is made up, and the dates and the names of the persons to whom the amounts composing such bill or demand were severally paid, with the affidavit of the party claiming payment of said bill or demand that the same is correct, that any disbursing officer is authorized to take said affidavit without cost."

It is conceded that Stewart presented to the township no verified statement of his claim before suit. The proofs show that prior to suit the township denied it owed him anything and indeed claimed to recover a large sum against him. The contention of the defendant that this action would not lie the court below denied, saying:

"The manifest purpose of the statute, viz., the enjoined payment of moneys without sworn proof of the correctness of the claim in detail, does not contemplate a case where the plaintiff's claim is totally repudiated, and he is relegated to an action at law to prove it, wherein sworn proof of his claim in detail is necessary to reduce it to judgment."

We find no error in the court's so holding. Clearly this act was meant to create certain statutory requirements in the absence of which municipal boards could not pay public money to any one. It was meant to cover cases where the money was being paid, to forbid its being paid until these statutory prerequisites were observed, and "to protect the body that audits its bills by giving them the protection of a sworn claim." Wahl v. Atlantic City (N. J.) 85 Atl. 1024. The purpose of that statute to prevent improper municipal payments, and the mischief it was meant to prevent, had no application where such municipality was not only refusing to pay but denying liability. No reason is now suggested why a person, payment of whose claim is contested, should, in order to enable him to sue, be required to present a verified statement thereof to the municipality. This holding has the support of Downie v. Passaic, 54 N. J. Law, 223, 23 Atl. 954, where the Supreme Court held that:

"The statutory prohibition seems to be applicable when a claim is undisputed; a verification of an account can serve no useful purpose when the debt is wholly repudiated and the creditor is obliged to prove the justice of his demand in a court of law."

[2, 3] The next question refers to the admission of oral testimony which, it is alleged, wrongfully was allowed to supply or vary the recorded minutes of the township. Briefly stated, it appears that, Stewart having been directed to do some extra work not provided for in the contract, evidence was admitted to show that at a regular meeting of the township board, the board, by corporate action, granted Stewart, who was present, an extension of time. The evidence further tended to show that acting under directions the clerk did not record such action of the committee in the minutes, but at once and by direction made a note "on the calendar, July 26th, so as to refer to it when the six weeks had expired." The plaintiff having acted thereunder, and there being no question of the good faith of all parties in the matter, we think the court committed no error in admitting testimony to show that proper corporate action had been taken to extend the time. That the rights of a third person dealing in good faith with a municipality cannot be prejudiced by omission of that body to duly record corporate action taken is well settled. Bank v. Dandridge, 12 Wheat. 64, 6 L. Ed. 552; United States v. Fillebrown, 7 Pet. 28, 8 L. Ed. 596; Bigelow v. Perth Amboy, 25 N. J. Law, 297; Calahan v. The Mayor, 34 App. Div. 344, 54 N. Y. Supp. 279; 2 Dillon on Municipal Corp. (5th Ed.) § 557.

[4] The next question concerns the right of the plaintiff to recover for extras not covered by the contract and for which the plaintiff produced no written order signed by the engineer and the township committee. In that regard the contract provided that the plaintiff should not be entitled "to receive payment for any extra work as extra work unless such bill for extras be accompanied by an order in writing from the engineer and said township committee, who shall fix the price for such work." The court admitted proof which tended to show that at regular meetings of the township committee, and acting as such the committee, the engineer and the plaintiff fully discussed and considered such extra items and work, and the plaintiff was then directed to proceed with them; they saying "their word was as good as their contract." That a contract requirement such as here provided may be subsequently waived by the parties is established by the authorities. Headley v. Cavileer, 82 N. J. Law, 635, 82 Atl. 908; Kilby v. Hinchman, 132 Fed. 960, 66 C. C. A. 67. The court therefore was not in error in admitting testimony tending to show such waiver.

Without entering into a detailed discussion of the other questions raised and ably argued by counsel, we content ourselves with saying that they have all been duly considered, with the result that we find no sufficient reason for disturbing this judgment, which was reached after a patient and protracted trial and subjecting the parties to the expense, delay, and labor of another trial.

The judgment below is affirmed.

MORRIS et al. v. GLOBE NAVIGATION CO.

(Circuit Court of Appeals, Ninth Circuit. February 2, 1914. Rehearing Denied March 10, 1914.)

No. 2267.

COLLISION (§ 95*)—STEAM VESSELS—FAULT.

A collision at night in the Carquinez Straits between a steamship and a tug with a barge loaded with stone on her side *held*, on the evidence, due solely to the fault of the tug in giving a passing signal of one whistle and going to starboard across the course of the steamship, which was then on her starboard side.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 200–202; Dec. Dig. § 95.*]

Appeal from the District Court of the United States for the First Division of the Northern District of California; John J. De Haven, Judge.

Libel in admiralty for collision by the Globe Navigation Company against the steam tug Ada Warren; Daniel E. Morris, Louis A. Lloyd, and J. A. Maguire, trustees of the Warren Improvement Company, claimants. Decree for libelant, and claimants appeal. Affirmed.

Louis T. Hengstler, of San Francisco, Cal., for appellants.

William Denman and Denman & Arnold, all of San Francisco, Cal., for appellee.

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

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

ROSS, Circuit Judge. About 4:30 a. m. of October 11, 1906, a collision occurred between the steamship Meteor and the tug Ada Warren having in tow a barge loaded with rock, resulting in damage to the ship, to recover which the present libel was brought. The trial court found the tug solely in fault and gave judgment for the libelant, to reverse which the claimants of the tug brought this appeal.

It is conceded that at the time of the collision the captain of the tug was asleep and did not come on deck until after it had occurred. The tug was at the time in charge of a pilot named Oden, and there was also on it as lookout a seafaring man who seems to have disappeared; at all events, he was not produced as a witness by either party. There was also on the tug as a passenger a man named Miller, who, it appears, had had many years' experience at sea, but who seems from the record to have then had some connection with the rock company. The collision occurred at a point somewhere in the Carquinez Straits. In the appellants' answer to the libel it was, among other things, alleged as follows:

"That, on the 11th day of October, at the hour of about half past 4 o'clock a. m., the tug Ada Warren, with a barge heavily laden with rock lashed to her starboard side, was about to enter the Straits of Carquinez, proceeding in the direction from San Pablo Bay. That just as she was rounding a point near the place called Oleum, and entering the said straits, a red light was seen a little to starboard by those in charge of and navigating said tug, which red light proved to be the port light of the steamship Meteor, coming down the stream at a considerable rate of speed. The tug Ada Warren thereupon blew one whistle to indicate her intention to go to the starboard of said approaching vessel and ported her helm. That, in the moment when said signal was given and said maneuver executed, it appeared to those in charge of the tug that but for said maneuver the fast approaching vessel of large size would strike the tug or her barge amidship and probably sink them or one of them. That said signal of one whistle was not answered by said steamship, but after a short interval of time two whistles were heard coming from said steamship, and simultaneously she showed her green light in close proximity. A collision then appearing impending and almost inevitable, the officer in charge of the watch on the tug, in order to ease the blow which he expected the tug and her barge to receive, gave three whistles and signaled to the engineer of said tug to reverse, full speed astern. Immediately thereafter the steamship and the barge came together. That, owing to the excessive speed of said Meteor in the locality where said vessels met, and to her failure to respond to and act upon the signals of the Ada Warren, and to the change of the Meteor's course to her port, the collision between the two vessels occurred in spite of the effort of the tug to keep out of the way of said steamship; and that by the fault of said steamship Meteor, her officers and crew, the said tug and her barge, together with the cargo of said barge, suffered severe damage, and that the damage so received amounted to not less than the sum of ——— dollars."

Subsequently the answer was amended by striking therefrom the clause reading:

"That said signal of one whistle was not answered by said steamship, but after a short interval of time two whistles were heard coming from said steamship, and simultaneously she showed her green light in close proximity."

The answer was verified by D. O. Church, secretary of the Warren Improvement Company, who, in his verification, stated:

"That the source of deponent's knowledge in the premises is information received by deponent from the master and pilot of said steamship Ada Warren, and that deponent verily believes the same to be true."

As has been said, the lookout on the tug was not called by either party; nor was the pilot, Oden, in respect to whom the record shows that the proctor for the claimants stated to the trial court that he requested Church to find Oden, and, after having done so:

"That then we had a conference with reference to Oden, and went carefully over his testimony given before the local inspectors. I am sorry to say that that testimony, which was taken on two different dates, shows that he seems to have changed his mind between the first date and the second date, for some unaccountable reason, so that we cannot call him as a trustworthy witness. After Saturday we gave up the attempt to find him and call him as a witness. That is the unfortunate predicament we are in in this case, if your honor please. We shall have to rely entirely, outside of the evidence given by Capt. Hammer with reference to the locality and the circumstances surrounding this occurrence, upon the evidence as it appears in the depositions on the other side."

The record shows that at the time in question the Meteor was going down the straits from Port Costa at about eight knots an hour, and that the Ada Warren with the barge lashed to her starboard side was proceeding up the straits bound for Suisun Bay. The night was clear, and a strong tide running, which of course lessened the speed at which the ship was going. Her master was examined as a witness, and his testimony is, in part, substantially as follows:

That he first saw the tug about a point and a half off the port bow of the Meteor, first seeing her upper masthead light, then the lower one, and a green light. That the green light seemed to be proceeding across the straits, but he was not able to determine whether the tug was going directly across or at an angle, although he thought she was bound for South Vallejo. That when the two vessels were about 1,000 feet apart the green light of the tug crossed the bow of the Meteor from port to starboard until it could be seen probably one-quarter of a point on the starboard side of the ship, and that then the Ada Warren showed both red and green lights and blew her whistle. That up to that time the Meteor had held her course and speed, but then answered with one whistle, and her wheel was at once brought hard aport, and seeing that a collision was imminent she blew three whistles and was started full speed astern, the effect of which was to swing her bow to starboard. That the Ada Warren never gave any other signal than the one whistle. That the starboard bow of the barge struck the Meteor about 35 feet aft of her port bow, inflicting the injury for which the libel was brought.

It is earnestly insisted by the appellants' proctor that the testimony of the Meteor's master is in direct conflict with an affidavit made by him on the 12th of October, 1906, which is printed in the transcript and which it is insisted on behalf of the appellants this court should consider for the reason, as is said, that they were not aware of its existence in time to have introduced it in evidence on the trial or to have

called it to the attention of the master at the time of his examination as a witness.

A perusal of the affidavit shows that in it the master (McFarland) states that, when he discovered the green light of the tug off the port bow of the Meteor, it was about 1½ miles distant, whereas in his testimony he gives the distance as approximately 3 miles; but upon the important points in the case we do not discover the positive conflict between his affidavit and testimony that the appellants' proctor insists exists. The substance of his testimony upon those points has already been stated, and upon the points referred to the affidavit is as follows:

"That having the right of way, under the local rules, the Meteor held her course. Both vessels continued until seeing that the other vessel was not changing her course, as she should have done, and seeing there was danger of collision, the deponent started to put his helm to starboard to change his course to port to avoid collision, and had started to blow his whistle to give notice to this effect, when suddenly the other vessel, which subsequently proved to be the tugboat Ada Warren with barge alongside, blew one whistle and changed her course, showing a red light. (At this time of changing his course when he started to give two blasts of his whistle, the deponent had already pulled the whistle cord and a short blast had been given before the change of course of the Ada Warren was noticed.) Immediately the red light was seen, the engines were ordered full speed astern and three short blasts given to indicate this procedure. The Ada Warren seemed to continue on her course, and within about two minutes struck the Meteor on the port bow, doing considerable damage to the Meteor and sustaining damage herself. That at the time of the collision, in the opinion of the deponent, the Meteor had practically lost her headway. That at the time of the collision Second Officer Look and Quartermaster Harry Johnson were on the bridge with the deponent."

The appellants' proctor insists that the master in his affidavit states that the Meteor was the first of the two vessels to blow one whistle. We do not so understand the affidavit. The statements in it are confused, but what we think the master does therein state is that, having the right of way, the Meteor held her course, and, seeing that the tug was not changing hers and that there was danger of collision, he "started" to put his helm to starboard to change his course to port in order to avoid collision, and had "started" to blow his whistle to give notice to that effect when suddenly the tug blew one whistle and changed her course, showing a red light. He then states in the affidavit that he gave a short blast before he noticed the change of course of the Ada Warren. This is by no means saying that the Ada Warren had not before that blown her whistle. His testimony, as has been seen, is positive to the effect that the tug first blew the one whistle, and in that respect, as in others, the master of the Meteor is corroborated by the positive testimony of the only disinterested eyewitness to the accident—Miller, the passenger on the tug. And the master's testimony to the effect that the tug blew the first one blast is somewhat corroborated by the finding of the local inspectors as to what the pilot of the tug testified before them, which finding is in the record (although the testimony of the pilot is not) and is as follows:

"We also find from the evidence taken in the above-entitled matter that the tug Ada Warren was in charge of Pilot William T. Oden, at the time of the collision; and we are satisfied that he was negligent in navigating said vessel on that occasion, inasmuch as he violated rule III of the Pilot Rules for At-

lantic and Pacific Coast Inland Waters, in not blowing four blasts of the steam whistle, when, as he testified, the Meteor blew two blasts of the whistle after the Ada Warren had blown one blast."

It will be seen from this finding that the Pilot Oden testified before the local inspectors that the Ada Warren had blown one blast before the master of the Meteor blew two to give notice of his intent to change his course to port.

Apart from this, we find positive confirmation of the master's testimony in the following portions of that of the only disinterested eyewitness to the occurrences in question:

"Q. Did you, going up the stream, at any time see a steamer coming down the stream? A. Yes, sir.

"Q. Was that the steamer that run into you? A. Yes, sir; it was this way—

"Q. One moment. Whereabouts was the steamer with reference to the channel; not with reference to your vessel, but with reference to the channel of the Carquinez Straits, when you saw her? A. I was in the towboat, and I went over to the barge, over here. The towboat blew one whistle. I stepped on the lower boxes and looked over the boxes.

"Q. Was it necessary for you to look over the boxes? A. Yes, sir; certainly; I could not see. I had to step over so that I could see what was going on.

"Q. On which side of the boxes were you? A. Right amidships.

"Q. On the port side? A. I was right in amidships of the barge, and stepped on the boxes and looked right ahead.

"Q. Were you standing on the port or starboard side of the barge? A. I was standing right in the middle of the barge.

"Q. On the port or starboard side? A. Right in the middle of the barge.

"Q. In which direction did you look to see the steamer, port or starboard? A. Starboard bow. I could see the steamer about half a point from the bow. When I was on this lookout I sang out: 'She is about half a point on the starboard bow.'

"Q. This was just after you heard this one whistle? A. Yes, sir; that is all I noticed, one whistle that they blew. I came down again, and think everything was all right, and I took a tumble to myself that there might be a mistake, and I went outside the boxes on the barge on the starboard side and I looked to see where the steamer was, and there came the steamer right across the channel—that big steamer. It came right across. I think I says, 'He run into us.' I jumped on board of the tow, and it throwed me down on deck.

"Q. From the force of the collision? A. Yes, sir; it throwed me right down on deck when the towboat was going.

"Q. After the time that you heard the one whistle, did you see anything that went on in the pilothouse of the tugboat? A. No, sir; I can say nothing from that.

"Q. What direction was the course of the steamer changed, the steamer that was approaching you? From what direction to what direction? A. He changed to the east. Here is east and there is west (illustrating). No, here is west and this is east.

"Q. In one moment. In what direction, considering the starboard and port side of the steamer, did she turn to her starboard or port side? A. She turned to her starboard side.

"Q. After that the collision occurred? A. Yes, sir.

"Q. What point of the barge was hit? A. Just on the corner of the barge.

"Q. Starboard or port corner? A. The starboard corner. The big steamer went across us. I was standing outside of the barge and I expected to see the barge go right through.

"Q. Let me ask you: When you saw the vessel approaching on your starboard bow, if you had continued on the course you were on, would you have cleared her? If the tug and tow had continued on the course you were on when you saw the vessel on the starboard bow, would you have cleared her?

"Mr. Hengstler: I object to that question.
"The Court: Let him answer.
"A. Yes, sir; I believe it. He was blowing no whistle; he blew one whistle, and the big steamer changed his course and went across us. The barge did not change its course at all. I cannot say that—nothing about that. The big steamer changed and came across.
"Mr. Denman: Q. As I understand it, at the time that you saw the big steamer coming down the channel the vessels would have cleared if you had kept on your courses. A. Yes, sir.
"Q. Was that because the steamer was sufficiently on your starboard bow to clear you? A. If our towboat only blew two whistles, he would have been all right. The tug only blew one whistle, and that was the cause of the accident; the big steamer run into us. I told that to the captain of the tugboat right there. He wanted to know my name. I said, 'Captain, you only blew one whistle, and you might as well leave me out altogether.'"

We are of the opinion that the evidence in the case does not justify us in setting aside the findings of fact made by the trial court. And as it appears that when the lights of the tug were first seen by the master of the ship the vessels were on crossing courses, we are further of the opinion that the court below was right in holding, as it did, that as the tug had the ship on her starboard bow it was the duty of the tug to keep out of the way, and that it was clearly in fault in crossing or attempting to cross the bow of the privileged vessel, under the circumstances of the case. See The Delaware, 161 U. S. 468, 16 Sup. Ct. 516, 40 L. Ed. 771; The George S. Shultz, 84 Fed. 508, 28 C. C. A. 476; Hughes on Admiralty, § 130.

We also think that we would not be justified, in view of the evidence, in interfering with the findings of the commissioner, approved by the trial court, in respect to the amount of damages, demurrage, and insurance premium allowed the libelant.

The judgment is affirmed.

HOWARD et al. v. CITY OF NEW YORK.

(Circuit Court of Appeals, Second Circuit. January 13, 1914.)

No. 115.

COLLISION (§ 42*)—STEAM VESSELS CROSSING—FAILURE TO KEEP COURSE.

A decree affirmed which found, on conflicting testimony of many witnesses who testified in open court, that libelant's steam lighter was solely in fault for a collision with a city ferryboat in Buttermilk Channel on the ground that, the vessels being on crossing courses with the lighter, the privileged vessel, she did not keep her course nor conform to the crossing agreement made with the ferryboat.

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

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

Suit in admiralty for collision by Harold M. Howard and A. F. Howard, copartners and owners of the steam lighter Howard Company, against the City of New York. Decree for respondent, and libelants appeal. Affirmed.

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

The following is the opinion of Hand, District Judge, in the lower court:

In this case the facts are that the Bay Ridge always carried the Howard Company on her starboard bow; and, when the vessels first sighted each other, the Howard Company had the Bay Ridge on her port bow. While in that position, therefore, the Bay Ridge was the burdened vessel and the Howard Company, the privileged. I conclude, amid the dispute in testimony, that before the collision occurred the Bay Ridge had crossed the Howard Company's bows, and the situation covered by the starboard hand rule had disappeared. My reason for thinking this is that all the witnesses except Hull, Rogers, and Hansen placed the vessels on passing courses starboard to starboard at the time the whistles were blown. Hull and Rogers are witnesses whose testimony has little weight with me; Hull, both from his appearance and his contradictory statements, Rogers because he seemed so strangely addled in everything he said and because he talked so much at random. Hansen was a good witness, but I think his observation must yield in this case to that of other witnesses. E. F. Lewis originally put the vessels on passing courses starboard to starboard, but drew a different diagram upon the trial. I accept his first statement. Moreover, the testimony is almost unanimous that the Bay Ridge was in about midstream, favoring the Brooklyn shore, while the Howard Company had passed close to the buoy and not moved very far in the same direction.

I believe that the probability is it was the Howard Company which ported her helm and subsequently in extremis starboarded, and not the Bay Ridge. The Bay Ridge was angling upon the Brooklyn shore, and her course was divergent at least two points, and probably more than that from that of the Howard Company; she was much the faster vessel, and once she got upon the bows of the Howard Company, it was not possible for their starboard sides to come in contact, unless one or the other ported markedly. I think that the Bay Ridge at that time meant to cross the Berwind's bows, a boat substantially dead in the water; had she meant to go under her stern, she would have involved herself not only with the Howard Company, but with the Major, which she had already seen. Her course therefore took her continuously away from the Howard Company, once she steadied her helm after rounding Governor's Island, and there was nothing to induce her to change that course. It is quite true that a number of disinterested witnesses say that it was the Bay Ridge which ported into the Howard Company and not the Howard Company which ported into the Bay Ridge, and that of these witnesses the men on the Berwind's tugs, who were themselves substantially still in the water, were in good position to tell which vessel was moving. On the other hand, it is very likely they were misled by the undoubted fact that the Bay Ridge ported two or three points when opposite the end of Governor's Island to lay out a new course across the Berwind's bows. Men in the position of the Berwind's tugs or of Hansen saw the distance from them in perspective, but the distance between the Bay Ridge and the Howard Company lineally, and they might well mistake this porting for the cause of the collision, which it certainly was not. As to the respondent's two passengers who swore that it was the Howard Company which swung into the Bay Ridge and not the Bay Ridge which swung into the Howard Company at least they had the advantage of being at the very spot, and Swackhamer, the other impartial witness, was nearer than the libelant's witnesses unless it be Hansen. Again, if any credence is to be given to interested witnesses, the Bay Ridge is in a much stronger position than the Howard Company.

But the chief thing upon which I rely in determining which vessel ported into the other is the difference in the apparent poise and character of the men at the wheel and the difference of readiness to answer to the emergency of each vessel. My impression of the general feebleness of the Howard Company's mate was strongly corroborated by his conduct at the time of the collision, his aimless rolling of the wheel back and forth, which is amply attested, and his failure to stop his boat until the very moment of collision. Whether or not he actually ported during that time I cannot know, but that he might have done anything seems to me amply proved. On the other hand,

I am sure that the Bay Ridge had been much more prompt to avoid collision, and that she had backed at the time of the collision long enough to kill her way in the water. The position of the wreckage requires the conclusion that the Howard Company ran into the Bay Ridge and not the Bay Ridge into the Howard Company. This suggests that the care and the watchfulness was on board the Bay Ridge. I am inclined to believe the story of Bunce that when he first blew all was well, but that when he looked again the Howard Company had turned in upon him. At least I am satisfied that the Howard Company has not carried the burden of proof on this point.

Next is the question of the lack of a lookout on the Howard Company. These were very crowded waters, and there was only one man to do everything which might be necessary, and that man quite lost his head in the emergency. Certainly it was a fault not to leave more than one man on deck or in the pilothouse at the time (The Gilchrist, 183 Fed. 105), and I cannot say that the fault did not contribute to the collision. I believe that had the Howard Company put her helm hard a starboard at once upon answering the two blasts, or, if she had backed at the same time, she would probably have avoided the collision.

This brings up the final question which is of the alleged fault of the Bay Ridge in waiting so long before giving her first signal. There is a good deal of dispute about this, but I think it quite clear, especially from Bunce's original statement that the vessels were very near together, say not over 500 feet, when he blew. This was too short a time to allow and did not fairly comply with the rule which requires a reasonable time, certainly more than the 20 seconds, which Bunce allowed. Can I say that this certainly did not contribute to the collision? I have found that there is no adequate ground for supposing that the Bay Ridge sheered to starboard, but now the burden of proof is upon the Bay Ridge and not the Howard Company. Nevertheless, I believe that it was the Howard Company that sheered, not the Bay Ridge, even when the burdens are changed, and, if so, then how could the failure of the Bay Ridge to blow sooner affect the result? The collision was caused by the fault of the Howard Company in porting when she should have starboarded, and certainly that was not caused in any way by the failure to blow the signal sooner. The only theory I can think of is that it was the delay in the signal which confused the pilot and made him swing in when he should have swung out, but that was not a result to be anticipated. If the delay had prevented the Howard Company from doing what she otherwise could have done to avoid collision, then the delay would have contributed; but, if it was the occasion for needlessly doing the exact opposite of what was necessary to avoid collision, then it should not be attributed as a fault to the Bay Ridge.

Besides, this is a case where the fault, as I view the facts, are disproportionate, and I need not speculate too nicely about the results of failing to blow sooner.

The libel will be dismissed, with costs.

This cause comes here upon appeal, holding the steam lighter Howard Company solely liable for a collision between herself and the municipal ferryboat Bay Ridge. The collision occurred somewhat to the northward and eastward of the black spar buoy in Buttermilk Channel at the southeastern side of Governor's Island. The facts are sufficiently stated in the opinion of the District Judge.

Carpenter & Park, of New York City (Samuel Park, of New York City, of counsel), for appellants.

Archibald R. Watson and Carter, Ledyard & Milburn, all of New York City (Walter F. Taylor and J. M. Richardson Lyeth, both of New York City, of counsel), for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

PER CURIAM. The Howard had no lookout, but as her navigator saw the Bay Ridge as soon as a lookout would—in ample time for ex-

changing signals and for safe navigation—we cannot see that such fault had anything to do with this collision.

When the first signals were blown, the boats were either substantially head to head, or on crossing courses. The District Judge found that they were on crossing courses. In such a position with the Howard on the starboard hand of the Bay Ridge the propriety of the suggested departure from the rules (a departure acceded to by the Howard) depended on the relative positions of the boats. If the positions were such that the Bay Ridge would cross the Howard's bow before reaching the point of intersection, the two-blast signal proposed a safe mode of passing. As to the position and heading of the two vessels at the time of interchange of signals there is a sharp controversy on the proofs.

As the finding of fact reached from the testimony is one way or the other, the conclusion of law, fault, or no fault in signaling by the Bay Ridge, follows. The findings of Judge Hand on this branch of the case, on conflicting testimony, we are not inclined to reverse.

The testimony suggests that there was a change of course contrary to the promise of the exchanged signals: (a) By one vessel; (b) by the other; or (c) by both.

Which changed her course contrary to the exchanged signals is a disputed question of fact, with much testimony on both sides.

The District Judge had the witnesses all before him, participated in their examination and, as his opinion shows, was influenced towards his decision by their several personal equations—which was quite natural. He found that, if, when their signals were blown, both had kept their courses (still more if both had starboarded as their signals promised) they would have passed safely. He also finds that the Bay Ridge did not sheer to starboard, but that the Howard did sheer to starboard. We cannot persuade ourselves that all these findings of the District Judge are so clearly wrong (the evidence is from many witnesses and greatly conflicting) that we who have had no opportunity to really weigh the evidence of individual witnesses should reverse him on his findings of fact. Upon those findings, the conclusions as to the faults alleged are correct.

Decree affirmed, with costs.

PITTSBURGH RYS. CO. v. GIVENS.

(Circuit Court of Appeals, Third Circuit. March 30, 1914.)

No. 1809.

1. TRIAL (§ 295*)—INSTRUCTIONS—CONSTRUCTION AS A WHOLE.
A reviewing court must consider objections to specific parts of the charge in the light of the whole charge, in order to determine whether harmful error to the prejudice of plaintiff in error has been committed.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 703–717; Dec. Dig. § 295.*]

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

2. CARRIERS (§ 280*)—INJURY TO PASSENGERS—CARE REQUIRED.
Under the rule that a common carrier is responsible for the safety of a passenger, so far as the exercise of human prudence, caution, and foresight can secure it, an instruction that a street car company in carrying a passenger owes to her the highest degree of care, that the contract is for safe carriage, and therefore the company undertaking to carry must exercise a high degree of care in the operation of the car carrying the passenger, was proper.
[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1085–1092, 1098–1103, 1105, 1106, 1109, 1117; Dec. Dig. § 280.*]

3. CARRIERS (§ 321*)—INJURIES TO PASSENGERS—INSTRUCTIONS.
In an action for injuries to a street car passenger in a collision between the car and an automobile, an instruction that any rivalry between the motorman and the driver of the automobile, each expecting the other to get out of the way, would not excuse, but would rather aggravate, the negligence of the motorman, was not erroneous.
[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1247, 1326–1336, 1343; Dec. Dig. § 321.*]

4. CARRIERS (§ 305*)—STREET RAILROADS—INJURIES TO PASSENGERS—COLLISION WITH AUTOMOBILE—CONCURRING NEGLIGENCE—INSTRUCTIONS.
In an action for injuries to a street car passenger in a collision between the car and an automobile, an instruction that, even though the chauffeur was negligent, if the jury found the motorman was guilty of any negligence contributing to the accident, they should find for plaintiff, was proper.
[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1132, 1136–1139, 1245, 1246; Dec. Dig. § 305.*]

In Error to the District Court of the United States for the Western District of Pennsylvania; James S. Young, District Judge.

Action by Anna Givens against the Pittsburgh Railways Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Clarence Burleigh and Wm. A. Challener, both of Pittsburgh, Pa., for plaintiff in error.

Meredith R. Marshall and Rody P. Marshall, both of Pittsburgh, Pa., for defendant in error.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

GRAY, Circuit Judge. Anna Givens, the defendant in error (hereinafter called the plaintiff), brought suit in the court below against the Pittsburgh Railways Company, plaintiff in error (hereinafter called the defendant), to recover damages resulting from injuries caused by the collision of an automobile with a street car of the defendant company in which she was riding, the collision having occurred, as was alleged, by reason of the negligence of the said defendant company. From the judgment on a verdict in plaintiff's favor, the defendant has sued out this writ of error.

It appears from the record before us, that the jurisdiction of the case rested upon the diverse citizenship of the parties.

On the night of December 3, 1911, while the plaintiff was a passenger on a street car operated by the defendant, the said car collided with an automobile at the intersection of two streets, viz., Murray Ave-

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

nue, along which the street car was running, and Darlington Road, which crosses Murray Avenue at right angles. The automobile was being driven along Darlington Avenue, somewhat on the right side thereof, and the street car was proceeding on the inbound track nearest the approaching automobile. It appears that, when the trolley car had nearly crossed Darlington Road, the automobile had approached so closely that, as it turned sharply to the right on Murray Avenue, to avoid a head-on collision with the car, the fender of the car struck the left front wheel of the automobile and swung it around, so that the rear thereof struck the rear part of the street car, smashing in two windows and throwing the plaintiff out of her seat, thereby inflicting the injuries complained of. On the right hand side of the inbound track, facing the direction in which the trolley car was moving, and a short distance before reaching Darlington Road, there was a signal to run slowly.

There is much conflict of testimony as to the speed at which the car was running at the time it crossed Darlington Road. Witnesses for the plaintiff who were in the automobile testified that the trolley car was running from 25 to 28 miles an hour, one of the witnesses saying that he believed it was running at 40 miles an hour. The plaintiff testifies that before the car reached Darlington Road, the high speed attracted her attention and caused her to put down a book which she was reading, and that immediately afterward she felt the crash of the collision. Testimony on behalf of the defendant was that they were running much more slowly, and that the car was within control. The passengers in the automobile testified that they were looking out for the car as they approached the crossing, and had slowed down to 6 or 7 miles an hour, within 60 feet of the tracks.

In its assignments of error, the defendant makes three objections to the charge of the court below.

"First. The court erred in charging the jury as follows: 'A street car company in carrying a passenger owes to that passenger the very highest degree of care. The contract is for safe carriage, and therefore the company undertaking to carry must exercise a high degree of care in the operation of the car which is carrying the passenger.'

"Second. The court erred in charging the jury as follows: 'Of course there may be a rivalry between the motorman and the driver of the automobile, each expecting the other to get out of the way, but that does not excuse the negligence. It rather aggravates it.'

"Third. The court erred in charging the jury as follows, in affirming plaintiff's fourth point: 'Fourth. Even though the chauffeur of this automobile was negligent, if you find that the motorman was guilty of any negligence, contributing to the collision, then your verdict should be for the plaintiff.'"

[1] Of course in this case, as in all others, the reviewing court must consider objections to specific parts of the charge of the court below, in the light of the whole charge, in order to determine whether any harmful error to the prejudice of the plaintiff in error has been committed.

[2] Thus viewing the language of that portion of the charge excerpted in the first assignment of error, we do not think the assignment can be sustained, nor do we think that, taken by itself, there was error in instructing the jury that the defendant in this case owed to

the plaintiff a duty to exercise "the highest degree of care" in performing its undertaking of safe carriage. The duty of a common carrier of passengers is described in varying language, and there is no settled formula of words that need be or could be usefully recognized by courts in describing the duty of care owing from the carrier to the passenger. The law imposes the duty, and in doing so recognizes the human factors involved. The duty of the carrier to the passenger arises, it is true, from the contract of carriage, but apart from special stipulation, that duty is implied and defined by law. It is not one of insurance as to the safety of the passenger, but a duty which requires of the carrier that degree of care, caution and foresight which a person of great prudence experienced in the business of a common carrier would exercise in order to secure the safety of the passenger. In other words, the common carrier is responsible for the safety of the passenger, so far as the exercise of human prudence, caution and foresight can secure it. This, of course, is the prudence, caution and foresight of the man of average intelligence who recognizes and appreciates the responsibility cast upon him by the nature and risks of the business.

It is, of course, obvious that the duty of the carrier may be otherwise described, and though it is somewhat vague and unsatisfactory to speak of degrees of care, it is not extravagant or unphilosophical to speak of the care which a carrier is bound to exercise for the safety of a passenger as the very highest degree of care. This phrase, of course, means a degree of care that is consistent with the performance of an operation which, at its best, is attended with hazard. But to so characterize the care required of a carrier, does not import that he is an insurer of the safety of a passenger, as a carrier of goods is an insurer of their safe carriage. In fact, the phrase imports a liability far short of insurance. Many things may happen in the course of the performance of a carriage service which, with the highest degree of care on its part, the carrier can neither foresee nor prevent.

Taking the charge as a whole, however, it is impossible to find that the case was not properly submitted to the jury by the learned judge of the court below, and we quote the context of the part of the charge excepted to, in order to support this statement:

"The burden of proving negligence of the defendant, the injuries to the plaintiff and the resulting damages, is upon the plaintiff, and this the plaintiff is bound to establish by the weight of the evidence.

"In order that you may understand this case, it is necessary to give you some rules that ought to govern you in the application of the evidence.

"Now I have said that the burden is on the plaintiff to establish by the weight of the evidence the negligence of the defendant.

"A street car company in carrying a passenger owes to that passenger the very highest degree of care. The contract is for safe carriage, and therefore the company undertaking to carry must exercise a high degree of care in the operation of the car which is carrying the passenger. It is proper for me to state to you that this is not a controversy between the Street Car Company and the owner of the automobile. The degree of care in a case of that kind would be entirely different from what it is in this case. In this case the company owes a high degree of care; and that is, that in approaching a cross street, the car must be coming in a way that it is under control so that it may be stopped—a lookout must be kept for vehicles or persons coming across—not only for the protection of the vehicle or the person, but in order

that no accident may happen to the car in which the passenger is riding. The lookout must be kept by the motorman in order that the passenger may be safely carried. He must be on the alert. It is right to presume that vehicles, automobiles, etc., will cross, and therefore in approaching a crossing it is the duty of the motorman to keep a lookout—a careful lookout, to see if anything is coming. It is his duty to ring the gong; it is his duty to have his car so under control that he may stop it and avoid a collision. Now that is the measure of duty which the company owes to its passengers. And you must consider the evidence in the light of that rule."

[3] The rule laid down by the learned judge of the court below, to be observed by trolley cars running under the circumstances attending the running of the car in question, was severe, but not more severe than the law justifies and public policy demands for the protection, both of the passengers on the car and of those who are lawfully traversing the public highways. We see no error—certainly no prejudicial error—in the part of the charge excepted to by the second assignment.

[4] In regard to the third assignment, we have only to say that the learned judge of the court below made no mistake in instructing the jury to the effect that if they found negligence on the part of the defendant, and that it was the proximate cause of the accident—but for which the accident could not have occurred—then no negligence on the part of the driver of the automobile contributing to such accident could relieve the defendant.

The judgment of the court below is therefore affirmed.

ATLANTIC COAST LINE R. CO. v. THOMPSON.

(Circuit Court of Appeals, Fourth Circuit. February 3, 1914.)

No. 1189.

1. DAMAGES (§ 158*)—PERSONAL INJURIES—EVIDENCE—PLEADING.
Where a complaint alleged that by reason of defendant's negligence plaintiff seriously and permanently injured his leg and foot, causing a tumor to form on the inner side of the foot and the same to be deformed, and a supplemental complaint charged the amputation of the foot as a consequence of the injury, defendant having filed a general denial, evidence that the tumor was cancerous in its nature and would result fatally, though an effort had been made to arrest the cancer by amputation, was admissible.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 441–444; Dec. Dig. § 158.*]

2. APPEAL AND ERROR (§ 1039*)—RULINGS ON EVIDENCE—ISSUES—PREJUDICE.
Where, on a former trial, evidence had been offered of the fatal nature of plaintiff's injury, and it would have been impossible for defendant to offer any evidence against plaintiff's conclusive evidence that a cancer alleged to have resulted from the injury would cause death, defendant was not prejudiced by the admission of evidence of the fatal nature of the injury, though the complaint did not so allege.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4075–4088; Dec. Dig. § 1039.*]

3. DAMAGES (§ 185*)—PERSONAL INJURIES—RESULT—CANCER—QUESTION FOR JURY.
Where plaintiff claimed that cancer of the foot developed as the result of his injury, and there was direct evidence from attending physicians

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

that, while the primary cause of cancer is unknown, the cause of its development is usually irritation, and in their opinion the cancerous condition of plaintiff's foot was due to the injury he had received, the jury were authorized to infer that the injury was the proximate cause of such condition.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 503–508; Dec. Dig. § 185.*]

4. COURTS (§ 356*)—NEW TRIAL—DENIAL—REVIEW.

Denial of a new trial in the exercise of discretion under the federal practice is not subject to reversal by writ of error except where it involves clear error of law which cannot be corrected by assignment of error for anything done in the course of the trial.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 937; Dec. Dig. § 356.*]

5. TRIAL (§ 149*)—QUESTIONS OF LAW AND FACT—SUBMISSION TO JURY—MOTION FOR NONSUIT—DIRECTED VERDICT.

An objection that there is no evidence to support an alleged cause of action must be made by a motion for nonsuit or request for a directed verdict, and a failure to take such course amounts to consent that the issue be submitted to the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 345; Dec. Dig. § 149.*]

In Error to the District Court of the United States for the Eastern District of South Carolina, at Columbia; Henry A. M. Smith, Judge.

Action by W. D. Sturgeon, revived after his death in the name of W. B. Thompson as executor, against the Atlantic Coast Line Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Douglas McKay, of Columbia, S. C. (Barron, Moore, Barron & McKay, of Columbia, S. C., P. A. Willcox, of Florence, S. C., and L. W. McLemore, of Sumter, S. C., on the brief), for plaintiff in error.

W. Boyd Evans, of Columbia, S. C., for defendant in error.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

WOODS, Circuit Judge. W. D. Sturgeon recovered a judgment for personal injuries against the Atlantic Coast Line Railroad Company in the District Court for the Eastern District of South Carolina. Afterwards Sturgeon died, and W. B. Thompson, executor of his will, was made a party to the cause as defendant in error. The errors assigned are in admitting testimony and giving instructions to the jury not responsive to the allegations of the complaint, and refusing to grant a motion for a new trial made on the ground that the verdict was not warranted by the evidence.

The complaint alleges that Sturgeon was a passenger on defendant's train from Sumter, S. C., to Orangeburg, S. C., that on arrival at Orangeburg as he was leaving the station with his two infant children in his arms he fell into a hole negligently left by the railroad company in its platform. The allegation as to the injury is that by the fall the plaintiff "seriously and permanently injured his leg and

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

foot as follows: Causing his leg to be bruised and skinned and the ligaments of the foot to be torn and lacerated, and a tumor to form on the inner side of the foot, and caused the said foot to become deformed, and the plaintiff now suffers from what is known as traumatic flat foot; that, by reason of the above-described injuries, the plaintiff has suffered and still suffers great pain; that his said foot has become deformed; and that he has been informed and believes that he will never be free from pain again, by reason of said accident."

By supplemental complaint amputation of the foot was alleged as a consequence of the injury. The answers admit the amputation, but deny the other allegations of the complaints.

[1] There was no error in allowing the plaintiff to introduce evidence tending to show that the tumor alleged to have been caused by the fall was cancerous in its nature and would result fatally, although the effort had been made to arrest the cancer by amputation. In view of the general denial of the allegation of the injury and of the existence of a tumor resulting therefrom serious enough to cause deformity, traumatic flat foot, and amputation of the foot, it was clearly competent for the plaintiff to show the malignant or cancerous nature of the malady in support of the allegation that the injury did produce the deformity and make amputation necessary. If it was essential to a proper defense that the defendant should know in advance the precise nature of the tumor mentioned, it should have asked that the complaint be made more definite and certain on that point.

The objection to the testimony that the tumor would be fatal is more serious, but its admission cannot be regarded error. It is true the complaint does not allege that the injury would be fatal, and proof that it would be so was no doubt an important factor in the jury's consideration of the damages to be awarded. But if the extreme illness of Sturgeon resulted directly from the injury, it was provable under the general allegation as to the nature of the injury. This rule was applied in Denver, etc., Railroad v. Harris, 122 U. S. 597, 7 Sup. Ct. 1286, 30 L. Ed. 1146, where the plaintiff in an action to recover for injuries inflicted upon him by the servants of the defendant was allowed to introduce evidence that the wounds received had deprived him of the power to have offspring, although the declaration did not specify such loss as a result of the injury. In Baltimore, etc., Railroad Co. v. Slanker, 180 Ill. 357, 54 N. E. 309, a case involving precisely the same issue as this, the plaintiff, a woman, under her declaration alleging that she had been injured upon her foot, head, and body, and that her flesh had been lacerated, was allowed to introduce evidence that as a result of the injury a tumor had developed necessitating amputation of the breast.

[2] Aside from this, the matter must be looked at in a practical way, and the real question is whether the defendant was surprised or put at a disadvantage in making its defense on the issue. An allegation in the complaint could have been of no benefit to the defendant except to give it notice that the plaintiff would offer evidence of the fatal nature of the injury. This notice was fully given by the evidence on the point which it was admitted at the argument had been

offered at a former trial of the cause. Besides, the record shows beyond all doubt that it would have been impossible for the railroad company to offer anything against the conclusive evidence that the cancer would result in death.

The only possible issues were: First, did Sturgeon fall into a hole negligently left by the railroad company on its platform and receive an injury from the fall; second, if he did, was the fall the proximate cause of the malignant tumor or cancer with which he was afflicted; third, if the fall was not the proximate cause of the malignant tumor or cancer and the disease was already present, to what extent, if at all, did it aggravate or accelerate the malady? These issues and the legal results which would follow the various conclusions which the jury might reach with respect to them were clearly stated in the charge.

[3] The railroad company assigns error in the submission of the second issue, contending that the only reasonable inference to be drawn from the testimony is that the cause of sarcoma is unknown. In the record there is direct evidence from attending physicians that, while the primary cause of cancer is unknown, the cause of its development is usually irritation, and that in their opinion the cancerous condition of Sturgeon's foot was due to the injury he had received. From this evidence it was not beyond reason for the jury to infer that the cancer developed because of the injury, and that in this direct sense the injury was the proximate cause. In Texas & Pacific R. Co. v. Howell, 224 U. S. 577, 32 Sup. Ct. 601, 56 L. Ed. 892, the court held that the jury was warranted in finding that tuberculosis of the spine had developed in the plaintiff as a direct result of his being struck by a piece of falling timber, although the accident happened a year before the disease appeared. Aside from this view, the railroad company cannot now make this question because it requested that the issue whether the injury was the cause of Sturgeon's condition be submitted to the jury.

[4] The last point made is that the district judge erred in refusing the motion for a new trial made on the ground that there was not sufficient evidence to support a finding that the railroad company was responsible for Sturgeon's sarcomatous condition. The well-known rule of federal practice derived from the common law is that the granting or refusing a new trial is in the discretion of the trial judge, and that his action is not reversible by writ of error. Newcomb v. Wood, 97 U. S. 583, 24 L. Ed. 1085. To this rule an exception has been allowed where the conclusion of the trial judge involved clear error of law which could not be corrected by assignment of error for anything done in the course of the trial: As in Mattox v. U. S., 146 U. S. 140, 13 Sup. Ct. 50, 36 L. Ed. 917, where the trial judge refused to consider affidavits concerning the conduct of the jury; in San Jose Land, etc., Co. v. San Jose Ranch Co., 189 U. S. 177, 23 Sup. Ct. 487, 47 L. Ed. 765, and Chicago, etc., R. Co. v. Chicago, 166 U. S. 226, 17 Sup. Ct. 581, 41 L. Ed. 979, where the opinion of a state court refusing a new trial showed that the question was whether the plaintiff in error had brought himself within the scope of the fed-

eral Constitution or a federal statute on which it relied; in Coughlan v. District of Columbia, 106 U. S. 7, 1 Sup. Ct. 37, 27 L. Ed. 74, where the new trial was improperly granted after the expiration of the time allowed by law; in Felton v. Spiro, 78 Fed. 576, 24 C. C. A. 321, Ogden v. U. S., 112 Fed. 523, 50 C. C. A. 380, and Dwyer v. U. S., 170 Fed. 160, 95 C. C. A. 416, where the trial judge refused to exercise his discretion in such matters as deciding whether the verdict was against the great weight of the evidence. This case obviously falls within the general rule, not within the exception.

[5] But the assignment of error cannot be allowed for another reason. There was no motion for a nonsuit nor request for a directed verdict. The point that there is no evidence to support an alleged cause of action should be made by one or the other motion, and a failure to take such course must be taken as consent that the issue be submitted to the jury. Hartford Life Annuity Ins. Co. v. Unsell, 144 U. S. 439, 12 Sup. Ct. 671, 36 L. Ed. 496; Hansen v. Boyd, 161 U. S. 397, 16 Sup. Ct. 571, 40 L. Ed. 746; Keely v. Ophir Hill Consol. Mining Co., 169 Fed. 601, 95 C. C. A. 99.

In this instance the failure to make the request for a directed verdict was of no consequence, for, as we have indicated, there was material evidence to go to the jury on all the issues made.

Affirmed.

MISSOURI PAC. RY. CO. v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. February 16, 1914.)

No. 4033.

MASTER AND SERVANT (§ 13*)—RAILROADS—OPERATION—HOURS OF SERVICE LAW—CONSTRUCTION—"OTHER EMPLOYÉ."

Hours of Service Act, § 2 (Act March 4, 1907, c. 2939, 34 Stat. 1416 [U. S. Comp. St. Supp. 1911, p. 1321]), makes it unlawful for any carrier subject to the act to permit any employé subject thereto to remain on duty for a longer period than 16 consecutive hours in any 24-hour period, provided that no operator, train dispatcher, or other employé who by use of telegraph or telephone dispatches, reports, transmits, receives, or delivers orders pertaining to train movements, shall be permitted to remain on duty for a longer period than 9 hours in any 24-hour period in towers, offices, places, and stations continuously operated day and night. *Held* that, under the rule ejusdem generis, the words "other employé" should be construed to mean an employé of the same class, engaged primarily in the same class of service as would be performed by an operator or train dispatcher; and hence servants employed by a railroad company as switch tenders, whose duty was to operate certain hand switches regulating trains in accordance with directions given them by telephone connected with a shanty erected at their place of employment, were not "other employés" within the statute, so that the railroad company was not liable for a penalty thereunder for requiring them to labor more than 9 hours a day.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 14; Dec. Dig. § 13.*

Hours of service of employés, see note to United States v. Houston Belt & T. Ry. Co., 125 C. C. A. 485.]

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

In Error to the District Court of the United States for the Western District of Missouri; Arba S. Van Valkenburgh, Judge.

Action by the United States of America against the Missouri Pacific Railway Company. Judgment for the United States, and defendant brings error. Reversed, and new trial ordered.

Edward J. White, of Kansas City, Mo. (Martin L. Clardy, of St. Louis, Mo., on the brief), for plaintiff in error.

Philip J. Doherty, of Washington, D. C. (Francis M. Wilson, U. S. Atty., of Platte City, Mo., and Thad B. Landon, Sp. Asst. U. S. Atty., of Kansas City, Mo., on the brief), for the United States.

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

CARLAND, Circuit Judge. This is an action by the United States against the railway company to recover penalties for a violation of the "Hours of Service Act, 34 Stat. 1415." The complaint contained ten counts which alleged violations of section 2 of said act, by the company, in requiring and permitting R. Connell and J. W. King, alleged to be telegraph operators and employés, to be and remain on duty for a longer period than 9 hours in certain 24-hour periods, occurring from August 1 to 6, 1912, at Kansas City, Mo. At the close of all the evidence, the trial court, at the request of counsel for the United States, directed a verdict against the company. This ruling of the court is assigned as error. The facts appearing at the trial were undisputed, and the only question for decision is as to whether the facts showed that R. Connell and J. W. King were operators, train dispatchers, or other employés, who by the use of the telegraph or telephone dispatched, reported, transmitted, received, or delivered orders pertaining to or affecting train movements. Upon this question the evidence established these facts: R. Connell and J. W. King were employed by the company as switchtenders, and they performed the duties of switchtenders and those alone. They performed their work at a shanty located at the junction between a track of the company leading to Kansas City, Kan., and the track leading up quite a steep incline to the Union Station at Kansas City, Mo. They operated ten low hand switches. There were telephones in the shanty. One of these phones connected with Grand avenue, the Burlington tower, the Union Depot, and the Union Depot tower. Another connected with Troost avenue and Henning street. Trains which desire to enter the Union Depot cannot always do so on account of the limited trackage and space therein, and on account of the incline extending from the junction, above mentioned, up to the depot, trains find it impracticable to stop at the foot of the incline and have the switches thrown, and therefore the men operating any of the trains always desire to know whether there is room for it in the Union Depot, and as to whether the switches are so situated as to allow a continuous run, when, for instance, the train reaches as near as Grand avenue. On the other hand, trains departing from the Union Depot for the East when desiring to know if the track is clear, a man at the Burlington tower asks R. Connell or

J. W. King about it and receives the desired information. When all is said about the duties of these men, it comes to this: Their primary duty was to throw these switches whenever necessary, and the telephones were used to inform them from time to time what was wanted in regard to the switching and in reporting to those who intended to use the switches, the preparation that had been made for such use. It did not differ except in complexity of operation from the service performed by a brakeman who runs ahead of his train, turns a switch, and swings his hand by day, or lantern by night to signal the engineer. If one is within the proviso of section 2, so is the other, unless it be held that the mere use of the telephone brings one switchman within the 9-hour provision and leaves another who does not use it under the 16-hour clause, although the service performed is the same. But we apprehend that there will be no contention that Congress fixed the period of 9 hours for certain employés because of the use of the telephone. The difference in the hours of labor fixed by section 2 was based upon the character of the service rendered by the employé, not upon the use of the telephone. R. Connell and J. W. King, beyond question, were not operators or dispatchers. They were employés, but were they employés within the meaning of section 2, who by the use of the telegraph or telephone dispatched, reported, transmitted, received, or delivered orders pertaining to or affecting train movements? There can be no doubt about the purpose of the statute. Baltimore & Ohio R. Co. v. I. C. C., 221 U. S. 612, 30 Sup. Ct. 86, 54 L. Ed. 164; United States v. Kansas City Southern Ry. Co., 202 Fed. 832, 121 C. C. A. 136; St. Louis, I. M. & S. Ry. Co. v. McWhirter, 145 Ky. 427, 140 S. W. 672; United States v. Chicago, Milwaukee & P. S. Ry. Co. (D. C.) 197 Fed. 624. We must take its language as the best evidence of the intention of Congress and bring to bear upon the language used, established canons of statutory construction so far as applicable, keeping in view the declared purpose of Congress, namely, the promotion of the safety of employés and travelers. Section 2 of the act, so far as material, reads as follows:

"That it shall be unlawful for any common carrier, its officers or agents, subject to this act to require or permit any employee subject to this act to be or remain on duty for a longer period than sixteen consecutive hours, and whenever any such employee of such common carrier shall have been continuously on duty for sixteen hours he shall be relieved and not required or permitted again to go on duty until he has had at least ten consecutive hours off duty; and no such employee who has been on duty sixteen hours in the aggregate in any twenty-four hour period shall be required or permitted to continue or again go on duty without having had at least eight consecutive hours off duty: Provided, that no operator, train dispatcher, or other employee who by the use of the telegraph or telephone dispatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements shall be required or permitted to be or remain on duty for a longer period than nine hours in any twenty-four hour period in all towers, offices, places, and stations continuously operated night and day."

The law quoted first provides that it shall be unlawful for any common carrier to require or permit any employé to be or remain on duty for a longer period than 16 consecutive hours. Then the proviso of

the section takes out of all the employés of the common carrier a certain class, namely, operators, train dispatchers or other employés who by the use of the telegraph or telephone dispatch, report, transmit, receive, or deliver orders pertaining to or affecting train movements. The proviso ought not to be construed so broadly as to annihilate the general language of the section. We think that under a well-established rule of construction the words "or other employé," found in the proviso, must be construed to mean an employé engaged in the same character of service as a train dispatcher or operator, who by the use of the telegraph or telephone performs the work described in the proviso. In other words, Congress intended the 9-hour provision to apply to employés whose primary duty was to dispatch, report, transmit, receive, or deliver orders pertaining to or affecting train movements. We do not mean by this that the word "orders" should be limited to technical train orders described in what are known as standard rules for the movement of trains. Congress was dealing with a class of employés engaged primarily in a particular service and the mere form of the order, pertaining to or affecting train movement, is immaterial if it is dispatched, reported, transmitted, received, or delivered by the use of the telegraph or telephone. Where general words follow an enumeration of particular classes of persons or things, they will be construed as applicable only to persons or things of the same general nature or class as those enumerated. The particular words are presumed to describe certain species and the general words to be used for the purpose of including other species of the same genus. The rule is based on the obvious reason that, if the Legislature had intended the general words to be used in their unrestricted sense, they would have made no mention of the particular classes. The words "other" or "any other," following an enumeration of particular classes, are therefore to be read as "other such like," and to include only others of like kind or character. First National Bank of Anamoose v. United States, 206 Fed. 374, 379, 124 C. C. A. 256, 46 L. R. A. (N. S.) 1139; Cyc. vol. 36, p. 1120, and cases cited.

The principle involved is illustrated by the case of United States v. Bevans, 3 Wheat. 336, 4 L. Ed. 404. In this case William Bevans was indicted for murder in the United States Circuit Court for the District of Massachusetts. The offense was alleged to have been committed on November 6, 1816, on board the United States ship of war Independence, lying at anchor in the main channel of Boston Harbor. After trial and conviction, the judges holding the Circuit Court, being divided in opinion as to their jurisdiction, certified the question to the Supreme Court of the United States. The third section of the act of Congress of April 30, 1790, c. 9, 1 Stat. 112, provided:

"That if any person or persons shall, within any fort, arsenal, dockyard, magazine, or in any other place or district of country, under the sole and exclusive jurisdiction of the United States, commit the crime of willful murder, such person or persons on being thereof convicted shall suffer death."

Jurisdiction in the Circuit Court was claimed upon two grounds: First, that the place where the murder was committed was within the admiralty and maritime jurisdiction of the United States; second, that

the United States ship of war Independence was a place, within the sole and exclusive jurisdiction of the United States. In reference to the last contention, Chief Justice Marshall, in delivering the opinion of the court, said:

"The objects with which the word 'place' is associated are all, in their nature, fixed and territorial. A fort, an arsenal, a dockyard, a magazine, are all of this character. When the sentence proceeds with the words, 'or in any other place or district of country under the sole and exclusive jurisdiction of the United States,' the construction seems irresistible that, by the words 'other place,' was intended another place of a similar character with those previously enumerated, and with that which follows. Congress might have omitted, in its enumeration, some similar place within its exclusive jurisdiction, which was not comprehended by any of the terms employed, to which some other name might be given; and therefore the words 'other place,' or 'district of country,' were added; but the context shows the mind of the Legislature to have been fixed on territorial objects of a similar character."

As the word "employé" in the proviso of section 2 includes "operator" and "train dispatcher," for the latter are both employés, the conclusion here is irresistible that Congress intended by the use of the words "other employé" to mean an employé engaged primarily in the same class of service as would be performed by an operator or train dispatcher. If this be the right construction to place upon the proviso, then R. Connell and J. W. King were not in any sense employés, whose primary duty was to dispatch, report, transmit, receive, or deliver by the use of the telegraph or telephone orders pertaining to or affecting train movements within the meaning of the proviso. While, as has been said before, we must give the law such a construction as will promote the purpose of the law, in our zeal to do so, however, we must not attempt to legislate ourselves. We are cited to the case of United States v. Houston Belt & Terminal Ry. Co., 205 Fed. 344, 125 C. C. A. 481. In regard to this case, it is sufficient to say that the facts which appear in the report of that case differ from the facts in the present record.

Judgment below reversed, and a new trial ordered.

UNITED STATES v. ATLANTIC COAST LINE R. CO.

(Circuit Court of Appeals, Fourth Circuit. February 3, 1914.)

No. 1191.

1. MASTER AND SERVANT (§ 13*)—OPERATION OF RAILROADS—HOURS OF SERVICE LAW.

Hours of Service Law (Act Cong. March 4, 1907, c. 2939, 34 Stat. 1415 [U. S. Comp. St. Supp. 1911, p. 1321]), regulating the hours of service of employés on interstate railroads, is a remedial and not a criminal statute, enacted to promote the safety of employés and the traveling public by prohibiting hours of service which presumably result in impaired efficiency on the part of employés.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 14; Dec. Dig. § 13.*]

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

2. MASTER AND SERVANT (§ 13*)—EMPLOYMENT—REGULATION—HOURS OF SERVICE LAW.

Hours of Service Law (Act Cong. March 4, 1907, c. 2939, 34 Stat. 1416 [U. S. Comp. St. Supp. 1911, p. 1322]) § 2, provides that no operator, train dispatcher, or other employé who by the use of telegraph or telephone dispatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements, shall be permitted to remain on duty more than nine hours in any 24-hour period in towers, offices, places, and stations continuously operated night and day, nor for a longer period than 13 hours in offices and stations operated only during the daytime, except in case of emergency, etc. *Held*, that no distinction is to be drawn between offices in which train orders originate and from which they are issued and local offices, which merely receive and deliver the orders so issued, and which may be closed during a substantial portion of each 24-hour period; and hence, where a local telegraph office was regularly kept open for business from 6:30 a. m. to 10:15 p. m. in each 24-hour period, it was an office continuously operated night and day and was therefore within the nine-hour requirement.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 14; Dec. Dig. § 13.*

Hours of service of employés, see note to United States v. Houston Belt & T. Ry. Co., 125 C. C. A. 485.]

In Error to the District Court of the United States for the Eastern District of South Carolina, at Columbia; Henry A. M. Smith, Judge.

Action by the United States of America against the Atlantic Coast Line Railroad Company. Judgment for defendant, and plaintiff brings error. Reversed.

Ernest F. Cochran, U. S. Atty., of Anderson, S. C., and Philip J. Doherty, Sp. Asst. U. S. Atty., of Washington, D. C.

George B. Elliott, of Wilmington, N. C. (P. A. Willcox, of Florence, S. C., on the brief), for defendant in error.

Before KNAPP and WOODS, Circuit Judges, and ROSE, District Judge.

KNAPP, Circuit Judge. This suit is brought by the United States to recover penalties for alleged violations of the act of Congress approved March 4, 1907, commonly known as the hours of service law, and the employés directly concerned are telegraphers in the service of defendant in error at Bennettsville, S. C.

From the stipulated facts on which the action was tried it appears that the telegraph office at the station named was regularly kept open for business from 6:30 a. m. to 10:15 p. m., or 15 hours and 45 minutes in each 24-hour period; that two operators were employed at this station, one of whom was required to be on duty from 6:30 a. m. to 12 o'clock noon, and from 1:00 p. m. to 6:30 p. m., and the other, known as a "second trick" operator, from 10:15 a. m. to 5:30 p. m., and from 6:30 p. m. to 10:15 p. m., or a total of 11 hours in each case; that the office in question, during the period covered by the suit, was closed for business, and the operators entirely relieved from duty, from 10:15 p. m. to 6:30 a. m., or 8 hours and 15 minutes, except on a few specified dates when the second trick operator remained on duty from 15 to 45 minutes after 10:15 p. m.; that during the hours from

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

6:30 a. m. to 10:15 p. m., when the office was kept open for business as aforesaid, the operators employed therein, by the use of telegraph and telephone, received and delivered, more or less frequently, orders relating to or affecting the movement of trains engaged in interstate commerce; and that these operators received such train orders from the office of the chief dispatcher, which was located at Florence, S. C., and kept continuously open throughout the 24 hours.

The question to be decided is whether the defendant in error, by requiring or permitting its Bennettsville operators to be on duty during the 11 hours above described, to say nothing of the instances of somewhat longer hours, violated the proviso of section 2 of said act, which reads as follows:

"Provided, that no operator, train dispatcher, or other employé who by the use of the telegraph or telephone dispatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements shall be required or permitted to be or remain on duty for a longer period than nine hours in any twenty-four hour period in all towers, offices, places and stations continuously operated night and day, nor for a longer period than thirteen hours in all towers, offices, places and stations operated only during the day time, except in case of emergency, when the employés named in this proviso may be permitted to be and remain on duty for four additional hours in a twenty-four hour period of not exceeding three days in any week."

As the operators in question were customarily kept on duty for 11 hours out of the 24, and sometimes a little longer, it is apparent that defendant in error was chargeable with repeated violations of the statute, if the Bennettsville office belongs in the class of offices "continuously operated night and day," and equally apparent, since the hours of duty were always less than 13, that the law was fully observed and the defendant in error free from liability, if this office belongs in the class of those "operated only during the daytime." The trial court held that it was an office of the latter class, and accordingly directed a verdict in favor of defendant. The correctness of that ruling is challenged by the writ of error to this court.

The meaning and intent of the hours of service act in various particulars has been the subject of considerable litigation, and some aid to the conclusion which should be reached in this case, or at least a starting point for discussion, is found in the decision of the Supreme Court in United States v. Atchison, Topeka & Santa Fé Ry. Co., 220 U. S. 37, 31 Sup. Ct. 362, 55 L. Ed. 361. In that case it is said:

"We think that the government is right in saying that the proviso is meant to deal with all offices, and, if so, we should go further than otherwise we might in holding offices not operated only during the day time as falling under the other head."

In view of this declaration, that the statute covers all telegraph offices in which interstate train orders are handled, and since the statute itself makes only two classes of such offices, it follows of course that this Bennettsville office is one to which the law applies, and that the telegraphers there employed can be kept on duty not more than 9 hours, if it be adjudged a "night and day" office, but may be held up to 13 hours, if it be adjudged a "daytime" office. It must perforce be put in one class or the other.

[1] This is not a criminal statute, and therefore is not governed by the rule of strict construction. Johnson v. Southern Pacific Co., 196 U. S. 17, 25 Sup. Ct. 158, 49 L. Ed. 363; St. Louis Southwestern Ry. Co. v. United States, 183 Fed. 771, 106 C. C. A. 136. It is rather a remedial statute which should be so construed, if its language permits, as to best accomplish the protective purpose for which it was enacted. Stewart v. Bloom, 11 Wall. 493, 20 L. Ed. 176; Bechtel v. United States, 101 U. S. 597, 25 L. Ed. 1019. Obviously, that purpose was to promote the safety of employés and the traveling public by prohibiting hours of service which presumably result in impaired efficiency for discharging their important duties. The end to be attained by the law is a guide to its interpretation.

[2] It is argued by counsel for defendant in error that the Congress intended to distinguish between (1) offices in which train orders originate and from which they are issued, and which in the nature of the case must ordinarily be kept open for approximately the entire 24 hours, and (2) local offices which merely receive and deliver the orders so issued, and which may be and frequently are closed during a substantial part of each 24-hour period; and that therefore the classification of a given office depends as a practical matter upon whether it is an office like that of a train dispatcher, who actually directs and controls the movement of trains, or only a way station office where the operator aids the dispatcher by communicating orders and sending in reports. Besides, it is said that telegraphers in offices mainly occupied with the dispatching of trains have heavier responsibilities and are under greater strain, and consequently should be restricted to shorter hours, than employés at local stations who perform miscellaneous duties and perhaps devote only a small portion of their time to the receipt and delivery of train orders and the transmission of train reports.

The answer to this argument is twofold. In the first place, we find nothing in the language of the act to support such a distinction. The terms employed are plainly intended to include every sort of place where train orders are handled, however infrequently, by telegraph or telephone. There is nothing to suggest that the permitted hours on duty, whether 9 or 13, are determined by the number of train orders handled, if they are handled at all, or by the proportion of time which the employé spends in that particular service. Surely the descriptive words, "towers, offices, places, and stations," negative any intention to confine the nine hour limitation to those offices, however designated, in which the principal work of the operator is connected with the movement of trains. In short, we deem it beyond dispute that the classification of an office is fixed by the length of time it is kept open, and not in the least by the nature of the duties performed, if only those duties include the handling of train orders as occasion may require.

In the second place, it is not to be assumed that the telegrapher in a train dispatcher's office, or other similar office, performs more wearisome labor, or becomes sooner fatigued, than the operator at an ordinary local station. The latter, it is true, may average only a small number of train orders in the course of a day, but nevertheless he may have, and usually does have, other duties which are varied and

often onerous. Even if he is not called upon to act as station agent, and does little but use the telegraph or telephone, the orders and messages of the company not relating to trains, and the commercial business of the community, may involve exertion and responsibility quite as fatiguing as the work of a telegrapher engaged mainly in the transmission of train orders. In other words, and for the reasons here suggested, it seems to us that operators at local and subordinate stations are scarcely less liable than operators at main offices to suffer loss of alertness and efficiency from excessive hours of duty. In our judgment, neither the terms and purpose of the statute, nor the conditions of actual service, justify us in upholding the contention here considered.

It is conceded that an office need not literally be kept open every minute of the 24 hours in order to be within the 9-hour restriction. But if it may be closed for one or more substantial intervals of time and still remain in the 9-hour class where shall the line of division be drawn? In the Atchison Case, above cited, the office was shut from noon to 3 p. m., and from midnight to 3 a. m., or 6 hours in all out of the 24, and the Supreme Court strongly intimated, though the point was not directly involved, that it should be classed as a 9-hour office, because the proviso was meant to deal with all offices, and therefore "we should go farther than otherwise we might in holding offices not operated only during the daytime as falling under the other head." But where is the logical place to stop? The words "operated only during the daytime" are quite as much entitled to be made effective as the words "continuously operated night and day." Manifestly, if we look only at the surface meaning of words, these two definitions are inconsistent, or at least overlap each other, since there must be many offices which could not be fairly described as "operated only during the daytime" and yet are not, in any absolute sense, "continuously operated night and day." For example, in a case argued at the same time with this, the office was open throughout the 24 hours except from 1:30 a. m. to 6:30 a. m. To say that such an office is operated only in the daytime is to do violence to the commonest understanding.

This is plainly a case where the natural significance of terms must yield to the necessity for giving to the entire proviso such reasonable meaning as will promote its beneficial purpose. If it seems a strained and unwarranted construction to hold that an office which is generally closed at 10:15 p. m., and never later than 11, and kept closed till 6:30 a. m., is nevertheless "continuously operated night and day," is it not equally strained and unwarranted to hold that an office which is kept open from 6:30 a. m. to 10:15 p. m., or later, is nevertheless "operated only during the daytime"? Since the office in question must be assigned to one class or the other, we are of opinion on the whole that it will be more correctly and usefully placed in the night and day class than in the daytime class. If this conclusion gives greater effect to the words "operated only during the daytime" than to the words "continuously operated night and day," we think the objects of the law require that preference be accorded to a construc-

tion which recognizes the legislative intent to permit 13 hours of service in offices kept open only such number of hours in the aggregate as do not materially or substantially exceed the length of an ordinary day, and to prohibit more than 9 hours service in offices kept open such number of hours in the aggregate as necessarily include a material or substantial portion of the night.

It follows that the judgment should be reversed, and the case remanded for a new trial.

Reversed.

WOODS, Circuit Judge (concurring). The decision of this case depends on the meaning of the word "continuously" in the following statute:

"Provided, that no operator, train dispatcher, or other employé who by the use of the telegraph or telephone dispatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements shall be required or permitted to be or remain on duty for a longer period than nine hours in any twenty-four hour period in all towers, offices, places, and stations continuously operated night and day, nor for a longer period than thirteen hours in all towers, offices, places, and stations operated only during the daytime, except in case of emergency, when the employés named in this proviso may be permitted to be and remain on duty for four additional hours in a twenty-four hour period of not exceeding three days in any week."

The defendant contends that "continuously" means without cessation, and that the offices, etc., "continuously operated night and day" can only include places operated without cessation through the night and day. The context and the purpose of the statute shows that this is not the sense in which the words were used. The statute was intended to cover all telegraph offices. United States v. Atchison, etc., R. Co., 220 U. S. 37, 31 Sup. Ct. 362, 55 L. Ed. 361. If the defendant's construction were adopted, it would cover only day offices and offices operated throughout the day and night, leaving out the offices operated during the day and into the night. There is some reason for attributing the meaning of habitually or regularly to the word continuously; but the plain construction, and that which will give the statute its full signification, is to take the whole phrase "offices, places, and stations continuously operated night and day" to mean offices whose operation is continued from the day into the night. The statute assumes that all offices will be operated during the daytime, and for those operated during the daytime only it makes the 13-hour requirement; for those which are operated during the daytime with a continuance of operation into the night it makes the nine hour requirement. The office at Bennettsville was in operation during the daytime with continuance into the night, and therefore falls under the 9-hour class.

ATLANTIC COAST LINE R. CO. v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. February 3, 1914.)

No. 1195.

In Error to the District Court of the United States for the Eastern District of South Carolina, at Columbia; Henry A. M. Smith, Judge.

Action by the United States of America against the Atlantic Coast Line Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

George B. Elliott, of Wilmington, N. C. (P. A. Willcox, of Florence, S. C., on the brief), for plaintiff in error.

Ernest F. Cochran, U. S. Atty., of Anderson, S. C., and Philip J. Doherty, Special Asst. U. S. Atty., of Washington, D. C.

Before KNAPP and WOODS, Circuit Judges, and ROSE, District Judge.

KNAPP, Circuit Judge. This case is determined by our decision, just announced, in United States v. Atlantic Coast Line (No. 1191) 211 Fed. 897, 128 C. C. A. 275. For the reasons stated in the opinion in that case, the judgment herein is affirmed.

MARQUSEE v. INSURANCE CO. OF NORTH AMERICA.

KLINE BROS. & CO. v. LIVERPOOL & LONDON & GLOBE INS. CO., Limited.

(Circuit Court of Appeals, Second Circuit. February 17, 1914.)

Nos. 117, 118.

1. CORPORATIONS (§ 406*)—OFFICERS—PRESIDENT—AUTHORITY.

The president of a private corporation by virtue of his office alone has no power to bind the corporation by his contracts, but his power to contract on behalf of the corporation must be found in its organic law, or in a delegation of authority from it, either directly or through its board of directors formally expressed or implied from habit or custom of doing business.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1611–1614; Dec. Dig. § 406.*]

2. CORPORATIONS (§ 432*)—CONTRACT—EXECUTION — RATIFICATION — BURDEN OF PROOF.

Where the acting president of a private corporation, without authority, obtained certain fire insurance on its behalf on which the corporation subsequently sought to recover, the burden of proof of ratification of his act in making the contract was on the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1717, 1718, 1724, 1726–1735, 1737, 1743, 1762; Dec. Dig. § 432.*]

3. CORPORATIONS (§ 433*)—POLICY—CONTRACT—RATIFICATION.

Where the acting president of a private corporation without authority procured certain insurance for it, whether particular facts relied on amounted to a ratification of his act by the corporation was a question of law for the court.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1706, 1719, 1738–1744; Dec. Dig. § 433.*]

4. CORPORATIONS (§ 426*)—UNAUTHORIZED ACTS OF PRESIDENT—RATIFICATION.

Where the acting president of a private corporation obtained insurance on its behalf, without authority, his act in tendering to the agent of the

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

insurance company an amount equal to the premium due on the policy did not amount to a ratification of his act in making the contract for the policy by the corporation, under the rule that the party to ratify the act of an agent made for its benefit must be the party who had authority to make the contract in the first instance.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1596, 1702–1704, 1707, 1708, 1710–1716; Dec. Dig. § 426.*]

5. CORPORATIONS (§ 426*)—CONTRACTS—ACTS OF OFFICERS—RATIFICATION—MODE.

Where a corporation's articles and by-laws provided that the power to make all contracts, or obligations, of any kind rested with the board of directors acting jointly, but that the directors, with the consent of each and all members of the board in writing might agree to and transact any business specified in the writing without actually holding a meeting for that purpose, the unauthorized act of the corporation's acting president in obtaining insurance for the corporation could only be ratified in the mode prescribed.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1596, 1702–1704, 1707, 1708, 1710–1716; Dec. Dig. § 426.*]

6. CORPORATIONS (§ 426*)—INSURANCE (§ 142*)—CONTRACT—POLICY—RATIFICATION BY INSURED.

Where the acting president of a private corporation obtained insurance for it without authority, the fact that G. & Co., after a loss, assuming to act as adjusters for the corporation, notified the insurance company of the loss, to which the latter replied that its Southern manager would look after the adjustment, did not constitute a ratification of the policy on the part of the corporation, in the absence of proof that G. & Co. were authorized by the corporation to do what they did, nor did the insurer's reply to the notice constitute a recognition of the policy; it appearing that at the time it had no knowledge of the facts constituting its invalidity.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1596, 1702–1704, 1707, 1708, 1710–1716; Dec. Dig. § 426;* Insurance, Cent. Dig. §§ 263, 264; Dec. Dig. § 142.*]

7. INSURANCE (§ 247*)—POLICY—VALIDITY—RATIFICATION—WITHDRAWAL BY INSURER.

Where the acting president of a private corporation, without authority, obtained insurance for it, and his act in doing so was not ratified prior to loss, the insurer prior to ratification was entitled to withdraw from the contract, and did so by giving notice that it elected to treat the policy as void from the beginning.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 534–536; Dec. Dig. § 247.*]

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

Actions by Julius Marqusee against the Insurance Company of North America and by Kline Bros. & Co. against the Liverpool & London & Globe Insurance Company, Limited. Judgment for defendant in each case, and plaintiffs bring error. Affirmed.

The plaintiff is the assignee of Kline Bros. & Co., a Florida corporation. The defendant is a corporation organized under the laws of the state of Pennsylvania.

The complaint avers, among other things, that at the city of Quincy, Fla., plaintiff's assignor and the defendant entered into a contract of insurance on March 16, 1909, against loss by fire to an amount of $2,500 on the stock and merchandise consisting of leaf tobacco. The property insured was totally destroyed by fire on March 19, 1909. It is further averred that the loss and

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

damage was over $112,000 and that the concurrent insurance aggregated a like sum. On April 27, 1909, defendant notified Kline Bros. & Co. that it denied all liability on the policy, and that although duly demanded it refused to pay its share of contribution in said loss aggregating $2,500.

The defendant denied practically every material allegation of the complaint. It denied that Thomas M. McIntosh, who negotiated the contract of insurance on behalf of the plaintiff's assignee, had any authority to make the contract.

The court below entered judgment in favor of the defendant on a direction of a verdict.

Fried & Czaki, of New York City (Marion Erwin and Frederick M. Czaki, both of New York City, of counsel), for plaintiff in error.

Ivins, Mason, Wolff & Hoguet, of New York City (Theodore A. Hammond, of Atlanta, Ga., Robert L. Hoguet and Randolph W. Childs, both of New York City, of counsel), for defendant in error.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). The question presented in this case involves the validity of a contract of fire insurance.

A charter having been granted by the state of Florida incorporating Kline Bros. & Co., an organization meeting was held on December 16, 1908, at which by-laws were adopted and the directors were chosen. Immediately thereafter the directors met and elected one McIntosh president. On March 8, 1909, the stockholders met, and new directors were chosen who subsequently met and elected Morris Kline president. The newly elected officers demanded the books, records, and property of the company, which demand was not complied with by the old officers, who insisted that the new officers had not been duly elected. While this dispute was pending, McIntosh, who was still acting as president, applied to the defendant's agent for insurance, and on the same day the policy in suit was made out and delivered. Three days later the warehouse in which the subject of the insurance was stored was destroyed by fire. The premium had not then been paid, but within a week after the fire McIntosh tendered the premium, which was refused. The defendant has set up several grounds of defense, one of which is that McIntosh had no authority to negotiate the insurance.

[1] It is quite immaterial whether McIntosh at the time he undertook to contract for the insurance was de facto or de jure president. So far as his authority to make the contract is concerned, this case is not different in its material facts from that of Marquesee v. Hartford Fire Insurance Co., 198 Fed. 475, 119 C. C. A. 251, 42 L. R. A. (N. S.) 1025, in which this court decided that McIntosh was not empowered to make a contract of insurance binding on Kline Bros. & Co. The law is well settled that the president of a private corporation has not, by virtue of his office alone, power to bind the corporation by his contracts. His power to do so must be found in the organic law of the corporation or in a delegation of authority from it directly or through its board of directors formally expressed, or implied from a habit or custom of doing business. The charter conferred no contractual power on the president, and the by-laws provided that all

contracts should be made by the board of directors. The contract of insurance was never authorized by the directors. And there was no evidence that by custom the president had been recognized or held out by the corporation or even by the directors as authorized to make contracts. It was urged that he had previously entered into contracts of insurance, but it did not appear that they had not been authorized by the board.

[2, 3] As McIntosh had no authority to contract with the defendant for insurance upon the property destroyed, we must inquire whether the unauthorized contract subsequently became effective by ratification. The burden of proving ratification rests upon the party who sets up the contract. Moffitt-West Drug Co. v. Byrd, 92 Fed. 290, 34 C. C. A. 351; 34 Cyc. 351; The Accamee (C. C.) 12 Fed. 345; Mississippi, etc., Steamship Co. v. Swift, 86 Me. 248, 29 Atl. 1063, 41 Am. St. Rep. 545. And whether the particular facts relied upon amount to a ratification of the contract is a question for the court. Dickson v. Bamberger, 107 Ala. 293, 18 South. 290.

The legal existence of the corporation in the case at bar dates from August 31, 1908; that being the time when the letters patent were issued by the Governor and Secretary of State of Florida.

The contract, or alleged contract, of insurance was entered into on March 16, 1909.

The question therefore does not arise whether a corporation not in existence at the time the policy was issued can, upon coming into existence, ratify a contract so made. It has been held in many cases that it is necessary for a valid ratification that the principal should have been in existence at the time the unauthorized act was done.

In Whitney v. Wyman, 101 U. S. 392, 25 L. Ed. 1050, the corporation was in existence when the contract was made, although not having a right at that time to do business as its articles of association had not been filed. Subsequently it ratified the contract and the court held it valid.

[4] It was admitted at the trial in the court below that within a week after the fire McIntosh went to the office of the agent of the insurance company and tendered him legal currency in an amount equal to the premium due on the policy and that the agent refused to accept it. If the tender had been made under the authorization of the corporation of Kline Bros. & Co., it would have amounted to a ratification of the contract in case Kline Bros. & Co., had the right to ratify after the loss. But an officer who makes an unauthorized contract has no more right to ratify it than he has to make it. The party to ratify the contract is the party who had authority to make it. Western National Bank v. Armstrong, 152 U. S. 346, 14 Sup. Ct. 572, 38 L. Ed. 470; Norton v. Shelby County, 118 U. S. 425, 6 Sup. Ct. 1121, 30 L. Ed. 178; Marsh v. Fulton County, 10 Wall. 676, 19 L. Ed. 1040; Hotchen v. Kent, 8 Mich. 526; Bishop on Contracts, § 848. As there is nothing in the record which shows that McIntosh ever was authorized to make the contract, so the record equally fails to disclose that after the contract was made he was ever authorized to ratify it. An agent cannot bind his principal by an unauthorized ratification. Fay

v. Slaughter, 194 Ill. 157, 62 N. E. 592, 56 L. R. A. 564, 88 Am. St. Rep. 148; Britt v. Gordon, 132 Iowa, 431, 108 N. W. 319, 11 Ann. Cas. 407; Deffenbaugh v. Jackson Paper Mfg. Co., 120 Mich. 242, 79 N. W. 197; Driscoll v. Modern Brotherhood of America, 77 Neb. 282, 109 N. W. 158.

[5] Ratification proceeds upon the theory that there was no previous authority. It follows therefore that, if the original authorization of the contract was required to be in a particular mode, the authority to ratify must be conferred in like manner. Wherever the law requires a particular mode of authorization, there can be no valid ratification except in the same manner. Borel v. Rollins, 30 Cal. 408; McCracken v. San Francisco, 16 Cal. 591; Despatch Line of Packets v. Bellamy Mfg. Co., 12 N. H. 205, 37 Am. Dec. 203; Morris v. Ewing, 8 N. D. 99, 76 N. W. 1047; 31 Cyc. 1261. The power to make "all contracts or obligations of any kind" was in the board of directors acting jointly. And "the directors by the consent of each and all of the members of the board may, in writing to be filed with the records and minutes of the company, agree to and transact any business specified in such writing, without the actual holding of a meeting for such purpose; but, in all such instances, the said writing shall be preserved and kept by the secretary of the board." The board of directors never authorized, so far as the record discloses, McIntosh to make the tender. Neither did they proceed to authorize him to do so under the clause which provided that they might act under conditions specified without holding a meeting.

[6] On April 5th, Goldstein & Co., assuming to act as adjusters for Kline Bros. & Co., notified the insurance company of the loss. This too cannot be accepted as a ratification of the contract by Kline Bros. & Co., for there is nothing in the record which shows that Goldstein & Co. were ever authorized by Kline Bros. & Co. to do what they did.

To this letter of Goldstein & Co., the insurance company replied that the letter would be forwarded to its manager for the Southern States at Atlanta, Ga., "who will look after the adjustment." This cannot be regarded as a recognition of the policy for at the time it was written the insurance company had no knowledge of the facts which affected its validity. There can be no ratification where there is not full knowledge of all the material facts. Schutz v. Jordan, 141 U. S. 213, 11 Sup. Ct. 906, 35 L. Ed. 705; Weber v. Bridgman, 113 N. Y. 600, 21 N. E. 985; Foote v. Cotting, 195 Mass. 55, 80 N. E. 55, 15 L. R. A. (N. S.) 693; Sill v. Pate, 230 Ill. 39, 82 N. E. 356; Goodwin v. East Hartford, 70 Conn. 18, 38 Atl. 876; Daley v. Iselin, 218 Pa. 515, 67 Atl. 837; Belcher v. Manchester Building, etc., Ass'n, 74 N. J. Law, 833, 67 Atl. 399.

[7] Then followed on April 27, 1909, a letter addressed to Kline Bros. & Co., written by the manager of the insurance company, notifying the former:

"That we have just learned after diligent inquiry that the above numbered policy * * * which you hold was void from its incipiency. Said policy is not, and never was a contract of this company, and we further notify you that this company hereby specifically denies any liability whatever under said policy."

This amounted to a final repudiation of the contract by the insurance company, and prior to that there is nothing in the record which can be accepted as proof of a ratification by Kline Bros. & Co., of the unauthorized action of McIntosh in taking out the policy on March 16, 1909, even if we assume that his action was capable of ratification after the loss.

According to some of the authorities, in order to sustain the action on this policy, it would be necessary to show not only that there was ratification of the policy by Kline Bros. & Co., but also ratification by the insurance company. The theory being that inasmuch as the obligations of a contract must be mutual, if when the policy was issued Kline Bros. & Co. was not bound, the insurance company was not bound. In Mechem on Agency, § 179, that writer says:

"The principle, however, as has been seen, may by his subsequent affirmance become bound by the contract, but it is obvious that, unless the other party has expressly agreed to that effect, it cannot rest with the principal alone to bind the other party also to the contract. That can be done only by some act on the part of the other party signifying his present consent to be bound."

Upon this proposition the authorities are conflicting, and we do not find it necessary at this time to say whether we regard as correct the rule stated by this author. It is enough for the purposes of this case for us to say that there is no doubt that, until ratification had taken place, the insurance company was free to withdraw from the contract and that it did so withdraw by the notification given on April 27th, which was prior to any valid ratification by Kline Bros. & Co.

In the second case, the title of which stands at the head of this opinion, the essential facts are the same as in the first case considered except that the amount of the policy in question is in the latter case $4,000.

The judgment in each of the cases is affirmed, with costs.

In re WRIGHT-DANA HARDWARE CO.

Appeal of CANTWELL.

(Circuit Court of Appeals, Second Circuit. February 17, 1914.)

No. 140.

1. SALES (§ 454*)—CONDITIONAL SALE DISTINGUISHED FROM BAILMENT.

Claimant from time to time consigned paints to the bankrupt under an agreement that claimant was to pay the freight and keep the goods insured. Both claimant and the bankrupt were entitled to sell from the stock, but the prices at which sales were made were fixed by claimant; the bankrupt accounting to claimant for paints sold by it, less 10 per cent. commission. It was allowed no compensation for paint sold by claimant except 8 per cent., which was intended to compensate for the bankrupt's trouble in packing and shipping the goods; the bankrupt being only responsible to the claimant for payment for paint sold to its

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

customers. *Held*, that the transaction constituted a bailment and not a conditional sale.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1324, 1325, 1333, 1334; Dec. Dig. § 454.*

What constitutes a contract of conditional sale, see note to Dunlop v. Mercer, 86 C. C. A. 448.]

2. BANKRUPTCY (§ 140*)—OWNERSHIP OF PROPERTY—BAILMENT.

Where paint belonging to claimant was in the hands of a bankrupt under a contract of bailment, title did not pass to the bankrupt's trustee under the rule that he takes only the title which the bankrupt had at the time of bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 198, 199, 219, 225; Dec. Dig. § 140.*]

3. BAILMENT (§ 21*)—POSSESSION OF PROPERTY—RECOVERY BY BAILOR.

Where a creditor of a bailee seizes the bailed property, the bailor may recover possession unless by his acts he has estopped himself from asserting title.

[Ed. Note.—For other cases, see Bailment, Cent. Dig. §§ 91–102; Dec. Dig. § 21.*]

4. BANKRUPTCY (§ 143*)—TRUSTEE—TITLE—STATUTES.

Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451]) § 70, providing that the bankrupt's trustee shall be vested by operation of law with the title of the bankrupt to "property which, prior to the filing of the petition, he could by any means have transferred, or which might have been levied on and sold under judicial process against him," does not include property in the hands of a bankrupt bailee or of an agent who never had title, but who may have had a right to sell the property for the benefit of the bailor or principal.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 194, 201, 202, 213–217, 223, 224; Dec. Dig. § 143.*]

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

In the matter of bankruptcy proceedings of the Wright-Dana Hardware Company. From a decree (205 Fed. 335) allowing the claim of the Warren Paint Company, John A. Cantwell, as trustee, appeals. Affirmed.

On appeal from a final decree of the United States District Court for the Northern District of New York allowing a claim of the Warren Paint Company at the sum of $3,529.82 against the Wright-Dana Hardware Company, bankrupt.

The Wright-Dana Hardware Company was adjudicated a bankrupt February 5, 1912, on a petition filed by its creditors January 17, 1912. Among the claims filed against the bankrupt's estate was that of the Warren Paint Company in the sum of $3,696.42.

The Wright-Dana Hardware Company had carried on for many years at Utica, N. Y., a general hardware business. The Warren Paint Company, was a corporation incorporated by and under the laws of the state of Ohio. The paint company claimed that it kept a stock of paint with the hardware company; the said paint being consigned to the latter company, which had the right to sell portions of the stock to its own customers as needed, the hardware company receiving a commission on its sales and becoming responsible to the paint company for the payment by the persons to whom the paint was sold. The paint company also had the right to sell from the stock of paint kept in the warehouse of the hardware company. The hardware company was to pay at the end of the year for the goods it had sold during the year.

On February 5, 1912, the day of the adjudication of bankruptcy, a salesman of the Warren Paint Company called at the store of the Wright-Dana Com-

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

pany and was permitted to take away some of the stock of paint of the value of $1,766.80, which was shipped by him to the Warren Paint Company. This was done with the knowledge and approval of the attorneys for the bankrupt. No question is made but that the Warren Paint Company had full knowledge of the financial condition of the hardware company at that time.

The trustee claims that the return of a portion of the paint on February 5th constituted a preference, and that the claim made against the bankrupt by the Warren Paint Company should have been disallowed unless a sum equal to the value of the paint thus turned back to the company was paid over to him.

Martin & Jones, of Utica, N. Y. (Richard R. Martin, of Utica, N. Y., of counsel), for appellant.

Charles B. Mason, of Utica, N. Y. (James F. Hubbell, of Utica, N. Y., of counsel), for appellee.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). The question which is involved in this case depends upon whether the paint which the Warren Paint Company shipped to the Wright-Dana Hardware Company became the property of the latter or continued to be the property of the former. If it remained the property of the paint company, as the court below held it did, then that company had a right to the possession of its property and no preference was obtained over other creditors. But, if the title was vested in the hardware company, it is evident that the paint company obtained a preference under the Bankuptcy Act when it was allowed to take into its possession a portion of the stock on the day the hardware company was adjudicated a bankrupt, and that its claim should have been disallowed until its preference was surrendered.

[1] An examination of the record convinces us that the title to the paint which the paint company shipped to the hardware company was not vested in the bankrupt, but remained in the paint company. It appears that, under the agreement between the two companies, the paint company, from time to time consigned a stock of its paints to the hardware company; the former company paying the freight on goods so shipped. The paints, while in the possession of the hardware company, were kept insured by the paint company, down to the time of the bankruptcy. Both the paint company and the hardware company had the right to sell from the stock of paint thus carried, but the price at which sales could be made was fixed by the paint company. If prices rose during the year, the price at which the paint could be sold out of the consigned stock was advanced by the paint company. If prices declined, then the paint company reduced the price at which the hardware company could sell. When the hardware company took inventories of its own assets, it never included the stock of consigned paint. The hardware company at the close of a year (for the arrangement between the companies extended over a series of years) ascertained from the inventory of the year before the amount of paint it then had on hand. To this it would add the amount of paint shipped to it by the paint company during the year. It would then deduct the amount of paint sold during the year out of the stock to its cus-

tomers by the paint company as well as the amount shown to be still on hand by the inventory then taken. The difference disclosed what goods the hardware company had sold during the year, and for these goods the paint company was paid, less the 10 per cent. commission which it was allowed on its sales. For goods sold out of the stock by the paint company, the hardware company never received any compensation except a commission of 8 per cent. which was intended to compensate the hardware company for its trouble in packing the goods and shipping them to the persons who had purchased direct from the paint company. As to the sales made by the hardware company, that company was itself responsible to the paint company for the payment by its own customers. The hardware company never paid for any stock of paint it received but only on sales made out of such stock. On June 26, 1911, the paint company wrote the hardware company:

"We regard all of the shipments that have been made to you and all the goods that you retain as being on consignment."

And there is nothing in the record to show that the hardware company at any time understood the matter in a different manner, but much to show that that company understood it in the same way. The facts as disclosed in the record are consistent only with the theory that the title to the paint consigned to the hardware company was retained by the paint company, and that both companies so understood the matter and at all times acted in conformity to that understanding. The paint consigned from time to time was not sold to the hardware company. Indeed, that company refused to buy and never agreed to pay for any part of it except such as it sold, and there is no evidence to justify the theory of a conditional sale. The transaction was a bailment; the bailee being given the privilege of selling to its own customers any part of the stock of paint intrusted to it. But the fact that the hardware company had this privilege did not convert what otherwise would have been a contract of bailment into a contract of sale except as to such portions of the stock as the company actually sold to its customers. See Walter A. Wood Mowing & Reaping Mach. Co. v. Vanstory, 171 Fed. 375, 96 C. C. A. 331.

The claim of the trustee seems to be that as these goods were in the warehouse of the bankrupt at the time of the bankruptcy, and as the bankrupt had the right to make sales from this stock of merchandise, no provision that the title was to remain in the manufacturer, the Warren Paint Company, could be effectual as against the creditors of the hardware company. That would undoubtedly be true if the transaction had been an absolute or even a conditional sale. In re Howland (D. C.) 109 Fed. 869; In re Garcewich, 115 Fed. 87, 53 C. C. A. 510. But in the case at bar, as we have pointed out, the merchandise was not sold either absolutely or conditionally to the hardware company.

[2] As the transaction was simply a bailment, the title continued in the bailor, and inasmuch as the bailee, the bankrupt, never had the title, it is difficult to see how its trustee could get it. The title which the trustee takes is the title which the bankrupt had. It is true that in some respects a trustee's rights are greater than those of his bank-

rupt. Thus he may set aside fraudulent transfers or liens which the bankrupt himself could not do. But the trustee does not assert any fraud in this case. On the contrary, his counsel admitted in his argument that there had been no fraudulent transfer. There can be no doubt that a trustee in bankruptcy is not entitled to goods in the possession of the bankrupt which have been left simply for repairs, storage, or upon other bailments. Remington on Bankruptcy, vol. 1, § 1887. "The general rule is that the trustee succeeds to the bankrupt's title and stands in his shoes and takes the property, in cases unaffected by any fraud of the bankrupt toward creditors, in the same plight and condition in which the bankrupt held it and subject to all equities and rights imposed upon it in the hands of the bankrupt." Remington on Bankruptcy, vol. 1, § 1144.

[3] It has been held that, where a creditor of a bailee seizes the bailed property, the bailor may recover possession unless the bailor has by his acts estopped himself from asserting his title to the property. Hardy v. Hunt, 11 Cal. 343, 70 Am. Dec. 787; Small v. Hutchins, 19 Me. 255; Bellows v. Denison, 9 N. H. 293; Kings v. Humphreys, 10 Pa. 217; Caldwell v. Cowan, 9 Yerg. (Tenn.) 262; Hart v. Hyde, 5 Vt. 328; 5 Cyc. 208.

[4] It is true that the Bankruptcy Act, § 70, provides that the trustee shall be vested by operation of law with the title of the bankrupt to "property which prior to the filing of the petition he could by any means have transferred, or which might have been levied upon and sold under judicial process against him." We do not, however, understand that this clause includes, or was intended to include, property in the hands of a bankrupt bailee or of a bankrupt agent who never had the title but who may have had a right to sell the property for the benefit of his bailor or principal. It is impossible to give the act any such construction. The bailor cannot thus be divested of his title.

The decree is affirmed, with costs.

FARNSWORTH v. UNION TRUST & DEPOSIT CO.

In re R. M. SMITH & CO.

(Circuit Court of Appeals, Fourth Circuit. February 17, 1914.)

No. 1211.

1. STIPULATIONS (§ 14*)—OPERATION AND EFFECT.

Where, in a bankruptcy proceeding, the parties stipulated that the receiver of a corporation was duly authorized to prove a claim for unpaid stock subscriptions by the bankrupts, the receiver's failure to institute certain proceedings or obtain certain orders or decrees necessary to entitle him to maintain the claim was immaterial; the vital question being whether the bankrupts were liable, as the purpose of the agreement was to save time, trouble, and expense over other less material matters, and it would be construed accordingly.

[Ed. Note.—For other cases, see Stipulations, Cent. Dig. §§ 24–37; Dec. Dig. § 14.*]

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

2. PARTNERSHIP (§ 162*)—PARTNERSHIP DEBTS—STOCK SUBSCRIPTIONS.
Anything due on stock subscriptions made in the individual names of partners for the partnership account was a partnership debt.
[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 296–299; Dec. Dig. § 162.*]

3. BANKRUPTCY (§ 340*)—CLAIMS—STOCK SUBSCRIPTIONS—PAYMENT—EVIDENCE.
On the hearing on a claim in bankruptcy on unpaid stock subscriptions by the bankrupts, evidence *held* insufficient to support a finding that a certain lease was taken by the corporation on the subscriptions at an agreed valuation.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 527; Dec. Dig. § 340.*]

4. CORPORATIONS (§ 88*)—STOCK SUBSCRIPTIONS—PAYMENT IN PROPERTY.
To accept property in payment for stock at an agreed valuation required corporate action, and an understanding between the principal stockholders without any corporate action was insufficient.
[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 337–364, 425–428; Dec. Dig. § 88.*]

Appeal from the District Court of the United States for the Northern District of West Virginia, at Parkersburg, in Bankruptcy; Alston G. Dayton, Judge.

In the matter of R. M. Smith & Co., bankrupts. From an order, in proceedings against the Union Trust & Deposit Company confirming the reduction by the referee of the claim of John W. Farnsworth, special receiver of the Smith-Chapman Lumber Company, he appeals. Reversed and remanded.

Linn, Brannon & Lively, of Glenville, W. Va., and Steptoe, Rixey & Johnson, of Clarksburg, W. Va., for appellant.

Van Winkle & Ambler, of Parkersburg, W. Va., for appellee.

Before KNAPP and WOODS, Circuit Judges, and ROSE, District Judge.

ROSE, District Judge. R. M. and J. H. P. Smith were copartners. They traded as R. M. Smith & Co. They will be called the "bankrupts." In the names of its individual members the copartnership subscribed for 445 shares of the par value of $100 each of the capital stock of the Smith-Chapman Lumber Company. This corporation will be referred to as the "company." It had a short life. It became insolvent less than two years after it was formally organized and a trifle over two years after its certificate of incorporation was issued. A state court of competent jurisdiction appointed a receiver for it. He will be called the "receiver." In the bankruptcy proceedings he filed a claim against the partnership estate for $22,500, which he said was the unpaid balance due on the stock subscriptions. The referee reduced his claim to $3,423.75. The order was confirmed by the District Court. The receiver took this appeal.

[1] The trustee says the receiver is not entitled to maintain his claim because certain proceedings had not been previously instituted or certain orders or decrees obtained. During the pendency of the case

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

below, the parties stipulated that the receiver was "duly authorized to prove his claim for unpaid stock subscriptions in this bankruptcy proceeding, and to prosecute the same." The vital question was whether the bankrupts were liable under any circumstances for the sum alleged to be due by them on their stock subscriptions. The purpose of the agreement was to save time, trouble, and expense over other less material matters. It must be construed accordingly.

[2] The evidence clearly shows that the subscriptions were made for the partnership account, although in the individual names of the partners. If anything is legally due upon them, it constitutes a partnership debt.

The referee and the court below found that the bankrupts had on their subscriptions paid in cash, in supplies, and by taking up a note of the company for $5,000, in all $27,576.25. We see no reason to differ. This leaves but one question in the case.

[3] The trustee says that a certain lease from one McGraw was taken by the company on account of the subscriptions of the bankrupts and others at a valuation of $30,000. If this be true, the receiver was awarded below all, and more than all, coming to him. If it be not true, he has a provable claim for the difference between $44,500, and $27,576.25, or $16,923.75.

On June 20, 1907, the bankrupts agreed with one Chapman to form the company. The bankrupts were to put in property and money to the amount of $31,000, Chapman to the amount of $15,500. The last named was to get one-third of the stock, the bankrupts the other two-thirds. On the next day they executed the certificate of incorporation of the company by which its capital was fixed at $75,000. In August of that year the company actually began business. It was not until November 4, 1907, that the formal meeting for organization was held. At that time the bankrupts subscribed for 445 shares, other nominees of theirs for 55 shares, Chapman for 250. The agreement of June 20th was laid before the stockholders' meeting and by resolution was approved and ratified; that is to say, the company voted that for $31,000 the bankrupts should get two-thirds of its stock and that Chapman, for $15,500, should have the remaining third.

The referee found that it was the original intention to incorporate the company for $46,500, and that it was the subsequent acquirement of the McGraw lease which led to an increase of the capitalization to $75,000. The only evidence in support of this finding is the statement of Chapman when examined as a witness. He said the agreement contemplated his putting up $15,500, the bankrupts $31,000. It was "enlarged by the contract with McGraw for the mill and property, and we placed a nominal value of $30,000 upon it." He, however, expressly testified that when the written agreement was made the McGraw lease was not considered. It had not then been procured. The referee in reaching the conclusion he did obviously lost sight of the chronology. The agreement to form the company was dated June 20th. The incorporators signed the certificate of incorporation on the next day. There is no hint that the McGraw lease was gotten overnight. The agreement and the certificate were parts of one transac-

tion. They were practically contemporaneous. The capitalization named in the certificate had no relation to the lease and was not fixed in contemplation of it, nor is there the slightest suggestion in the proceedings of the meeting at which the company was organized and the stock formally subscribed that any one supposed that the lease and the stock subscription had any connection with each other. The subscription was made, the agreement of June 20th was read and spread at length on the minutes, and was formally ratified. At the close of the minutes there is this entry:

"It was reported to this meeting that certain of the stockholders of this company had entered into a certain contract for the purchase of certain property, including mill property at Palmer, certain land and contracted certain leases, etc., in relation to the business of this company with one John T. McGraw, which said contract is ratified and approved by this meeting."

This statement implies that the lease was negotiated for the corporation. There is not a word to indicate anything else or other. No copy of the lease is found in the record. Chapman, however, expressly testifies that it was made directly to the company. The company, it will be remembered, had actually begun business three months before the meeting for organization was held. Both the bankrupts were examined as witnesses. Neither of them said anything as to the lease being valued at $30,000, or at any other sum. Mr. R. M. Smith testified that he knew of no agreements between the incorporators, save those spread on the minutes of the meeting. In our view the evidence does not show that any agreement was ever made that the lease should be taken as worth $30,000, or any other sum. Chapman's testimony to the contrary is not reconcilable with the order of events and with what he and others prove to have been actually done. The conclusion at which the referee arrived, that the bankrupts owed $3,423.75, is itself inconsistent with his finding that the lease was taken in payment of stock subscriptions at the sum of $30,000. If it had been, two-thirds of it would have been paid in on account of the bankrupts. With the $27,576.25 which they had otherwise paid, the company would have received from them a total of $47,526.25, which would have exceeded by upwards of $3,000, the full amount of the stock subscriptions made in their names. It is true that additional stock to the par value of $5,500 was issued to their nominees and was not paid for by anyone other than themselves, if by them. Even so, the total amount of their subscription did not exceed $50,000 and their payments, if the referee's theory be right, footed up, as has already been stated, $47,576.25, so that their liability would not exceed $2,423.75, which is $1,000 less than the referee found it to be.

[4] Even, however, if there had been some more or less vague understanding between Chapman and the bankrupts that the lease should be taken in full payment of any balance due on their subscriptions, such understanding would not be sufficient. To accept such property in payment for stock at such a valuation required corporate action. There was none.

The trustee says that it is immaterial that the issue of stock for property was not authorized by formal resolution entered in the min-

utes. He relies on Cook on Corporations, § 21, and the cases there cited. In these cases, however, it was satisfactorily shown that corporate action had been actually taken, and it was by mere inadvertence that the resolutions adopted by the corporation had not been entered upon the minutes. Handley v. Stutz, 139 U. S. 417, 11 Sup. Ct. 530, 35 L. Ed. 227; Whitlock v. Alexander, 160 N. C. 465, 76 S. E. 538. In both these cases the necessity of corporate action in some form was distinctly recognized. It is not necessary to follow counsel for the trustee in their discussion of Richardson v. Graham, 45 W. Va. 134, 30 S. E. 92, or Bank v. Belington Co., 51 W. Va. 60, 41 S. E. 390. According to their contention, those cases decide that a West Virginia corporation may take property in payment of stock subscriptions; that it may take such property at any value to which it may agree; and that in the absence of a showing of actual fraud such valuation, however excessive, is conclusive. Before the doctrines laid down in those cases become applicable, the corporation must agree to take the property at the valuation. The evidence here does not show that the corporation ever made any such agreement, formally or informally. Individuals as such cannot value property at any sum they see fit and require the rest of the world to accept that valuation as conclusive. Such power, if conferred upon them by the Legislature, is conferred in their corporate capacity. It is an extraordinary grant and should be construed strictly, at least to the extent of insisting upon a substantial compliance with the legislative requirements. However that may be, for the reasons already stated, the order below must be reversed and the case remanded, with directions to allow the appellant's claim for $16,923.75.

Reversed.

CLARK et al. v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. March 2, 1914.)

No. 4051.

1. COMMERCE (§ 33*)—REGULATION—POWER OF CONGRESS—OBSCENE PRINTED MATERIAL.

Congress had power to enact Penal Code (Act March 4, 1909, c. 321, 35 Stat. 1138 [U. S. Comp. St. Supp. 1911, p. 1664]) § 245, making it an offense for any person to knowingly deposit with any express company or common carrier, for the carriage from one state to another, any obscene, lewd, or lascivious or filthy book, pamphlet, picture, paper, letter, writing, print, or other matter of indecent character.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 26, 81; Dec. Dig. § 33.*]

2. CONSTITUTIONAL LAW (§ 90*)—CIVIL RIGHTS—FREEDOM OF PRESS.

Penal Code (Act March 4, 1909, c. 321, 35 Stat. 1138 [U. S. Comp. St. Supp. 1911, p. 1664]) § 245, prohibiting the transportation by express from one state to another of any obscene, lewd, or lascivious book, etc., was not unconstitutional as an improper abridgment of the freedom of the press.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 172; Dec. Dig. § 90.*]

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

3. INDICTMENT AND INFORMATION (§ 125*)—DUPLICITY.
Where an indictment charged defendants with violating Penal Code (Act March 4, 1909, c. 321, 35 Stat. 1138 [U. S. Comp. St. Supp. 1911, p. 1664]) § 245, prohibiting the deposit with an express company for transportation in interstate commerce of any obscene, lewd, or lascivious or any filthy book, etc., it was not duplicitous because it charged the deposit of several copies of the alleged obscene, lewd, or lascivious book in an express office to be transported in interstate commerce to different people.
[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 334–400; Dec. Dig. § 125.*]

4. CRIMINAL LAW (§ 396*)—EVIDENCE—OBSCENE BOOK.
Where defendants were charged with depositing an obscene and filthy book with an express company for transportation in interstate commerce, in violation of Penal Code (Act March 4, 1909, c. 321, 35 Stat. 1138 [U. S. Comp. St. Supp. 1911, p. 1664]) § 245, the charge not being limited to particular passages or parts of the book, defendants were entitled to have the whole book introduced in evidence and considered by the jury under proper instructions from the court.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 861, 862; Dec. Dig. § 396.*]

In Error to the District Court of the United States for the District of North Dakota; Charles A. Willard, Judge.

Sam H. Clark and C. H. Crockard were convicted of knowingly depositing with an express company an obscene, lewd, lascivious, or filthy book, and they bring error. Reversed and remanded.

George A. Bangs and Tracy R. Bangs, both of Grand Forks, N. D., (D. L. Nash and George R. Robbins, of Grand Forks, N. D., on the brief), for plaintiffs in error.

Edward Engerud, U. S. Atty., of Fargo, N. D. (M. A. Hildreth, Asst. U. S. Atty., of Fargo, N. D., on the brief), for the United States.

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

CARLAND, Circuit Judge. Clark and Crockard were indicted, tried, convicted, and sentenced in the District Court for the District of North Dakota on counts 2 and 25 of an indictment which charged them with violating section 245 of the Penal Code. That section, so far as material, was as follows:

"Whoever shall bring or cause to be brought into the United States or any place subject to the jurisdiction thereof, from any foreign country, or shall therein knowingly deposit or cause to be deposited with any express company or other common carrier, for carriage from one state * * * to any other state, * * * any obscene, lewd, or lascivious, or any filthy, book, pamphlet, picture, paper, letter, writing, print, or other matter of indecent character, * * * shall be fined not more than five thousand dollars, or imprisoned not more than five years, or both."

Count 2 charged that Clark and Crockard on March 6, 1912, in the county of Burleigh, state and district of North Dakota—

"did willfully and knowingly unlawfully deposit and cause to be deposited with Northern Express Company (said express company being then and there a corporation engaged in the business of a common carrier), for carriage and transportation by said Northern Express Company from the city of Bismarck in the state of North Dakota to and into the several places and states here-

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

inafter set forth, numerous copies of a certain lewd, obscene, lascivious, indecent, and filthy book, being a book or magazine commonly known and described as 'Jim Jam Jems by Jim Jam Junior,' for the month of March, 1912, said books so deposited for transportation being copies of the March, 1912, number, issue, or edition of a periodical, magazine, or publication which was in the year 1912 published by said defendants in the said city of Bismarck in monthly issues or editions and bearing the title and commonly known as 'Jim Jam Jems by Jim Jam Junior,' and which said books so deposited for transportation contained printed on the pages thereof, as defendants then and there well knew, a certain writing, essay, or article entitled 'Three Weeks in the Magic City,' and certain other articles and writings, all of which articles and writings were and are so obscene, lewd, lascivious, filthy, and indecent that they would be offensive to the court and improper to be here reproduced and spread upon the records of this court; that said books, when so deposited, were packed in several packages, each of which packages contained one or more of said books, and each of said several packages, respectively, were by said defendants then and there directed, consigned, and intended for transportation by said express company by and in interstate commerce to the respective places outside the state of North Dakota for delivery to the respective consignees, as follows, namely: To J. J. Casey, at Billings, in the state of Montana; to Monogram Cigar Company, at Aberdeen, in the state of South Dakota; to H. C. Compton, at Minneapolis, in the state of Minnesota; to Miss Loftus, at St. Paul, in the state of Minnesota; to Helen Faust, at Denver, in the state of Colorado; to L. Newman, at Great Falls, in the state of Montana."

Count 25, in language similar to that in count 2, charged that the same defendants on September 9, 1912, at the same place, deposited for transportation in interstate commerce a book called the "Semi-Annual Number of the Jim Jam Jems," addressed to one M. E. Krelle, Chicago, Ill.

[1] By demurrer and otherwise counsel for defendants challenged the power of Congress to enact the law alleged to have been violated, and an interesting argument has been presented to us in support of this proposition. We do not, however, regard the question as an open one, in view of the decisions of the Supreme Court in Lottery Cases, 188 U. S. 321, 23 Sup. Ct. 321, 47 L. Ed. 492; Hoke v. United States, 227 U. S. 308, 33 Sup. Ct. 281, 57 L. Ed. 523, 43 L. R. A. (N. S.) 906, Ann. Cas. 1913E, 905; Reid v. Colorado, 187 U. S. 137, 23 Sup. Ct. 92, 47 L. Ed. 108; The Daniel Ball, 10 Wall. 557, 19 L. Ed. 999; Coe v. Errol, 116 U. S. 517, 6 Sup. Ct. 475, 29 L. Ed. 715.

[2] It is also claimed that the law is an abridgment of the freedom of the press. We think that the freedom of the press has enough to answer for without making it a protecting shield for the commission of crime. Davis v. Beason, 133 U. S. 333, 10 Sup. Ct. 299, 33 L. Ed. 637; Knowles v. United States, 170 Fed. 409, 95 C. C. A. 579.

[3] It was objected by demurrer that count 2 was bad for duplicity. This contention is based upon the fact that the alleged obscene matter was addressed to different parties, and that more than one copy of the book was deposited. The offense charged is the depositing of copies of an obscene, lewd, or lascivious book in the express office, to be transported in interstate commerce. The fact that these copies were addressed to different persons or that more than one copy was deposited would not render the count bad for duplicity. In Dunlop v. United States, 165 U. S. 486, 17 Sup. Ct. 375, 41 L. Ed. 799, it was alleged that the defendant at a certain time and place deposited and

caused to be deposited "a large number of copies, to wit, 100 copies, of a certain paper, print, and publication entitled 'The Chicago Dispatch,' one of which said copies was then and there directed to 'Mr. Montgomery,' at Chicago aforesaid; another to 'R. M. Williams, Box 801,' at St. Louis, Mo., and the rest to divers persons, respectively, to the said grand jurors unknown." Although this case was contested vigorously, no point seems to have been made that the counts upon which Dunlop was tried and convicted charged more than one offense. It is undoubtedly true that in the Dunlop Case the deposit of a single copy of the paper and in this case a single copy of the book could have been charged as an offense, but, where the copies are all deposited at the same time and place, the pleader may properly charge the depositing as a single offense. 1 Bishop, Cr. Proc. § 436 et seq.; U. S. v. Nunnemacher, Fed. Cas. No. 15,903; U. S. v. Patty (D. C.) 2 Fed. 664; U. S. v. Ferro (D. C.) 18 Fed. 901; U. S. v. Scott (C. C.) 74 Fed. 213.

[4] At the trial, in order to support the charge in count 2, counsel for the prosecution offered in evidence the title page or front cover of the book or magazine referred to therein. Counsel for defendants objected to the offer for the reason that the whole book or magazine was not offered; the objection was overruled and exception allowed. Counsel for the prosecution then offered the fly leaf of the same book or magazine. This fly leaf contained the following: "Jim Jam Jems by Jim Jam Junior," and "Jim Jam Jems, will not be sent by mail. When ordering single copies include express charges in remittance, address Jim Jam Jems, Bismarck, N. D." To this offer there was the same objection, ruling, and exception. Counsel for the prosecution then offered from page 31 of the same book or magazine the following language:

"Henry George once said, 'I am for men.' So is Jim Jam Jems, but we understand that women and preachers sometimes read it."

To this offer there was the same objection, ruling, and exception. Counsel for the prosecution then offered a part of the article entitled "Three Weeks in the Magic City," and referred to in count 2 as being so obscene, lewd, lascivious, filthy, and indecent as to be offensive to the court and improper to be spread upon its records. To this offer there was the same objection, with the addition that the whole of the article, which count 2 alleged made the book or magazine obscene, was not offered. The objection was overruled and exception taken. When the case was with the defendants, their counsel offered in evidence the whole book or magazine referred to in count 2. The offer was denied, and exception allowed. Counsel for defendants then offered all of the article entitled "Three Weeks in the Magic City," which offer was denied, and exception taken.

To support the charge in count 25, counsel for the prosecution offered in evidence the front cover of the book referred to therein. The cover contained this language:

"Jim Jam Jems by Jim Jam Junior, Semi-Annual Number, Six Months Old and such a Healthy Chap; A Volley of Truth."

Counsel for defendants objected to the offer for the reason that the whole book was not offered, objection overruled, and exception allowed. Counsel for prosecution then offered articles from the book, described in count 25, entitled "The Common Law," "Evelyn and the Serpent," "The Blond Hair," and "June Brides." There was the same objection, ruling, and exception. Counsel for the prosecution then offered a part of the article entitled "Affinities and Platonics," and a part of an article entitled "Three Weeks in the Magic City." There was the same objection, ruling, and exception. When the case was with the defendants, their counsel offered in evidence the whole book and all of the articles, a portion of which had been offered in support of count 25. The offer was denied, and exception allowed. At the close of all the evidence, counsel for the defense moved the court to direct a verdict of acquittal for the reason, among others, that the book, which the defendants were charged with depositing for transportation in interstate commerce, had not been introduced in evidence. The motion was denied and exception allowed. We have recited all the evidence which was introduced at the trial under counts 2 and 25, with reference to the character of the book or magazine referred to in said counts. The only evidence the jury considered or were allowed to consider, with reference to the character of the book, were certified copies of the portions thereof, which counsel for the prosecution had introduced in evidence as being obscene, lewd, lascivious, or filthy. The book itself was not introduced in evidence for the consideration of either court or jury. Did the court err in excluding the book and the articles, a portion only of which were offered in evidence by the prosecution? We suppose that the book and the articles, before mentioned, were excluded on the theory that the portions of the book or article excluded had no relevancy whatever in the mind of the court to the question as to whether those portions introduced in evidence were obscene or not. The question then presents itself as to whether, when an indictment charges that a certain book is obscene, the passages, which the prosecutor claims to be obscene, may be introduced in evidence and submitted to the jury, and the remaining portion of the book excluded. Does not the charge in the indictment that the book is obscene necessarily make the book material and relevant evidence upon the question as to whether it is obscene or not? When a prosecutor charges in an indictment that a certain book is obscene, is he not estopped from claiming that the book itself may not be introduced in evidence? No case has been cited, nor have we been able to find one, where the book alleged to be obscene was not admitted.

The case of United States v. Bennett, Fed. Cas. No. 14,571, 16 Blatchf. 338, is cited in support of the ruling of the trial court in excluding the alleged obscene book. We do not think the case cited supports the contention of counsel for the government. In the Bennett Case the book that was offered and received in evidence consisted of 24 printed pages of white paper and four pages of colored paper. The whole book was in evidence. When counsel for Bennett was summing up his client's case to the jury in the trial court, he proposed to

read the whole book. The trial judge said that he would not permit the whole book to be read, but in so ruling also said to counsel:

"If there is any particular sentence necessary to make the sense and meaning of a passage clear, I intend to allow you to read that."

When the case came before the Circuit Court, held by Blatchford, Circuit Judge, and Bennedict and Choate, District Judges, the record showed that each one of the jurymen who tried Bennett had a copy of the book in his hand and took the same with him. The Circuit Court, in deciding that no error was committed by the trial court in preventing counsel from reading all of the book introduced in evidence, said:

"The case elsewhere states that the court allowed the counsel for the defendant to read and comment on the contexts of the passages marked by the prosecution, so far as to show the meaning of the language of the marked passages."

The only inference that can be gathered from the record as brought to the Circuit Court was that to permit counsel to read the whole book was an unnecessary consumption of time, as each juror had the book in his hand.

The next case cited in support of the ruling of the court below is Burton v. United States, 142 Fed. 57, 73 C. C. A. 243, a case decided by this court. The following is quoted from the opinion in that case:

"Of course the character of the book was not to be judged by any brief extracts therefrom, the proper understanding of which depended upon their being taken in connection with the context; nor was it necessary to consider more of the context than was essential to a proper understanding of what was claimed to be obscene."

But this court also said immediately following the above language:

"The portions deemed to be of that character (obscene) were read to the jury by the prosecution, and other portions deemed essential to a proper understanding of what was read by the prosecution were read to the jury by the defendants; thus much of the book was practically and properly eliminated from consideration."

It was ruled in this case that it was not error for the trial court to refuse to charge the jury that the character of the book should not be judged by any extract or extracts therefrom, but upon an inspection of the whole book and with reference to all its contents, for the reason that as counsel for both sides by their mode of conducting the case had eliminated a large part of a book consisting of 300 pages from consideration, it would be confusing to the jury to tell them that they must consider the whole book. Of course the whole book was in evidence. We see nothing in Burton v. United States that conflicts with the language of Judge Thayer in charging the jury in United States v. Clark (D. C.) 38 Fed. 736. In the Clark Case the jury returned into court and asked the following question:

"If the jury find any portion of the book, pamphlet, or circular obscene, lewd, etc., would such finding be sufficient grounds for them to condemn the whole book, pamphlet, or circular?"

Judge Thayer answered this question as follows:

"If the effect of the pamphlet and papers as a whole would be to deprave and corrupt the minds of those into whose hands they might come, whose minds are open to such influences, or to excite lustful or sensual desires, then the pamphlets and circulars should be found to be obscene and lewd, whether such effect on the minds of the readers is produced by single passages or portions of the pamphlet or circulars or by many passages or portions."

In our opinion the above language states the true rule of law. After the defendants had been placed in jeopardy, the power to convict them of the crime charged in the indictment existed nowhere except in the jury. This power was not merely advisory but was absolute and undivided. So far as the record shows, the jury never saw the book that was alleged to be obscene. Certain passages therefrom were submitted to the jury, and, finding these passages obscene, they returned a verdict finding the defendants guilty of depositing an obscene book. It is true that the jury may in a particular case find a book obscene from the consideration of certain passages, but it is placing a defendant at a great disadvantage to have the jury compelled to consider only such passages as the prosecutor deems obscene. It bars counsel from any argument or legitimate comment of whether the book is obscene or not. We think that the conclusion is irresistible that a defendant charged with depositing an obscene book, as in the case at bar, is entitled to have the book, which it is claimed by the prosecutor to be obscene, introduced in evidence to be considered by the jury under proper instructions from the court. It is claimed, however, that the court has the power to say what portions of the book may be excluded, as not having any relevancy or materiality upon the question as to whether the book is obscene or not. Conceding this power, we decide that whatever is charged to be obscene in the indictment of necessity and by virtue of the charge becomes material and relevant evidence to be admitted for the consideration of court and jury, and that, in the exercise of the power to rule upon the admissibility of evidence, the court erred in excluding the book alleged to be obscene in the case at bar. Numerous other errors are assigned, but, as a new trial must be granted, some of them cannot and others may not occur again.

Judgment reversed, and case remanded, with instructions to grant a new trial.

McSWEENEY PACKING CO. et al. v. BESHLIN.

(Circuit Court of Appeals, Fifth Circuit. March 10, 1914.)

No. 2599.

1. ESTOPPEL (§ 68*)—DISMISSAL — RETURN OF MANDATE — JURISDICTION OF TRIAL COURT.

Where a writ of error was dismissed for want of appearance or brief filed on behalf of plaintiff in error, and mandate filed in the District Court, and on the day of such dismissal an alleged settlement of the judgment was entered into, the term of the Court of Appeals having expired, appellee could not take advantage of the appellate court's denial of jurisdiction on an application of appellants to recall the mandate and at

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

the same time assert that the District Court had no jurisdiction as of the same date to restrain the enforcement of the judgment on the filing of a bill for specific performance of the alleged settlement on the ground that jurisdiction still resided in the Court of Appeals because, at the time the bill was filed, the 20 days allowed for the filing of an application for rehearing had not expired.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 165–169; Dec. Dig. § 68.*]

2. SPECIFIC PERFORMANCE (§ 114*)—SETTLEMENT OF JUDGMENT—BILL.

A bill to enforce specific performance of a settlement of a judgment after a writ of error had been dismissed for want of prosecution, but before the time for filing an application for a rehearing had expired, *held* to contain sufficient equity to entitle complainants to a hearing on the merits.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 356–370, 372; Dec. Dig. § 114.*]

3. COMPROMISE AND SETTLEMENT (§ 6*)—JUDGMENT—CONSIDERATION.

Pendency of a writ of error to review a judgment which would be dismissed in case of a settlement constituted a sufficient consideration for the compromise and settlement.

[Ed. Note.—For other cases, see Compromise and Settlement, Cent. Dig. §§ 35–50; Dec. Dig. § 6.*]

4. JUDGMENT (§ 459*)—ENFORCEMENT.

Where complainants sued to enforce specific performance of a compromise and settlement of a judgment on the same day a writ of error was dismissed for want of prosecution, and deposited the amount due on the judgment in the registry of the District Court, complainants were entitled to an injunction against the enforcement of the judgment pending final disposition of the suit for specific performance on condition that the deposit be continued for defendant's benefit to answer the decree in the suit for specific performance.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 924, 925; Dec. Dig. § 459.*]

Shelby, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the Northern District of Texas; Edward R. Meek, Judge.

Action by the McSweeney Packing Company and others against E. H. Beshlin, trustee in bankruptcy of Robert S. Redfield & Co. From an order denying complainants' application for an interlocutory injunction restraining defendant from enforcing a judgment against complainants pending final hearing of a bill to enforce specific performance of an agreement for settlement, complainants appeal. Reversed and remanded, with directions.

I. W. Stephens and Geo. E. Miller, both of Ft. Worth, Tex. (R. N. Grisham, of Sweetwater, Tex., on the brief), for appellants.

Theodore Mack, of Ft. Worth, Tex. (A. H. Kirby, of Ft. Worth, Tex., on the brief), for appellee.

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

GRUBB, District Judge. This is an appeal from an order of the District Court for the Northern District of Texas, denying the application of the appellants for an interlocutory injunction against the

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

appellee, seeking to restrain him from enforcing a judgment obtained by him against the appellants in a suit at law in the same court for the sum of $27,760, pending the final hearing of a bill filed by appellants to enforce the specific performance of an agreement of settlement of the judgment, alleged to have been entered into between the plaintiff and defendants in the judgment, pending the disposition of the case upon writ of error to this court. The writ of error was dismissed in this court, on motion of the defendant in error, because, when the case was called for argument upon the regular call of the docket of this court at Ft. Worth, there was no appearance made or brief filed on behalf of the plaintiffs in error. The dismissal of the writ of error occurred on November 10, 1913, and the alleged settlement of the judgment occurred on November 10, 1913. The District Judge denied the injunction because of the belief expressed in his opinion that the District Court had no jurisdiction to restrain the enforcement of the judgment at the time the bill was filed, which was within the 20 days allowed for the filing of an application for a rehearing in the cause.

[1] It does not appear from the record, but we know it to be the fact, that an application was made by the appellants to this court, after the termination of the court's session at Ft. Worth, to recall the mandate, because of the alleged settlement of the cause and the failure of plaintiffs in error to appear and prosecute their writ of error by reason of their reliance upon the settlement. We denied the application to recall the mandate by reason of the doubt entertained by us of our jurisdiction to control the judgment of dismissal, on which the mandate issued, after the adjournment of the session of this court at Ft. Worth. It would have been futile to recall the mandate, if this court had lost control of the judgment. If the judgment of this court had passed beyond the control of this court by reason of the adjournment, and this court had parted with jurisdiction of the cause, then it follows that the District Court had regained jurisdiction over the cause and the judgment rendered therein. As the bill for specific performance, upon which the application for a temporary injunction is based, was filed in the District Court after the application for a recall of the mandate was denied by us, the District Court then had jurisdiction of a bill to enforce a specific performance of a compromise of the judgment, and to restrain the enforcement of the judgment, pending a final hearing. The appellee cannot obtain the advantage of our denial of jurisdiction in this court upon the application of appellants to recall the mandate, and now assert a want of jurisdiction as of the same date in the District Court because of the insistence that jurisdiction still resided in this court. For the purposes of this litigation between appellants and appellee, it must be treated for the sake of consistency as having vested in the District Court upon the adjournment of the term of this court at Ft. Worth.

The appeal is from an order of the District Court denying plaintiff's application for an injunction pendente lite. The District Judge passed only upon the question of jurisdiction. If the averments of

the bill show that it contains equity, it would not be proper for us, upon this appeal, to consider the merits. The evidence, upon another hearing in the court below upon the application for an injunction or upon final hearing, may be different from that now appearing in the record. The parties are entitled to the judgment of the court of original jurisdiction in the first instance upon the merits, and this they have not had.

We are not prepared to say that the averments of the bill are insufficient on their face to give it equity. The right to the specific performance prayed for is assailed upon the ground that no settlement was had between the parties, and for these reasons: (1) That the appellee's offer of settlement was not accepted or acted upon by appellants in time; (2) that there was no consideration moving from appellants to the appellee therefor; (3) that the tender in the letter addressed by appellants to appellee was not in pursuance of appellee's offer; and (4) that appellee had no authority, as trustee, to enter into the settlement on behalf of certain of his beneficiaries. The last reason is developed only by the answer, and does not affect the equity of the bill.

The details of the offer of appellee and of the action of appellants thereon are set out in the bill. The message containing the offer of settlement was sent by appellee November 7, 1913, to his local attorney at Sweetwater, and received in the absence of the attorney by his office man on the morning of November 8th, which was Saturday, and by him communicated to the presidents of the two defendant banks, who each accepted for his bank. The president of the remaining defendant, the packing company, was absent from Sweetwater on Saturday. Efforts were made to reach him by telephone on Saturday, but unsuccessfully. He returned to Sweetwater on the evening of Sunday, November 9th, and was notified of the offer, and communicated his acceptance to the receiver of the message, who then stated his want of authority to close because of the delay. The appellants notified him that they would tender the consideration of the settlement to him on Monday morning, but he disclaimed authority to act for appellee further. On Monday morning at 8:45, appellants sent appellee, by registered mail, New York exchange for $10,500 of one of the defendant banks, and the check of the appellant packing company, certified by the other defendant bank for $7,000, and a bill of sale for the machinery, and wired the appellee that his offer was accepted and they were remitting him the proceeds of the settlement. On the same day the writ of error was dismissed at Ft. Worth. The appellee refused to receive the registered letter upon its arrival in Pennsylvania, and repudiated the settlement, and is insisting on the enforcement of the judgment.

[2] 1. The telegram containing the offer was emphatic that the money consideration was to be paid in cash and immediately. However, reasonable time for the communication of the offer to the appellants and for procuring the money is to be implied. Upon receipt of the telegram Saturday, and the communication of its contents to the two defendant banks, communication of their acceptance was

immediate. The representative of the third appellant happened to be away from Sweetwater, and diligence was unsuccessfully used to communicate with him Saturday. He was reached Sunday and accepted the offer for the other defendant. The money part of the consideration could not reasonably be secured on Sunday, nor could the bill of sale to the machinery be legally executed on that day. The money was sent, and the bill of sale executed and forwarded to the appellee, and appellee notified early Monday morning and before any action upon the pending writ of error could have been taken at Ft. Worth. In view of these facts, it is at least a debatable question as to whether the offer was timely acted upon by the appellants, and one which we think should receive consideration from the court upon the evidence, rather than upon the averments of the bill.

[3] 2. When the money and the bill of sale were sent the appellee by registered mail, the writ of error was still pending in the Circuit Court of Appeals at Ft. Worth. This furnished sufficient consideration for the compromise of the judgment. In addition, it does not appear that the settlement was necessarily a reduction in value from the face of the judgment. The value of the machinery which was an element of the consideration moving to appellee, for all that appears from the record, may have been esteemed by him as of more value than the difference between the amount due on the judgment and the money he received in the settlement.

3. Money was not tendered the appellee by the appellant. In its stead, New York exchange drawn by one of the defendant banks was forwarded in liquidation of part of the consideration, and the check of the defendant packing company, certified by the other defendant bank, for the balance thereof. The appellee, however, refused to carry out the settlement and receive the amount due thereunder, upon another and different ground than that money was not tendered. This might be a waiver of any infirmity in the quality of the tender. The telegram apprised him of the fact that New York exchange and not money was being forwarded, and he made no objection to the character of remittance. However, the telegram was not truthful in that part of the consideration was not forwarded in New York exchange, but in the form of a certified check, as to the worth of which there is a dispute. The appellee was unaware, when he rejected the registered letter, that the message did not truly declare its contents, and it may be that his rejection of it, upon another ground, would not be a waiver of his right to object to it, because of the character of that part of the remittance which differed from the description of it in the message, when he thereafter became aware of the discrepancy. It may also appear from the evidence that the parties in their negotiations treated as money what is usually accepted as such between persons trading at a distance from each other, and that they so regarded New York exchange or a certified check of a solvent bank. If so, the requisition of the offer was complied with, if the certified check was good. It was in fact paid. It is also said that the bill of sale to the machinery was executed to the appellee individually instead of in his capacity as trustee, and that it did

not contain the proper covenants as to title. He rejected the registered letter containing the bill of sale, unopened and upon another ground, and the question of his consequent waiver of any irregularities that may have existed in the bill of sale cannot be properly determined upon the averments of the bill and in the absence of what may prove to be qualifying evidence.

For these reasons, we think the appellants are entitled to a hearing in the court below upon the evidence, and that their bill should not be dismissed in this court and in advance of such a hearing.

[4] It appears from the record that the amount due upon the judgment, the enforcement of which is sought to be enjoined, has been deposited in the registry of the District Court, to give the appellants an opportunity to apply to this court or a judge thereof for a stay of proceedings upon the original judgment, which was to be done without unreasonable delay and prior to February 5, 1914. We think it would best subserve the interests of justice that the enforcement of the original judgment be restrained pending the final disposition of the equity cause, and the determination of appellants' right to a specific performance of the settlement, provided the amount due appellee upon the judgment, if the settlement is not specifically enforced, remain on deposit in the registry of the District Court, where it is now, under an agreement that so much thereof as may be necessary shall be subject to the satisfaction of the original judgment, if its specific enforcement be not perpetually enjoined, or to the amount due appellee under the agreement of settlement, if such agreement be specifically enforced against appellants by decree in the equity cause.

The order of the court denying the interlocutory injunction is reversed, and the cause remanded to the District Court, with directions to there enter an order granting the appellants' application for an interlocutory injunction as prayed for upon the condition mentioned, and the appellee is ordered to pay the costs of appeal.

SHELBY, Circuit Judge, dissents.

FIRST SAVINGS & TRUST CO. et al. v. WAUKESHA CANNING CO. et al.

(Circuit Court of Appeals, Seventh Circuit. January 14, 1914.)

No. 2001.

1. CORPORATIONS (§ 469*)—BONDS—SALE FOR MONEY, LABOR, OR PROPERTY.

Under St. Wis. 1913, § 1753, providing that no corporation shall issue bonds except for money, labor, or property estimated at its true value actually received equal to 75 per cent. of the par value thereof, and that all bonds issued contrary thereto shall be void, where the creditors of a corporation accepted its bonds secured by a mortgage as collateral for their past-due claims at not less than 75 per cent. of their face value, and extended the time of payment of the claims, the bonds were issued for property at not less than 75 per cent. of their value, as the creditors took them with the obligation either to return them, or to account therefor at 75 cents on the dollar.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §.1832; Dec. Dig. § 469.*]

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

2. CORPORATIONS (§ 472*)—BONDS—SALE FOR MONEY, LABOR, OR PROPERTY.
Where a corporation, which was being pressed by its creditors, issued its bonds secured by mortgage and delivered them as collateral security, the creditors were advised of the statutory provision, and told that the bonds would be void if received on a basis of less than 75 per cent. of their face value, in no case were bonds delivered on a basis of less than 75 per cent. of their value, and the creditors, in seeking their enforcement, were asking that they be charged with the bonds at such rate, the facts showed an agreement to accept them at that rate, and hence they were not void under St. Wis. 1913, § 1753.
[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1837, 1839, 1841; Dec. Dig. § 472.*]

Appeal from the District Court of the United States for the Eastern District of Wisconsin; Arthur L. Sanborn, Judge.

Stockholder's bill by William H. Nichols against the Waukesha Canning Company. From a decree dismissing the cross-bill of the First Savings & Trust Company as trustee, it appeals. Reversed, with directions.

In pursuance of the plan agreed upon by all the creditors and the principal stockholders at a meeting held about November, 1909, to consider the financial condition of appellee, it was decided to issue bonds to the amount of $150,000, to be secured by mortgage upon the real property of appellee, which bonds were to be used for the purpose of retiring the indebtedness, or to obtain extensions through collateralizing same. Consent of the preferred stockholders was obtained to such an arrangement. Afterwards, at the annual meeting of appellee's stockholders held on February 14, 1910, it was, in substance, voted that it was necessary that a large portion of the indebtedness of the company be refunded and secured; that in order to do so it was necessary that security be given; that therefore bonds to the amount of $150,000 and a mortgage securing the same were authorized, "the terms, provisions and conditions, number and amount of such bonds to be determined and fixed by the board of directors, to be either sold or used as collateral security by the proper officers of the company under the direction and authority of the board of directors for the purpose of refunding present indebtedness of the company or to provide new funds with which to prepare for the coming season's business."

The creditors, including several banks, were pressing appellee for their money, calling their loans, and refusing to renew, and demanding payment or security. Thereupon, and on February 15, 1910, the bonds were executed, and the mortgage securing the same executed and recorded. These steps were all approved by the board of directors. One Wm. H. Nichols, who had been made president and general manager of appellee, was authorized to dispose of the bonds for the benefit of appellee, and to liquidate, refund, renew, or secure, as the case required, or as he might deem best for the company, any or all of the indebtedness then existing. Afterwards, by and with the aid of F. T. Stare, president, and C. S. Crary, vice president of appellee, said Nichols delivered $123,500 of said bonds to the respective creditors to be received by them as collateral security to their several claims, without other consideration than the extension of the time in which to pay said respective claims. In some instances new notes were taken, in others no change in the form of the indebtedness was made. All the claims thus secured had accrued prior to the giving or taking of the security. Both Stare and Crary testified that they were respectively advised, prior to the placing of the said collateral, that the issue of bonds would be illegal if pledged at any less valuation than 75 per cent. of their face; that they were so advised before any of the bonds were issued, but were not advised of the necessity of taking a formal stipulation from the creditor that the same were received on that basis. One Markham testified that Nichols told him the bonds must be accounted for on that basis. Nichols himself testified that he secured several claims without knowing about this provision of the Wisconsin statute, but was obliged to comply with it in taking

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

security in return. This statutory provision appears to have been a matter of common talk in placing the collateral. Crary testified that there was in no instance an agreement to hold the collateral at 75 per cent. of its face value, but that "there was a statement on my part to each one, and so specifically made that I did not want them to misunderstand it, that if they accepted the bonds they must accept them on a basis as good as 75 per cent. of their face value, or the collateral would be worthless to them, as I understand the Wisconsin statute." The bonds were actually taken as collateral at not less than 75 per cent. of their face value by the several creditors, after being respectively cautioned by Crary, as above set out.

Thereafter said Nichols brought a stockholders' bill against appellee corporation and secured the appointment of himself and one Cambier as receivers, by whom possession was taken of all the property and effects of appellee. Default having been made in the payment of interest upon the collateralized bonds aforesaid, appellant as trustee under the trust deed securing said bond issue, at the request of the bondholders filed its cross-bill to foreclose the trust deed. The corporation appellee and its receivers filed their answers, opposing foreclosure and asking that the trust deed and bonds secured thereby be canceled, as being given in contravention of section 1753 of the Wisconsin Revised Statutes, which reads as follows, viz.: "No corporation shall issue any stock or certificate of stock except in consideration of money or of labor or property estimated at its true money value, actually received by it, equal to the par value thereof, nor any bonds or other evidences of indebtedness except for money or for labor or property estimated at its true money value, actually received by it, equal to seventy-five per cent. of the par value thereof, and all stocks and bonds issued contrary to the provisions of law and all fictitious increase of the capital stock of any corporation shall be void."

On the hearing the District Court held that the bonds in question and the trust deed securing the same came within the prohibition of section 1753 aforesaid, and were invalid and void, and ordered that the bonds be delivered for cancellation and that appellant satisfy and discharge said mortgage. The cause is now here on appeal from said finding and order, and the same are assigned for error.

Miller, Mack & Fairchild and Bloodgood, Kemper & Bloodgood, all of Milwaukee, Wis. (Jackson B. Kemper, Wheeler P. Bloodgood, and Arthur W. Fairchild, all of Milwaukee, Wis., of counsel), for appellants.

Merton, Newbury & Jacobson, of Waukesha, Wis., for appellees.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

KOHLSAAT, Circuit Judge (after stating the facts as above). [1] The question presented is, whether the placing of the bonds under consideration as collateral to the indebtedness of appellee existing prior to the issue thereof was obnoxious to the terms of section 1753 of the statutes of Wisconsin aforesaid. Concretely stated, did the issue and application of the bonds in suit as collateral security to existing indebtedness constitute the issue and application of bonds for money or labor or property?

"The object of the statute," says Chief Justice Lyon in Pfister et al. v. Milwaukee Electric Railroad Company, 83 Wis. 86, 53 N. W. 27, "is to protect stockholders and bona fide creditors from the improvident issue of its bonds by the corporation. * * * When a corporation puts its bonds beyond its control by hypothecating them as security for loans, or for any other purpose, or in any other manner, it issues them within the meaning of the statute."

To the same effect are Hinckley v. Pfister, 83 Wis. 64, 53 N. W. 21, and Memphis, etc., R. R. Co. v. Dow, 120 U. S. 298, 7 Sup. Ct. 482, 30 L. Ed. 595.

Undoubtedly the plain intention of the statute is that corporations shall get the benefit of at least 75 per cent. of the face value of the bonds so issued.

There are two ways in which property interests may be enhanced. One consists in the increase of the quantity, and the other in the increase of the quality. In either case the benefit arising from the application of the bond issue or the proceeds thereof inures to the owner. Had the bonds been applied in satisfaction of appellee's indebtedness pro tanto, there would undoubtedly have been a compliance with the statute. Assuming that the bonds were pledged for 75 per cent. of their face value, what was the legal effect of the acceptance thereof as collateral? It is clear that the creditors took them with the obligation either to return same or to account for them at 75 cents on the dollar. If the creditor chooses to dispose of his bonds at a price less than 75 cents, the loss is his. Here the creditors are asking that they be charged with the bonds at the rate of 75 per cent. of their face. Thus it appears that the issuing corporation got 75 cents on the dollar for its bonds, and the spirit at least of the statute was complied with.

But, says appellee, quoting the language of Judge Ross at the circuit, "the money paid, labor done, or property actually received, must be paid, performed, or received, as the case may be, on account of the issuance of the bonds; and any bonds issued contrary to this provision are of course illegally issued. The provision does not mean, and cannot be held to mean, that such bonds may be issued as collateral security for any sort of pre-existing indebtedness."

The language of the statute does not, in our view of it, justify the conclusion arrived at in the case just quoted. If it be that an increase of the interest of the corporation in its assets is equivalent to the acquirement of property to the amount of such increase, and it be further true that the agreement of the creditors to accept the bonds at a valuation of 75 per cent. of their face upon their several claims results in the reduction of the unsecured indebtedness in a sum equal to 75 per cent. of the face of the bonds, why does not the placing of the bonds as collateral result in the enhancing, to that extent, of the interest of the appellee in its property just as advantageously as though appellee had acquired that much more property and incurred the bonded debt, as well as its unsecured indebtedness? How can it then be said that the issue of bonds was not made for money or labor or property at its true money value actually received? The statute is not in its terms technical. It does not attempt to say how the money, labor, or property shall be procured. It is said in Nelson v. Hubbard, 96 Ala. 238, 11 South. 428, 17 L. R. A. 375.

"And we do not think that such pledge [to secure debts already contracted], if made without fraud, and solely for the bona fide purpose of satisfactorily securing the payment of corporate debts, can properly be regarded as effecting a fictitious increase of indebtedness, or as not issued for money, labor done, or money or property actually received."

This case is cited approvingly by the United States Circuit Court of Appeals for the Fourth Circuit in Firth Co. v. S. C. Loan & Trust Co., 122 Fed. 575, 59 C. C. A. 73, and in Illinois Trust & Savings Bank v. Pacific Ry. Co., 117 Cal. 332, 49 Pac. 197.

The United States Circuit Court of Appeals for the Second Circuit held, in Re Waterloo Organ Co., 134 Fed. 345, 346, 67 C. C. A. 327, where a bond issue was transferred to a bank to secure accrued and future indebtedness, that the transaction complied with the requirements of the New York statute which provides that:

"No corporation shall issue either stock or bonds except for money, labor or property actually received for the use and lawful purposes of such corporation."

The court says in Hoskins v. Seaside Ice Mfg. & Cold Storage Co., 68 N. J. Eq. 476, 59 Atl. 645:

"Nor does the fact that some of these bonds were taken as collateral security for an existing debt make the holder any less a bona fide holder for value than if he was a purchaser for cash."

In Cook on Corporations (5th Ed.) § 763, it is said:

"A constitutional provision against the issue of bonds except for money, labor, or property, does not prevent the corporation from pledging its bonds."

That a bond may be collateralized to secure an existing debt is the conclusion of the New York court in Duncomb v. N. Y., etc., R. R. Co., 84 N. Y. 190.

We are therefore of the opinion that in agreeing to take the bonds in question as collateral at the rate of not less than 75 per cent. of their face value upon their past-due claims, and in extending time of payment of the same, the present bondholders afforded to the corporation a valid property consideration equal to 75 per cent. of the face of the bonds, and are therefore satisfying the demands of the Wisconsin statute above set out, provided, of course, the creditors had agreed to accept the bonds on that basis. As to this proposition, all the creditors, excepting perhaps American Appraisal Company, are in the same situation. Unless there was such an agreement, the collateralized bonds are invalid. Pfister et al. v. Milwaukee Electric R. R. Co., 83 Wis. 86, 53 N. W. 27; Hinckley v. Pfister, 83 Wis. 64, 53 N. W. 21; National Foundry & Pipe Works, Ltd., v. Oconto Water Co. et al. (C. C.) 52 Fed. 29; Mowry v. Farmers' Loan & Trust Co., 76 Fed. 39, 22 C. C. A. 52; Haynes v. Kenosha Elec. Ry. Co., 139 Wis. 227, 119 N. W. 568, 121 N. W. 124.

In Re Waterloo Organ Co., supra, it was said:

"The record fails to show any written agreement fixing the value at which the bonds were issued. It is agreed that their par value was their fair market value. In case of doubt as to the character of a transaction, or as to the proper construction and interpretation of a contract, and the determination of the respective rights and obligations of the parties thereto, such doubts may be resolved, and the intention or understanding of the parties thereto may be determined, by a consideration of their relations, the objects they respectively had in view, their declarations at the time of the transaction, and their acts then and thereafter done."

In that case the court says further:

"In view of the amount then due, and the immediate increase by the bank of the company's line of discount until the direct liability alone of the company exceeded the fair market value or par value of said bonds, we think it may fairly be inferred that the company was in need of further funds in order

to carry on its corporate business; that the bank was unwilling to grant further credits, except upon receipt of further security, and that the agreement between the parties was that said bonds should be issued at their fair market value, * * * and that they were actually issued for property in the nature of advances, loans, discounts, credits, etc., received for the use and lawful purposes of said corporation; and that said issue, therefore, was valid."

The court found further evidence that the bonds were issued for par in the fact that the holders were, by the terms of the transfer instrument, authorized to sell the bonds to others at par and account for the proceeds.

"Under this arrangement," says the court, "the bank was bound to account for said bonds at their par value."

[2] So here, there was every reason why the creditors should obey the statute in taking the collateral. They were advised by the officers of the appellee corporation as to what the statute was, and that any attempt on their part to receive said bonds on a basis of less than 75 per cent. of their face would invalidate the issue. Appellee was in need of leniency and extension of its business liabilities. It was obliged to conciliate its creditors. The latter were placed in a somewhat better position as against future indebtedness of the appellee than before, while appellee was in no sense injured by the arrangement. No one can read the testimony of Crary without being impressed with his anxiety to impress upon the creditors the necessity of complying with the statute in respect to the 75 per cent. clause thereof. In addition, in no case were bonds turned over as collateral on a basis of less than 75 per cent. of their value. These creditors are now in court asking that they be permitted to proceed to avail themselves of that arrangement. It is incredible that, under the circumstances hereof, there should have been any hesitancy in accepting the plan proposed by Crary and his co-officials. We have no trouble in deducing from the facts presented an agreement between the appellee, through its officers, attorneys, and representatives, and the several creditors, that the bonds should be accepted by the latter on the basis of 75 per cent. of their face value.

We are therefore of the opinion that the District Court erred in dismissing the cross-bill and in ordering that the mortgage be satisfied and the bonds secured thereby canceled. The decree of the District Court is reversed, with directions to grant the prayer of the cross-bill and make such further orders as may be necessary in the premises.

BRITISH-AMERICAN TOBACCO CO., Limited, v. BRITISH-AMERICAN CIGAR STORES CO.

(Circuit Court of Appeals, Second Circuit. February 10, 1914.)

No. 131.

TRADE-MARKS AND TRADE-NAMES (§ 70*)—UNLAWFUL COMPETITION—CORPORATE NAME.

Complainant for 11 years had been extensively engaged in the wholesale tobacco business throughout the world, and had established an enviable reputation, dealing under the name "British-American." Though authorized to sell at retail, it had not done so, in order to conserve its wholesale trade. Defendant, a New Jersey corporation without any connection with complainant, organized itself to establish a chain of cigar stores under the name "British-American Cigar Stores Company." Defendant had no business in England nor anywhere else to warrant the use of the name "British," and during the years succeeding defendant's organization its use of the name "British-American" had caused confusion, and was calculated to lead the public to believe that there was some connection, financial or otherwise, between the companies, and induced the public to buy defendant's goods and its stocks and bonds, believing that they were issued by a corporation organized or connected with complainant. *Held*, that defendant's adoption of the words "British-American," which had become irrevocably associated with the tobacco business, was unlawful and would be enjoined.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 81; Dec. Dig. § 70.*

Imitation or simulation of trade-mark or trade-name as unfair competition, see note to John H. Rice & Co. v. Redlich Mfg. Co., 122 C. C. A. 447.]

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

Suit by the British-American Tobacco Company, Limited, against the British-American Cigar Stores Company, to restrain defendant's use of the word "British" in its corporate name. From a decree dismissing the bill (206 Fed. 189), under equity rule 29 (198 Fed. xxvi), complainant appeals. Reversed.

Nicoll, Anable, Lindsay & Fuller, of New York City (De Lancey Nicoll and Thomas S. Fuller, both of New York City, of counsel), for appellant.

Kearny & Dickinson, of New York City (Carroll G. Walter, of New York City, of counsel), for appellee.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

COXE, Circuit Judge. The question presented by this appeal is whether or not the complaint states a cause of action.

The complainant is a British corporation engaged in growing and manufacturing tobacco and dealing in tobacco, cigars, cigarettes and snuff in England, America and elsewhere. It is authorized by its charter to buy, sell, grow, import and export tobacco, in all its forms, at wholesale and retail. It may organize or promote any company to deal in its products. Its business has existed since 1902 and has spread to

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

all parts of the world. Its principal office is in London and its chief subsidiary office, since 1903, has been in New York. Although it has the right to sell at retail it has refrained from doing so because of a widespread prejudice among retailers against wholesalers who enter the retail trade and thus compete with their own customers. For these reasons the complainant, although it has a right to do so, has not established a so-called chain of cigar stores or retail tobacco stores, as its doing so would greatly offend its customers and induce them to withdraw their trade.

The complaint further alleges that the defendant is a corporation recently organized in New Jersey, having no connection with Great Britain, and no inherent right to use the words "British-American" in choosing its name "British-American Cigar Stores Company." It is alleged that the defendant has established a chain of cigar stores which it purposes to extend in the future and that its conduct has already caused great confusion and uncertainty in the tobacco trade and has been widely discussed in the trade journals inducing many interested persons to believe that the complainant is to engage clandestinely in the retail tobacco trade and is in competition with its own customers and intends to establish a retail business throughout this country. It is asserted, further, that the widespread belief thus engendered by the defendant's use of the complainant's name has been, and will continue to be, a great injury to the complainant and will impair its credit and good name and will enable the defendant to secure trade and credit under the belief that its stores are operated by, or are under the patronage of, the complainant.

In short, without further entering into details, the contention of the complainant is as follows:

First: That it has for eleven years been engaged in the tobacco business throughout the world and has established an enviable reputation for financial responsibility and honorable dealing under the name *British-American.*

Second: That the defendant arbitrarily and without right has appropriated complainant's name, which is exclusively associated in the tobacco business with the products of the complainant.

Third: That the defendant is a New Jersey corporation with no business in England or anywhere else to warrant the use of the name *British.*

Fourth: That during the year the defendant has been operating, the use of the name British-American has caused great confusion and will continue to cause confusion in the future.

Fifth: That the purchasing public having knowledge of complainant's goods and desiring to procure them will, misled by the name, take the defendant's goods instead.

Sixth: If the defendant's goods are inferior in quality, the complainant's reputation will be seriously impaired, as the public will draw the inference that complainant's output is deteriorating in quality.

Seventh: That should the complainant at any time in the future desire to establish a chain of cigar stores it may find the field entirely occupied by the defendant.

We cannot resist the conclusion that the complaint states a case of unfair competition. Unfair to the complainant because the use of its name may induce the thoughtless purchaser, anxious to secure its product, to take the defendant's instead, and unfair to the public because they may be induced to purchase not only the defendant's goods, but also its bonds and stocks, believing that they are issued by a corporation organized by or connected with the complainant.

There can be no pretense that the defendant is in any way connected with the complainant or any other British company, or that the word *British* is descriptive of its product, its methods or its incorporators. We are unable to discover any valid, or even a plausible, reason for its adoption unless it was to accomplish the objects alleged in the complaint. If the object of the defendant were to sell its goods and securities upon their merits, what possible motive could it have had in choosing a name which had been pre-empted in the tobacco trade for ten years? We can think of none. If, on the other hand, the object were to induce the unthinking public to believe that the defendant was connected with the great British-American Company, with its boundless resources and a decade of successful business behind it, the defendant's conduct was perfectly natural.

To change the defendant's name can injure no one, to retain it may mislead the public, confuse the trade and seriously injure the complainant's business. When such an alternative presents itself, the duty of a court of equity is plain, viz., to stop the unfair proceeding in limine. We think that the use of a name which is not descriptive of the defendant, which is not true in fact and which the defendant has no inherent right to appropriate may mislead the public in the sale of its products and securities and injure the business and credit of the complainant. If the defendant intends to deal fairly, it can do no harm to change its name; if it intends to use the name unfairly, it should be compelled to change it.

The words "British-American" may be geographical or political, but in this controversy they have acquired a secondary meaning; they have been irrevocably associated with a large tobacco corporation for a decade, and any other tobacco company with the same name is sure to be associated in the public mind with the elder company and is sure to reap such benefits as accrue from such association.

If there were any valid reason for adopting the name, or if the business were other than tobacco, there might be some reason for the defendant's action, but no honest reason can be suggested for appropriating the name of the old and long established company. In the absence of any plausible explanation we have a right to assume that the reason was to secure the advantages which would result from a supposed connection with the well known company.

The case of Borden's Ice Cream Co. v. Borden's Condensed Milk Co., 201 Fed. 510, 121 C. C. A. 200, can be readily distinguished on the facts, but assuming that it applies, we think the preponderance of authority sustains the conclusion we have reached. Elgin Nat. Watch Co. v. Loveland (C. C.) 132 Fed. 41; Cole v. American Cement Co., 130 Fed. 703, 65 C. C. A. 105; Met. Telegraph & Telephone Co.

v. Met. Telephone & Telegraph Co., 156 App. Div. 577, 141 N. Y. Supp. 598; Florence Mfg. Co. v. Dowd, 178 Fed. 73, 101 C. C. A. 565.

The decree is reversed with costs.

In re ZOFFER et al.

(Circuit Court of Appeals, Second Circuit. February 10, 1914.)

No. 138.

1. BANKRUPTCY (§ 407*)—DISCHARGE—OBJECTIONS—GROUNDS—FALSE STATEMENT.

Under Bankr. Act July 1, 1898, § 14b3 (as added by Act Feb. 5, 1903, c. 487, § 4, 32 Stat. 797) and amended by Act June 25, 1910, c. 412, § 6, 36 Stat. 839 (U. S. Comp. St. Supp. 1911, p. 1496), providing that a discharge shall be refused if the bankrupt has obtained money on a false statement in writing made by him to any person or his representative to obtain credit from such person, a false statement of a bankrupt's assets and liabilities made to the agent of a commercial agency, merely that the agency may fix a credit rating in its books and not requested by any customer, is not ground for denial of a discharge.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 729–731, 737, 738, 740–751, 758, 760, 761; Dec. Dig. § 407.*]

2. BANKRUPTCY (§ 408*)—DISCHARGE—OBJECTIONS—OFFENSES PUNISHABLE BY IMPRISONMENT.

Bankruptcy Act July 1, 1898, c. 541, § 14b1, 30 Stat. 550 (U. S. Comp. St. 1901, p. 3427), provides that a discharge may be denied where the bankrupt has committed an offense punishable by imprisonment, and section 29b2 declares that the taking of a false oath by a bankrupt in or in relation to any proceeding in bankruptcy, shall constitute such offense. *Held*, that where the bankrupt, while testifying under oath before a special commissioner at the first meeting of creditors, swore positively and falsely that he had never made a statement of financial condition to any one, when he in fact had made a false financial statement to a commercial agency shortly before, he was guilty of knowingly and fraudulently making a false oath which was a bar to his discharge.

[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 Eastern District of New York.

This cause comes here upon appeal by the bankrupts from an order of the District Court, Southern District of New York, sustaining a report of the Special Commissioner and denying application for discharge. No opinion was filed by the District Judge.

James S. Lawson, of New York City, for appellants

S. S. Leff, of New York City, for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge. Several specifications of objection to discharge were filed by creditors. It will be necessary to discuss only the two which were sustained. These are:

1. That the bankrupts obtained credit upon a materially false statement in writing made to R. G. Dun & Co.

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

2. That the bankrupts committed an offense punishable by imprisonment.

[1] As to the first of these: The evidence shows that a representative of R. G. Dun & Co., a mercantile agency called at the bankrupt's store, announced that he was "here again" and asked them what stock they had. They replied that they did not know; that they had not taken an inventory. He then asked them to give the figures approximately, and they did so. These he put down, and one of them signed the statement with the firm name in the presence of the other. The mercantile agency had not been requested by any customer to get this information for him; its representative made his inquiries in order to obtain a report upon which to fix credit rating in the books of the agency. It is not disputed that the signed statement falsely represented (among other things) that bankrupts had an equity of $12,500 in certain real estate omitting all reference to a third mortgage which substantially wiped out the $12,500.

The Bankrupt Act in force at the time in question provides (section 14b3) that discharge shall be refused if the bankrupt has—

"obtained money or property on credit upon a materially false statement in writing, made by him to any person or his representative for the purpose of obtaining credit from such person."

It is contended that a general financial statement made to a commercial agency for the latter's purposes is not within the terms of the section above quoted. The special commissioner held that such "contention is untenable as has been shown in several decisions among which are the following cases: In re Augspurger (D. C.) 25 Am. Bankr. Rep. 83, 181 Fed. 174, and In re Pinsker (D. C.) 25 Am. Bankr. Rep. 494." The District Judge sustained the special commissioner.

The effect of such statements to commercial agencies was considered by this court in Matter of Dresser & Co., 146 Fed. 383, 76 C. C. A. 655, and Matter of Russell, 176 Fed. 253, 100 C. C. A. 77. The clause of the section (14b3) then read as follows:

"obtained property on credit from any person upon a materially false statement in writing made to such person for the purpose of obtaining such property on credit."

In the Russell Case we held that this clause did not include the ordinary statement of financial condition made to a mercantile agency for general circulation among its inquiring subscribers. The clause then in force was incorporated in the act by amendment in 1903. Our construction of its terms was largely influenced by the circumstance that the amendment, as it originally passed the House contained the words "or of being communicated to the trade" which were struck out in the Senate; the House subsequently concurring in this modification of the amendment.

The section was again amended in 1910, subsequent to the decision of the Russell Case, and it is now contended that such amendment has operated to enlarge the clause sufficiently to cover these general financial statements. Examination of the proceedings in Congress

disposes of such contention. The amendment originated in the House. It then read:

"obtained money or property on credit upon a materially false statement in writing, made by him to any person for the purpose of obtaining credit or of being communicated to the trade or to the person from whom he obtained such property or credit."

In reporting this amendment to the House, the Judiciary Committee said:

"It is still an open question whether a false credit statement to be available as an objection to a discharge must not have been made to the creditor who extended the credit and at the time of the extension of the credit. Thus see In re Allendorf [D. C.] 129 Fed. 981, and to the opposite effect In re Dresser, 146 Fed. 383 [76 C. C. A. 655]. The change accomplished by the bill is simply one which makes available to any creditor any materially false mercantile statement on which the debtor has obtained money or property on credit, and irrespective of whether such statement has been given to the creditor objecting or communicated generally to the trade." 61st Congress, 1st and 2d Sessions, 1909–10, House Rep., vol. 1, Miscellaneous.

In the proposed form it passed the House. In reporting the amending bill to the Senate, its Judiciary Committee said:

"The third change made by the House bill, that which in effect made the obtaining of property on false written statements to mercantile agencies ground of opposition to discharge, without the creditor whose property has thus been obtained first asking such mercantile agencies to procure him the written statement, is not concurred in by your committee. Any tendency to make the bankrupt act unduly harsh is to be avoided. It is a sufficient ground of opposition to discharge that the bankrupt has obtained property from a creditor by a materially false statement in writing where that statement was specifically asked for by the creditor or by the creditor's representative. General statements to mercantile agencies, not specifically asked for by prospective creditors, ought not to be ground of opposition to discharge; it makes the provision too harsh, in the estimation of your committee. Merchants are likely to make careless general statements where they would be very careful were they making statements to creditors from whom they were at the time asking credit.

"Your committee proposes a substitute for the House amendment of this ground of opposition to discharge, which is thought to go as far as is proper."

This substitute amendment was adopted by the Senate and concurred in by the House, leaving the clause as quoted at the beginning of this opinion. That clause certainly cannot be construed to cover "general statements to mercantile agencies, not specifically asked for by prospective creditors."

[2] The second specification of objection is that bankrupts had committed an offense punishable by imprisonment. Section 14b1. Among such offenses is included the making "a false oath * * * in, or in relation to, any proceeding in bankruptcy." Section 29b2.

When testifying under oath before a special commissioner appointed in this proceeding under section 21a, and at the first meeting of creditors, each of the bankrupts swore positively that he never made a statement of financial condition to any one. The written statement they did make was so close in time to the date when they denied making it that we cannot doubt the false oath was made "knowingly and fraudulently."

The specifications were probably defective because they did not include these words "knowingly and fraudulently"; but they were not demurred to, nor was the point raised in any other way. Bankrupts went to trial on the merits of the objections, and cannot now be heard to say that the pleading which stated them was badly expressed. If necessary, it could be amended to conform to the proof.

The order is affirmed.

UNITED STATES v. LEE YOU WING.

(Circuit Court of Appeals, Second Circuit. February 17, 1914.)

No. 127.

1. ALIENS (§ 32*)—CHINESE PERSONS—DEPORTATION—DEFENSES—BURDEN OF PROOF.

A Chinaman, relying on the defense, in a deportation proceeding, that he is a merchant, has the burden of proving it.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 84, 92, 93–95; Dec. Dig. § 32.*]

2. ALIENS (§ 25*)—CHINESE PERSONS—DEPORTATION—MERCHANTS.

In order that a Chinese person may be exempt from deportation as a merchant, as provided by Act Cong. May 5, 1892, c. 60, 27 Stat. 25, as amended by Act Nov. 3, 1893, c. 14, § 2, 28 Stat. 8 (U. S. Comp. St. 1901, p. 1322) he must have had a substantial and real interest in a merchantable business, though his own name need not necessarily appear in the firm style, when the business is carried on under a company name which does not include the names of the individuals interested therein.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 79–82; Dec. Dig. § 25.*

What Chinese persons are excluded from the United States, see note to Wong You v. United States, 104 C. C. A. 538.]

3. ALIENS (§ 23*)—CHINESE PERSONS—DEPORTATION—MERCHANTS.

Defendant was born in China in 1870, and came to San Francisco in 1890 with $800 in American money. He joined two others in operating a drug business, which they continued until 1906, when it was destroyed by earthquake. He then went to Oakland, where he remained for a short time, then went to New York City, having $1,500 in United States currency, finally establishing himself in New Jersey as partner in a grocery business, in which he invested about $1,000. This was unsuccessful, and after losing some $200 he sold his interest and purchased a laundry, and while engaged in the laundry he was arrested as a Chinese laborer unlawfully within the country. In 1910, contemplating a visit to China, he applied for a certificate that he was a merchant to enable him to return, but, though this was denied, no steps were taken to deport him until October 22, 1912. *Held*, that defendant was a merchant during the period of registration prescribed by Act Cong. May 5, 1892, c. 60, 27 Stat. 25, as amended by Act Nov. 3, 1893, c. 14, 28 Stat. 8 (U. S. Comp. St. 1901, p. 1322), and, not being required to register under that act, was not subject to deportation.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 76–90; Dec. Dig. § 23.*]

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

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

Chinese deportation proceedings by the United States against Lee You Wing. From a judgment of the District Court (208 Fed. 166), reversing an order of the United States Commissioner directing defendant's deportation, the United States appeals. Affirmed.

H. Snowden Marshall, U. S. Atty., and Frank M. Roosa, Asst. U. S. Atty., both of New York City.

James A. Donegan, of New York City, for appellee.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge. The United States Commissioner for the Southern District of New York, after a hearing, issued an order on January 30, 1913, directing that the defendant be deported from the United States to China on the ground that he is unlawfully in the United States, being a Chinese person of Chinese descent and a laborer, and without a certificate of residence, as required for Chinese laborers under the act of Congress of May, 1892, as amended November 3, 1893. The defense is that he was a merchant and as such not required to have a laborer's certificate.

The act of Congress made it the duty of certain Chinese laborers within the limits of the United States to apply to the Collector of their respective districts within six months after the passage of the act for a certificate of registration, and, in default of compliance with the terms of the act, they were to be subject to arrest and deportation, unless, for certain reasons given in the statute excusing them, they were unable to procure the certificate required by law.

Section 2 of the act provided as follows:

"The words 'laborer' or 'laborers,' wherever used in this act, or in the acts to which this is an amendment, shall be construed to mean both skilled and unskilled manual laborers, including Chinese employed in mining, fishing, huckstering, peddling laundrymen or those engaged in taking, drying, or otherwise preserving shell or other fish for home consumption or exportation.

"The term 'merchant,' as employed herein and in the acts of which this is amendatory, shall have the following meaning and none other: A merchant is a person engaged in buying and selling merchandise, at a fixed place of business, which business is conducted in his name, and who during the time he claims to be engaged as a merchant, does not engage in the performance of any manual labor, except such as is necessary in the conduct of his business as such merchant."

If the defendant was a merchant, he was not required to register under the terms of the act and could not be deported for failing so to do, when found without a registration certificate. The period of registration was from and including May 5, 1892, to May 3, 1894. If the defendant was, in fact, a merchant during that period, he was not required by the act to register.

[1] The courts have held in some cases that a Chinaman relying on the defense that he is a merchant has the burden of proving it. United States v. Lung Hong (D. C.) 105 Fed. 188. In Tom Hong v. United States, 193 U. S. 517, 521, 24 Sup. Ct. 517, 519 (48 L. Ed. 772), the Supreme Court expressly refrained from passing on that question, saying:

"We do not find it necessary to determine this question in the cases now before us."

[2] The Supreme Court has held that in order to be a "merchant," and as such exempt from the necessity of registering, the man must have a substantial and real interest in the business, although his own name need not necessarily appear in the firm style when the business is carried on, as is usual among the Chinese, under a company name, which does not include individual names. Tom Hong v. United States, supra (1903). The court in that case declared:

"The main purpose is to require the person to be a bona fide merchant, having in his own name and right an interest in a real mercantile business, in which he does only the manual labor necessary to the conduct thereof."

[3] The defendant testified that he was born in China in 1870, and came to San Francisco in 1890 with $800 in American money, where he established himself in a partnership with two others in a drug business, which they conducted until 1906, when he abandoned it on account of the earthquake. After giving up this business in San Francisco, he went to Oakland for a short time and from there came to New York City, having $1,500 in our money. He finally established himself in Newark, N. J., where he became a partner in a Chinese grocery in which he claimed to have invested $1,000. After continuing in Newark for about three years and losing some $200 in his venture, he sold his interest and returned to New York City, where he purchased a laundry. And it was while he was engaged in working there that he was in October, 1912, arrested on the charge that he was a Chinese laborer unlawfully within the country, being without the certificate which the statute required persons of that class to possess.

It appears that in 1910 he contemplated a visit to China and applied for a certificate that he was a merchant, which would entitle him to return to the United States, and that this was denied him on the ground that he was not a merchant but a laborer.

The court below attached, and we think properly, some significance to the fact that, although he was refused a certificate on April 8, 1910, no steps were taken to have him deported until October 22, 1912, two years and six months afterwards. If he was unlawfully within the country in 1910, it was the duty of the officials of the government to have taken steps at that time to have him arrested and deported. The fact that during this long period of inaction the government made no move against him implies a lack of confidence in its case. We are also inclined to attach some importance to the fact that the defendant voluntarily applied to the government officials in 1910 for a certificate to establish his status as a merchant. It is extremely doubtful whether he would have ventured to make such an application if he had entertained a doubt as to his ability to establish the facts necessary to sustain his application, with the danger of deportation threatening him if he brought the matter to the attention of the government and failed to secure the certificate.

We are confronted in this case, as in Chinese cases usually, with evidence more or less contradictory and inconsistent. The defendant's testimony was considerably confused and we have noted that he contradicted his own testimony many times. But the fact is not to be overlooked that the only material fact in the case is whether or not the de-

fendant was a merchant during the period of registration. If he was, he cannot be deported, although he may subsequently have become a laborer. That he was a merchant in San Francisco and in Newark was not only testified to by the defendant but his testimony was corroborated by that of other witnesses. There was positive testimony to show that he had an actual interest in the firms in which he claimed to be a member. We fail to find in the record any evidence which contradicts his contention and the corroborative testimony that he was a merchant in San Francisco for 13 years until the earthquake destroyed his business and dissolved his firm. We are not prepared to disregard all his testimony because of his erroneous and contradictory statements of events which occurred over 20 years ago. The court may well take into consideration the fact that this man is a foreigner, uneducated, and with such slight knowledge of our language that it was necessary to take his testimony through an interpreter, whose knowledge of English may not have been greatly superior to his own.

The evidence upon the whole, unsatisfactory and incomplete though it may be, has led us to the conclusion that this man was in fact a merchant within the meaning of the statute during the registration period, and that he was therefore not required to have a laborer's certificate.

The judgment of the court below is affirmed, and the defendant is discharged.

COCA-COLA CO. v. GAY-OLA CO.

GAY-OLA CO. v. COCA-COLA CO.

(Circuit Court of Appeals, Sixth Circuit. March 13, 1914.)

Nos. 2542, 2543.

1. TRADE-MARKS AND TRADE-NAMES (§ 100*)—UNLAWFUL COMPETITION—SALE OF DEFENDANT'S PRODUCT—METHOD.

Where defendant put out a soda water syrup in unlawful competition with coca-cola, it was not entitled to sell its syrup in bulk to bottlers on their agreement to put it up only in such bottles as would cause it to reach the ultimate consumer in a form permitted by a decree in a suit for unlawful competition; complainant being entitled to restrain the marketing of defendant's product except through such branches or agencies as would charge defendant with their acts.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 114; Dec. Dig. § 100.*

Unfair competition, see notes to Scheuer v. Muller, 20 C. C. A. 165; Lare v. Harper & Bros., 30 C. C. A. 376.]

2. TRADE-MARKS AND TRADE-NAMES (§ 100*)—UNLAWFUL COMPETITION.

In a suit for unlawful competition, it is proper for the court under certain circumstances in settling a decree forbidding unfair competition to prescribe that certain forms may be used, and if used will not constitute prohibited fraud.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 114; Dec. Dig. § 100.*]

Appeals from the District Court of the United States for the Western District of Tennessee; John E. McCall, Judge.

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

Suit in equity by the Coca-Cola Company against the Gay-Ola Company. From a decree in favor of complainant in a suit for unlawful competition, both parties appeal. Modified.

W. D. Thomson and Candler, Thomson & Hirsch, all of Atlanta, Ga., and Lehman, Gates & Martin, of Memphis, Tenn., for Coca-Cola Co.

Leo Goodman and Hirsh & Goodman, all of Memphis, Tenn., for Gay-Ola Co.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

PER CURIAM. Upon settlement of a decree in the district court pursuant to our opinion in Coca-Cola Co. v. Gay-Ola Co., 200 Fed. 720, 119 C. C. A. 164, the questions arising were so disposed of as to cause both parties to appeal. This makes it necessary for us to consider and apply our former opinion.

The Gay-Ola Company offered two plans by which it thought its syrup might be kept in bulk at soda fountains, and there prepared in glasses and served, without too much danger that it would be palmed off for Coca-Cola. We agree with the district judge that neither plan would be efficient, or within the fair meaning of our opinion. Upon the appeal of the Gay-Ola Company, the action below must be affirmed.

[1] The Gay-Ola Company claims it should be allowed to sell its syrup in bulk to bottlers in different parts of the country who will agree with it to put up the syrup only in such bottles as will cause it to reach the ultimate consumer in the form permitted by our opinion. The Coca-Cola Company insists that this would result in evasion of the intended restriction, since the bottlers could then use or sell the syrup as they pleased. We cannot see how it is possible for this syrup, carrying what on the record must be called the guilty color, to be sold by the Gay-Ola Company, so that it loses title and control, and for the court at the same time to retain practical power to enforce against the Gay-Ola Company the existing restriction upon the ultimate form of sale. Obviously, by establishing its own bottling works in different places, or by causing the bottling to be done by its agents, whose acts are its acts, it can get its product on the market in bottled form; if such branches or agencies are impracticable, and the Gay-Ola Company must either change the color or abandon the business, this result must be charged to its fraudulent inception—to a "congenital defect." We think the decree should absolutely prohibit sales by the Gay-Ola Company unless in the form prescribed for ultimate use.

[2] The Gay-Ola Company presented a package which it proposed to use for its bottled product, in order to differentiate from the Coca-Cola bottled product; and asked the district judge to approve and sanction this form by a paragraph in the decree. He did so. The Coca-Cola Company appeals from this action, and insists that the court cannot, in settling a decree forbidding unfair competition, prescribe that certain forms may be used, and will not constitute the prohibited fraud. This seems to be held in the Seventh Circuit Court of Appeals.

Hires v. Consumers' Co., 100 Fed. 809, 41 C. C. A. 71; Williams v. Mitchell, 106 Fed. 168, 45 C. C. A. 265; Sterling Remedy Co. v. Spermine Med. Co., 112 Fed. 1000, 50 C. C. A. 657. We are not content to adopt this rule. To say that such action is not within the issues seems hardly accurate, because the pleading issues in such suits are usually general and broad enough to include all the specific forms of the device which have been or may be used. It is clear that there are cases where the problem presented by the new form for which authority is asked will be so far away from the questions which the court has considered, and which the proofs cover, that it ought not to be solved without a new suit or a new proceeding; but there are many cases where the court will be as ready as it ever can be to decide such a question; and to refuse to do so, and compel a new suit, is unnecessarily to prolong uncertainty and litigation. Whether a given case falls within one or the other class, or whether opportunity for additional and summary hearing will properly take the case from the second class into the first, can safely be left to the discretion of the court. The practice condemned in the Seventh Circuit was followed by Judge Coxe at Circuit (Carlsbad v. Schultz [C. C.] 78 Fed. 469, 472); and it seems to us equivalent to what we think is very common in unfair competition cases, i. e., providing that defendant's publication or article shall contain, or shall be enjoined unless it does contain, a certain notice or label, for this amounts to saying that if it does contain the prescribed notice it will not violate the decree. This has been done (if not more generally) in the Second Circuit (Waterman Co. v. Modern Co. [C. C. A.] 197 Fed. 534, 535, 117 C. C. A. 30); in the First Circuit (Merriam Co. v. Ogilvie [C. C. A.] 170 Fed. 167, 168, 95 C. C. A. 423); and in this court (Merriam v. Saalfield, 198 Fed. 369, 378, 117 C. C. A. 245).

The question whether the court below rightly approved the form of bottle then presented needs no discussion. The Gay-Ola Company does not now insist upon the one then authorized, but in open court before us presented another form, which counsel for the Coca-Cola Company accepted as satisfactory. We will effectuate their agreement by directing that the decree authorize this new form, instead of the form approved by the district judge. The decree below will be re-entered in the same form it now is, excepting that the following two paragraphs will be substituted for the corresponding paragraphs in the entry appealed from.

"It is further ordered, adjudged, and decreed that the said defendant, its directors, officers, agents, servants, employés and assigns, and each and every one of them, be and they are hereby perpetually enjoined, restrained and prohibited from selling, or disposing of Gay-Ola of the same or substantially similar color to Coca-Cola, except when the same is sold by it in bottles, receptacles, or packages marked or labeled prominently with the name of the defendant's product, and designed and intended to be sold and delivered to the ultimate consumer in said original bottle, receptacle, or package, with said mark or label still remaining thereon.

"It is further ordered, adjudged and decreed that the proposed bottling package presented to the Circuit Court of Appeals upon its hearing of cases No. 2542 and No. 2543 does constitute a package by which the ultimate consumer will be fairly advised that he is not getting Coca-Cola; and that the sale of Gay-Ola in such package to the ultimate consumer, or to others in such

package for sale to the ultimate consumer thereof, will not constitute any violation of this decree. The bottling package so authorized is a long-necked clear-glass bottle having two complete annular ribs and two partially complete such ribs blown in the body of the bottle; and having the word 'Gay-Ola' in large capital letters blown in the shoulder thereof, and the words 'The Improved Cola' in the body thereof; being also provided with a cap or crown on which the words, 'Gay-Ola. It's Better,' are printed in red. This package is further identified by filing one of the same as an exhibit in this cause, and by front and rear photographs thereof attached to this decree, and made a part hereof."

Neither party will recover costs against the other.

MAYO v. AMERICAN MALTING CO.

(Circuit Court of Appeals, Fourth Circuit. February 4, 1914.)

No. 1210.

1. CONTRACTS (§ 10*)—REQUISITES AND VALIDITY—MUTUALITY.

A provision, in a contract for the sale of malt to be shipped as ordered, that if not ordered as required by the contract, the seller might charge one cent a bushel per month during the continuance of the delay, and that if all the malt was not ordered within the contract period, the seller might cancel the contract for the unshipped balance, or continue to carry the malt at such stipulated price, did not destroy the mutuality of the contract, as the seller would by the general law have such a choice of modes of redress, but merely fixed in advance the damages for delayed performance.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 21–40; Dec. Dig. § 10.*

Mutuality in contract, see notes to American Cotton Oil Co. v. Kirk, 15 C. C. A. 543; Oakland Motor Car Co. v. Indiana Automobile Co., 121 C. C. A. 362.]

2. SALES (§ 116*)—RESCISSION BY BUYER—BREACH OF CONTRACT BY SELLER.

Under a contract for the sale of malt, by which it was agreed that the seller would not quote prices on malt to other persons in the buyer's state, a sale of malt to another party in such state did not entitle the buyer to rescind, unless he was thereby prevented from selling the malt purchased by him at a satisfactory price.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 290; Dec. Dig. § 116.*]

In Error to the District Court of the United States for the Eastern District of Virginia, at Richmond; Edmund Waddill, Jr., Judge.

Action by the American Malting Company against George D. Mayo, trading as the Mayo Milling Company. Judgment for plaintiff, and defendant brings error. Affirmed.

S. S. P. Patteson, of Richmond, Va., for plaintiff in error.

John A. Cutchins, of Richmond, Va., and Edwin Blumenstiel, of New York City (Cutchins & Cutchins, of Richmond, Va., on the brief), for defendant in error.

Before PRITCHARD and WOODS, Circuit Judges, and ROSE, District Judge.

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

ROSE, District Judge. [1] The parties will be designated as they were below. The malting company was there the plaintiff, Mr. Mayo the defendant. On October 26, 1911, the defendant agreed to buy 6,250 bushels of malt from the plaintiff. He was to pay $1.32 a bushel for it. The terms were sight draft, bill of lading attached. He was to order the malt shipped in approximately equal monthly installments prior to June 1, 1912. If he should not give shipping orders as required by the contract, the seller was authorized to charge him for storing and carrying a cent a bushel per month during the continuance of the delay. If he failed to order all the malt within the contract period, the seller was given the option of canceling the contract for the unshipped balance, or of continuing to carry the malt for him for such time as it deemed fit at the stipulated cent a bushel per month.

Defendant claims that this reservation of alternative remedies to the plaintiff in the event of the defendant's breach destroyed the mutuality of the contract. A seller would, by the general law, have such a choice of modes of redress. The contract merely fixes in advance the damages for delayed performance. This contention does not require further consideration.

[2] The defendant never ordered any of this malt. Subsequent to June 1, 1912, he several times asked the plaintiff to cancel the contract. It refused to do so. It told him that upon certain conditions it would carry the malt for him to December 31st without exacting the monthly compensation of a cent a bushel. He never accepted this offer, or bound himself to the conditions named. On the 28th of October, 1912, he notified the plaintiff that he would not take the malt. It caused the malt to be sold. The net proceeds of the sale were $4,866.64 less than the contract price. None of the facts thus far stated are in dispute. The defense rests on other grounds. The relations between the parties began in September, 1911. Defendant then wrote to plaintiff for its prices for distillers' malt. An agent of the plaintiff thereupon called upon the defendant. At the interview an understanding was reached that defendant would buy malt from the plaintiff, and that the latter would not quote prices on distillers' malt to other persons in Virginia. This understanding was never reduced to writing. Its precise terms, conditions, and durations do not appear to have ever been definitely settled. On the day on which this interview took place defendant ordered from plaintiff a car of malt. Subsequently and prior to November 23, 1911, other orders were given. One of these was that now sued upon. All of them were in writing. Except as to dates, qualities, quantities, and prices they were identical in terms. Plaintiff in the fall of the year was wont to contract for all the malt he expected to need in the next 9 or 10 months. Such seems to have been the common usage of the trade. Shipments in accordance with the directions given by him were made to him at different times between September 19, 1911, and February 22, 1912. He paid for all the malt he received. His payments footed up an aggregate of over $37,000. For some reason during the season of 1912, the Richmond distillers bought much less than the usual quantity of malt. The barley crop of 1912 was large and of high average quality. The price of malt fell rapidly.

In September, 1911, it brought f. o. b. Richmond $1.32 per bushel. Thirteen months later it could be had for 74 cents. Defendant himself testified that in the summer and fall of 1912 he held some thousands of bushels of malt. He had paid the preceding year's prices for it. There was a very small local demand. In the general markets of the country it was falling with great rapidity. He and a Richmond competitor of his, who was in like case, tried to protect themselves by agreeing not to sell under $1.35 a bushel. The jury was entitled to infer, if they wished, that the reason why he never agreed to the conditions upon which the plaintiff offered to extend the time of delivery was that he could not make up his mind to surrender the hope that he might escape in some way from taking the malt at all. While things were thus drifting along a car of distillers' malt sold by the plaintiff to the Adams Grain & Provision Company of Richmond arrived in that city. The defendant learned of the incident almost immediately. He at once, on the 23d of October, wrote to the plaintiff that he regarded this sale to one whom he described as a competitor as a breach of the contract with him, and told it that he would not take any of the malt. In the court below and here he contends that he had the right to take this position, and that it is a complete answer to plaintiff's demand.

At the trial plaintiff objected to the proof of the verbal understanding or agreement. It said that the evidence was offered in the attempt to add by parol a new term or condition to a written contract. It relied, not only on the general rules of law upon that subject, but upon an express provision of the contract sued on, to the effect that no verbal conditions or modification of it would be valid. The court allowed the evidence to go to the jury. The plaintiff contended that, even if there was a parol agreement, it was not operative beyond the latest date fixed by the written contracts for the shipment of the malt. It argued that the indulgence as to time of delivery given to the defendant at his request could not extend the life of the agreement not to sell to others. It pointed out that there was no consideration shown or even suggested to sustain a binding contract to extend, and no acceptance by defendant of plaintiff's conditional offer of extension. Again the court overruled the objection and upheld the contention of the defendant. The court told the jury that if they believed that on the 23d of October, 1912, the defendant could have sold the malt which the plaintiff was then holding for him at a price satisfactory to himself and at which he was holding it, and that he was prevented from so doing by reason of the shipment into his territory of malt at a price below that at which he was then holding it, they must find for the defendant. They were further instructed that if, on the other hand, they found that the shipment did not prevent the plaintiff from selling, but that his inability to do so was the result of a long-continued fall in the market price, or of the shutting down of business by his customers, or for any other cause over which plaintiff had no control, their verdict must be for the plaintiff. It is to this latter instruction, and to the refusal to tell the jury that the shipment in question in itself entitled the defendant to rescind, that he makes his most serious objection. It is not every breach of a term or provision of a contract which will justify its rescission by the other party. If the breach did

nim no hurt, it was immaterial. If the shipment in question forced down the price of defendant's malt, or kept him from selling it, he was injured by it. It could not have harmed him in any other way. Whether it did him that harm was squarely submitted to the jury. They decided against him. They did not give the plaintiff a verdict for the full amount to which from the evidence it would appear to have been entitled. The 1,500 bushels of malt were shipped to the Adams Grain & Provision Company. They paid 74 cents a bushel for it, or $1,110 in all. Defendant points out that the verdict for the plaintiff was for $3,756.64, and that this is precisely $1,110 less than the sum claimed by it. Such appears to be the fact. We do not see that the defendant has any reason to complain of the action of either court or jury.

Affirmed.

In re MEADOWS et al.

(Circuit Court of Appeals, Second Circuit. February 10, 1914.)

Nos. 16, 17.

BANKRUPTCY (§§ 223, 368*)—COMPENSATION OF REFEREE AND TRUSTEE.

Under Bankr. Act July 1, 1898, c. 541, § 40, 30 Stat. 556 (U. S. Comp. St. 1901, p. 3436), providing that referees shall receive 1 per centum of all moneys disbursed to creditors by the trustee, section 48, which prior to the amendment of 1910 (Act June 25, 1910, c. 412, § 9, 36 Stat. 840 [U. S. Comp. St. Supp. 1911, p. 1502]) provided for specified commissions, which might be allowed to the trustee on moneys disbursed by him belonging to estates administered by him, and section 72, as added by Act Feb. 5, 1903, c. 487, § 18, 32 Stat. 800 (U. S. Comp. St. Supp. 1911, p. 1512), providing that neither the referee nor trustee shall in any form or guise receive, nor shall the court allow, any other or further compensation than that expressly authorized by that act, where a bankrupt to secure valid loans pledged negotiable stock and bonds having a market value about equal to the amount of the loan, which were sold in bankruptcy, realizing a small surplus, the trustee and referee were entitled to commissions only on the surplus after paying loan, especially where the commissions on the entire amount would have exceeded the surplus.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 571, 888–894; Dec. Dig. §§ 223, 368.*]

Petitions to Revise Order of the District Court of the United States for the Western District of New York.

In the matter of Harold G. Meadows and another, as individuals and members of the firm of Meadows, Williams & Co., bankrupts. On petitions by William H. Hotchkiss, referee, and Edward F. Walsh, trustee, to review an order which sustained exceptions by a creditor to the trustee's final report and disallowed commissions to the trustee and referee, except so far as they were based upon moneys disbursed and realized from available assets, exclusive of the amount due to pledgees upon their securities. Order affirmed.

The opinion of the District Court is reported in 199 Fed. 304.

See, also, 181 Fed. 911.

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

John Lord O'Brian and Bradley Phillips, both of Buffalo, N. Y., for appellants.

Shire & Jellinek, of Buffalo, N. Y. (Vernon Cole and Edward L. Jellinek, both of Buffalo, N. Y., of counsel), for respondent.

Before LACOMBE, COXE, and WARD, Circuit Judges.

COXE, Circuit Judge. On August 25, 1908, the bankrupts, who had been doing business as stock and bond brokers at Buffalo, N. Y., were, on their own petition, adjudged bankrupts. It is unnecessary to enter upon a discussion of the facts or to state them in detail as there is practically no dispute regarding them.

The question is one of law and may be epitomized as follows: Where a bankrupt has borrowed money from a bank and has pledged negotiable stock and bonds for its repayment, having a market value about equal to the amount of the loan, and the pledged property is sold in bankruptcy, realizing a small surplus, are the trustee and referee entitled to commissions on the entire amount realized or only upon the surplus after paying the loan?

We are of the opinion that upon these facts the commissions should be charged only upon the amount realized by the estate. Section 72 provides:

"That neither the referee, receiver, marshal, nor trustee shall in any form or guise receive, nor shall the court allow him, any other or further compensation for his service than that expressly authorized and prescribed by this act."

The compensation which alone can be received by the referee and trustee is expressly provided for in sections 40 and 48 respectively. Section 40 permits a commission of 1 per centum to the referee "on all moneys disbursed to creditors by the trustee." Section 40, prior to the amendment of 1910, provided for certain commissions which may be allowed the trustee on moneys disbursed by him, belonging to an estate which he has administered. Section 2 (5) of the act provides for extra compensation where the court has authorized the trustee to conduct the business of the bankrupt for a limited period, but this was not done in the case at bar. The result of the sale of the securities was of no benefit financially to the general creditors, if the appellants' position be correct, for the amounts allowed by the referee to himself and to the trustee more than absorbed the small surplus realized at the sale. The total amount of the liens was $366,807.68. The total amount received from the purchaser was $371,485.55, so that the amount of the equity of redemption, which was the only interest the creditors had in the securities was $4,677.87. The amounts allowed by the referee aggregate $5,807.64, so that the general creditors are worse off by $1,129.77 than they would have been if the banks had sold the securities. The suggestion that the deposit of $10,670.13 in the Fidelity Trust Company to the credit of the bankrupt partnership was saved by the trustee's sale can hardly be maintained. There is no reason to suppose that the sale of the securities, if made by the banks, would not have been an honest sale and that full notice would not have been given to all interested in the securities. In short, there is nothing to

induce us to think that a sale by the pledgees would not have realized as much as the sale by the trustee.

We must not be understood as questioning the right of the trustee to sell the securities, the title to which remained in the bankrupts and passed from them to him. Realizing, however, as he must have done, that the only interest the creditors whom he represented had in the security was the equity of redemption, and being able to estimate with accuracy what that equity was, we think it doubtful whether he and the referee should have taken the course they did take, knowing that if they took the fees, which they now claim, their action would be detrimental to the interests of the general creditors. These creditors might be justified in thinking that the sale by the trustee was not for their interest, but was had for the purpose of enabling these officers to collect commissions on the entire value of the property, although the creditors had no interest except in the small equity. We do not intend to question the good faith of the referee and trustee in ordering and conducting the sale in question. We have called attention to the lack of benefit to the creditors to emphasize the improbability that Congress intended to include money paid to banks, under such circumstances as are here developed, as money disbursed to creditors by the trustee.

It is conceded that the pledges were in all respects regular and valid, the security was given by the bankrupts to the banks to secure honest loans. The only interest the creditors or the trustee had in the pledged property was in the equity of redemption. When that is ascertained, a reliable basis is found upon which commissions may be computed. The theory upon which commissions are allowed is that they shall be regulated with reference to the benefits conferred on the estate. In the case at bar no benefit was conferred upon the creditors, the amount in the hands of the trustee was not increased and no basis for extra compensation amounting to nearly $6,000 was laid. The net result of the proceeding in the bankruptcy court is that in order to collect a $4,677 equity for the general creditors $5,800 has been expended. The validity of the pledges of the property to the banks was never disputed and as most of the property had a market value, the balance due to the estate could at any time have been ascertained. The general creditors had no interest in these securities unless their value exceeded the debts for which they were pledged and yet the referee and trustee demand a percentage upon the entire amount so realized. The result of the proceeding being that the creditors would have been much better off if the pledgees had been permitted to sell the pledged property without interference. These officers not only appropriated the entire equity of redemption but collected a part of their percentages from property which otherwise would have been divided among the general creditors.

If it be once established that the bankruptcy officials can collect the percentages authorized by the two sections in question from the pledged property, irrespective of its value to the estate, it follows logically that if the property be worth far less than the debt for which it is pledged, still these officials may collect the percentages.

The order is affirmed.

McKINNEY v. GENERAL ACCIDENT FIRE & LIFE ASSUR. CO., Limited.

(Circuit Court of Appeals, Eighth Circuit. March 7, 1914.)

No. 3979.

(Syllabus by the Court.)

1. INSURANCE (§ 646*)—ACCIDENT INSURANCE—RIGHT OF RECOVERY—BURDEN OF PROOF.

Under a policy whereby the insurance company contracts that if death shall result to the insured from bodily injuries caused by an accident alone within 90 days from the date of the injuries it will pay on account thereof $5,000 in addition to specified weekly indemnity, and that if such injuries shall "immediately, wholly and continuously disable and prevent the insured from performing any and every kind of duty pertaining to his occupation, and during the period of such continuous disability and within two hundred weeks from the date of the accident, result" in the death of the insured, the company will pay $5,000, it is indispensable to a recovery for a death occurring more than 90 days after the date of the bodily injuries caused by the accident that they should have immediately, wholly, and continuously disabled and prevented the insured from performing any of the duties of his occupation.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1555, 1645–1668; Dec. Dig. § 646.*

Accident insurance—risk and causes of loss, see notes to National Acc. Society of City of New York v. Dolph, 38 C. C. A. 3; New Amsterdam Casualty Co. v. Shields, 85 C. C. A. 126.]

2. INSURANCE (§ 146*)—ACTION ON POLICY—CONSTRUCTION.

Where the terms of a contract are unambiguous and their meaning is plain, they must be held to mean what they clearly express, and no room is left for construction.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 292, 294–298; Dec. Dig. § 146.*]

In Error to the District Court of the United States for the District of Kansas; John C. Pollock, Judge.

Action by Susie C. McKinney against the General Accident Fire & Life Assurance Company, Limited. Judgment for defendant, and plaintiff brings error. Affirmed.

C. M. Williams, of Hutchinson, Kan., for plaintiff in error.

J. C. Rosenberger and Kersey Coates Reed, both of Kansas City, Mo., for defendant in error.

Before SANBORN and SMITH, Circuit Judges, and POPE, District Judge.

SANBORN, Circuit Judge. This case presents a single question. Is pleading and proof that the accidental bodily injuries, which caused the death of the insured, immediately, wholly, and continuously disabled him from performing the duties pertaining to his occupation, indispensable to a recovery by the beneficiary on account of such a death which occurred more than 90 days after the infliction of the injuries under a policy of accident insurance whereby the maker agrees to pay for death caused by accidental bodily injuries on these conditions:

"If any one of the disabilities enumerated below" (the first of which was death) "shall result from such injuries alone, within ninety days from the

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

date of the accident, the corporation will pay the sum specified opposite such disability, under section 'B'" (which sum was $5,000), "and in addition to weekly indemnity as provided in part 2, from the date of the accident to the date of death, dismemberment or loss of sight; or, if such injuries shall, independently and exclusively of all other causes, immediately, wholly and continuously disable and prevent the insured from performing any and every kind of duty pertaining to his occupation, and, during the period of such continuous disability and within two hundred weeks from the date of the accident, shall result in any one of the disabilities enumerated below" (the first of which was death), "the corporation will pay the sum specified opposite such disability under section 'B'" (which sum was $5,000), "and in addition, weekly indemnity as provided in part 2 to the date of the death, dismemberment or loss of sight."

The court below answered this question in the affirmative and sustained a demurrer to a complaint for a recovery for the death of an insured which disclosed the facts that his accidental injuries occurred on September 25, 1909, that they did not disable him from performing the duties of his occupation until March 15, 1910, and that he did not die until May 21, 1911.

[1] Counsel specifies this ruling as error, argues that the condition that "if such injuries shall immediately, wholly and continuously disable" the insured found in the second part of the paragraph quoted does not limit the right of recovery for his death after the 90 days, but applies to the weekly indemnity only, because, as he contends, there is strong reason for conditioning the right to recover the weekly indemnity by immediate and continuous disability and none for thus limiting the beneficiary's right to recover for the death of the insured, and he cites in support of his argument Rorick v. Railway Officials' & Employés' Ass'n, 119 Fed. 63, 55 C. C. A. 369; Ætna Life Ins. Co. v. Bethel, 140 Ky. 609, 131 S. W. 523, 526; and Continental Casualty Co. v. Colvin, 77 Kan. 561, 95 Pac. 565. The opinions in these cases have been read and considered, but they are neither authoritative nor persuasive upon the question in this case, because none of the contracts in either of the cases cited contain the clear and conclusive agreement which has been recited. There is a sound reason for limiting the accidental deaths occurring more than 90 days after the accidents for which an insurance company agrees to become liable to those caused by accidents which are followed by immediate, complete and continuous disability. The proportion of deaths that are caused by accidents independently of all other causes is small. All die, but most deaths are caused by disease or by causes other than accidents. It is not difficult to prove by the mistaken opinions of witnesses that a death which occurs more than 90 days after an accident which was not followed by immediate and continuous disability was caused by that accident independently of all other causes, even when the truth is that it was caused by disease alone, or by disease and the accident. It was undoubtedly to guard itself against recoveries for such deaths and to restrict its liability, as it had the moral and legal right to do, to the liability for deaths occurring more than 90 days after the accidents to those in which the immediate, complete, and continuous disability of the victims after the accidents presented physical evidence that the accidents were the cause thereof, that the company, while it contracted without condi-

tion to pay $5,000 for the accidental death of the insured occurring within 90 days after the accident, limited its liability to pay for his accidental death occurring more than 90 days after the accident and within 200 weeks thereof by the express condition that the injuries caused by the accident should immediately, wholly, and continuously, until his death, disable him from performing any duty pertaining to his occupation.

[2] A consideration of the reason for this provision of the policy and of the general rules for the construction of contracts, however, while persuasive, is not controlling in the case in hand, for the terms of the policy are free from ambiguity or uncertainty, and this case falls under the familiar rule that, where the terms of a contract are unambiguous and plain, they must be held to mean what they clearly express, and no room is left for construction. Imperial Fire Ins. Co. v. Coös County, 151 U. S. 452, 463, 14 Sup. Ct. 379, 38 L. Ed. 231; Liverpool & London & Globe Ins. Co. v. Kearney, 94 Fed. 314, 319, 36 C. C. A. 265; Delaware Ins. Co. v. Greer, 120 Fed. 916, 921, 57 C. C. A. 188, 61 L. R. A. 137.

Stripped of some of its verbiage, the plain and certain contract of this insurance company by its policy was to pay to the plaintiff, the beneficiary named therein, $5,000 on account of the death of the insured occurring within 90 days after the accident which alone caused it, and to pay her $5,000 on account of his death occurring more than 90 days and within 200 weeks after the accident which alone caused it, if the bodily injuries inflicted by that accident immediately, wholly, and continuously disabled and prevented him from performing any and every duty pertaining to his occupation. The plaintiff admits by her complaint that the death of the insured did not occur within 90 days after the accident which caused it and that the bodily injuries caused by that accident did not immediately, wholly, or continuously thereafter disable or prevent him from performing for several months duties pertaining to his occupation. The death of the insured was not, therefore, one of those on account of which the insurance company agreed to make a payment to the beneficiary, and the judgment below must be affirmed.

It is so ordered.

VALLEY CAMP COAL CO. v. KUCEWICZ.

(Circuit Court of Appeals, Third Circuit. March 30, 1914.)

No. 1828.

MASTER AND SERVANT (§ 286*)—INJURIES TO SERVANT—NEGLIGENCE—FAILURE TO WARN—PRECAUTIONS—QUESTIONS FOR JURY.

Where plaintiff, a slate picker at a coal tipple, was called from his regular duty in the early morning, before daylight, to assist in adjusting a belt to a large pulley wheel operated by electricity, and he was injured by the sudden, rapid starting of the wheel while engaged in such work, whether defendant was negligent in failing to warn him of the danger, and whether it had exercised reasonable care to safeguard the place, by

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

taking reasonable precautions against accidental or inadvertent starting of the machinery, was for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010–1015, 1017–1033, 1036–1042, 1044, 1046–1050; Dec. Dig. § 286.*]

In Error to the District Court of the United States for the Western District of Pennsylvania; James S. Young, District Judge.

Action by M. Kucewicz against the Valley Camp Coal Company. Judgment for plaintiff, and defendant brings error. Affirmed.

John McCartney Kennedy, Watson & Freeman, and Robert W. Sutton, all of Pittsburgh, Pa., for plaintiff in error.

John T. Moore, of Pittsburgh, Pa., for defendant in error.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

GRAY, Circuit Judge. The defendant in error, an alien, brought suit in the court below to recover from plaintiff in error, a corporation and citizen of the state of Pennsylvania, damages for injuries alleged to have been occasioned by its negligence.

The facts as disclosed by the record are as follows:

On January 5, 1912, and for nearly two years prior thereto, the plaintiff was employed at the defendant's mine, his principal and regular duty being to pick slate out of the coal that had been taken from the mine. On the day above stated, while yet dark, Kinloch, superintendent of the mine, ordered plaintiff to go on the top platform of the coal tipple, 40 or 50 feet above the ground, to assist another employé in putting a belt on a wheel, which was then at rest. The wheel was some eight feet in diameter, and the belt very heavy and ten inches in width. It led from this large wheel down to a smaller wheel on the ground floor, connected with machinery for raising coal from the mine. The machinery was actuated by electricity in charge of an engineer down on the floor of the mine and some 200 feet away from the wheel on which the plaintiff was assisting to place the belt. A narrow platform, but of sufficient width for the purpose, seems to have surrounded the wheel on which, at the time of the accident, plaintiff, another man called an engineer, and Kinloch, the superintendent of the mine, were standing. Plaintiff was standing on one side of the wheel and the engineer on the other, both engaged in putting the belt on this large wheel. It appears that after the belt had been once put on, the wheel was started, on a signal shouted from this platform to some one who touched a button on the first floor, which rang a bell in the switch room where the engineer was in charge. Directly after the wheel was started, the belt again came off, the machinery was stopped, and the two men undertook again to place the belt back on the wheel. While doing so, and before the belt had been put in position, the wheel suddenly started at high speed and the plaintiff, who was holding the belt with both hands, was so caught by it that he was thrown from the wheel down onto the floor immediately beneath the platform, and sustained the injuries complained of.

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

It was in evidence that the plaintiff had never been employed in this work of placing or assisting to place the belt on this wheel prior to the morning in question. The hour was about twenty minutes before seven in the morning, the month of December, and as it was not yet light, Kinloch, the superintendent, had a torch in his hand to furnish the necessary light for the operation. No signal was given from the platform for the starting of the wheel this second time. The engineer testified, however, that he did receive a signal from the bell connected with the button on the first floor, although the man who usually gave that signal testified that he did not give it for the second starting. There is practically no evidence to show just how this wheel came to be started, or how, if at all, the bell was rung. The evidence shows that, where the machinery actuating such a wheel is started by steam, it may be, and generally is, when a belt is being put on, started slowly, in order to assist the placement of the belt, but that where the machinery is actuated by electricity, this slow turning of the wheel cannot be had, but it commences to revolve suddenly and at once at high speed, as was the case at the time of the accident.

Plaintiff contends that the work he was required to assist in doing, and the place where it was to be performed, were necessarily dangerous, and that as he was without experience in such work, it was the duty of his employer to warn, or to cause him to be warned, of dangers attendant upon what he was required to do. It is admitted that no such warnings were given, but it is contended by the defendant that none were required, as plaintiff had been working on and around the machinery of the mine for more than two years, and could not have been unaware of the conditions surrounding the replacing of the belt in question, and of the dangers, if any, attending the same, though he had never been actually engaged in such work.

It was upon this uncontradicted testimony that defendant made its request, at the conclusion of the evidence, that the jury should be instructed to return a verdict in favor of the defendant. This motion was refused, and the case was submitted to the jury by the learned judge of the court below, in a charge which fairly stated the contentions both of the plaintiff and the defendant. The verdict and judgment thereon being in favor of the plaintiff, the present writ of error was sued out by the defendant. The only assignment of error is founded on the exception to the refusal of the court below to grant the peremptory instructions asked for.

Having examined carefully all the evidence disclosed in the record, we think the court below was justified in not withholding this case from the jury. The evidence tended to show that the work required of the plaintiff had peculiar dangers of its own, owing to the possibility of the wheel being inadvertently or accidentally started in rapid revolution while the work was going on; that such starting, where electricity was used as the motive power, was always sudden and at high initial speed, differing in that respect from the slow and gradual movement where steam was the actuating force. Such being the case, the court below decided to submit to the jury the question, as to what were the dangers of the place in which he was required to work, and

whether they were such as imposed upon the employer a duty of instructing a man inexperienced in such work in regard to them. Moreover, in view of the danger peculiar to the situation, of an inadvertent or accidental starting of the machinery, the question arises on the evidence, whether defendant had performed the master's duty of exercising reasonable care to safeguard the place wherein his employé is required to work, by taking precautions against such accidental or inadvertent starting of the machinery, precautions not necessary under other and ordinary circumstances.

We think these questions were properly for the jury, and therefore the judgment below is affirmed.

GOOD v. KANE.†

(Circuit Court of Appeals, Eighth Circuit. March 7, 1914.)

No. 133.

(Syllabus by the Court.)

1. BANKRUPTCY (§ 136*)—SUMMARY PROCEEDINGS AGAINST BANKRUPT—EVIDENCE.

On a hearing upon an order on the bankrupt to show cause why he should not be required to turn over assets to the trustee, his testimony on his general examination at the first meeting of his creditors is admissible against him, even though the referee at that examination erroneously denied the bankrupt the right to have his counsel cross-examine him and give him an opportunity in that way to explain and to correct the testimony on his examination.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 233, 235; Dec. Dig. § 136.*]

2. BANKRUPTCY (§ 446*)—PETITION TO REVISE—DECISIONS REVIEWABLE.

Decisions of disputed questions of fact on conflicting evidence are not reviewable upon a petition to revise.

But the question of law whether or not there was any substantial evidence to sustain a decision or order may be considered or determined by the appellate court upon such a petition.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 929; Dec. Dig. § 446.*

Appeal and review in bankruptcy cases, see note to In re Eggert, 43 C. C. A. 9.]

3. BANKRUPTCY (§ 136*)—POSSESSION OF PROPERTY—PRESUMPTION—BURDEN OF PROOF.

When property of a bankrupt estate is traced to the possession of one on the eve of his bankruptcy, it is presumed to remain in his possession or under his control until he satisfactorily accounts to the court of bankruptcy for its disposition or disappearance, and the burden is on him so to account.

He cannot escape an order for its surrender by a mere denial under oath that he has the property or its proceeds in his possession or under his control, or that they are the property of the bankrupt estate.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 233, 235; Dec. Dig. § 136.*]

Petition to Revise Order of the District Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

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

† Rehearing denied May 4, 1914.

Petition by Isadore Good against Joseph Kane, trustee in bankruptcy of the estate of Isadore Good, bankrupt, to revise an order of the referee, affirmed by the District Court, that petitioner turn over certain property to the trustee. Petition to revise dismissed.

C. W. Rutledge, of St. Louis, Mo., for petitioner.

Lee W. Grant, of St. Louis, Mo., and W. H. Close, for respondent.

Before SANBORN and SMITH, Circuit Judges, and POPE, District Judge.

SANBORN, Circuit Judge. [1] Isadore Good, a bankrupt, challenges, by a petition to revise, an order of the referee which was affirmed by the District Court, that he turn over to the trustee $2,000 which they found was property of his bankrupt estate and in his possession. He founds his challenge on the grounds: (1) That the referee and the court admitted in evidence against him on the hearing for the order his testimony on his general examination at the first meeting of creditors, at which it was alleged that he was denied the right to be cross-examined by his counsel or to explain and correct his testimony; and (2) that there was no legal evidence that the bankrupt had in his possession or under his control $2,000 of the property of the bankrupt estate at the time the order was made. The answer to the petition denies that the referee refused to permit the counsel for the bankrupt to cross-examine him on his general examination at the meeting of creditors; but, even if the referee had made such a denial, it would not have disqualified his testimony on that examination as evidence against him, although it would have undoubtedly much weakened its force. A bankrupt without question has the right on his general examination at the first meeting of the creditors, or at any other examination, to the attendance and services of counsel to object to inadmissible evidence and examination, to except to erroneous rulings and to so cross-examine the bankrupt as to elicit the whole truth regarding the subjects of the examination by means of the bankrupt's correction of mistakes in and explanations of his earlier testimony. A timid, thoughtless, or ignorant debtor may not be led on by a quick, trained examiner to make mistaken admissions and to tell half truths and then denied the opportunity to correct or explain his testimony in answer to questions by his own counsel. However, there was no error in the admission of his general examination in this case because it was competent evidence against the bankrupt as an admission against interest although he was denied cross-examination. In re Cole, 163 Fed. 180, 90 C. C. A. 50, 23 L. R. A. (N. S.) 255; Kirsner v. Taliaferro, 202 Fed. 51, 59, 120 C. C. A. 305, 312, 313.

[2] Nor is the position that there was no legal evidence to sustain the finding that the bankrupt had $2,000 belonging to his estate in his possession or under his control maintainable here upon the record which is presented. The bankrupt himself testified on his general examination to the amounts of money he received from the sales of his merchandise at wholesale and to the amounts he expended during the four months preceding the filing of the petition for his adjudication in bankruptcy, and the amounts he thus received exceeded the amounts

he expended, or in any way accounted for, by at least $2,000. He also testified that during this time he was constantly selling at retail and receiving the proceeds of considerable quantities of goods, but that he did not know and could not estimate the amounts he received from these sales. He testified that he sold at wholesale large amounts of goods in proportion to his stock at prices much less than their cost, took the money of all these sales, and kept no books of account from which the amounts of his sales, receipts, or expenditures could be determined with reasonable accuracy. Counsel in his brief declares that:

"The whole case turns on the amount of goods sold Herman Faber and the amount of cash received from Faber. The referee found he received $5,000 in cash from Faber, and the evidence conclusively shows, and petitioner contends, he received but $3,000 in cash from him. The difference is the $2,000 the referee ordered paid."

If the crucial question had been, as counsel asserts, whether the bankrupt received $5,000 or $3,000 from Faber, it would not be reviewable in this case, for he testified on his general examination no less than four times that he received $5,000 in cash from him, and on his subsequent examination on the order to show cause he testified that he received only $3,000. His own testimony was both competent and conflicting. This hearing is on a petition to revise, and decisions of disputed questions of fact on conflicting evidence are not reviewable upon a petition to revise, although the question of law whether or not there was any substantial evidence to sustain such a decision or order may be considered and determined upon such a petition. In re Frank, 182 Fed. 794, 797, 105 C. C. A. 226, 229; Kirsner v. Taliaferro, 202 Fed. 51, 56, 120 C. C. A. 305, 310; In re Lee, 182 Fed. 579, 581, 105 C. C. A. 117, 119.

[3] Nor was the fact that the bankrupt denied in his testimony that he had this $2,000 in his possession or under his control conclusive of that issue. There was much competent evidence to sustain a finding that more than that amount of money of his estate above all that he claimed to have paid out and above all that he accounted for had been received by him within the four months preceding the filing of the petition in bankruptcy. And when property of a bankrupt estate is traced to the possession of one on the eve of his bankruptcy, it is presumed to remain in his possession or under his control until he satisfactorily accounts to the court of bankruptcy for its disposition or disappearance, and the burden is on him so to account. He cannot escape an order for its surrender by simply denying under oath that he has it, or that it is the property of the bankrupt estate.

The conclusion is that there was competent and substantial evidence to support the finding and order below, and the petition to revise is, accordingly, dismissed.

HUNTLEY v. EMPIRE ENGINEERING CORPORATION.

(Circuit Court of Appeals, Second Circuit. February 10, 1914.)

No. 86

1. CANALS (§ 18*)—CONSTRUCTION—LIABILITY FOR INJURIES.
A party contracting with the state to widen and deepen a section of a canal was liable for any damage resulting to a party using the canal from its negligence in performing its contract.
[Ed. Note.—For other cases, see Canals, Cent. Dig. §§ 20–24; Dec. Dig. § 18.*]

2. CANALS (§ 18*)—ACTIONS FOR INJURIES—BURDEN OF PROOF.
Where the rock upon which a canal boat struck must have been raised while a contractor with the state was in possession and charge of the bottom of the canal, for the purpose of widening and deepening it, the burden was on it to explain how the rock became displaced, which burden was not met by showing that the buckets on its ladder dredge did not raise the rock by direct contact.
[Ed. Note.—For other cases, see Canals, Cent. Dig. §§ 20–24; Dec. Dig. § 18.*]

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

Libel by Loren E. Huntley, individually and as trustee, against the Empire Engineering Corporation. From a decree for the libelant (189 Fed. 516), the respondent appeals. Affirmed.

D. L. Spring, of Buffalo, N. Y., for appellant.

Brown, Ely & Richards, of Buffalo, N. Y. (J. B. Richards, of Buffalo, N. Y., of counsel), for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. The respondent contracted with the state of New York to perform a part of the improvement of the Erie Canal, the work to be conducted so as not to interfere with navigation. It was to widen and deepen one section while the state continued to operate the canal as usual. The original depth of 7 to 7½ feet of water was to be increased from 10 to 10½ feet. October 24, 1909, the contractor, having excavated by means of a ladder dredge to a point within 35 to 40 feet west of Bridge No. 101, discontinued there and moved the dredge to a point about 150 feet east of the bridge. October 28th at 1:15 a. m. the steam canal boat Paragon, pushing the canal boat L. E. Huntley ahead and towing the canal boats Valiant, John D. Fish, and Ella M. Hamilton astern on a hawser about 500 feet long, approached the bridge in the center of the canal. The boats were grain laden and drew 6 feet of water or less; 6 feet being the maximum draft allowed by law. When close to the bridge, the L. E. Huntley struck something sustaining injuries which caused her to sink at a point a little east of the bridge. The Paragon also struck, but cleared, while the Valiant fetched up and remained fast. The libelant, as owner of the boats and bailee of the cargoes, filed this libel to recover damages of the respondent on the ground that in excavat-

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

ing it had thrown up a large rock on the bottom and negligently left it unbuoyed and unmarked. Judge Hazel directed a decree for the libelant, from which the respondent appeals.

The canal is open for navigation from May 15th to November 15th in every year and is used by many boats drawing 6 feet of water; canal boats, especially steam canal boats, generally towing in the center of the canal. At the close of the season, the water is run out through culverts and spillways, so that the bottom is bare. The rock was well known to some of the witnesses and was examined when the water was run off shortly after the accident.

[1] The law is quite clear that the respondent is responsible for any damage resulting from its negligence in performing its contract with the state. St. Peter v. Denison, 58 N. Y. 416, 424, 17 Am. Rep. 258; Dunn v. Empire Engineering Corporation, 147 App. Div. 237, 131 N. Y. Supp. 935; Harrison v. Hughes, 125 Fed. 860, 60 C. C. A. 442. The libel proceeds upon this theory, and not upon the ground that the contract with the state was made for the libelant's benefit, and that he could avail himself of its provisions.

[2] Therefore the single question is: Did the respondent displace the rock so as to reduce the depth of water in the canal? It is proved that this rock had been upon the bottom for many years and did not protrude more than a few inches; also, that at the time of the accident it protruded from 12 to 18 inches. It was what is called a hardhead, described as being a round or oval boulder three or four feet in diameter. That this change in its position must have happened shortly before the accident is shown by the fact that no boat had ever touched it before the dredge moved to the other side of the bridge October 24th, and that two steam canal boats which passed between that date and October 28th, when this accident occurred, did touch it.

The dredge is a large rectangular boat having what is called a ladder extending in front which can be moved up and down, but in no other way. When in operation, the outer end of the ladder rests on the bottom. An endless belt runs around its length, carrying 51 steel or iron buckets some 2½ feet wide by 18 inches deep. When the belt is set in motion, the buckets move at the rate of 25 to 27 a minute from the upper end of the ladder toward the water and gradually turn upside down. Their weight makes the belt sag down to the bottom, and they begin to bite in about 10 feet from the lower end of the ladder. From that point they move forward and upward, getting gradually straighter until they are carried in a vertical position full of whatever they have dug around a cylinder called a tumbler and then up the upper side of the ladder to a hopper at the upper end where they empty their contents and return via the underside to the bottom. The dredge is placed in the center of the canal fixed by a single spud in the bottom astern, and, by the movement of the bow by fasts on shore controlled by winches on the dredge, the ladder is enabled to work from one side of the canal to the other transversely in the arc of a circle. There was absolutely no indication that the boulder had been displaced after the water was run out of the canal. The dredge had evidently worked nearly up to it. If the buckets had

struck and rolled it over as they rose from the water to go up the ladder, they would also have displaced the earth around it; but this was not the case. Nor was there any evidence of stoppage in the work of the dredge or of injury to any of the buckets which would certainly have been the result of contact with so large a rock.

The respondent was, so to speak, in possession and charge of the bottom of the canal where it was working. This necessarily follows from what it had contracted to do. The District Judge found, and we think on sufficient evidence, that the rock must have been raised during the time the respondent was at work. There is no conceivable cause for it excepting the work. Under these circumstances, we think the burden of explanation was upon the respondent. If it had offered no explanation at all, we think it would properly have been held liable. The explanation it does give goes only to show that the buckets did not raise the rock by direct contact. While we are not convinced that the buckets actually contacted with and moved the rock, their operation on the bottom may have caused the change indirectly. Under the peculiar circumstances of the case, we think the respondent has not met the burden of explanation, and we come to this conclusion less reluctantly because the touching of the rock by two other steam canalboats between October 24th and 28th should have put it on inquiry whether something was not radically wrong at the point where its dredge had been working.

Decree affirmed, with interest and costs.

WOFFORD v. PRESS PUB. CO.

(Circuit Court of Appeals, Second Circuit. February 11, 1914.)

No. 137.

LIBEL AND SLANDER (§ 86*)—INNUENDO—COMPLAINT.

Defendant newspaper, after the failure of a trust company, printed several articles stating that C., a stockholder and director, had illegally permitted his personal friends and business associates to borrow large sums of money on insufficient security or on no security, in fraud of the rights of creditors and stockholders, and in violation of the laws of the state. Thereafter an article was published stating that efforts were being made to pay the depositors in full, and charged that the notes, representing money loaned to C. and his friends, would yield more than was expected, after which followed a list of the makers of bills or notes due to the trust company under a heading that they contained "the names of some friends of City Chamberlain H.," who was also accused of the same offenses as C. In the list appeared plaintiff's name, followed by the figures $10,000. *Held*, that such publication was insufficient to sustain an innuendo that it was intended to mean that plaintiff, through friendship or a common interest with C. or H., had obtained $10,000 with the trust company with a dishonest purpose not to repay it, and that the publication was therefore not libelous.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 205–208; Dec. Dig. § 86.*]

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

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

This cause comes here upon appeal by plaintiff in error, who was plaintiff below, from a judgment of the District Court, Southern District of New York, dismissing the complaint. The action is for libel, and the complaint was demurred to on the ground that it did not state facts sufficient to constitute a cause of action.

H. Cabell, of New York City, for plaintiff.

Taylor, Jackson & Brophy, of New York City (C. B. Brophy, of New York City, of counsel), for defendant.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge. The complaint sets forth that one Cummins was a stockholder and director of the Carnegie Trust Company, which was taken possession of in January, 1911, by the Banking Department of the state of New York to be liquidated for the benefit of its creditors and that Charles H. Hyde was chamberlain of the city of New York. That shortly after the action of the Banking Department there appeared, from day to day, numerous editorials and articles in the columns of defendant's newspaper, wherein and whereby the said Cummins and the said Hyde were, both openly and by implication, accused of various illegal and criminal acts in connection with the affairs of the Carnegie Trust Company; that among other things and more especially they were accused of borrowing and permitting their business associates and personal friends to borrow large sums of money from said trust company, upon insufficient security or upon no security at all, in fraud of the rights of the creditors and stockholders of said Carnegie Trust Company, and in violation of the laws of the state of New York. That in March, 1911, the defendant published in the columns of its newspaper an article headed "Plan on foot to pay depositors of Carnegie Trust Company in full," and that said article contained the following language:

"The men who have thus come to the aid of the trust company have taken into consideration the long list of bills purchased, which really are promissory notes, upon which the company lent money to Cummins and the latter's friends. They hold, however, that the notes will yield much more than was expected, now that the public knows about them, but even if they do not, they say they form only a comparatively small portion of the real assets.

"In the following partial list of the makers of bills or notes the names of some friends of the City Chamberlain Hyde may be recognized."

That a list of names and amounts is thereafter given as and for said "partial list," among which appears the name "Charles P. Wiffard," followed by figures $10,000.

By innuendo the complaint then alleges:

"That by the language above quoted the defendant meant and intended to mean, and was understood by the general public as meaning, that the moneys obtained by the persons named in said list were obtained by them through their friendship with or business connection or identity with the said Cummins or the said Hyde, with the dishonest purpose on the part of the persons so obtaining said loans of never repaying the same. That the spelling of the name of plaintiff was a mistake in the printing of the list; but it was the intention of defendant to insert therein the plaintiff's name, and the name 'Charles P. Woffard' on such list was intended for the plaintiff and was so understood by the general public. That by the insertion of this plaintiff's name

in said list the defendant meant and intended to mean, and was understood by the general public to mean, that plaintiff, through the friendship of or common interest with the said Cummins or said Hyde, or both, had obtained a loan of money from the Carnegie Trust Company with the dishonest purpose of never repaying it; and that by the figures $10,000 being set out in said list opposite said name was meant, intended to mean, and was understood by the general public to mean, that this plaintiff then owed to the Carnegie Trust Company the sum of $10,000 upon a loan obtained with the dishonest purpose aforesaid."

The complaint further states that *subsequent to the publication* complained of Cummins and Hyde were indicted; Cummins was convicted. What bearing these facts are supposed to have upon the prior publication it is difficult to understand.

A majority of the court think it putting too much strain on the theory of "innuendo" to justify the conclusion that the article complained of is a libel on the plaintiff. Even if it were conceded that the prior publications of the newspaper might lead a reader to suppose that every friend of the chamberlain, who borrowed money from the trust company without security, did so "with the dishonest purpose * * * of never repaying the same," and such concession would seem to put an excessive strain on "innuendo," the only statement in this issue is that in the published list the names of *some* friends of the chamberlain may be recognized. It is not stated that all the names on the list are "friends"; on the contrary, the phraseology would seem to indicate that some of them are not. No fact and no statement of defendant which is set forth in the complaint would, as it seems to us, warrant a jury in finding that the defendant has asserted, directly or indirectly, that the plaintiff borrowed money from the trust company with the fraudulent and dishonest intention of not repaying the loan.

The judgment is affirmed.

THE HENDRIK HUDSON.

(Circuit Court of Appeals, Second Circuit. January 13, 1914.)

No. 134.

COLLISION (§ 71*)—STEAMER STARTING FROM WHARF—WANT OF DUE CARE.

The passenger steamer Hendrik Hudson, navigating the Hudson river, which on leaving a bulkhead where she had stopped to discharge passengers came into collision with a tug lying some distance ahead outside of two other vessels, *held* solely in fault for not allowing more room but passing so close that her suction caused the stern of the tug to swing out.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 101; Dec. Dig § 71.*]

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

Suit in admiralty for collision by the Knickerbocker Steam Towage Company, owner of the tug Baldwin, against the steamboat Hendrik Hudson; the Hudson River Day Line, claimant. Decree for libelant, and claimant appeals. Affirmed.

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

This cause comes here on appeal from a decree of the District Court, Southern District of New York, holding the steamer Hendrik Hudson in fault for a collision with the steamtug William H. Baldwin while the former was leaving her landing place at Kingston Point.

Burlingham, Montgomery & Beecher, of New York City (Charles C. Burlingham and Robinson Leech, both of New York City, of counsel), for appellant.

Hyland & Zabriskie, of New York City (Nelson Zabriskie, of New York City, of counsel), for appellee.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

PER CURIAM. The landing place at Kingston Point is a long bulkhead, leased to the Day Line by the Ulster & Delaware Railroad. The boats of the Day Line make their landings there each day, with passenger gangway (forward or aft) opposite a covered shed. Their berth is well known to all rivermen. No question is raised as to the right of other craft to moor at the same bulkhead, in the course of their lawful business. The Hudson, northward bound, berthed at the bulkhead and lay there several minutes landing passengers. Just ahead of her berth and 50 or 60 feet from her bow lay a schooner discharging railroad ties; outside of the schooner a lighter and outside of the lighter the Baldwin. The schooner and lighter were securely moored with all necessary lines, so that neither tide nor suction would draw them substantially out from the bulkhead. The tug was waiting for an up-bound tow, and was moored only by bow and stern lines, so she could cast off readily and get away. The tide changed to flood before the Hudson's arrival; in consequence the Baldwin's stern swung out into the river, at least four feet from the lighter, as her master admits —probably a few feet further, witnesses from the Hudson make it as much as ten feet.

Some little time before the Hudson started, her pilot hailed the deckhand of the tug who stood on her after deck and warned him that he would "either have to kick his stern in or get out of the way." The deckhand notified the captain of the tug, who was resting in the pilot house, telling him that the "pilot on the Hendrik Hudson wanted him to work her in close to the scow." Her wheel was then put to port and her engines worked ahead under one bell, which slowly brought her stern in close to the lighter. No one tended any of the lines; since she had out no breast line, we cannot see that attention to her bow and stern lines would have accomplished anything.

While the tug lay thus snugged up through the operation of her propeller and her port helm, the Hudson got under way. She cast off her bow line and backed down the bulkhead, slackening gradually away upon her stern line; a maneuver which tended to bring her stern close to the bulkhead and to swing her bow out into the river. She backed down about 100 feet, could safely go no further because of the presence of piles, rocks, and shoal water near the stern. When her bow had swung out sufficiently as her pilot thought to clear the tug, she cast off and went ahead under a port helm. After clearing the tug she

put her helm to starboard to swing her stern away. Apparently she would have passed on without causing any trouble, had the tug remained snugged up; but, as soon as the suction produced by the Hudson's displacement became operative, the tug swung out as she had before and was struck by the Hudson's guards abaft the paddle wheel.

The pilot of the Hudson admits that he could have swung her bow further out before she cast off and started forward. He had seen just what an obstruction he had to clear; it was evident that the Baldwin was not moored securely in place by lines sufficient to hold her close against suction; they had not so held her, against tide. The snugging up which was obtained by use of screw and wheel would presumably terminate when suction neutralized the force of those agencies. Apparently the pilot did not make allowance for this and laid a course involving too close a clearance. We concur with Judge Holt in finding the Hudson at fault.

As to the tug: The schooner was 50 feet wide, the lighter 25 feet, the Baldwin 16 feet. The vessels thus built out from the bulkhead, just in front of the regular and well-known landing place of the day boats, a temporary projection 91 feet out from the bulkhead. But the Hudson is a very wide river at Kingston Point, and such a projection cannot be held to be an obstruction to its navigation. The Rhein, 204 Fed. 252, 122 C. C. A. 520. No doubt it was an embarrassment to the Hudson, but it was plainly visible and involved no hidden danger because when first seen by the pilot of the Hudson it was apparent that the outlying boat was slackly made fast with no breast line and might be expected to project a few feet further into the river when suction began to operate. There is nothing to show that the tug was in fault for tying up where she did, in plain view of every approaching vessel.

The decree of the District Court is affirmed, with interest and costs.

THE TRANSFER NO. 8.

THE NO. 25.

(Circuit Court of Appeals, Second Circuit. January 13, 1914.)

Nos. 87–88.

COLLISION (§ 96*)—VESSELS PASSING AND COMING OUT OF SLIP—FAILURE TO MAINTAIN LOOKOUT.

A tug passing up East River before daylight about 125 feet from the piers, with a car float alongside projecting ahead 170 feet, *held* solely in fault for a collision between her tow and a transfer tug, which backed out of a slip after giving a slip whistle, on the ground that she should have heard such whistle and that she did not have a lookout on the float.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 203–205; Dec. Dig. § 96.*

Collision with or between towing vessels and vessels in tow, see note to The John Englis, 100 C. C. A. 581.]

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

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

Suit in admiralty for collision by the New York Central & Hudson River Railroad Company, owner of steam tug No. 25, against the Transfer No. 8, the New York, New Haven & Hartford Railroad Company, claimant, with cross-libel against tug No. 25. Decree against tug No. 25, and her claimant appeals. Affirmed.

These causes come here upon appeals from decrees of the District Court of New York which held tug No. 25 solely to blame for a collision between herself and Transfer No. 8. In the early morning, before daylight, No. 25 was bound up in the East River about 125 to 130 feet from the piers bound for Pier 34. She was going at full speed, but with a loaded car float on her starboard side was making slow progress against an ebb tide. The car float projected ahead of her about 170 feet, and there was no lookout on the float. When her pilot house reached the south side of Pier 30, her master saw the stern and staff lights of No. 8 projecting beyond the upper side of Pier 31, the covered portion of which shut out any view of vessels on her upper side. He had heard no slip whistle from her.

No. 8 had brought a lighter to the upper side of Pier 31, and after remaining tied up there a short time cast off her lines, blew a slip whistle, and proceeded to back out of the slip. The first deckhand was stationed aft. He could see nothing below Pier 31 on account of its height, but made out No. 25 when the stern of his tug reached the pier end. He at once sung out for the captain to go ahead, as there was a boat coming up close along the docks. The captain at once gave an order to stop, and a bell to go ahead, and a jingle. When No. 25 reached Pier 30, and before she saw No. 8, her master gave a slow bell, and as soon as he saw No. 8 gave a single whistle, which No. 8 answered with an alarm. No. 25 did not reverse. Reversal would have tended to throw her bow inshore.

The vessels collided about 125 feet outside the pier line. The District Judge held No. 25 in fault for not hearing the slip whistle and not maintaining a lookout on the float.

Barry, Wainwright, Thacher & Symmers, of New York City (James K. Symmers, of New York City, of counsel), for appellant.

Charles M. Sheafe, Jr., and James T. Kilbreth, both of New York City, for appellee.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

PER CURIAM. The appellant contends that No. 8 was at fault in failing to stop her sternway in time to avoid collision. Whether she could have done so depends naturally on the speed she had reached when she first saw No. 25. All difficulties and inconsistencies in the testimony, which are urged in argument, are explained by the fact that No. 8 was much further in the slip than the 50 feet her master estimated he was from the end of the pier. The slip is 330 feet long. He tied his lighter close up to the bulkhead, and lay himself bow inshore just a little out from the lighter. As No. 8 was 103 feet long, her stern must have been considerably further in than 50 feet from the pierhead. Naturally, when her lines were cast off, No. 8, to overcome inertia, would start her engines briskly, and her engineer says she did so. In consequence, by the time she came near enough to the end of the pier to sight No. 25, her speed was such that she could not at once overcome it. We see no fault in her starting as she did, having warned every one with her slip whistle, which was not heard on No. 25, no doubt because there was no lookout on the float. We find no fault

in the navigation of No. 8. The force of the blow, which has been much relied on in argument, was due not so much to the speed of No. 8 as to the momentum of No. 25.

Decree affirmed, with interest and costs.

UNITED STATES v. OCEANIC STEAM NAVIGATION CO.

(Circuit Court of Appeals, Second Circuit. February 11, 1914.)

No. 133.

ALIENS (§ 57*)—DEPORTATION—TIME—COSTS—LIABILITY OF STEAMSHIP COMPANY.

Act Cong. Feb. 20, 1907, c. 1134, § 20, 34 Stat. 904 (U. S. Comp. St. Supp. 1911, p. 511), provides that any alien entering the United States in violation of law shall be deported at any time within three years after the date of his entry, from the port of entry, at the expense of the owners of the vessel or transportation line by which he came into the country, etc. *Held* that, where an alien was not tendered to the steamship line by which he entered the United States for deportation within the three-year period, the line was not bound to deport him without expense to the United States, though the reason why he was not deported within the time was that he was serving an indeterminate sentence in the state reformatory.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 114; Dec. Dig. § 57.*]

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

Action by the United States against the Oceanic Steam Navigation Company. Judgment for defendant, and the United States brings error. Affirmed.

H. Snowden Marshall, U. S. Atty., and A. S. Pratt and Frank E. Carstarphen, Asst. U. S. Attys., all of New York City.

Burlingham, Montgomery & Bucher, of New York City (N. B. Beecher and Ray Rood Allen, both of New York City, of counsel), for defendant in error.

Before COXE, WARD, and ROGERS, Circuit Judges.

COXE, Circuit Judge. The District Court sustained a demurrer to the complaint which alleges that the plaintiff had paid the defendant $41 for transporting an alien, ordered to be deported, from New York to Naples. Judgment is demanded for this amount and interest. The alien arrived at New York September 11, 1908, and on the 20th of February, 1912, he was tendered to the chief officer of the Adriatic, one of defendant's steamships, who declined to receive him unless his passage was paid in advance. It was so paid and the plaintiff now seeks to recover it.

On February 20, 1912, three years and five months after the alien's entry into the United States, the defendant was asked to deport him

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

at its own expense. The excuse for not deporting him within the three years required by sections 20 and 21 of the Immigration Act is that he was serving an indeterminate sentence in the state reformatory, at Monroe, Wash.

Little need be added to our opinion in International Mercantile Marine Co. v. United States, 192 Fed. 887, 113 C. C. A. 365. The language of the statute is perfectly plain. The deportation may be made at any time within three years after the alien's entry into the United States. Such a statute cannot be enlarged by judicial interpretation; there is no room for construction. It cannot be twisted, turned, lengthened or shortened to meet the exigencies of each particular case. If it is to be effective, all interested persons must understand that it means what it says. A law of this character to be effective must be uniform and precise.

If exceptions are to be made to the three years' period Congress should make them and not the courts.

Judgment affirmed.

WILLCOX et al. v. SOUTHERN NAT. BANK OF WILMINGTON, N. C., et al. BUELL v. KANAWHA LUMBER CORPORATION.

(Circuit Court of Appeals, Fourth Circuit. March 12, 1914.)

No. 1232.

RECEIVERS (§ 128*)—RECEIVERS' CERTIFICATES—PRIORITY OF PAYMENT.

Where, though attorneys rendered expensive and valuable services to receivers during protracted litigation, they acted for the complainant in instituting the original proceedings, procured the appointments of the receivers and the order authorizing them, upon the security of receivers' certificates, to borrow money to carry on the business, and assisted in negotiating loans, representing to the lenders that the certificates were ample security, and the lenders were compelled to employ independent counsel to defend their interests arising from the loans, the lenders' equities were superior to those of the attorneys, and, the fund in the receivers' hands being insufficient to pay both, it should be paid to the lenders.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 205, 210, 219–222; Dec. Dig. § 128.*]

Appeal from the District Court of the United States for the Eastern District of South Carolina, at Charleston; Henry A. Smith, Judge.

Action by George F. Buell against the Kanawha Lumber Corporation. From a decree denying compensation as attorneys to P. A. Willcox and another, copartners as Willcox & Willcox, from a fund previously directed paid to the Southern National Bank of Wilmington, N. C., and others, such attorneys appeal. Affirmed.

Henry E. Davis, of Florence, S. C. (F. Barron Grier, of Greenwood, S. C., on the brief), for appellants.

A. G. Ricaud, of Wilmington, N. C., for appellees.

Before KNAPP and WOODS, Circuit Judges, and DAYTON, District Judge.

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

PER CURIAM. The original cause has been before this court several times heretofore. It comes now upon an appeal from a decree of the court below, denying compensation to attorneys for the receivers for services rendered them, payable out of the fund in their hands which this court has heretofore approved the payment of to appellee banks in part payment of moneys lent the receivers upon credit of their certificates. Boyce v. Bank, 203 Fed. 698, 122 C. C. A. 82.

There can be no question that these attorneys rendered extensive and valuable legal services to these receivers during this protracted litigation, and it is to be regretted that they should fail of compensation therefor. To compensate them from this remainder of the funds would deplete, to that extent, the amount payable to the banks in return for the moneys lent by them to the receivers and expended by such receivers in their conduct of the business. This fund is now entirely inadequate to reimburse the banks. It is therefore a case of two innocent parties, one of whom must suffer. It appears from the record that these attorneys acted for the complainant in instituting the original proceedings, procured, as such attorneys, the appointments of the receivers and the order authorizing them, upon security of receivers' certificates, to borrow money to carry on the business of the company, and that they assisted the receivers in negotiating the loans from the banks, believing and representing to the banks that the certificates were ample security for the loans made, and finally that the banks, in the course of these proceedings, have been compelled to employ and pay independent counsel to defend their interests arising from such loans. In view of these facts, we cannot help thinking that the superior equity is with the appellees, and that the court below did not err in the entry of the order and decree complained of, which must therefore be affirmed.

Affirmed.

NEW ORLEANS RY. & LIGHT CO. v. STAFFORD.

(Circuit Court of Appeals, Fifth Circuit. March 10, 1914.)

No. 2560.

TRIAL (§ 212*)—INSTRUCTIONS—PREPONDERANCE OF EVIDENCE.

Where there was no such conflict in the evidence as to make material the number of witnesses testifying to any particular fact or facts, and the judge charged that where there was a conflict between the witnesses, it was the jury's duty to resolve it so as to have all the witnesses speak the truth, if possible, otherwise they must accept the testimony of those the jury believed, and reject that of the others, but that they were not at liberty to reject the testimony of any witness arbitrarily, it was not error to refuse a request to charge defining the term "preponderance of evidence."

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 501, 502; Dec. Dig. § 212.*]

In Error to the District Court of the United States for the Eastern District of Louisiana; Rufus E. Foster, Judge.

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

Action by Mrs. Eveline Stafford against the New Orleans Railway & Light Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Benj. W. Kernan, of New Orleans, La., for plaintiff in error.

John Alonzo Woodville and J. L. Warren Woodville, both of New Orleans, La., for defendant in error.

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

PER CURIAM. On the issues and evidence there was no error in refusing to give the special charge requested, as follows:

"The term 'preponderance of evidence' means that the plaintiff must prove by the greater weight of evidence that the defendant's employés were guilty of the fault charged in the petition and that said fault caused her injuries. Evidence is held to preponderate on that side which produces the greater number of witnesses—all being equally credible—who testify to the state of facts asserted by that side; or where there are an equal number of witnesses, all of equal credibility, on each side, who testify to propositions of fact asserted by the side by which they are called, that side which is corroborated by the circumstances and probabilities in the case has proved its case by a preponderance of the evidence; so, therefore, unless the plaintiff has proved her case by a preponderance of the evidence, she cannot recover."

While this requested charge may be correct in law, there was no such conflict in the evidence as to make material the number of witnesses testifying to any particular fact or facts in the case.

The judge charged the jury:

"Where there is any conflict between the witnesses, it is your duty to resolve the conflict. You must endeavor to have all the witnesses speak the truth, if possible; but, if you cannot do so, then you must accept the testimony of those you believe, and reject the testimony of the witnesses you do not believe. But you are not at liberty to reject the testimony of any witness arbitrarily. You must have some real and sufficient reason for doing so."

And to this there was no exception. We think the case was fully and fairly submitted to the jury, and find no error in the record.

Judgment affirmed.

ROBERTS v. KENDRICK.†

(Circuit Court of Appeals, Fifth Circuit. March 12, 1914.)

No. 2598.

APPEAL AND ERROR (§ 459*)—SUPERSEDEAS—ANNULMENT—GROUNDS—WRIT OF ERROR—FILING.

Where a writ of error was not sued out and lodged in the trial court within 60 days of the date of the judgment, plaintiff in error was not entitled to a supersedeas.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2218–2221; Dec. Dig. § 459.*]

In Error to the District Court of the United States for the Northern District of Georgia; Wm. T. Newman, Judge.

Action by A. F. Kendrick against Columbus Roberts. Judgment for plaintiff and defendant brings error. On motion to dissolve supersedeas. Granted.

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

† For opinion on motion to recall mandate and vacate order, see 211 Fed. 1024.

M. F. Goldstein, Arthur G. Powell, and John D. Little, all of Atlanta, Ga., for plaintiff in error.

Thomas T. Miller, of Columbus, Ga., Clifford L. Anderson and Daniel W. Rountree, both of Atlanta, Ga., and Wm. C. Dufour and H. Generes Dufour, both of New Orleans, La., for defendant in error.

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

PER CURIAM. The transcript shows that judgment was rendered on May 10, 1913, a motion for a new trial was overruled and refused July 17, 1913, and thereafter a writ of error was allowed on November 8, 1913, as follows:

"On consideration whereof the court does allow and grant the writ of error, upon the defendant giving bond and security in the sum of $7,000; and upon the giving of said bond in said sum when it is approved by the court, the judgment herein rendered in favor of the plaintiff against the defendant shall be suspended, and supersedeas will be granted until the determination of said writ of error by the United States Circuit Court of Appeals for the Fifth Circuit."

The defendant in error on due notice moves to dissolve the supersedeas so granted, on the ground that the writ of error was not sued out and lodged in the court below within 60 days from the date of the judgment, and we are satisfied that the same should be granted upon the authority of Kitchen v. Randolph, 93 U. S. 86, 92, 23 L. Ed. 810; Sage v. Central R. R. Co., 93 U. S. 417, 23 L. Ed. 933; Title Guaranty Co. v. United States, 222 U. S. 401, 32 Sup. Ct. 168, 56 L. Ed. 248.

It is therefore ordered and adjudged that the supersedeas granted in this case on November 8, 1913, be and the same is hereby vacated and annulled. Mandate to that effect may issue.

In re TANENHAUS.

(Circuit Court of Appeals, Second Circuit. February 17, 1914.)

No. 75.

BANKRUPTCY (§ 444*)—PETITION TO REVIEW—TIME FOR SERVING AND FILING.

Where a petition to review an order in bankruptcy was not served and filed within 10 days after the order was entered, as expressly required by rule 38 of the Second circuit, though served and filed 11 days after such entry, the petition will be dismissed.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 920–927; Dec. Dig. § 444.*

Appeal and review in bankruptcy cases, see note to In re Eggert, 43 C. C. A. 9.]

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

In the matter of Michel Tanenhaus, bankrupt. On petition by Frank J. Waldeyer as trustee, to review an order relative to the disbursement of a certain fund. Petition dismissed.

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

Archibald Palmer, of New York City, for appellant.
Harry N. Selvage, of New York City, for creditor.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge. This petition by a trustee in bankruptcy cannot be entertained. It asks this court to review and reverse an order entered in the District Court directing him to disburse a certain fund which he had received, and ordering that one Herman S. Hoffman have a valid claim against said fund in the sum of $560, and directing him further to pay the said Hoffman the sum of $129.60 for certain expenses he had incurred.

It appears that the order we are asked to review was filed on April 25, 1913, and the petition to review was not served or filed until May 6, 1913, 11 days after the entry of the order. Rule 38 requires such a petition to be filed within 10 days. We, therefore, have no alternative but to dismiss the petition.

The petition, accordingly, is dismissed.

JAMES v. CLEMENT et al.

(Circuit Court of Appeals, Fifth Circuit. March 10, 1914.)

No. 2544.

EXCEPTIONS, BILL OF (§ 13*)—INCORPORATING EVIDENCE.

A bill of exceptions, composed in large part of a reference to the evidence contained in a bill of exceptions taken when the case was before the Circuit Court of Appeals on a writ of error to review a former judgment, does not properly bring up all the evidence.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. § 13; Dec. Dig. § 13.*]

In Error to the District Court of the United States for the Northern District of Georgia; William T. Newman, Judge.

Action between D. W. James and Waldo P. Clement and others. From a judgment in favor of the latter, James brings error. Affirmed.

Alex W. Smith, of Atlanta, Ga., for plaintiff in error.

Hollins N. Randolph, Spencer R. Atkinson, and Robert S. Parker, all of Atlanta, Ga., for defendants in error.

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

PER CURIAM. The bill of exceptions in this case is composed in large part of a reference to the evidence contained in a bill of exceptions taken when the case was brought to this court on error from the first judgment.

A majority of the judges are of opinion that this mode of procedure does not bring all the evidence properly before us. Being familiar with the evidence on the first trial, and having re-examined it for the purposes of the present hearing, we do not think our conclusion would be

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

changed if we considered the full bill of exceptions as now presented. There have now been two verdicts in favor of the validity of the transactions between the parties.

We are of opinion that no reversible error is shown by the record, and the judgment is therefore affirmed.

BERNZ v. SCHAEFER et al.

(Circuit Court of Appeals, Third Circuit. March 30, 1914.)

No. 1831.

PATENTS (§ 328*)—VALIDITY—BLOW TORCHES—AIR PUMP.

The Bernz patent, No. 937,757, claim 2, for an air pump for blow torches, *held* void for lack of patentable novelty and invention, in view of the prior art.

Appeal from the District Court of the United States for the District of New Jersey; Joseph Cross, Judge.

Suit in equity by Otto Bernz against Frederick J. Schaefer and another for patent infringement. Decree for defendants (205 Fed. 49), and complainant appeals. Affirmed.

Russell M. Everett, of Newark, N. J. (Leo J. Matty, of New York City, of counsel), for appellant.

George D. Richards, of New York City, for appellees.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

GRAY, Circuit Judge. A bill of complaint was filed by the appellant in the court below, to restrain an alleged infringement on patent No. 937,757, for air pumps in blow torches, and another, No. 955,313, for an improvement on the same, which was afterwards withdrawn from the consideration of the court. The cause came on for final hearing, on the bill, answer, replication and proofs, as to patent No. 937,757 alone. It was admitted that if the patent was valid, defendants had infringed it. The specifications of the patent state the subject-matter of the invention as follows:

"The objects of the invention are to secure improved means for obtaining the necessary air pressure in the body of the torch; to secure a construction of pump which shall not leak and in which the plunger is always out of the way; to secure a safe and practical pump for ordinary usage; to obtain a simple and inexpensive construction throughout, and to obtain other advantages and results as may be brought out in the following description."

Of the four claims of the patent, the second is the only one relied upon. It is as follows:

"2. The combination of a cylinder having discharge means at one end and at its opposite end an interiorly threaded aperture, a piston in said cylinder having a rod extending slidably through said aperture, a handle on the outer end of said piston rod, and a sleeve around the piston rod exteriorly threaded to screw into the said threaded aperture of the cylinder head, said sleeve being fast to said handle."

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

The defenses urged in the court below and here are invalidity of the patent, by reason of anticipation and want of patentable invention in view of the state of the art.

It appears from the evidence that from the beginning of the use of the modern plumber's torch, trouble and annoyance arose to the user from the raising of the plunger and its handle after the pumping operation had ceased. This lifting of the piston and plunger was occasioned by the leakage of air through the valve at the bottom of the cylinder. The need of some device by which the lower conical end of the plunger rod might be held down in its receiving cap, thus closing the air valve at the bottom of the cylinder and at the same time preventing the troublesome rising of the plunger rod through the aperture at the upper end of the cylinder, was obvious. It is apparent from the most casual observation of the drawings of the patent in suit and of those accompanying prior patents and devices for air pumps of different kinds, that the plunger rod must have some sort of handle at its topmost end and must pass through an aperture in the cap covering of the top of the cylinder. It is also apparent that this aperture must fit the plunger loosely enough to permit it to freely reciprocate in an up and down motion through it, but tightly enough to prevent any appreciable wabbling of the plunger from side to side, while being operated. In other words, the aperture in the center of the cap of the cylinder must be of such size as to serve as a guide to the plunger when moving axially to the cylinder and at the same time inclose it closely enough to prevent the wabbling of which we have spoken.

This was a simple and basic feature in the construction of all such pumps. When the desirability of securing the lower end of the plunger down on the valve seat at the lower end of the cylinder and the upper or handle end of the plunger down upon the cap of the cylinder, for the reasons above stated, was recognized, it would seem that only ordinary mechanical skill was necessary to devise a way in which the thing desired could be accomplished. Though something on the principle of the bayonet lock had been used for this purpose on cylinders containing a reciprocating piston rod, some sort of screw on the upper end or attached to the upper end of the rod engaging with the aperture through the cap of the cylinder, seems to have been the device that most readily occurred to those who sought to hold the piston rod in its downward position. Devices of this kind in fire extinguishers, pumps for inflating tires, and air pumps generally, are shown in the drawings of prior patents exhibited in the record. It is obvious that, if the circumference of the piston rod is the same from top to bottom, a thread cut on the top of a rod would not engage with a corresponding thread cut on the inner side of the aperture of the cap, so that a bushing of some kind on the upper end of the piston rod, immediately under the handle, would be necessary to project threads cut thereon, so as to engage with threads in the aperture. Such bushing on the unreduced end of the rod and under the handle would naturally have to be of such thickness as to require some enlargement of the aperture. The complainant, however, by a former patented device, obviated the necessity of enlarging the aperture by upsetting the upper end

of the rod, so as to enlarge its circumference just to the extent that threads cut thereon would engage the corresponding threads on the inside of the aperture without any enlargement thereof. The present patent shows what is possibly an improvement upon this method, by first machining down the upper end of the rod for the required distance, and then placing a sleeve thereon which would be of just such thickness as to engage the threads thereon with the threads on the inside of the aperture. No new thought or invention was involved in this change. The thought was the same and the essential principle and manner of accomplishing the end sought was the same in both patents.

An air pump with a piston rod of uniform circumference from end to end, reciprocating freely through an aperture at the top of the cylinder, was all that was necessary for a successful pumping operation. To fasten said rod in its downward position after the pumping operation had been performed, required only such enlargement of the upper end of the rod as that threads thereon would engage with the threads on the inside of the aperture. The patent in suit accomplished this enlargement of the upper end by the device of a sleeve fitted thereon in the manner described, just as the upsetting of the upper end of the rod in the device of the former patent accomplished the same purpose. That the sleeve must be fastened securely to the handle or to the rod, was obviously necessary for the simple operation described. The claim requires the sleeve to be fastened to the handle. As a matter of fact, it is integral therewith.

It is contended by the complainant, however, with much earnestness, that the word "slidably," in describing the reciprocation of the rod at the top of the cylinder, introduces a new feature essential to the patent in suit, and involving invention. In the first place, it is to be remarked that the word "slidably" in the claim would hardly convey, even to those conversant with the art, the notion that the rod must be in contact at the same time with the threaded interior of the aperture through which it passes at all points in its circumference. Such a fitting of the rod through the aperture would suggest the close contact of a packing box around a valve rod. The evidence of the experts and common knowledge both suggest that such a fitting, if it did not render impracticable the movement of the rod by hand, would nevertheless make such movement unnecessarily difficult. There is every reason from the testimony to think that the word "slidably" conveyed to the ordinary mind skilled in the art, the idea that the piston was to move easily through the aperture, and though it might contact with the interior of the aperture, first on one side, then on the other, it nevertheless would not be restrained from being moved easily up and down by the hand of the operator. Dictionary meanings of the word "slide" or "slidably" do not help us. The word as used in the claim is not explained in the specifications, nor is any function which it describes suggested, except such closeness of the aperture around the rod, as would not interfere with the rod's ready reciprocation through such aperture. It expresses no new or useful function of the device, and, applied in its literal or dictionary sense, would render the recipro-

cation of the rod impracticable for hand operation. If it means anything more than that the rod passes easily through the aperture which incloses it, closely enough to serve as a guide, it was unnecessary, as it presents no new feature in the passing of a rod through an aperture for the purposes required in structures like that of the patent in suit.

Moreover, the evidence shows that in the device of the patents, there is a slight movement or play of the rod from side to side. One structure may show more of such play than another, and there is nothing in the evidence to show that the degree of play of the rod in the aperture is not negligible, as long as the aperture incloses the rod sufficiently closely to furnish a sufficient guide for its reciprocation.

We are not unmindful of the oft-repeated caution necessary in considering the question of patentability, that a method or device which may seem simple after it is disclosed, may nevertheless have required invention for its production, and may be the result of a "happy thought" which entitles the one to whom the thought has occurred, to a patent. On the other hand, we are admonished that nothing tends more to hamper the progress of the mechanical arts, than to attach a monopoly to every improvement or advance therein that might readily, or would inevitably, occur to the skilled mechanic. Such is the character, we think, of the improvement disclosed in the patent in suit. It is a direct development, if not a suggestion, of the prior device of the patentee, where the upset or thickened end of the piston rod was threaded so as to engage the interior thread of the aperture.

We think the learned judge of the court below (Cross, J.) has in his opinion so clearly discussed this patent in the light of the prior art, especially in its relation to the prior patent of Walsh, No. 489,513, which he finds to have anticipated the patent in suit, that it is sufficient to refer to that opinion (205 Fed. 49) and adopt the same as our own.

The decree of the court below is therefore affirmed.

MACOMBER & WHYTE ROPE CO. v. HAZARD MFG. CO.

(Circuit Court of Appeals, Second Circuit. January 13, 1914.)

No. 96.

1. PATENTS (§ 66*)—SCOPE—LIMITATION BY PRIOR DEVICE.

A patent does not cover a prior device, although it is within the terms of the patented device, and although its deviser did not appreciate its value for the purposes of the patent.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 79, 81; Dec. Dig. § 66.*]

2. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—WIRE ROPE.

The Whyte patent, No. 952,161, for a nonrotating wire rope composed of two layers of strands wound in opposite directions around a core, construed, and *held* valid and infringed.

3. WORDS AND PHRASES—"CROSS-LAY"—"LAY."

The "lay" of a strand of rope is the length of rope within which such strand makes one complete turn. The winding of the outer strands in a reverse direction to the inner strands is called "cross-lay."

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

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

This cause comes here upon appeal from a decree of the District Court, Southern District of New York, holding defendant to be an infringer of United States letters patent No. 952,161 issued March 15, 1910, to George S. Whyte for an "improvement in nonrotating wire rope."

MacFarlane & Monroe, of New York City (Robert Grier Monroe and Philip Burwell Goode, of New York City, of counsel), for appellant.

Miller & Merwin, of New York City (Timothy D. Merwin, of New York City, of counsel), for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge. In order to improve wire rope as it was then made, Whyte undertook to accomplish two useful results:

1. To reduce attrition by securing more points of contact of the rope with the sheave. This cuts no figure in the suit at bar.

2. To prevent rotation or spinning, when hoisting, a trouble caused by the tendency of a rope to untwist by turning on its longitudinal axis in a direction contrary to the one in which it was twisted. This trouble was apparently negligible when the lift was short, but became serious in a long lift—such as those in mine and elevator shafts where there are no guides (guide or guy ropes) to check the rotation. Whyte accomplishes this result by doing two things. He makes the rope in two layers, e. g., first the ordinary wire rope of, say, six strands wound around a core of yarn or wire. Then around the first rope, treating it as a core, is wound another set of strands (12) of the same size wire. These are wound in a reverse direction to the first set—a method of winding which is called "cross-lay." When such a rope is hoisting, the inner portion tends to untwist in one direction, e. g., "clockwise"; and the outer portion tends to untwist in the reverse direction, e. g., "anti-clockwise." The theory is that these tendencies, which are thus opposed, will neutralize each other. But in practice they do not always do so; one tendency is stronger than the other and prevails, so that, although rotation is reduced, it is not eliminated. Merely "crossing" the lay, therefore, does not wholly solve the problem. The patentee went further, experimenting with overlaid ropes having different proportions of lay between inner and outer layer of strands. The "lay" of a strand is the length of rope within which such strand makes one complete turn; the "lay" varies in length according to the way in which the strand is applied to the rope. A short lay might be represented by a close helix, while a longer lay might be represented by a more open helix. If the wires are all of the same size or diameter, and all of exactly the same length, it is geometrically certain that when wound as above indicated the "lay" of the inner strands will be half the "lay" of the outer strands, expressed 1:2. Incidentally it appears that the tensile strength of a rope is greatest when all its strands are of the same length; then each strand does its full share of the work of holding the weight. If the strands are unequal, a greater burden is laid

on the shorter strands and less on the longer ones, and the hoisting strength of the rope is reduced. When the "lays" of inner and outer strands vary in some other proportions than substantially one to two, the strands will be of unequal lengths.

The patentee investigated to discover what proportion of lay would produce opposing tendencies to untwist which would practically just about balance each other. He tried making ropes with ratio of lay of 1 to 2, 1 to 1.5, 2 to 1, 1 to 1, 1 to 3.2, and others, and determined that the torsion or opposed tendency of the two layers to untwist would be balanced or equalized by a proportion of 1 to 1.87.

The specifications contain the following statement:

"In order that the tendency of the two layers of strands to untwist or spin may neutralize each other, I give the strands *b* a considerably shorter 'lay' or twist than the strands *c* of the other layer, so that the relatively strong tendency of the inner layer to untwist shall be practically equalized by the weaker tendency of the larger number of strands in the outer layer to untwist in the opposite direction. As a specific example of such construction of rope in which the lay of the strands of the inner layer is sufficiently shorter than the lay of the strands of the outer layer to balance or equalize the torsion or tendency to untwist due to the greater number of strands in the outer layer, a ratio of 1 to 1.87 between the lay of the strands of the inner layer and that of the strands of the outer layer may be employed."

The claims are:

"1. In a wire rope, in combination, a core, a series of strands laid helically therearound and another series of similar strands laid helically around the first series in the opposite direction, each strand being composed of a plurality of wires laid helically together, the strands of the inner layer having such shorter 'lay' than those of the outer layer as will balance or neutralize their opposed torsional strains, as and for the purpose specified.

"2. A wire rope comprising, in combination, a layer composed of a plurality of strands laid helically in contact with each other, each strand being composed of a plurality of individual wires laid helically with relation to each other, and an outer layer of approximately twice as many similar strands helically and oppositely laid thereon, the strands of the inner layer having such shorter lay or twist than the strands of the outer layer that their tendency to untwist will neutralize the tendency of the outer layer of strands to untwist in the opposite direction."

When he applied for his patent, Whyte apparently believed that he was the first one to discover that the tendency of a wire rope to untwist could be neutralized, by surrounding it with a second layer of strands laid reversely or "cross-lay." His two original claims, therefore, covered only the use of an outer reversely wound layer of strands, without any statement of the ratio of lay required to produce the result. Original claim 1 read as follows:

"1. In a wire rope combination of a central core, a plurality of strands each composed of a plurality of single wires twisted together wound spirally about said central core and a plurality of other wire strands each composed of a plurality of single wires twisted together wound spirally in the opposite direction about said first mentioned strands and in direct contact therewith."

Thereafter his attention was called to earlier patents in which (as in Cheeseman, British 1770 of 1880) it was suggested that a "non-twisting" rope could be produced by laying a series of outer strands in an opposite direction to the series of inner strands. He thereupon

amended his specifications by inserting the clause, as to proportions, above quoted, and amended his claims to the form finally allowed by the Patent Office.

[1] Whyte certainly made a contribution to the art, because although prior patents and publications had pointed out that the tendency of a rope to untwist might be reduced by making it with two groups of strands, one overlaying the other and wound so that the tendency of rotation of the two groups was in opposite directions, no one had pointed out that a particular proportioning of lay would secure practical nonrotation. He is entitled to claims which will protect his invention and disclosure. By their terms the claims are confined to combinations in which the inner layer has a shorter lay than the outer; and they cannot be construed to cover a rope of the prior art in which there is shown two layers reversely wound with a precisely indicated proportion of lay. So far as such a rope would operate to reduce torsion due to untwisting, it would not be covered by this later patent, even though the prior deviser of such rope did not himself appreciate the philosophy of balancing tendencies by proportioning the lays. See our opinion in Mosler Company v. Lurie, 209 Fed. 364, 126 C. C. A. 290 (November, 1913), referring to our opinion in Consolidated Bunging Case, 60 Fed. 93, 8 C. C. A. 485.

[2] Such a rope is shown in the prior German publication "Die Drahtseile." It describes a rope which is "overbraided"; that is, a certain number of strands are laid over a center already braided. The strands are to be all of the same kind, and there are to be twice as many strands in the over layer as there are in the center layer. Moreover, all the strands are to be exactly the same length, which, according to the law of geometry above referred to, instructs the reader that the proportion of lay must be 1 to 2. The testimony indicates that a rope so made would to some extent eliminate the tendency to torsion, although not as completely as does the combination of the patent. It would have somewhat greater tensile strength, because all the strands are of the same length. Every one is free to use the rope of this German publication, although its author may not have understood fully why it was that it was itself an improvement on single layer ropes. The claims can be sustained only by reading into them an exception which will leave this German rope with its exact proportion of 1 to 2 outside of their scope.

The testimony satisfies us that defendant has made and sold wire rope with two layers of strands reversely wound and having a proportion of lay of 1 to 1.8. This is an infringement, and the decree is sustained, with costs of this appeal.

ST. LOUIS UNION TRUST CO. v. STUDEBAKER CORPORATION et al.

(Circuit Court of Appeals, Second Circuit. January 13, 1914.)

No. 99.

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—STREET FLUSHING MACHINE.

The Ottofy patent, No. 795,059, for a street flushing machine, designed to deliver streams at such an angle to the pavement as to have a scouring effect, was not anticipated, and is valid, but cannot be construed to cover a machine which delivers streams at an angle substantially greater than 20 degrees. As so limited, *held* not infringed.

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

This cause comes here upon appeal from a decree of the District Court, Southern District of New York, dismissing the bill of complaint. The suit was brought for infringement of the claims of United States patent No. 795,059, granted July 18, 1905, to L. F. Ottofy, assignor to the American Street Flushing Machine Company, which company assigned the patent to the complainant.

Clifton V. Edwards, of New York City, for appellant.

Duell, Warfield & Duell, of New York City (C. H. Duell, F. P. Warfield, H. S. Duell and R. S. Blair, all of New York City, of counsel), for appellees.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge. This patent has been repeatedly before the courts. A very full discussion of the specifications and prior art will be found in St. Louis Street F. M. Co. v. American Street Flushing M. Co. (C. C. A. 8th Circuit) 156 Fed. 574, 84 C. C. A. 340. That court sustained the Circuit Court, Eastern District of Missouri (opinion not reported), and held the patent valid and infringed. In the same suit the patent was again considered, on accounting for profits, in the Circuit Court (180 Fed. 759), and on appeal by C. C. A. 8th Circuit (192 Fed. 121, 112 C. C. A. 582). In American Street Flushing M. Co. v. D. Connolly Boiler Company the same patent, in connection with a different device used by the defendant, was discussed at length by Judge Hazel, sitting in the Southern District of New York (opinion not reported). Upon appeal from his decree holding the patent valid and infringed this court concurred fully in his opinion and affirmed his decree. American Street Flushing Company v. D. Connolly Boiler Company, 198 Fed. 99, 117 C. C. A. 285. In the case now at bar preliminary injunction was issued against defendant's device, but Judge Ward's opinions filed on granting complainant's application are not reported. The validity of the patent has been repeatedly upheld after careful and exhaustive investigation of the prior art, as presented in the several causes. Although some of the opinions are not reported, there will be found in those which are reported a sufficient statement of the facts relating to invention, prior art and construction of the claims. It is unnecessary to repeat such statement here.

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

It is contended that the present record contains evidence as to the prior art which was not before the courts which have heretofore sustained the patent. The new references are German patent to Mengelberg, No. 4331 of 1876, English patent to Robertson, No. 286 of 1866, and an article in the London Journal of October 18, 1901. The article in the Journal is merely descriptive of the Murphy patent, which was fully considered in the earlier cases. In the two patents we do not find anything so different from what was shown of the prior art in the earlier record before us as to call for any such modification of our conclusions. It has never been contended that any of the elements of patentee's combination were new; they were all old, but no prior patent showed them all in combination, nor do these three new references do so. The suggestion that the Eccles patent (introduced in the Connolly record) was not considered, because it was first presented to the District Judge on motion for reargument, is unfounded. Presumably the very manner of its introduction brought it sharply to the attention of the District Judge. Certainly in this court it was fully covered in the briefs, and was vigorously discussed in oral arguments.

The crux of the case is the question whether or not the device of this defendant infringes as did that of Connolly and of the infringers who were before the Court of Appeals in the Eighth Circuit. That of course involves also a question of construction of the claims. The C. C. A. in 8th Circuit indicated that the claims could not be given any broad or pioneer construction, and intimated that the requirement in them that the flat stream of water should be delivered "nearly parallel" to the plane of the base restricted the claims to a stream which struck the pavement at an angle not less than 20 degrees. The devices before that court delivered the streams at a less angle and so did the machine before us in the Connolly Case—at least as to nearly three-fourths of its discharge.

It is to be borne in mind that when the patentee undertook to solve the problem most of the pavements in our cities were laid with stones or blocks, the interstices between which were filled with earth liable to be cut out by a stream of water improperly delivered. It was to meet that situation that he devised his invention, which apparently was practically and commercially successful. There was no call for his combination with its low, flat, nearly horizontal delivery when a street was paved solidly, without interstices. The Court of Appeals in the Eighth Circuit points out that an earlier device which delivered at an angle of 40 degrees was apparently "well adapted to flush and scour granite or other streets, which are not easily injured." So long as the majority of streets remained of the character they were when the patent issued, it is quite likely that no machine, similar to patentee's, but having greater angle than 20 degrees, was sufficiently successful commercially to invite a suit for infringement. But with the wide spread of better paving, especially asphalt, a field is open for machines which deliver the streams at a much greater angle than he indicated; at an angle so great that on a street paved in the old way it would have lacked utility, doing more harm than good. The patentee cannot gradually enlarge his angle as pavements improve till he reaches an angle

of incidence found in the prior art, but not then usefully operative because the pavement was poor. It is always difficult to fix exactly in figures the limitation of a claim, when no exact figures are given either in claim or specifications, but without entering into any elaborate discussion of the question we may say that we agree with Court of Appeals in the Eighth Circuit that, although the defendant's argument to the Patent Office in answer to the McDade reference does not constitute an estoppel like the abandonment of claims once made and the acceptance of others in lieu of them, it may be considered as illuminative of the range within which it was understood, at the time the patent issued, that the angle of stream might be varied. Since in the case at bar—in which respect it differs from the Connolly Case—we have to fix some exact boundary, we conclude that, in view of the prior art and the language of the patent, the claims cannot be construed to cover streams delivered at an angle substantially greater than 20 degrees.

As to the machine now alleged to infringe the testimony is conflicting, but we are inclined to think defendant's witnesses have based their statements more on careful measurements, and less on estimates. Upon the whole we think it has been shown that defendant's machines, as made and operated, do not deliver the stream at any less angle than 25 degrees, which seems to be a satisfactory arrangement for modern streets and is not an infringement of the patentee's device. We are also satisfied that defendant's machine has all the elements of the patent claims, except the angle less than 20 degrees, and that it is a very simple and easy job to modify it, so that it will be a complete infringement. The mere lengthening of the pipes a very few inches, and a trifling regulation of the position of the nozzle, will make any one of defendant's machines an infringing device. As at present organized these machines would probably not commend themselves to a municipality which had streets paved with cobble or blocks with earth interstices, but the changes which would adapt it for use there are so slight that there must be a constant temptation to make them. However, until that temptation has been yielded to, we cannot find that the patent has been infringed, and therefore affirm the decree dismissing the bill, with costs of this appeal to defendants.

AMBURSEN HYDRAULIC CONST. CO. v. HYDRAULIC PROPERTIES CO.

(Circuit Court of Appeals, Second Circuit. January 13, 1914.)

No. 104.

PATENTS (§ 328*)—VALIDITY—DAM CONSTRUCTION.

The Ambursen reissue patent, No. 12,246 (original No. 734,796), for an improvement in dams, claims 2 and 3, are void for lack of invention as being for a dam not differing from former structures except in the substitution of concrete for other materials.

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

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

Suit in equity by the Ambursen Hydraulic Construction Company against the Hydraulic Properties Company. Decree for defendant, and complainant appeals. Affirmed.

For opinion below, see 208 Fed. 27.

On appeal from a decree of the District Court for the Southern District of New York dismissing the bill in an infringement suit based on reissued letters patent No. 12,246 granted to Nils Fredrick Ambursen for an improvement in dams. Judge Holt held the claims involved—Nos. 2 and 3—invalid for lack of invention and dismissed the bill.

Edwards, Sager & Wooster, of New York City (Alexander P. Browne and George K. Woodworth, both of Boston, Mass., of counsel), for appellant.

Hillary C. Messimer and Albert M. Austin, both of New York City, for appellee.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

COXE, Circuit Judge. The patent relates to improvements in the construction of dams, its principal change from the dams of the prior art being the substitution of concrete for the materials before used in dam construction. The alleged invention is sufficiently described in the claims, which are as follows:

"2. A dam comprising a base, an inclined concrete flooring overhanging the base, a plurality of spaced buttresses interposed between the base and flooring, and metallic reinforcing members embedded in the flooring and extending lengthwise thereof and across the buttresses.

"3. A dam comprising a base, spaced buttresses rising therefrom and a relatively thin inclined concrete flooring supported by and overhanging the buttresses and base, said flooring having metallic reinforcing members extending lengthwise of the flooring and across the buttresses."

Ambursen's contribution to the art consisted in making the Austin dam of concrete instead of masonry and turning it around so that the vertical surface faces down stream and the slanting surface becomes the floor, so to speak, upon which the water of the reservoir rests which is piled up behind the dam. The weight and downward pressure of this water tends to hold the dam in place. This was a perfectly obvious thing to do. Anyone with the slightest knowledge of hydraulics would know that the imprisoned water would produce less pressure on the dam if the water pressed downward and outward instead of outward alone. The feature which has given popularity and strength to the complainant's structures is the use of concrete. This substance being a modern discovery, its efficiency in the various building trades has been a matter of slow development because of the doubt as to its durability, and its ability to resist certain strains. This was particularly so in dam construction where its use had it proved inadequate, would have resulted in enormous loss of life and property. But as time went on and its safe substitution for building materials then in use was demonstrated, it naturally occurred to dam builders to use it in their business. Ambursen invented no new principle of dam build-

ing. Every feature of construction which he uses had been used before in the construction of dams built of wood, stone and steel. If the mere substitution of concrete for stone in the building of a dam involves invention, it follows that each person in the future who substitutes it for other materials in well-known structures is entitled to a monopoly of that use. It is not easy to mention any structure in the building art where concrete is not used to-day. If it be assumed that concrete has not as yet been used in the construction of church pulpits, the architect who first builds a concrete pulpit will, upon the complainant's theory, be entitled to a patent. We do not so understand the law, the new pulpit performs the same office as the prior wood and stone pulpits. It may be less expensive and more durable than its predecessor, but it performs the old functions in the old way. It is said that the decision of this court in Frost Co. v. Cohn, 119 Fed. 505, 56 C. C. A. 185, is directly in point and that the Ambursen patent should be sustained upon the strength of that authority. We think this contention is not well founded. The Gorton invention, by substituting a rubber button, or one having a yielding or elastic surface, for the metal buttons of the prior art succeeded in keeping the hose of the wearer in proper position, whereas the metal buttons previously in use not only tore the fabric but failed to keep the stocking in place. The cases would be parallel if Gorton had substituted a celluloid button for the metal button of the prior art. The substitution of concrete for stone and wood accomplishes no new result. Ambursen's dam works upon precisely the same principles as the prior wood, stone and steel dams. Concrete performs no function that is not performed by the material of the prior dams.

We cannot resist the conclusion that Ambursen has merely substituted one well-known building material for another with no change except such as is inherent in the material which was well known and free to all builders.

The decree is affirmed.

STEBLER v. RIVERSIDE HEIGHTS ORANGE GROWERS' ASS'N et al.

(District Court, S. D. California, S. D. February 18, 1914.)

No. 1562.

1. PATENTS (§ 322*)—SUITS FOR INFRINGEMENT—REFERENCES FOR ACCOUNTING.
On a reference for an accounting in an infringement suit, the master has full power to inquire into and find all acts of infringement by either party up to the time of his report, and to award profits and damages for all such infringing acts.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 590–595; Dec. Dig. § 322.*]

2. PATENTS (§ 327*)—SUITS FOR INFRINGEMENT—EFFECT OF RECOVERY AND PAYMENT OF JUDGMENT.
Where a patentee recovers from an infringing manufacturer damages and profits on account of the infringement, and the judgment is paid, a prior purchaser from such manufacturer who is a user of the machine has the right to continue such use during the life of the machine.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 620–625; Dec. Dig. § 327.*]

3. PATENTS (§ 316*) — INFRINGEMENT SUITS — SUITS AGAINST BOTH MANUFACTURER AND USERS—STAY.
While the pendency of a suit for infringement against the manufacturer is no bar to a suit against users of machines bought from the manufacturer, still, if the patentee sues the manufacturer for profits as well as damages, a court of equity, in a proper case, will restrain the suit against the users until the determination of the suit against the manufacturer.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 562; Dec. Dig. § 316.*]

In Equity. Suit by Fred Stebler against the Riverside Heights Orange Growers' Association and others. On motion by defendants to restrain prosecution of pending suits and the institution of others. Motion granted.

Frederick S. Lyon, of Los Angeles, Cal., for complainant.
N. A. Acker, of San Francisco, Cal., for defendants.

WELLBORN, District Judge. 1. Complainant has thus far utilized his patent by manufacturing and selling directly to users his patented machines, and in this case has sued for and recovered of infringing manufacturers, who also sold directly to users, profits and damages.

[1] 2. The master has full power to inquire into and find all acts of infringement by either party, and to award profits and damages for all such infringing acts. Robinson on Patents, § 1153, and note cited; Tatham v. Lowber, 4 Blatch. 86, 23 Fed. Cas. 722, No. 13,765.

The accounting is had up to the time of the report. Knox v. Great Western Quicksilver M. Co., 6 Sawy. 430, 14 Fed. Cas. 809, No. 7,907.

[2] 3. Where a patentee, situated as complainant, recovers from an infringing manufacturer damages and profits on account of the infringement, and the judgment is paid, the purchaser from such manufacturer, who is a user of the machine, has the same right to such use

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

as he would have were he a licensee from the patentee; that is, the right to use continues during the life of the patented machine. Allis v. Stowell (C. C.) 16 Fed. 783; Gilbert & Barker Mfg. Co. v. Bussing, 12 Blatch. 426, 10 Fed. Cas. 348, No. 5,416; Perrigo v. Spaulding, 13 Blatch. 389, 19 Fed. Cas. 260, No. 10,994; Spaulding v. Page, 4 Fish. 621, 22 Fed. Cas. 892, No. 13,219; Stutz v. Armstrong et al. (C. C.) 25 Fed. 147; Fisher et al. v. Consolidated A. Mine, etc., 25 Fed. 201; U. S. Printing Co. v. American Playing Card Co. (C. C.) 70 Fed. 50; Kelley v. Ypsilanti, etc., Mfg. Co. (C. C.) 44 Fed. 19, 10 L. R. A. 686.

The case on which complainant largely relies, Birdsell v. Shaliol, 112 U. S. 485, 5 Sup. Ct. 244, 28 L. Ed. 768, does not conflict, but is in harmony, with this doctrine. While the court, in that case, holds that payment by an infringing manufacturer of damages only will not vest in him any right to the future of the infringing machine, yet the court seemingly recognizes the rule that full compensation to the patentee does free the infringing machine from the monopoly; the language of the court being:

"If one person is in any case exempt from being sued for damages for using the same machine for the making and selling of which damages have been recovered against and paid by another person, it can only be when actual damages have been paid, and upon the theory that the plaintiff has been deprived of the same property by the acts of two wrongdoers, and has received full compensation from one of them."

Payment of damages and profits is full compensation.

The law on this subject is well stated in Perrigo v. Spaulding, supra, as follows:

"But, where the patentee sells his patented instrument or machine for use by others, finding his remuneration in the profit of the sale of the manufactured machine or instrument, it is obvious that his interest is promoted by increasing the sale, and that into his profit enters the value of the patented invention over and above the cost of manufacture and the ordinary fair profit of the manufacture. Even if no patent or license fee is fixed, the value thereof, as a profit, enters into the selling price, and, if not capable of exact ascertainment, may, nevertheless, be approximated to by estimation, when necessary. When the patentee sells, he receives this profit, and thus obtains full compensation for the article sold and for the right to use it while it lasts. When, for an infringement, he obtains both the profits and damages, he will be presumed to have obtained a full compensation for all the injury he has sustained, and to be placed in as good a position as if he had made and sold the article himself. Such is, I think, the presumption between parties thus situated, and, if any different rule is sought to be applied in any particular case, it should appear that a recovery has not been sought or obtained for the whole gains of the manufacture as well as for all the damages sustained. Spaulding v. Page, before cited; Gilbert & B. Mfg. Co. v. Bussing, Fed. Cas. No. 5,416. When a patentee manufactures and sells his patented article for use, the right to use passes by the sale. If an infringer manufactures and sells, he must account for and pay the profits, which are to be calculated upon the principle that the gain by the appropriation by the patentee's invention is their measure. If there are damages sustained and proved by the plaintiff, beyond the profits made by the infringer, these also may be recovered. But, when a full recovery and satisfaction * * * has been had, the patentee has obtained all that the law gives him, and the particular article or machine, if it be a machine, becomes, in effect, licensed by the patentee, and may be used so long as it lasts, free from any further claim by the patentee."

To the same effect, in Spaulding v. Page, supra, the court says:

"Where a patentee does not use the patented machine himself, nor establish a patent fee, but manufactures the patented article, and sells at fixed prices, seeking his compensation in the profits of the manufacture and sale at such fixed prices, and another party infringes the patent by making and selling the patented article; and where the patentee sues the party so infringing, and claims to recover, and does recover, the full amount of profits which he himself would have obtained on said articles had he manufactured and sold them at his ordinary prices—by such claim and recovery he adopts the sale made by the party infringing, and the right to use the specific article so sold, and for which the recovery has been had, vests in the purchaser."

In U. S. Printing Co. v. American Playing Card Co., supra, another case cited by complainant, the same rule is stated thus:

"Where a patentee takes a decree for profits against a manufacturing infringer, he thereby sets the manufactured machine free. The distinction is obvious. In such cases the profits of the infringer are full compensation to the complainant for the wrong done him by the unauthorized manufacture and sale of the infringing machine; but, where there is merely a settlement or judgment for damages, it is only for damages in the past, and has no relation to the future."

The distinction between the recovery of mere damages and a recovery of damages and profits is expressly recognized in another of the cases cited by complainant (Computing Scale Co. v. National C. S. Co. [C. C.] 79 Fed. 962, 966), where the court says:

"As to the prayer for an injunction against suing users who have purchased from defendants, the complainant's bill as framed prayed for an injunction and account of profits, as well as for damages against the defendant company. Upon the argument of the motion, the bill, not having been answered, was amended by striking out the prayer for an account of profits, leaving only the claim for damages. This brings the case directly within the rule laid down in Birdsell v. Shaliol, 112 U. S. 485 [5 Sup. Ct. 244, 28 L. Ed. 768]. The right of the complainant, under the authority of that case, to sue the users, is undeniable; and, if the right to sue exists, the right to warn by letters, or by circulars, or by advertisements in newspapers, exists, and cannot be enjoined."

In Kelley v. Ypsilanti, etc., Mfg. Co., supra, another case relied on by complainant, the court says:

"So, in Allis v. Stowell (C. C.) 16 Fed. 783, in which the injunction was denied, it was intimated that, 'where a patentee recovers from an infringing manufacturer full damages and profits on account of the infringement, the purchaser from such manufacturer, who is a user of the machine, will be protected in such use against a suit for infringement, as he would be if he were a licensee from the patentee.' In this view of the law it was held that, to prevent a multiplicity of suits, the court might, in a proper case, and on proper showing, require the prosecution of suits between a patentee and a mere user of the patented machine to be suspended, to await the result of the suit between the patentee and the principal infringer from whom the user purchased this machine—a doctrine in which we fully concur, although we think the application should be made to the courts in which these suits are pending."

It should be obeserved that this enunciation was by Brown, then District Judge for the Eastern District of Michigan, subsequently Associate Justice of the Supreme Court of the United States, not only

an eminent jurist, but one notably learned in the patent law, and that, in the opinion in which the enunciation was made, Birdsell v. Shaliol, supra, was considered and discussed.

The distinction between full and partial compensation—that is, between payment of profits and damages and payment of damages alone—seems to be recognized also in a quotation made in complainant's brief from Walker on Patents (4th Ed.) § 314, p. 276, as follows:

"Where the money recovered in an infringement suit for unlicensed making and selling of a specimen of a patented thing is recovered as damages for such making and selling alone, that recovery does not operate as an implied license authorizing the use of that specimen."

[3] 4. While the pendency of a suit for infringement against the manufacturer is no bar to a suit against users of machines bought from the manufacturer, still, if the patentee sues the manufacturer for profits as well as damages, a court of equity, in a proper case, will restrain the suit against the users until the determination of the suit against the manufacturer. Birdsell v. Hagerstown A. I. Mfg. Co., 1 Hughes, 64, 3 Fed. Cas. 450, No. 1,437; National C. R. Co. v. Boston C. I. & R. Co. et al. (C. C.) 41 Fed. 51.

In the latter case the court says:

"The power of a court of equity, by petition in the main suit against a manufacturer, to restrain a complainant from bringing further suits against the purchasers or users of a patented article, seems to be recognized in this country, and to be founded upon sound principles of equity. Ide v. Engine Co. (C. C.) 31 Fed. 901; Allis v. Stowell (C. C.) 16 Fed. 783; Birdsell v. Manufacturing Co., 1 Hughes, 64 [Fed. Cas. No. 1,437]. Also the unreported cases of National Cash Register Co. v. Bensinger Self-Adding Cash Register Co., decided by Judge Blodgett in the Northern district of Illinois, and Consolidated Store Service Co. v. Lamson Consolidated Store Service Co., decided by Judge Nelson of this district. Recognizing the existence of the power of this court to restrain the complainant, as prayed for, the only question which remains is whether the defendants have made out a case upon their affidavits which entitled them to this relief. I think an examination of the affidavits shows that the numerous suits brought by the complainant against the customers of the defendants are vexatious and oppressive, and that therefore an injunction should be granted as prayed for."

The pending suits against users, 31 in number, and similar suits which complainant threatens to bring, are, and would be, I think, under all the circumstances of this case, oppressive, and accordingly defendants' motion will be allowed to the extent of enjoining complainant from further prosecuting the pending suits, or bringing other similar suits, until final decree herein, or until otherwise ordered by this court, provided defendants, within five days, file a bond in the sum of $10,000, with good and sufficient sureties, to be approved by the clerk of this court, for the payment of any damages and profits that may be adjudged against them in this suit.

Defendants' attorney will prepare an order in conformity with these conclusions, and, after serving a copy on complainant's attorney, submit the original to this court for its action thereon.

NEW YORK TRUST CO. v. BERMUDA-ATLANTIC S. S. CO., Limited.

BRUCE et al. v. BERMUDA-ATLANTIC S. S. CO.

(District Court, S. D. New York. December 31, 1913.)

1. MARITIME LIENS (§ 38*) — LIENS FOR REPAIRS AND SUPPLIES — FEDERAL STATUTE.

A New York corporation, which held an option for the purchase of a foreign steamship, for the purpose of avoiding the United States navigation laws and obtaining a Canadian charter for the vessel, caused a corporation to be organized in Canada which took title to the vessel, caused its registry in Canada, executed a mortgage thereon, and chartered it to the New York Company, and never did any further business. Its capital stock was owned entirely by the New York Company, which also controlled it through dummy directors of its own election who had no interest. The charter prohibited the charterer from creating liens on the vessel, but it in fact obtained repairs and supplies, some of which were not paid for. *Held*, that under Act June 23, 1910, c. 373, § 1, 36 Stat. 604 (U. S. Comp. St. Supp. 1911, p. 1192), which gives a lien for repairs and supplies furnished on the order of the owner or of a person authorized by him, those furnishing repairs and supplies to such vessel were entitled to liens which took precedence over the mortgage, of which they had no knowledge, whether the two corporations be regarded as identical or as separate entities with the Canadian Company as principal and owner of the vessel and the New York Company as its agent.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. §§ 71–77; Dec. Dig. § 38.*]

2. MARITIME LIENS (§ 38*) — LIENS FOR REPAIRS AND SUPPLIES — FEDERAL STATUTE.

In such case it is immaterial whether or not those furnishing repairs and supplies had knowledge of the provisions of the charter party, under the proviso in section 3 of the act, denying a lien when the furnisher knew, or by the exercise of reasonable diligence could have known, that, "because of the terms of a charter party," the person ordering was without authority, since the orders were given after the charter was signed and with the full knowledge and acquiescence of the Canadian Company, and it is only where actual authority is wanting that the proviso applies.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. §§ 71–77; Dec. Dig. § 38.*]

In Equity. Suits by the New York Trust Company, trustee, against the Bermuda-Atlantic Steamship Company, Limited, and by Charles A. Bruce and others against the Bermuda-Atlantic Steamship Company. On exceptions to report of special master. Exceptions overruled.

The following is the report of the special master:

I. These proceedings in equity grew out of the filing of bills of complaint, June 8, 1912, one by the New York Trust Company, as trustee, to foreclose a mortgage upon the steamship Oceana made by Bermuda-Atlantic Steamship Company, Limited, a corporation organized and existing under the laws of Canada (and hereinafter called the "Canadian Company"), and the other against the Bermuda-Atlantic Steamship Company by Charles A. Bruce and others, as holders of notes and of a majority of the capital stock of that company, which was incorporated under the laws of the state of New York (and hereinafter called the "New York Company"). A receiver was appointed who took possession of the steamship Oceana.

Various claimants filed petitions of intervention, and the court, by orders

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

dated June 12, 1912, appointed the undersigned special master "to take proofs and determine the nature, extent, and amount of the rights, liens, equities, and priorities of the several creditors of the defendant and to report thereon to this court with all convenient speed." Subsequent to June 12, 1912, various other creditors filed petitions or claims with the undersigned as special master, asserting maritime liens upon the steamship Oceana, and the receiver duly filed answers thereto; the principal claimants in amount being the Berwind-White Coal Mining Company, the Morse Dry Dock & Repair Company, and the Robbins Dry Dock & Repair Company. Other claims as enumerated below were also filed of the nature set forth after the names of the said claimants respectively.

II. The Berwind-White Coal Mining Company, the Morse Dry Dock & Repair Company, the Robbins Dry Dock & Repair Company, and other claimants of maritime liens contend that the amounts of their several claims constitute maritime liens upon the steamship Oceana under and by virtue of the act of Congress of June 23, 1910, "relating to liens on vessels for repairs, supplies or other necessaries," and under the maritime law previously obtaining in the courts of the United States. In this behalf the contention inter alia is urged that the real owner of the steamship Oceana is the New York Company, and the Canadian Company was the latter's "dummy" or instrumentality created and used by it for the sole purpose of taking and holding the legal title to the steamship and enabling the New York Company to obtain a registry and a flag under which the ship could be sailed and operated. There is practically no dispute as to the facts upon which this latter contention is based.

The steamship Oceana, which is substantially the only asset out of which any of the claims filed herein can be satisfied, was built in 1891 at Dumbarton, Scotland, and was constructed and is suitable for passenger traffic only. On September 30, 1910, it was chartered by its then owner, the Hamburg-American Line, to the Bermuda-Atlantic Steamship Company, the predecessor company of the present the Bermuda-Atlantic Steamship Company, a New York corporation. The charter party contained an option to the charterer to purchase the steamer for £40,000 Sterling.

On December 8, 1910, the predecessor company was dissolved, and the new company of the same name, but of supposedly broader powers, was organized and adopted or took over the charter. The present New York Company was organized with a capital stock of $250,000, equally divided between common and preferred, and the shares issued are distributed between the B. C. M. W. Company, one of the complainants in the second above-entitled suit, Philip Manson, and certain other individuals. After a short period of operation under the charter party, the charterer decided to exercise the option of purchase and agreed with the Hamburg-American Line upon the terms and conditions of sale. Owing to the provisions of our navigation laws, it was impracticable for the New York Company to get an American register for the steamer, and the Canadian Company was therefore formed, called Bermuda-Atlantic Steamship Company, Limited, having a capital stock of $100,000, divided into 1,000 shares of the par value of $100 each.

In this connection the facts in detail are as follows:

At a meeting of the directors of the New York Company, February 5, 1911, a resolution was passed authorizing the president and the secretary of such company to do everything necessary or proper to exercise the company's option to buy the steamer, and the executive officers of the New York Company, or any two of them, were by resolution authorized and empowered to cause to be formed, under the laws of such state or nation as counsel might advise and under such name as the executive officers or any two of them should deem proper, a corporation for the purpose of taking title to the steamship Oceana. February 15, 1911, the New York Company, by its president, wrote the Hamburg-American Line advising that the Bermuda-Atlantic Steamship Company, the charterer of the Oceana, would exercise its option to purchase the Oceana on or before the 11th day of May, 1911, in accordance with the terms of the option of purchase contained in the charter party. March 6, 1911, the president of the New York Company reported that the company had given notice that it would exercise its option to purchase the steamship

pursuant to the authority given on February 5th for the creation of a corporation "for the purpose of taking title to the steamship," and, pursuant to the resolution, the Canadian Company was incorporated on April 25, 1911, at the instance and at the expense of the New York Company, which paid the bill of the Canadian solicitors engaged to form the Canadian Company.

The incorporators of the Canadian Company were: Messrs. Strachan Johnston, Reginald Holland Parmenter, Arthur John Thompson, William Symon Morelock, solicitors, and George Ogston Merson, all of Toronto, Canada. These incorporators were in part members of the firm of Thompson, Tilley & Johnston, solicitors of Toronto, employed by the New York Company to incorporate the Canadian Company, and in part gentlemen associated with them by that firm for said purpose. On the day the Canadian Company was formed, a meeting of its shareholders (the incorporators above mentioned) was held at the office of the said solicitors at Toronto, at 5:30 p. m., and it was resolved:

"That the board of directors and officers of this company be and they hereby are authorized and empowered in their absolute discretion to purchase the steamship Oceana from the Hamburg-Amerika Linie, for a consideration not to exceed forty thousand pounds sterling, and to mortgage or cause to be mortgaged the said vessel to secure all or any part of the said purchase price upon such terms and conditions and in such manner as to the board of directors and officers may seem proper in their absolute discretion."

It was further resolved at said meeting:

"That the board of directors be and they are hereby authorized to take all necessary or convenient proceedings to register the steamship Oceana as a British vessel at such port of registry and in such manner as to them may seem proper in their absolute discretion."

It was further resolved at said meeting:

"That the board of directors and officers of the company be and they are hereby authorized and empowered to charter said steamship Oceana to the Bermuda-Atlantic Steamship Company, a New York corporation, for such term and consideration and upon such terms and conditions as may to them seem proper in their absolute discretion."

At the same meeting Strachan Johnston, W. S. Morelock, and R. H. Parmenter were elected directors; and at 6 p. m. on the same day a meeting of said directors was held at Toronto, at which Johnston was elected president of the company, and Merson treasurer, and "share certificates for unpaid shares" were issued to them and to Parmenter, Thompson, and Morelock, the other incorporators, "being the shares subscribed for by them in the memorandum of agreement and stock book of the company." Then Morelock transferred his "one share (unpaid)" to A. S. Rockwood, and resigned as director, and Rockwood was appointed director in his place; Johnston resigned as president, and Rockwood was appointed president in his place; Merson resigned as treasurer, the transfer of one share from Parmenter to George Norris was approved, Parmenter resigned as director, and Norris was appointed in his place; "shares (not paid)" were transferred, one from Johnston to Thomas Roberts, Jr., one from Thompson to Charles A. Bruce, and one from Merson to William S. Lare; and "Mr. Johnston, having ceased to be a shareholder, resigned from the board." Thereupon the meeting adjourned to 30 Broad street, New York, the offices of Curtis, Mallet-Prevost & Colt, where all future meetings were held. Rockwood, Norris, Roberts, Bruce, and Lare, who thus became the holders of the "shares (unpaid)," and officers of the company, were employés in the office of Curtis, Mallet-Prevost & Colt. Bruce is also the complainant in the suit against the New York Company.

On April 27, 1911, the New York Company, by Mr. Culver, its president, wrote the Hamburg-American Line inclosing a form of mortgage of the ship "in compliance with the terms of the contract * * * dated September 30, 1910," stated that the New York Company had placed the matter in the hands of its counsel, Messrs. Curtis, Mallet-Prevost & Colt, requested that the Hamburg-American Line refer it to its counsel, and stated concerning the proposed mortgage:

"You will note that the mortgagor named in the draft mortgage is Bermuda-Atlantic Steamship Company, Limited, a corporation organized under

the laws of the Dominion of Canada, to which company we hereby request that you transfer the title to the 'S. S. Oceana' in accordance with the terms of the contract of September 30, 1910, upon its compliance with all the terms of the said contract."

A further agreement was made between the New York Company and the Hamburg Line, dated May 2, 1911, which, after reciting the charter of the Oceana, and the exercise of the option to buy by the New York Company, required the Hamburg Line to make the bill of sale to the New York Company "or its nominee or assignee," excepted from the transfer the wines, liquors, cigars, and provisions aboard, but gave an option to purchase these, fixed the purchase price of the ship at £37,000 required that £20,000 of that amount be paid May 11, 1911, that the New York Company on or before May 29, 1911, give written notice to the Hamburg-American Line of the former's nominee to take title, name a date on or before May 31st for payment of the balance of the purchase price and closing the transaction, when a bill of sale to the New York Company's nominee would be delivered by the Hamburg Line, required the New York Company, on the date of such delivery, to deposit £14,000 of the purchase money, and interest thereon from May 11th, with the New York Trust Company, such deposit to be paid to the Hamburg-American Line on the joint order of certain gentlemen named, counsel for the Hamburg Line, and other gentlemen named, counsel for the New York Company, said order to be signed upon receipt of a written notice from the German consul at New York that the ship's registry had been canceled at Hamburg; and a note for the balance of the purchase price, £3,000, was to be given May 11th, secured by a chattel mortgage on certain passenger equipment and fittings of the ship described in a schedule annexed to the agreement; and the agreement also contained the following, the "Bermuda-Atlantic Line" therein referred to being the New York Company:

"The Bermuda-Atlantic Line hereby recognizes that the granting to it by the Hamburg-American Line of an extension of time to take title after May 11th, the date under which the Bermuda-Atlantic Line would have had to take title under the original contract (Exhibit A), is granted in order to give the Bermuda-Atlantic Line an opportunity to arrange for placing the Oceana under a flag other than German, on advantageous terms; and, in consideration of such extension, the Bermuda-Atlantic Line agrees to use its best efforts to make the necessary arrangements for putting the Oceana under a flag other than the German flag and to obtain other than German registry for her, and to close this transaction at the earliest possible date after May 11th, but not later than May 31st.

"The Hamburg-American Line agrees from and after the hour of noon on May 11, 1911, to and including the time when the title is passed hereunder, to let to the Bermuda-Atlantic Line, and the Bermuda-Atlantic Line agrees to hire the said steamship Oceana at a rental of one dollar ($1). The Bermuda-Atlantic Line shall keep said vessel tied up at the Port of New York during such period, and shall provide suitable officers and crew for the protection and care of said vessel, and pay all expenses connected with the vessel's maintenance. The Hamburg-American Line shall not be called upon to incur any cost or expense whatsoever in connection with the care and maintenance of the steamship Oceana after the hour of noon on May 11th, 1911.

"The Hamburg-American Line hereby agrees to hold harmless the Bermuda-Atlantic Line, the Oceana, and the Bermuda-Atlantic Steamship Company, Limited, or their assigns, from the infliction of any penalty upon the steamship Oceana by the German government for any matters or things whatsoever occurring prior to the cancellation of the Oceana's German registry, provided that the Oceana is placed legally under a flag other than German on or before May 31, 1911, and provided further that the Oceana be not retransferred under the German flag for a period of at least twelve months."

At a meeting of the board of directors, May 27th following, the president of the New York Company reported that, pursuant to the terms of the contract, $97,300, the equivalent of £20,000, had been paid by the New York Company to the Hamburg-American Line in part payment of the purchase price of the ship. The said agreement of May 2d, made with the Hamburg Line by the New York Company's president, and the said payment of $97,300, were

ratified. The secretary presented the letters patent of the Canadian Company, and the treasurer of the New York Company reported that "this company has paid the sum of $500 cash" to the Canadian Company "for account of the subscriptions of the signers of the application for said letters patent." "The acts and deeds of the officers of this company in paying the expenses of the formation" of the Canadian Company, and in paying said $500 "for account of the subscriptions of the signers of the application for letters patent," were ratified. It was resolved that the company borrow $60,000, or any less sum, from the New York Trust Company, for which sum the president or vice president and treasurer or secretary of the company were authorized to give the company's note or notes bearing interest not exceeding 6 per cent. "and to pledge as collateral security to such note or notes such securities owned by this company which this company may now own, or may hereafter acquire, as to said officers may seem proper in their absolute discretion, and to execute any renewals or substitutions of such note or notes, and to make such substitutions of collateral as to said officer may seem proper in their absolute discretion." And it was also resolved as follows:

"That this company, being, or about to be, the controlling stockholder of the Bermuda-Atlantic Steamship Company, Limited, consent to the said Bermuda-Atlantic Steamship Company, Limited, entering into an agreement with the New York Trust Company whereby the officers and directors of the Bermuda-Atlantic Steamship Company, Limited, shall be and remain clerks in the office of Curtis, Mallet-Prevost & Colt, for the protection of the trust company in the making of a loan on the stock of the said Bermuda-Atlantic Steamship Company, Limited, as collateral, until the making and completion and delivery of the mortgage upon the steamship Oceana to the New York Trust Company, as trustee, and the delivery of said bonds to the New York Trust Company, as collateral to the note of this company, which at that time the New York Trust Company may hold."

At the same meeting it was also resolved:

"That any two officers of this company be and they hereby are authorized and empowered, in their absolute discretion, to make and execute for and in the name of this company a charter party of the steamer Oceana upon such terms and conditions as to such officers may seem proper in their absolute discretion; such charter party to be in such form as may be approved by counsel."

The Hamburg-American Line then gave the New York Company an extension of time until June 10th, to take out registry of the ship "other than German"; and thereafter, in accordance with the direction of the New York Company, hereinbefore mentioned, the Hamburg-American Line made a bill of sale of the ship to the Canadian Company, dated May 31, 1911, at New York, and a bill of sale of the ship's passenger equipment; the New York Company paid the Hamburg-American Line $68,337.03, including interest from May 11th, the same being balance due on the purchase price, notice having been received from the German Consul at New York that the ship's German registry had been canceled; and a note was delivered of the Canadian Company for $14,595, dated August 11, 1911, to the order of the Hamburg-American Line, secured by a chattel mortgage on the passenger equipment of the ship. It had been agreed that the New York Company would cause such mortgage to be given by the party who should be named by the New York Company as purchaser. The note was subsequently paid by the New York Company.

Application to the register of shipping of Toronto, dated June 2, 1911, for the registry of the ship in the name of the Canadian Company, was made by Messrs. Rockwood and Lare, as respectively president and secretary of the Canadian Company, and a declaration of the Canadian Company's ownership, of the same date, was also made by them. The ship was then registered in the name of the Canadian Company as owner. The New York Company paid the bill of the Toronto solicitors for their services in attending to this registration.

June 12, 1911, the charter of the ship, containing the provisions upon which the parties' contesting liens rely, was made from the Canadian Company to the New York Company. These provisions are:

"That the charterer shall provide and pay for all provisions, coal, fresh wa-

ter for boilers, port charges, pilotages, agencies, commissions, consular charges, wages, and consular shipping and discharging fees of the captain, officers, engineers, firemen and crew; and shall keep said vessel insured and pay therefor for the benefit and to the satisfaction of the owners; and shall also pay for all cabin, deck, engine room and other necessary stores; and maintain her in a thoroughly efficient state in hull and machinery for and during the service; and shall also pay all other charges whatsoever which might be chargeable against said steamship.

"The charterer will not voluntarily, or except in case of absolute necessity, create or suffer to be created, any lien or charge upon said steamship; that the charterer will pay and discharge any lien or charge whatsoever which may attach to said steamship, and all claims which may arise or be made against the owner or owners, on account of supplies, repairs, services, advances of money, towage, pilotage, wharfage, salvage, damages for collision, breaches of contract of affreightment, negligence of the crew or others, or for any other cause whatsoever."

Under this charter party the New York Company took possession of and operated the Oceana in the transportation of passengers between New York and Bermuda. The vessel flew the British flag. Her port of registry was marked plainly upon her stern.

By the terms of the charter party, which was drawn by the attorneys for the New York Company, the New York Company agreed to pay to the Canadian Company hire at the rate of $2,000 per calendar month in advance on the 1st day of each month beginning June 1, 1911, and, in addition, the sum of $14,813.93 on August 11, 1911. This latter sum was the amount of the note of $14,595 given by the Canadian Company for the equipment and secured by the latter company's chattel mortgage, with interest and other additions. In fact, nothing was ever paid by the New York Company by way of charter hire. The only account book of the Canadian Company seems to have been a thin volume (Exhibit 14), described as a combined cashbook, journal, and ledger in which appear very few entries. In addition to this book, there was a bank pass book in which but one deposit was entered, and that was the $500 supplied by the New York Company to pay for the stock required to qualify the incorporators of the Canadian Company. No cash other than this was ever received by the Canadian Company, no check was drawn in its name, and no payment made by it. The Canadian Company's name appeared on the office door of an accountant whose office was in Toronto, but it had no other office. It had no stationery, and it does not appear that a letter was ever written in its name. The capital stock of the Canadian Company was owned by the New York Company from the beginning, and none of it was ever parted with except as security for loans made to the New York Company.

The officers of the two companies, as well as their directors, at all times knew of the existence of the charter and of its terms. Most of these officers and directors were residents of or did business at the port of New York, and at all reasonable times were accessible to any one that might have occasion to ask concerning their relations to the Oceana. The New York Company had an office at 290 Broadway, where a copy of the charter was kept, and during part of the time the company's treasurer had an office at 60 Broadway. Manson, one of its officers active in its management, at all times had a copy of the charter party.

Under the authority of the resolution of May 27, 1911, the New York Company, which had acquired the bonds of the Canadian Company in exchange for the vessel, borrowed $60,000 from the New York Trust Company on the New York Company's note. This note originally was secured by pledge of 1,000 shares of the stock of the Canadian Company pending the preparation of the bonds secured by the mortgage, and the amount of the loan was used in the purchase of the Oceana.

June 5, 1911, the statutory mortgage and deed of trust were executed by the Canadian Company, as mortgagor, and by the New York Trust Company, as trustee, and temporary bonds in the amount of $100,000 were issued which in the early part of July were surrendered in exchange for the definitive bonds called for by the terms of the mortgage. The trust company was advised of

the general situation, including the relations of the two companies, except that the terms of the charter party were not brought to its attention, and the loan was made by the trust company with the special view to its being secured by bonds of the owner of the vessel.

Three equal payments aggregating $15,000 were made on account of this note by the New York Company, and on each occasion $5,000 in amount of bonds were withdrawn from the pledge. On February 13, 1912—the day of the last of the three payments—the New York Company took up the original note and substituted a new note for $45,000 due four months after date, with interest at 6 per cent. Upon maturity demand was made, and payment of this note was refused. Whereupon, after notice to the New York Company, the $85,000 of bonds remaining in pledge were sold at public auction and were bought in by the trust company for its own account for $42,500, which being applied to the indebtedness left $3,579.75 due from the New York Company to the New York Trust Company, no part of which sum has been paid. The New York Trust Company accordingly is the holder for value of $85,000 face value of bonds of the Canadian Company and has filed its claim against that company for such amount. It has likewise filed a claim for the amount of the deficiency aforesaid against the New York Company upon its note of February 13, 1912, to wit, $3,579.75.

The Canadian Company, having failed to pay the first installment of interest on its bonds secured by the trust mortgage and likewise the principal sum of $10,000 due on bonds Nos. 1 to 10, inclusive, the trustee, in accordance with the terms of the mortgage, declared the principal of all the bonds to be due and payable and instituted the foreclosure proceedings.

No charge is made by any of the parties that the New York Company procured the organization of the Canadian Company with any view to defeat the liens of persons making repairs upon or furnishing supplies to the Oceana. The purpose was, and is generally conceded to have been, simply to secure a flag for the vessel.

Some of the lien claimants were advised by officers of the New York Company, before such claimants made repairs, or furnished supplies, to the Oceana, that the Oceana was owned by the New York Company, and others did their work or furnished supplies under the impression, gathered from the circumstances, that such was the fact. Such was the understanding on the part of Manson and others interested in that company, including apparently even its counsel, who assumed that material and supply men had liens for materials and supplies furnished, notwithstanding the facts of the enrollment and the charter party, and Manson testified that if inquiry had been made of him by any material or supply man he would have stated that the New York Company owned the vessel.

III. In this situation it seems clear that, if the controversy upon the point of whether the New York Company is to be regarded as owner of the vessel for the purpose of creating maritime liens concerned only the two companies and the material and supply men claiming liens, there would be no difficulty in concluding that the claims of such liens should be sustained. But it is urged that a different result must be reached because of the fact that the trust company made its loan upon the security of the bonds of the Canadian Company secured by a mortgage upon the steamer. It must be remembered, however, in this connection that the trust company at the time of making its loan was advised that the Canadian Company had been organized and existed only for the purpose of enabling the steamer to be operated under the British flag, and was charged with knowledge that the very situation which now exists with reference to maritime liens might come about to the prejudice of its mortgage lien.

I do not understand that it is necessary to find intentional deceit as the object of forming the Canadian Company in order to find that the claims of lien "for repairs, supplies or other necessaries," under the federal statute of June 23, 1910, may be sustained on the basis of the practical identity of the two companies. In my opinion it is enough if persons of ordinary business capacity and experience believed from the circumstances that they were dealing with the owner of the vessel and would have a lien, and if the application of the rule of separate corporate entities to companies one of which is a

mere instrumentality of the other would have the same result as might have been expected had the instrumentality been formed for the purpose of defrauding materialmen. In the circumstances I find that the trust company is in no better position than it would have been if the Oceana had been registered in the name of the New York Company as owner and its loan had been made nominally as well as really upon the security of the latter company's property.

The doctrine of separate corporate entity, however, is in general so important and disregard of it so likely to result in serious inconvenience and disturbance in many cases that I come to my conclusion as above with some hesitation. This doubt impels me to examine the claims of lien from another standpoint.

Assuming that the two companies should be considered as in all respect separate and independent entities, the claims of liens must be examined with further reference to the federal lien act of June, 23, 1910.

This act, so far as material to the questions here, is as follows:

"An act relating to liens on vessels for repairs, supplies, or other necessaries.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled: That any person furnishing repairs, supplies, or other necessaries, * * * to a vessel, whether foreign or domestic, upon the order of the owner or owners of such vessel, or of a person by him or them authorized, shall have a maritime lien on the vessel which may be enforced by a proceeding in rem, and it shall not be necessary to allege or prove that credit was given to the vessel.

"Sec. 2. That the following persons shall be presumed to have authority from the owner or owners to procure repairs, supplies, and other necessaries for the vessel: The managing owner, ship's husband, master, or any person to whom the management of the vessel at the port of supply is intrusted. No person tortiously or unlawfully in possession or charge of a vessel shall have authority to bind the vessel.

"Sec. 3. That the officers and agents of a vessel specified in section two shall be taken to include such officers and agents when appointed by a charterer, by an owner pro hac vice, or by an agreed purchaser in possession of the vessel, but nothing in this act shall be construed to confer a lien when the furnisher knew, or by the exercise of reasonable diligence could have ascertained, that because of the terms of a charter party, agreement for sale of the vessel, or for any other reason, the person ordering the repairs, supplies or other necessaries was without authority to bind the vessel therefor."

A full understanding of this act implies a knowledge of the law as it stood at the time of the passage of the act, the supposed evils of that law, and the remedy intended by Congress.

It is well known that at the time of the passage of the act some confusion existed in the law relating to materialmen's liens on vessels, and general dissatisfaction with certain anomalies of our law in this regard was evidenced by two bills that were submitted to Congress for the purpose of amending the law with respect to such liens. One of them subsequently became the act of June 23, 1910. Among the supposed evils which the act was intended to remedy were those which grew out of the decisions of the Supreme Court of the United States in the case of The General Smith, 4 Wheat. 438, 4 L. Ed. 609, and The St. Jago de Cuba, 9 Wheat. 409, 416, 417, 6 L. Ed. 122. In The General Smith, the Supreme Court first drew the distinction between "foreign" and "domestic" vessels, as those terms afterwards came to be understood. In The St. Jago de Cuba the court declared: (1) That it was not in the power of any one except the master to give implied liens on a vessel; and (2) that when the owner is present "the contract is inferred to be with the owner himself on his ordinary responsibility, without a view to the vessel as the fund from which compensation is to be derived." By the act of June 23, 1910, it is seen that the doctrine of presumption of credit to the owner which was recognized in the St. Jago de Cuba has been done away with, as has been the distinction with reference to foreign and domestic vessels.

Prior to the passage of this act, it was necessary to comply with the requirements of the state statute in order successfully to assert a lien upon a domestic vessel. These statutes differed somewhat in their provisions, and differences in their wording gave rise to differences of decision in the various federal circuits. These circuits also differed one from another in the construction of these state statutes even when they were practically identical in their wording. The present federal act practically supersedes these various state statutes.

The act prescribes that the lien shall exist when any person shall have furnished supplies, etc., to a vessel upon the order of the owner or of some one by the owner authorized. It further provides that any person to whom the management of the vessel at the port of supply shall have been intrusted shall be presumed to have been so authorized. A charterer is clearly such a person.

Nearly all the claims of maritime liens herein are predicated of the making of repairs or the furnishing of supplies or other necessaries to the Oceana upon the order of the Bermuda-Atlantic Steamship Company, the New York corporation, which most of the lien claimants assumed to be the owner of the vessel, and which others of the lien claimants were informed by Manson, or others officially connected with that company, was such owner. None of the maritime lien claimants knew of the existence of the two corporations, owner and charterer, respectively, and I cannot see that there has been proof of any circumstance brought to their attention that should have caused the making of inquiry as to the actual authority of the company which was in possession of and operating the ship to bind the vessel for repairs, supplies, and like necessaries. The only suggestion of a circumstance which, it is claimed, should have given rise to such inquiry, is that the vessel had plainly marked upon her stern the name of her port of registry, to wit, Toronto. But this alone amounted to nothing, because foreign registry and domestic ownership are not incompatible, and, even if they were, none of the lien claimants knew whether the Bermuda-Atlantic Steamship Company was a domestic or a Canadian corporation.

The language of the federal act to the effect that nothing in the act shall be construed to confer a lien when the furnisher knew or by the exercise of reasonable diligence could have ascertained that because of the terms of a charter party or for any other reason the person ordering the repairs, etc., was without authority to bind the vessel therefor is clearly by way of proviso. It must, as a proviso, be harmonized with the general purpose of the act, which was "to make the management of a vessel at its port of supply presumptive evidence of the right to bind it for supplies there furnished." The City of Milford (D. C.) 199 Fed. 960. It does not appear that if inquiry had been made by them—that is, such inquiry as a business man would be apt to make and such as the law would style reasonable—the lien claimants would have been any the wiser, and the burden to show that reasonable inquiry would have made them acquainted with the actual situation is upon those who seek to avail themselves of the proviso. The cases cited by counsel for the trust company as illustrating the rule which requires the dismissal of an indictment that fails to negative exceptions contained in the statute under which the indictment is had are not in point, because we are dealing with a proviso and not with an exception, and there is a familiar distinction between them in reference to the burden of proof. Potter's Dwarris Stat. 119. It is significant that none of the officers of the New York Company was produced as a witness except Manson, and Manson testified that he regarded his company as the owner of the vessel and has not contradicted those lien claimants that testified that he told them such was the fact. It does not appear that inquiry of others would have resulted in the ascertainment of the real relations of the company to the vessel.

It follows that on both of the grounds above examined the claims of maritime liens filed herein for "repairs, supplies, or other necessaries" should be sustained.

J. Parker Kirlin, of New York City, for mortgagee.
Herbert Green, of New York City, for Berwind-White Co.
James Armstrong, of New York City, for Morse Dry Dock Co.
J. Dexter Crowell, of New York City, for Robbins Dry Dock & Repair Co.
Charles Hickox, of New York City, for receiver.

HAND, District Judge. [1] The Canada Company was organized, as all agree, only to hold the title to the Oceana so as to avoid the laws of the United States. Not only was there no independent interest outstanding, but the complete actual management of the vessel and of the Canada Company was in the hands of the New York Company. The Canada Company never did anything, or was meant to do anything, except hold the title to the vessel, give the mortgage and charter, and get the registry; it carried on no subsequent business thereafter, and its directors were mere dummies directed by the New York Company.

This case depends simply upon whether, under these circumstances, the New York Company was either an owner, or a person authorized by the owner to order the supplies. We may, for the sake of argument, allow that the corporate entities remained distinct, and that the equitable title was in the Canada Company, so that a convenient fiction shall not become confused, and we shall retain the shorthand of clear concepts. When, however, we come to the question of authority, we are not bound by the whole sleight-of-hand paraphernalia of resolutions, deeds, leases, mortgages, and the like, because authority may rest in pais, and one may have authority to act for a corporation without the formal action of its board of directors. Phillips v. Campbell, 43 N. Y. 271. So the question changes form into whether the New York Company had such authority from the Canada Company. Their relations are so intricately interwoven that either may be regarded as the agent of the other without violence to the facts, though eventually it must be recognized that the only actor was the New York Company. It will do as well as any way to think of the New York Company as agent and the Canada Company as principal, or owner, and to think of the basis de jure of the New York Company's authority as depending upon the knowledge and acquiescence of all the principal's stockholders (i. e., the New York Company itself), and of its directors, who were merely its puppets, who consented to whatever they were told to do, and who in fact did nothing. In such a situation, when the knowledge is clearly brought home to the stockholders and directors, there is a valid ratification. Pennsylvania R. R. v. Keokuk Bridge Co., 131 U. S. 371, 9 Sup. Ct. 770, 33 L. Ed. 157. It is, of course, true that the New York Company had no right as against the mortgagee to incur these liens, or the Canada Company to authorize them, for they violated the mortgage, but that does not affect the question whether the New York Company had actual authority from the Canada Company, which is the relevant question under section 1 of this act. Nor does it affect that authority

that there had been previously executed a charter party which provided to the contrary, because these orders for supplies were given after the charter party was signed, and with the fullest acquiescence of the Canada Company.

[2] I am not quite clear that the mortgagee agrees that, if the Canada Company had given formal authority to the New York Company to create the liens, they would have been valid in the face of the mortgage; but there cannot be any question of that, for the statute gives a lien for supplies on the owner's order or his agent's, in that respect differing from the maritime law, which it changed. The St. Jago de Cuba, 9 Wheat. 410, 417, 6 L. Ed. 122. Furthermore, I need not consider the result, had the lienors known the terms of the mortgage, for no one contends that they are so chargeable; and, since they did not know of the mortgage, it is of no moment whether they knew of the charter party, because it is only when the charterer orders supplies without real authority that the question can arise under the proviso of section 3. In other words, since the charter did not refer to the mortgage, knowledge of it would only have shown that originally the Canada Company had refused an authority which, as a matter of fact, the New York Company had been exercising with the complete acquiescence of the Canada Company for some time. It is therefore irrelevant to inquire how far the lienors were put on notice of the charter party, under The Valencia, 165 U. S. 264, 17 Sup. Ct. 323, 41 L. Ed. 710, and The Kate, 164 U. S. 458, 17 Sup. Ct. 135, 41 L. Ed. 512.

Certainly any other result would be absurd. The statute means to give a lien when the owner orders the supplies or when any one having apparent authority orders for him. The proviso is only to protect the owner against the charterer if he has tried to protect himself. It does not try to protect prior mortgagees, nor does it prevent the owner from agreeing that the charterer may order supplies which will become prior liens to a mortgage. Bearing this in mind, it would be unreasonable to apply the protection of the proviso to the Canada Company. To protect it against the New York Company was to protect it against itself, for it had no independent existence. Unless the mortgage would have been good even against a formal resolution conferring authority by the directors of the Canada Company, it is not good against the course of conduct here shown. We should not suppose that the charter party was intended, as a kind of moral bulwark protecting the Canada Company against subsequent changes of mind of its own controlling spirits. There is no magic about the drawing of corporate papers.

The relations between these corporations are not to be measured, as the mortgagee seems to suppose, merely by the fact that one owned all the stock of the other. I agree that there is nothing in itself illegal in holding all the stock of a corporation and doing business in the corporate form, if you really mean to do it that way and everybody knows it. Salomon v. Salomon & Co., [1897] A. C. 22; C. Crane & Co. v. Fry, 126 Fed. 278, 61 C. C. A. 260; Gramophone Typewriter,

Ltd., v. Stanley, 99 Law Times Rep. 39. Yet, on the other hand, there is nothing merely in the fact that you have adopted a corporate form, which prevents you from so interjecting yourself into the corporate business as to become the principal though the form remain corporate. Chicago Junction Ry. Co. v. U. S., 226 U. S. 286, 33 Sup. Ct. 83, 57 L. Ed. 226. If, as here, you not only own all the stock, but also personally conduct the whole of the supposed corporate affairs, disregarding the corporate forms, you may be doing the business yourself, or at least your corporation may be an agent only. Apthorpe v. Peter Schoenhofen Breweries, Ltd., 80 Law Times Rep. 395. In the case at bar, it is, however, not necessary to take that final step, for even with the strictest observance of formalities we must say that the Canada Company authorized the New York Company to do all it did.

This disposes of all the general objections to the claims. The mortgagee does not except to the Morse claim as insufficiently proved, and it is clear that the receiver is bound by the account stated between the New York Company and the lienor for the bills rendered on December 16th and 29th, January 9th, and March 11th. Not only was acquiescence shown by failure to object, but by 12 large payments. The small items of May 31st and June 8th probably are not so proved, but I scarcely suppose these are seriously disputed.

In its brief the mortgagee also objects to claims 28, 29, 40, 41, 42, 43, and 44; but there are no exceptions to any of them, either of the mortgagee, or the receiver. The sixth exception of the receiver does not cover these, and I can find no exception of the mortgagee which even suggests any of these specific liens, though others are mentioned in some of the exceptions. It would hardly be fair to those lienors upon such a record to allow their liens to be attacked. They may have been content to let the larger lienors carry the main questions, and may have therefore defaulted in reliance upon the absence of any specific exceptions to their own liens.

As to the disbursements the mortgagee and receiver will have to share them equitably. It is a little hard to know what proportion will be equitable, and if the parties cannot agree they will have to submit the matter again.

A decree may be submitted in accordance with this opinion.

UNITED STATES v. LIM YUEN et al.

(District Court, E. D. North Carolina. March 16, 1914.)

Nos. 37–39.

ALIENS (§ 23*)—CHINESE PERSONS—DEPORTATION PROCEEDINGS—MINORS.

Where certain Chinese persons while minors were admitted into the United States, without fraud, as the sons of a Chinese merchant and a Chinese teacher, residents of the United States, they were not subject to deportation because, after arriving at age, they were found working as laborers in a laundry.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 76–90; Dec. Dig. § 23.*]

Deportation proceedings by the United States against Lim Yuen, Lam Gong, and Chan See Jock. Order directing defendants' discharge.

Francis D. Winston, U. S. Dist. Atty.

Thos. W. Davis, of Wilmington, N. C., and J. H. Ralston, of Washington, D. C., for respondents.

CONNOR, District Judge. Warrants were taken out by the inspector charging that respondents, Chinese persons, were unlawfully working as laborers in a laundry located at Wilmington, N. C. Upon the return of the warrants, the respondents appeared in person and by counsel. The three cases were, by consent of the district attorney and counsel for respondents, heard together. All questions in regard to the form of the affidavits and of the warrants were waived. The examination of the witnesses produced by the government and the respondents disclosed the following facts:

Lim Yuen arrived at San Francisco November 22, 1908. He was admitted as the minor son of Lim Jew (Kew), a Chinese merchant, lawfully domiciled and resident at Oakland, Cal., in the United States. The facts in regard to his status were investigated and determined by the Commissioner of Immigration at San Francisco. He was admitted December 14, 1908. These facts appear upon his certificate, and the records on file in the office of the Commissioner of Immigration at Washington. His photograph was attached to the certificate. From a preliminary statement, taken by the immigrant inspector at Wilmington, N. C., on January 6, 1914, and the examination of respondent on the hearing, it appears: That respondent was born at Bock Jop Village, China. That he resided at Oakland, attending school for two years after his admission. Has been in Wilmington, N. C., since that time. Cannot speak English. Has been working at the Chinese laundry of Sam Lee, in Wilmington, N. C. He is more than 21 years of age. His father resides at Oakland, Cal., engaged as a merchant.

Lam Gong's certificate shows that he was admitted at San Francisco as the minor son of a Chinese merchant, Lim Jew (Lim Kew), December 27, 1907. He is the brother of Lim Yuen. Upon his examination, it appears that he was born in China. His father was, when

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

respondent was admitted, and is now, a Chinese merchant, residing at Oakland, Cal. Respondent remained with him two months; came to Wilmington, N. C. Father gave him money. Has been in Wilmington about six years. When he came to Wilmington, he attended school—employed a teacher—more than a year. Attended Sunday school until a year ago. He can write some simple words in English; wrote in presence of court. Multiplied some figures. Spoke in English. Is now working in laundry of Sam Lee. Is about 21 years of age.

Chan See Jock's certificate shows that he was admitted at San Francisco August, 1909, as the minor son of Chan Ching Bor, Chinese teacher, lawfully domiciled in the United States. He states that his father resided at Oakland, Cal., was a teacher in Chinese school. Attended his father's school two years. Never attended English school. Can read and write English. Has been in Wilmington, N. C., two years. Works in Sam Lee's laundry.

The government introduced the certificates of entry and the records at Washington, all of which are regular. The affidavit charges that the respondents are Chinese laborers, not in possession of the certificates required by the statutes. The certificates held by them are not attacked for fraud. The government, however, insists that, if upon the hearing it appeared that they are unlawfully in, and not entitled to remain in, the United States, they should be deported; that no special form of complaint is required. This position is sustained by the authorities cited in the government's brief. Respondents resist an order of deportation upon the ground that, having been admitted as minor sons of a Chinese merchant, and teacher, then and now, lawfully domiciled in the United States, they have not, by becoming laborers in a laundry, as disclosed by the evidence, forfeited their right to remain; that they are not "unlawfully in the United States." The case is relieved of any technical difficulties. The essential facts are disclosed by the record and the uncontroverted testimony. That they were entitled to admission, as the minor sons of a Chinese merchant and teacher, is settled by the decision of the Supreme Court in United States v. Mrs. Gue Lim, 176 U. S. 459, 20 Sup. Ct. 415, 44 L. Ed. 544, in which it is held that the wife and minor children of a Chinese merchant, resident here, are entitled to be admitted into the United States. So, the Rules of the Department, governing admission of Chinese, provide that:

"The admissible classes are teachers, students, travelers for curiosity or pleasure, and merchants and their lawful wives and minor children." Rule 2.

It is not contended that the fact upon which they were permitted to enter the United States was not truthfully set forth and correctly found, nor is it denied that their fathers are, at this time, entitled to and do remain here, engaged as merchant and teacher. Does the fact that respondents have engaged, and are now engaged, in employment as laborers in a laundry, forfeit their right to remain here?

In United States v. Yee Quong Yuen, 191 Fed. 28, 111 C. C. A. 500 (C. C. A. 8th Cir.), it was held that a Chinese who had entered the

country as the minor son of a merchant was not subject to deportation because he temporarily engaged as a laborer in a laundry. It was said by Adams, Circuit Judge:

"The appellee's status and right of residence in this country were fixed by his lawful entry while a minor son of his father, who then resided here as a Chinese merchant. Presumptively this status and this right remained with him there afterwards. His father was a merchant in Salt Lake City where the boy came. He has continued to be such a merchant from that day to this. He has never left the country with the intention of abandoning his business here, and has never returned to China with the intention of remaining there. His boy, although a minor when he landed on our shores, was old enough to begin his life's work, and the father, for reasons of his own, deemed Denver a more promising place for him than Salt Lake City, and established him in the business of a merchant at that place. He was unsuccessful. He did not abandon his father, nor did his father abandon nor abdicate his duty of care and protection of him. While they were waiting after their first unsuccessful venture for an opportunity to engage in another business, the father supplied him with expense money. The worst of his offending was that he worked for his board at a laundry for a few months prior to his arrest, and while he and his father were attempting to find a new business for him."

He was discharged.

In United States v. Foo Duck, 172 Fed. 856, 97 C. C. A. 204, it appeared that respondent entered, when 16 years of age, as the minor son of a Chinese merchant, lawfully domiciled in the United States, without trick, deception, or fraud, under a certificate, and after arriving at full age worked as a laborer. Morrow, Circuit Judge, said:

"There is no fraud charged against the appellant (appellee) in obtaining the certificate under which he was admitted into the United States; nor is there any question raised as to his having been a student both before and after his arrival into the United States. It is not questioned that he is, and was at the time of his arrival in this country, a son of a merchant domiciled in this country. He was therefore lawfully admitted into the United States. The contention of the government is that, notwithstanding these facts, the appellant (appellee) should be deported because after he arrived in this country 'he worked as a cook and waiter at different times for several years.' * * * When he came to this country, he was 16 years of age. He is now over 23 years old. He has been here over seven years, five of these years he was a minor, and all of these years he was the son of a merchant residing and doing business in this country. Do these facts place the appellant (appellee) in the excluded class and subject him to deportation?"

The learned judge answers the question in the negative, giving cogent reasons for his conclusion. He points out the distinction between the case of an entry secured by fraud or misrepresentation as, where one, claiming to be a merchant and securing a certificate, as such, immediately becomes a laborer, and a case like this, in which the defendant is in truth in the admissible class. It is manifest that the learned judge did not regard this decision as conflicting with that rendered by him in Chain Chio Fong v. U. S. 133 Fed. 154, 66 C. C. A. 220, stressed by counsel for the government. The distinction between them is clear. In the Gue Lim Case, supra, Judge Peckham says:

"When the fact is established to the satisfaction of the authorities that the person claiming to enter, either as wife or minor child, is in fact wife or child of one of the members of a class mentioned in the treaty as entitled to enter, then that person is entitled to admission without the certificate."

It is not insisted, by respondents, that the certificate is conclusive upon the government. It seems that it does not relieve the respondents of the burden of showing their right to enter and remain, if called into question. The respondents here are conceded to have been within the admissible class, at the time of their entry. The authorities seem to uniformly hold that if a Chinaman is lawfully domiciled here, as a merchant, either by reason of having been a resident at the date of the treaty, or enactment of the exclusion acts, or by reason of having been admitted under a certificate, without fraud, he does not become subject to deportation because he thereafter becomes a laborer. The opinion of Judge Lowell in Re Chin Ark Wing (D. C.) 115 Fed. 412, is to that effect. In re Yew Bing Hi (D. C.) 128 Fed. 319, he says:

"Speaking generally, the Chinese Exclusion Acts are directed to prevent the unlawful coming of Chinese into the United States, and to remove those who have come in unlawfully."

After noting the several statutes, he says:

"Thus far no indication appears that a Chinaman who has lawfully entered the United States may not change his occupation after entry without risk of deportation. * * * Taken as a whole, the legislation appears not to intend the deportation of any Chinaman who lawfully entered the United States, and, since his entry, has complied with every applicable provision of the statute."

In United States v. Leo Won Tong, 132 Fed. 190, Judge Rogers says:

"The manifest purpose of Congress was to prevent Chinese laborers from coming into this country. Laborers already in the country were not to be expelled if they complied with the terms of the statute by taking out their certificates as laborers, and no provision was made for the expulsion of merchants, nor was there any provision made for certificates being granted to merchants, nor does the statute which defines what a laborer is, or what a merchant is, make any provision for a change of status from a merchant to a laborer. If it was the intention of Congress that when a merchant lawfully in the country at the passage of the act should cease to be a merchant, and become a laborer, he should be deported, provision should have been made therefor. It made no such provision, and the presumption ought to be that it did not so intend. The prevention of Chinese laborers from coming into the country is quite a different thing from deporting a merchant who has failed in business, and from necessity becomes a laborer, and especially after the passage of the act and the expiration of the period of limitation within which a laborer had the right to apply for a certificate of residence." U. S. v. Louie Juen, 128 Fed. 522; U. S. v. Fong Sen (D. C.) 205 Fed. 398.

These, and other, expressions of federal courts, while not determinative of the instant case, in respect to which the well-prepared brief for the government states "no case has yet arisen in which the question here involved has existed, clearly and uncomplicated with other issues," are persuasive in maintaining the view that a Chinaman lawfully admitted is not subject to deportation because of a change in his employment. The admission, free from fraud, or other invalidating element, entitles a Chinaman, under existing treaty, to "all the rights and privileges, immunities and exemptions which are accorded to the citizens of the most favored nation." Article 2, Treaty 1880.

It is insisted that the decisions of the courts in the construction and enforcement of the Chinese exclusion acts "show an evolution of the law towards extreme strictness." It is said that this is because of "constant evasion." There is here, however, no question of evasion in respect to the admission of respondents; they have made no false statement of their status for the purpose of obtaining admission; the claim upon which they were admitted, as the minor sons of a Chinese merchant, and teacher, lawfully resident in the United States, is conceded. It is true that, by section 12, Act of 1884 (Act July 5, 1884, c. 220, 23 Stat. 117 [U. S. Comp. St. 1901, p. 1310]), it is provided that "any Chinese person found unlawfully within the United States" shall be deported, etc. Section 13, Act 1888 (Act Sept. 13, 1888, c. 1015, 25 Stat. 479 [U. S. Comp. St. 1901, p. 1317]), contains the same language.

So the burden of proof is put upon the Chinaman arrested and brought before a judge, etc., to "establish, by affirmative proof, to the satisfaction of such judge, etc., his lawful right to remain in the United States." None of these provisions, nor others of like tenor, afford aid in the solution of the question presented by this record. Resort must be had to the language of the Treaty of Nov. 17, 1880, 22 Stat. 826 (article 2) and the acts of Congress, passed in pursuance thereof, as interpreted by the Supreme Court. These, as we have seen, entitled the respondents to admission. This is recognized by the Department in the Rules and Regulations made for the administration and enforcement of the act, defining admissible classes. Rule 2. It is strongly insisted, however, that the several acts of Congress, upon the subject, must be so interpreted as to repress the evil and advance the remedy; that is, prevention of the residence of Chinese engaged in laboring and their removal by deportation. Attention is called to the language of Judge Ross in U. S. v. Chun Hoy, 111 Fed. 899, 50 C. C. A. 57. The learned judge was there discussing the question of fact whether the defendant was within the admissible class, and, in doing so, enforcing the statutory burden of proof. It is further insisted that, as respondents were admitted by reason of the status of their fathers, they lost such status by abandoning the home and casting off the paternal custody and control, thus becoming liable to deportation, if they engaged in unlawful labor. To sustain this contention, it is urged that the admissibility of wives and minor sons is not based upon any language found in the statute or in the treaty, but to an interpretation of the court. That this interpretation is based upon the fact that the Chinese merchant, admitted under the treaty, is entitled to the society of his wife and the custody of his children; that, upon the reason of the thing and laws of universal application, it should be presumed that the wife and minor children were intended to come within the admissible classes by reason of their relationship; that, while this interpretation of the court should be given a fair construction, it should not be extended so as to confer the right of continued residence when the reason upon which it is based no longer exists.

In U. S. v. Joe Dick (D. C.) 134 Fed. 988, the defendant entered as the minor son of a Chinese merchant domiciled here. During his minority, the father returned to China, leaving the son here—employed as a laborer. Judge McPherson held that, as the father had ceased to reside here, the son was not entitled to remain as a laborer. He said whether he could have acquired an independent status for himself as a laborer during his minority, if his father had remained in the United States and had gone on with his business, need not be determined. The learned judge was of the opinion that, as the father had ceased to be a merchant, abandoned the son, and returned to China, the "privilege ended with the disappearance of the facts on which it was founded." It is also noted that, the son entered, and the father left the country, during the period within which the son was entitled to register and he failed to do so. Here the respondents came subsequent to the expiration of that period. The cases are not, in other respects, analogous. Here, the status of the father, upon which the sons were admitted, continues; so that whatever right the sons acquired from this status remains intact, unless forfeited by them. In the absence of any authoritative decisions we must endeavor to find, by interpretation or construction of the language used, the intention of Congress. The statutes must be read in the light of the treaty, the construction of the Supreme Court. Thus read, we find it agreed between the two governments.

"Article 1. Whenever in the opinion of the government of the United States, the coming of Chinese laborers to the United States, or their residence therein, affects or threatens to affect the interests of that country, or to endanger the good order of said country or of any locality within the territory thereof, the government of China agrees that the government of the United States may regulate, limit, or suspend such coming or residence, but may not absolutely prohibit it. The limitation or suspension shall be reasonable and shall apply only to Chinese who may go to the United States as laborers."

"Art. 2. Chinese subjects, whether proceeding to the United States as teachers, students, merchants or from curiosity (with their lawful wives and minor children), * * * shall be allowed to go and come of their own free will, and accord, and shall be accorded all of the rights, privileges, immunities, and exemptions which are accorded to the citizens and subjects of the most favored nation."

The legislation which has been, from time to time, enacted pursuant to this treaty, and changes made therein, not material to be noted, has been, in numerous decisions, sustained by the Supreme Court. Rigid requirements have imposed, by statutes, upon Chinese charged with coming into, or being within, the United States, to show as matter of fact that they have been lawfully admitted and lawfully remain in the United States. These have been sustained. In enforcing these statutory requirements, the courts have given full force and effect to the legislative will and policy to which they give expression. In the construction of the statutes dealing with the asserted right to remain free from deportation, where the facts are established, the courts have been guided by the well-settled rule that the will of the Congress must be ascertained and enforced by resorting to the same canons of interpretation used in the construction of other statutes. No purpose is found in the decisions to give a strained or forced construction to the

statutes or make their language bear any other than a reasonable construction, to effectuate either a real, or supposed, public policy. This is manifested by the language of the court in Gue Lim, supra. It is said, quoting the Chief Justice, in Lau Ow Bew v. U. S., 144 U. S. 47, 59, 12 Sup. Ct. 517, 520 (36 L. Ed. 340):

"Nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust and absurd conclusion."

Mr. Justice Peckham, after quoting the language of the treaty, and declaring that the statute must be read in the light thereof, says:

"It is impossible to entertain the belief that the Congress of the United States, immediately after the conclusion of a treaty between this country and the Chinese Empire, would, while assuming to carry out its provisions, pass an act which violated or unreasonably obstructed the obligation of any provision of the treaty."

So Mr. Justice Harlan, in Chew Heong v. U. S., 112 U. S. 536, 5 Sup. Ct. 255, 28 L. Ed. 770, says:

"Aside from the duty imposed by the Constitution to respect treaty stipulations, when they become the subject of judicial proceedings, the court cannot be unmindful of the fact that the honor of the government and the people of the United States is involved in every inquiry whether rights secured by such stipulations shall be recognized and protected."

The conclusion of the court is thus stated:

"We ought therefore to so construe the act, if it can reasonably be done, as to further the execution, and not to violate the provisions, of the treaty."

The right of the respondents to admission, upon the facts found by the Commissioner who issued the certificates, and the status being found to exist then, and to continue until this time, may the court read into the law the limitation that, upon arriving at full age or, engaging as laborers, the right to remain ceased? It is not so written into the statute. To find that such was the intention of Congress, we must go outside the language used. If permitted to indulge in speculation, it might not unreasonably be suggested that, in the opinion of Congress, the continued residence of minor children of Chinese merchants and teachers, after arriving at their majority, did not "affect, or threaten, the interest of the country, or endanger the good order of said country." Hence, it was not intended to declare their "residence," thereafter, unlawful. It may be that Congress was of the opinion that, while the "coming of Chinese laborers to the United States" had an effect against which the treaty provided, minor children, remaining after reaching their majority, was not objectionable. If it was intended that, upon the manumission of the minor children, their continued residence was to be deemed unlawful, it would seem that Congress would have so enacted. Again, if it was intended that minor children of the admitted classes should be permitted to remain after their emancipation by age, it would not be consistent with either a universal policy, or the laws of the states, in which they must reside, to impose upon them the burden of idleness; thereby becoming, in many instances, subject to the vagrancy laws of the state.

While it is true, as suggested by counsel, that respondents were admitted, upon a "communicated status," the minor sons of their parents, it does not follow that, when their right to remain is challenged, a different rule of construction of the statutes and of the decision of the Supreme Court is to be applied than if they were admitted upon some other legal status. The reasons assigned by the court for its construction of the treaty and the statutes passed pursuant to it have been recognized as satisfactory to the Congress by acquiescence; they appeal to the feelings of humanity and a fair construction of the language of the law.

Attention is called to Departmental Rule 19, which provides the form of the certificate issued to all Chinese persons admitted, in which it is declared that:

"The certificate is issued only for the protection and identification of Chinese of the exempt classes, only so long as such persons shall retain their exempt status, and are not transferable."

It is not perceived how this rule advances the argument, or throws any light upon the ultimate question to be decided, whether the respondents retain their exempt status. That answer must be found in the construction of the treaty and statutes, and not in the rules of the Department intrusted with its administration although due consideration will always be accorded the construction put upon statutes by the Department to which their administration is intrusted. This rule does not profess or attempt to construe the law; it is manifest that, without it, the certificate would have no other effect than is given it by the rule.

Attention is also called to Departmental Rule 23, which directs that:

"Chinese found in the United States engaged in laboring pursuits and not having in their possession a certificate issued under either the act of May 5, 1892, or the act of November 3, 1893, or other satisfactory evidence of their right to be and remain in the country, are subject to arrest and deportation."

This rule neither adds to, takes from, or construes the statutes. It is simply declaratory, and is manifestly correct. It imposes the duty on the officer, making the arrest, to give the Chinaman "full opportunity to produce the certificate, or other evidence before his arrest, etc." This right is "to be always accorded." That was done by the intelligent and efficient inspector in these cases.

The respondents were admitted when between the ages of 14 and 16 years. As they appeared before the court, they were dressed, and wore their hair in the manner and style of young men of their age and station in life of American nativity; they appeared to be sober, industrious, law-abiding, and answered the questions put to them, either through the interpreter or personally, with frankness and fair intelligence. It is conceded by the government that no authoritative decision directly "in point" is to be found. A careful examination of the cases cited and of the statutes, as construed by the Supreme Court, brings me to the conclusion that Congress has not placed any limitation upon the right of persons admitted, as minor children of Chinese merchants, teachers, etc, lawfully domiciled here, to remain in the United States, after their manumission, or limitation, upon their right

to engage as laborers in a laundry. In the absence of such statutory limitation, I am not authorized to create one. Independent of the want of authority to do so, manifest, practical difficulties would present themselves, if it were attempted. I am unable to find that the respondents secured their admission by fraud. They made no statement which was not true.

An order may be drawn discharging the respondents from custody.

THE CITY OF ERIE.

BROWN v. CLEVELAND & B. TRANSIT CO.

(District Court, N. D. Ohio, E. D. January 17, 1914.)

Nos. 2485, 2530.

COLLISION (§ 45*) — STEAM AND SAILING VESSELS — FAILURE TO MAINTAIN LIGHTS.

The steamer City of Erie came into collision with and sank a schooner at night on Lake Erie. The testimony tended to show that the lookout and the pilot in charge of the navigation of the steamer saw only the red light of the schooner somewhat to the starboard of straight ahead and the pilot directed the course of the steamer to starboard to pass under the stern of the schooner which he supposed to be on a crossing course, while it was in fact on a meeting and nearly parallel course. After a little time the red light disappeared, and the engines of the steamer were first stopped and then reversed, but too late to avoid the collision. *Held*, on the evidence that the green light of the schooner was not burning, which fault misled those on the steamer and accounted for the collision, and that in the situation as it appeared the steamer was properly navigated and was not in fault.

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

In Admiralty. Suit for collision by the Pittsburg & Erie Coal Company, owner of the schooner Sir C. T. Van Straubenzie against the steamer City of Erie (the Cleveland & Buffalo Transit Company, claimant), in which Annie Brown, administratrix, was intervening libelant. Decree dismissing both libel and intervening libel.

Hoyt, Dustin, Kelley, McKeehan & Andrews, of Cleveland, Ohio, for libelant in Case No. 2485.

Goulder, Holding & Masten, of Cleveland, Ohio, for respondent in Case No. 2485.

George B. Marty, of Cleveland, Ohio, for libelant in Case No. 2530.

Goulder, Day, White & Garry, of Cleveland, Ohio, for respondent in Case No. 2530.

DAY, District Judge. These causes of action grew out of a collision between the steamer City of Erie and the schooner Sir C. T. Van Straubenzie on the morning of September 27, 1910, in the vicinity of Long Point on Lake Erie, in which collision the schooner was sunk. A libel was first filed by the Pittsburg & Erie Coal Company, as owner

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

of the schooner, against the City of Erie, in which it is sought to recover for the value of the schooner. In this suit the Cleveland & Buffalo Transit Company, as owner of the steamer, intervened by filing claim and answer. Later Annie Brown, administratrix of the estate of Thomas Brown, who was drowned in the collision, filed a libel in personam against the Cleveland & Buffalo Transit Company, as owner of the steamer, intervened by filing claim and answer. To this libel exceptions were taken by the Cleveland & Buffalo Transit Company.

The steamer City of Erie is a side-wheel passenger boat, 316 feet long and 44 feet beam, engaged in the carriage of passengers and merchandise between Cleveland and Buffalo. The schooner Sir C. T. Van Straubenzie was a three-masted sailing vessel of the schooner type, 127 feet 7 inches long and 26 feet 2 inches beam.

The facts as told by witnesses from the City of Erie are substantially that on September 26th, the night before the collision, the City of Erie left Cleveland at 9 o'clock, which was her schedule time, bound for Buffalo. On leaving Cleveland the wind was from the northeast and it was raining, and as soon as the vessel was outside of the Cleveland breakwater, Edward S. Pickell, the pilot, relieved the captain and took charge of the vessel. From Fairport Point the vessel was put on a course further to the northward than the usual course, on account of the sea, which was running from the northward. At 2:37 a. m. standard time, the morning of September 27th, the vessel passed Long Point; at this time the vessel's course was east by north, half north. The wheelsman was at the wheel in the pilot house, and the lookout was standing his watch up in the eyes of the ship, while the pilot was standing at his station in front of the wheel at the window in the front of the pilot house. Some little time after passing Long Point the regular lookout relieved the regular wheelsman at the wheel while he went below, and an extra watchman, who is kept for the purpose of relieving the regular lookout whenever it becomes necessary, had taken the regular lookout's place in the eyes of the ship, and after this exchange of lookouts a red light was seen about a point and a half on the steamer's starboard bow. The pilot Pickell took his glasses and looked at the light, but could see no other light excepting a red one, and this indicated to him that it was a sailing vessel headed to the northward across the City of Erie's course. An order was given to the wheelsman to port, in order to go under the vessel's stern. The wheelsman ported and the pilot continued watching the red light, and as the bearing of the red light did not change fast enough, the pilot ordered the wheelsman to put his wheel hard aport, and this was done to make the steamer swing faster. When the red light was nearly dead ahead, it was shut out entirely, and the moment it was shut out the pilot signaled to the engine room first to stop and directly afterward signaled to back up. It was noticed that the vessel was slowing down. Shortly afterwards the schooner, which proved to be the Sir C. T. Van Straubenzie, was seen standing across the City of Erie's course, and some one was heard calling on the schooner, "Hard up! hard up!" Shortly after this the two vessels came together at an angle of about five points, the City of Erie's stem striking the schooner on the starboard side at about the main rigging. After the collision the engines

of the City of Erie were stopped, and the schooner very shortly after sank. Lifeboats were lowered in order to try to save the crew of the Sir C. T. Van Straubenzie, and two of the crew were saved. The collision occurred at 3 o'clock central standard time, about 20 minutes after passing Long Point. At the time of the collision, the wind was fresh from the north, northeast, probably 18 or 20 miles an hour.

The only member of the crew of the schooner whose testimony was taken was William T. Garner, one of the seamen of the schooner who were saved. He testified, in substance, that the schooner left Port Colbourne at 11 o'clock p. m., bound for Cleveland; that shortly after leaving Port Colbourne he turned in. When he left the deck the wind was well from the northward, a whole sail breeze; the sails were out to port, and they had the wind three or four points free on the starboard side, and were going seven or eight miles an hour; that he went to sleep and woke up, as he thought, about 4 o'clock eastern time, and he heard the captain talking, and soon thereafter he heard the captain calling, "Hard up! hard up!" and then he heard the captain running aft; that he thought there was something wrong, and while he was getting up he heard the crash of collision, and he ran out onto the deck with Hollis (the other man saved) following him; that when he got on the deck he saw that the steamer was right into them; then the steamer began to pull clear of them, and he could feel the schooner settling; he saw Hollis jump into the main rigging, and he ran and climbed into the forerigging, as the schooner was sinking. He then swam to the surface of the water, and was later rescued. He states that this night he did not know what the course of the schooner was, except the way they lay with the wind, which was from the northward; he also states that while he was climbing up into the forerigging he climbed over the green light, and noticed that it was burning.

The important issue in this case is whether or not the Van Straubenzie's green light was burning or was visible to those on the City of Erie at the time the red light was first sighted, for if the green light was not burning, it is probable that the Van Straubenzie was not on a course to the northward of the City of Erie's course at the time she was sighted. If the green light was not burning it is quite probable that the schooner was either on a course about parallel with the City of Erie's course and a little to starboard of the City of Erie's course, or else was heading slightly toward the City of Erie's starboard bow. If she were on either of these courses and both the green and red lights were burning, they could have been seen on the City of Erie. If the testimony of those aboard the Erie that the red light was shut out entirely shortly before the collision, this fact, accompanied by the fact that the captain of the schooner gave the order "Hard up," could account for the collision taken in connnection with the navigation of the Erie.

Garner's testimony in reference to the green light is partly supported by the lookout on the City of Erie, who says that the colored light which he saw on the schooner some time prior to the collision might have been green or it might have been red.

Rule 19 of the act of February 8, 1895 (28 Stat. 645, c. 64 [U. S. Comp. St. 1901, p. 2891]) provides:

"When a steam vessel and a sailing vessel are proceeding in such direction as to involve risk of collision the steam vessel shall keep out of the way of the sailing vessel."

Rule 20 of the same act provides:

"Where, by any of the rules herein prescribed one of two vessels shall keep out of the way, the other shall keep her course and speed."

If the red light alone was burning, those navigating the City of Erie had the right to assume that a sailing vessel was on a crossing course from starboard to port, and that this sailing vessel would keep its course, and a proper porting on the City of Erie's part would swing the steamer to starboard and go clear of the schooner by going under her stern. The City of Erie did port, and the red light began to draw closely ahead, which would be the case if the schooner was on a crossing course. But Pickell testified the light did not cross the City of Erie's bows very fast, and he then ordered his wheel hard aport, and after that he then ordered the vessel to slacken speed and back.

It was not the duty of the City of Erie to change her course or slacken her speed until the risk of collision was present. The Free State, 91 U. S. 200, 23 L. Ed. 299. In the present case the risk of collision was not present until the pilot of the Erie observed that the red light was entirely shut out. The fact that the red light was shut out would seem to indicate that the schooner was not holding her course, but that she starboarded and swung in the same direction as the City of Erie was swinging. If the green light was not displayed on the schooner, this is a fault which must be accounted for by the schooner, and would raise a prima facie case of fault against her. The Gray Eagle, 9 Wall, 505, 511, 19 L. Ed. 741; The Excelsior, 39 Fed. (C. C.) 393; The City of Washington, 92 U. S. 31, 23 L. Ed. 600; The Frank Moffet, Fed. Cas. No. 5,060.

It is plain from the record that if only the red light was burning on the Van Straubenzie, and the green light was not burning or was not visible, the City of Erie was properly navigated, and was not at fault. The pilot who was in charge of the navigation of the City of Erie testified that he could not see anything else but the red light; that he made an observation with the ship's glasses, and whether he had been in conversation with the wheelsman or not, as is indicated by the record, there is nothing to show but that he was paying attention to the navigation of the steamer at the time he made his observation of the light on the Van Straubenzie.

Eaton, the wheelsman, testifies that he did not see any lights at all on the Van Straubenzie. He, however, did not come on deck until he felt the jar of collision.

The extra lookout, Moran, was not called by the City of Erie. The testimony shows that he left the country shortly after the collision, and returned later on. He testified that he saw a colored light, and was unable to state whether the light was red or green. He also testified that he saw a flashlight.

McAlpine, the wheelsman on the Erie, also testified that he saw only the red light.

Pickell, the pilot, was produced in court, and asked a few questions by the court, and appeared to be a man of intelligence and integrity.

The only man who says that the green light was burning at the time of the collision, and immediately preceding that time, was the seaman, Garner, who rushed on deck about the time of the collision, and undoubtedly sought at once to save his life. It appears that he testified a day or so after this accident before the United States Local Inspectors of Steamboats, and he was asked certain questions, one of which was whether or not he knew whether the lights were burning. His answer was that they were burning when they were making sail.

The captain and steward of the Erie also testified that the morning after the collision Garner stated to them in a conversation that he did not know whether the green light was burning or not. The conversation which Garner had with the captain and steward of the Erie and the manager of the steamship line operating the City of Erie does not appear to have been of such a character as to cast suspicion upon their motives.

The pilot and the wheelsman on the Erie were apparently attentive to their duties. They testified that they could not see this green light. On the other hand, Garner must have been much excited and in peril of his life, and I am forced to the conclusion that this green light was not burning upon the Van Straubenzie.

This being the situation, the pilot, observing the red light with his night glasses, was of the opinion that there was a sailing vessel on a crossing course, and, knowing that under the law it was his duty to keep clear, he ported his wheel to go under this sailing vessel's stern. After that time there was no fault in his navigation of the steamer under his charge. I am of the opinion, therefore, that the City of Erie was, under the circumstances, properly navigated and the schooner Van Straubenzie was at fault in not having the green light burning. Had this green light been burning the collision would not have occurred.

Inasmuch as I have reached this conclusion, the question raised as to the jurisdiction under the claim of Annie Brown, administratrix, becomes a mooted one. If the facts justified its application, this question would be controlled by the doctrine so well announced by Judge Warrington in the case of Thompson Towing & Wrecking Association v. McGregor, 207 Fed. 209, 124 C. C. A. 479.

An order will accordingly be drawn, dismissing the libel and the claim of Annie Brown, administratrix.

CHAUTAUQUA SCHOOL OF NURSING v. NATIONAL SCHOOL OF NURSING.

(District Court, W. D. New York. January 27, 1914.)

1. COPYRIGHTS (§ 83*)—PRIMA FACIE PROTECTION—CERTIFICATE—SEAL.
Where a printed lecture on the administration of remedies, part of a correspondence course on nursing, was copyrighted, such copyright was shown prima facie by the certificate with seal of the copyright registration and the receipt card stating that the register had received the affidavit conforming to the requirements of Copyright Act (Act March 4, 1909, c. 320, § 16, 35 Stat. 1079 [U. S. Comp. St. Supp. 1911, p. 1477]).
[Ed. Note.—For other cases, see Copyrights, Cent. Dig. §§ 74–76; Dec. Dig. § 83.*]

2. COPYRIGHTS (§ 53*)—PAMPHLETS—INFRINGEMENT.
Complainant and defendant put out printed lectures in a correspondence course on nursing, defendant's lecture on the administration of medicines being practically identical with complainant's lecture on the same subject, especially in defining 12 steps for the administration of hypodermic injections. The original sources of information were the same, but it appeared that the author of defendant's lecture had complainant's lecture in his possession at the time he was writing for defendant. *Held*, that infringement appeared, though there were differences in the phrasing of the material and some differences in style.
[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 51; Dec. Dig. § 53.*]

3. COPYRIGHTS (§ 12*)—RIGHT TO COPYRIGHT—ARRANGEMENT OF COMMON MATERIAL.
Where complainant put out a lecture on the administration of remedies, including the giving of hypodermic injections, as a part of its correspondence course on nursing, the fact that complainant did not originate the method of giving such injections, or that the subject-matter of the lecture was taken from a common source, did not deprive it of the right to copyright, under the rule that a copyright may be claimed where the author has taken material from common sources, if he has arranged and combined it in a new way.
[Ed. Note.—For other cases, see Copyrights, Cent. Dig. §§ 14, 15; Dec. Dig. § 12.*]

In Equity. Suit by the Chautauqua School of Nursing against the National School of Nursing. Decree for complainant.

Arthur C. Wade, of Jamestown, N. Y., for complainant.
Stanchfield, Lovell, Falck & Sayles, of Elmira, N. Y., for defendant.

HAZEL, District Judge. This action is brought in equity to enjoin the National School of Nursing from using and distributing instruction paper No. 11, entitled "Medicines and Their Administration," which complainant claims is an infringement of its copyrighted lecture No. 6, entitled, "Remedies. The Methods by which they are Administered," and for damages. The litigants are competitors in business; the complainant conducting a correspondence school of nursing at Jamestown, and the defendant, at Elmira. The plan of teaching includes a series of printed lectures or courses of instruction which are contained in brochures and delivered by mail to pupils residing at distant points. It is undisputed that there were other correspondence

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

schools in existence at the time the complainant began its business, but concededly complainant originated the plan of teaching nursing by correspondence by the distribution of printed lectures or courses of instruction detailing the approved manner of administering to the sick and alleviating their sufferings. The evidence shows that complainant's secretary in collaboration with employés originated its course, including the lecture in question, which with great particularity sets forth in 12 successive steps a method of administering a hypodermic injection, each step having a prominent and distinctive head note; and contains in relation thereto 12 illustrations, the object or purpose of the illustrations being to simplify the operation by showing how the needle should be inserted and the dose given, etc.

The defendant company disputes the validity of the registration of the copyrighted lecture No. 6, denies infringement, and alleges that said lecture was not copyrightable, as the contents thereof were matters of common knowledge long before it was written.

[1] That the lecture was protected by copyright is shown prima facie by the certificate with seal of the copyright registration and the receipt card stating that the register received the affidavit conforming to the requirements of section 16 of the Copyright Act (Act March 4, 1909, c. 320, 35 Stat. 1079 [U. S. Comp. St. Supp. 1911, p. 1477]). The case of Saake v. Lederer, 174 Fed. 135, 98 C. C. A. 571, cited by counsel for defendant, wherein there was a dispute as to the title of a copyrighted play, is not opposed to this view; it being there held that the burden rests upon plaintiff to show compliance with the statutory requirements as conditions precedent. In this case the registered certificate as to the facts contained therein is of the required standard of proof. See section 55 of the Copyright Act of March 4, 1909.

[2] It is unnecessary to review the evidence in detail with reference to infringement. It is sufficiently proven that there is substantial similarity between complainant's lecture No. 6 and defendant's instruction paper No. 11. Upon comparison of the two pamphlets I am constrained to the conclusion that the 12 steps for administering a hypodermic injection first adapted by complainant are substantially the same as those contained in defendant's course of instruction, and that the photographs illustrating the two pamphlets are very similar. In a number of instances the headings of the paragraphs or the titles of the steps in the operation are precisely the same, and where they are not identical a colorable alteration or variation is used by the defendant. There are, it is true, differences in the phrasing and perhaps in the get-up or style of defendant's lecture or instruction paper which indicate some expenditure of time and labor on its part, but in the main its production retains the principal features of complainant's lecture, and I am impressed with the view that the latter was used as a model and unfairly simulated. Indeed, the defendant conceded that the author of its production was familiar with the complainant's lecture in question and had a printed copy in his possession when writing for the defendant. Under these circumstances, he was bound to avoid simulation of complainant's article in his paper on the method for practising the same treatment, and it was not permissible for him to simply paraphrase the former. He did not, however, observe this condition,

and contended himself with imitative alterations and the use of photographs similar to those displayed in Figures 8 to 18, inclusive, of complainant's lecture, to simplify the method of instruction.

[3] It makes no difference that complainant did not originate the method of giving hypodermic injections or that the subject-matter of its lecture was taken from a common source, as it is clearly apparent that it was the first to subdivide the method into different steps with illustrations, giving each step a prominent heading, and to arrange and combine the same in a new and useful way. In Lawrence v. Dana, 4 Cliff. 1, Fed. Cas. No. 8,136, it was substantially held that a copyright might be claimed where the author of a book has taken material from sources common to all writers if he has arranged and combined the material in a new way, and that if he exercised skill and discretion in his independent work he earned the right to statutory protection. The same rule has frequently been laid down in subsequent decisions.

Defendant's instruction paper No. 11 in its present form was unfairly produced and is an infringement of the copyright in controversy, and therefore its publication and distribution must be enjoined. In reaching this conclusion I have disregarded the testimony introduced by complainant, and tentatively received at the trial, tending to show unfair simulation by defendant of complainant's stationery and advertising literature; it may be stricken out as inadmissible to show an intention to imitate complainant's business methods.

The complainant may have a decree, with costs, but without damages.

UNITED STATES v. FEDERAL SUGAR REFINING CO.

(District Court, S. D. New York. February 20, 1913.)

CUSTOMS DUTIES (§ 81*)—FRAUDULENT UNDERVALUATION—RELIQUIDATION—FINDINGS OF COLLECTOR—EFFECT.

Act Cong. June 22, 1874, c. 391, § 21, 18 Stat. 190 (U. S. Comp. St. 1901, p. 1986), provides that where goods are entered, duty paid, and delivered to their owner, such settlement of duties, after the expiration of one year from the time of entry, in the absence of fraud, shall be final and conclusive on all parties. *Held* that, where duties on raw sugar had been liquidated and paid, the findings of a collector, who succeeded in office the one regularly liquidating the duties, that such liquidation was fraudulent in that the sugar had been underweighed, was not conclusive of the question of fraud in an action by the United States against the importer to recover additional duties under a reliquidation occurring more than a year after the entry.

[Ed. Note.—For other cases, see Customs Duties, Cent. Dig. § 197; Dec. Dig. § 81.*]

Action by the United States of America against the Federal Sugar Refining Company. On demurrer to complaint. Sustained, with leave to amend.

This case comes here upon demurrer to the complaint upon the ground that it fails to state facts sufficient to constitute a cause of action.

The complaint alleges that at various dates, stated in a schedule annexed, the defendant and its predecessors imported certain cargoes of raw sugar into the United States which were subject to duty, in part, according to the weight

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

thereof, and all of which were entered at the New York Custom House and liquidated by the collector on the basis of the weights stated as duty weight.

That on or about March 26, 1912, and more than a year subsequent to the original liquidation and payment of the duties upon the raw sugar so imported, the collector reliquidated the same and assessed thereon the additional amounts stated in the said schedule amounting in the aggregate to $119,080.98. That the said reliquidation was made pursuant to the findings and decisions of the collector as follows:

First, that the original weights were less than the true weights.

Second, that the true weights were at least the weights shown on the schedule as the true weights.

Third, that the difference between the true weights and duty weights was at least the amounts shown on said schedule.

Fourth, that the said difference was caused by fraudulent underweighing and fraud against the United States and its revenues by reason of which the amount as above stated became and still remains due.

That more than fifteen days prior to the commencement of this action and subsequent to March 12, 1912, the plaintiff notified the defendant of the reliquidation and demanded the above amount, which was refused.

The demand is for the above amount with interest, costs and disbursements.

W. Cleveland Runyon, Sp. Asst. Atty. Gen., of New York City, for plaintiff.

Ernest A. Bigelow, of New York City, for defendant.

*COXE, Circuit Judge (after stating the facts as above). The question presented by the demurrer is whether the collector's decision that the original entries were fraudulent is final and conclusive. In other words, could the successor of the collector who liquidated duties on the original entries, determine ten years afterwards, in an ex parte proceeding, that the sugar was fraudulently underweighed, and is his decision to that effect final and conclusive upon the defendant? The defendant insists that the existence of fraud in the original liquidation is a fact to be proved by the plaintiff, and it is not proved by the allegation in the complaint that the collector found it to exist. The defendant contends, therefore, that if the complaint be sustained, it has had and can have no hearing upon the vital question in the case—whether or not there was a fraudulent undervaluation. It would seem to follow as an inevitable conclusion that if the plaintiff's theory of the action be correct, the defendant may be compelled to pay over a hundred thousand dollars because of an alleged fraud which, in fact, never existed and the nonexistence of which the defendant is debarred from proving.

Section 21 of the Act of June 22, 1874, 18 Stat. L. part 3, pp. 186, 190 (U. S. Comp. St. 1901, p. 1986), is as follows:

"That whenever any goods, wares, and merchandise shall have been entered and passed free of duty, and whenever duties upon any imported goods, wares, and merchandise shall have been liquidated and paid, and such goods, wares, and merchandise shall have been delivered to the owner, importer, agent, or consignee, such entry and passage free of duty and such settlement of duties shall, after the expiration of one year from the time of entry, in the absence of fraud and in the absence of protest by the owner, importer, agent, or consignee, be final and conclusive upon all parties."

This statute provides, in substance, that where goods are entered, pay duty and are delivered to their owner, such settlement of duties,

shall, after the expiration of one year from the time of entry, in the absence of fraud, be final and conclusive upon *all* parties. That is to say, if the collector levies duties which are paid and the goods are delivered to the owner, the transaction, if free from fraud, cannot be inquired into after a year has elapsed from the time of entry. If fraud be shown, it may be inquired into. Who is to determine the existence of this fraud? If the collector be the sole and final arbiter, he is invested with autocratic powers. At any time he may, by the mere assertion that he has found an entry which is fraudulent, reliquidate it, without a particle of proof and the victim is remediless.

The plaintiff presents an elaborate argument to prove that it is the policy of government to confine all disputes relating to the assessment and collection of duties to the special tribunals created by Congress. This is undoubtedly the fact, but I do not see how the defendant could have appealed to these tribunals without being in danger of waiving the very contention which is the foundation of its defense.

The defendant is here because the plaintiff brought it here and it is entitled to show if it can that the complaint fails to state a cause of action. In determining that question the court can examine only the complaint and the demurrer.

Pursuant to section 21, supra, the original liquidations and payments of duties were final and conclusive upon all parties in the absence of fraud. If fraud be proved then they are not conclusive. The statute does not say that the collector shall determine this question. But, assuming that he may do so in the first instance, where is the law which makes his decision "final and conclusive"?

If the plaintiff's contention be correct, there will never be a time when the importer will be safe. Whenever the collector desires to do so, he may make a decision of fraud, reliquidate the duties and the importer will be remediless. If the findings and decisions of the collector are final, there is no answer that the defendant can make, even though he can prove conclusively that no fraud existed. Such a result is abhorrent to my sense of justice and is, I think, contrary to the principles of American jurisprudence. If the allegations stated in paragraph ninth of the complaint were stated, not as "findings and decisions," but as *facts,* the defendant by denying them would have its day in court and an opportunity to prove that there was no fraud.

The real issue upon which recovery depends is fraud in the original weighing, and the plaintiff should prove that fraud to the satisfaction of the court and jury. The fact that it was proved to the satisfaction of the collector is not controlling.

The demurrer is sustained, with leave to the plaintiff to amend within twenty days.

MEMORANDUM DECISIONS

AMERICAN SURETY CO. OF NEW YORK v. UNITED STATES, for Use of KENNARD et al. (Circuit Court of Appeals, Fifth Circuit. February 10, 1914.) No. 2561. In Error to the District Court of the United States for the Northern District of Florida; Wm. B. Sheppard, Judge. Action by the United States, for the use of E. S. Kennard and others, against the American Surety Company of New York. Judgment for use plaintiffs, and defendant brings error. Affirmed. Robert E. Davis, of Gainesville, Fla., for plaintiff in error. Fred C. Cubberly, of Gainesville, Fla., and Philip D. Beall, of Pensacola, Fla., for defendants in error. Before PARDEE and SHELBY, Circuit Judges, and GRUBB, District Judge.

PER CURIAM. In the rulings of the District Court on the pleadings and admission of evidence we find no reversible error. As the plaintiff's evidence was uncontradicted, the trial judge properly directed a verdict. On the merits we affirm the judgment, on the authority of Hill v. American Surety Co., 200 U. S. 197, 26 Sup. Ct. 168, 50 L. Ed. 437, and Title Guarantee & Trust Co. v. Crane Co., 219 U. S. 24, 32, 31 Sup. Ct. 140, 55 L. Ed. 72.

BEATTY et al. v. UNITED STATES. (Circuit Court of Appeals, Fourth Circuit. April 21, 1913.) No. 1143. In Error to the District Court of the United States for the Western District of Virginia, at Lynchburg. For opinion on reversal of judgment, see 203 Fed. 620, 122 C. C. A. 16. O'Flaherty & Fulton, of Richmond, Va., and E. Hilton Jackson, of Washington, D. C., for plaintiffs in error. Barnes Gillespie, U. S. Atty., of Tazewell, Va.

PER CURIAM. Defendant in error allowed writ of error to the Supreme Court of the United States. Case certified to the Supreme Court on a question or proposition of law.

COMFORT v. WALDIN. (Circuit Court of Appeals, Fifth Circuit. January 13, 1914.) No. 2539. Appeal from the District Court of the United States for the Southern District of Florida; Rhydon M. Call, Judge. Suit in equity by Walter R. Comfort against Walter Waldin. Decree for defendant, and complainant appeals. Modified and affirmed. Wm. P. Smith and H. H. Eyles, both of Miami, Fla., for appellant. A. A. Boggs and F. M. Hudson, both of Miami, Fla., for appellee. Before PARDEE and SHELBY, Circuit Judges, and GRUBB, District Judge.

PER CURIAM. The decree of the District Court, of date May 3, 1913, is amended, so as to make the dismissal of the bill without prejudice, and, as so amended, is affirmed. The appellant is taxed with the costs.

EQUITABLE ASPHALT MAINTENANCE CO. v. PARKER-WASHINGTON CO. (Circuit Court of Appeals, Eighth Circuit, May 2, 1913.) No. 3887. Appeal from the District Court of the United States for the Western District of Missouri. For opinion below, see 197 Fed. 920. Charles K. Offield, of Chicago, Ill., and Arthur C. Brown, of Kansas City, Mo., for appellant. R. E. Ball, of Kansas City, Mo., for appellee.

PER CURIAM. Reversed and remanded, with directions to enter decree sustaining validity of patent, per stipulation, each party to pay its own costs. Costs incurred after entry of decree to be divided equally between parties.

HEWITT INV. CO. v. MINNESOTA & OREGON LAND & TIMBER CO. et al. (Circuit Court of Appeals, Ninth Circuit. February 2, 1914.) No. 2274. Appeal from the District Court of the United States for the District of Oregon; Charles E. Wolverton, Judge. Suit by the Minnesota & Oregon Land & Timber Company, a Minnesota corporation, and another, against the Hewitt Investment Company, to compel specific performance of an agreement for the sale of certain real property situated in Clatsop county, Or. From a decree in favor of complainants (201 Fed. 752), defendant appeals. Affirmed. E. R. York and T. W. Hammon, both of Tacoma, Wash., for appellant. Fulton & Bowerman, both of Portland, Or., for appellees. Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge. The Minnesota & Oregon Land & Timber Company (a corporation organized and existing under and by virtue of the laws of the state of Minnesota) filed its amended complaint in the court below against the Hewitt Investment Company (a corporation organized and existing under and by virtue of the laws of the state of Washington) for the purpose of compelling the defendant corporation to make, execute, and deliver to one E. Z. Ferguson (who was joined as a party complainant in said action), for and on behalf of the complainant corporation, a deed for the following described real property, situate in Clatsop county, Or., pursuant to an agreement for the sale of said lands alleged to have been entered into between the defendant corporation and said E. Z. Ferguson, acting on behalf of and as agent for said plaintiff, Minnesota & Oregon Land & Timber Company: The S. E. ¼ of the N. E. ¼ and the N. E. ¼ of the S. E. ¼ of section 10, the S. W. ¼ of the N. W. ¼ and the N. W. ¼ of the S. W. ¼ of section 11, the S. E. ¼ of section 17, the E. ½ of the N. W. ¼ and the W. ½ of the N. E. ¼ of section 20, and the N. E. ¼ of section 30, all in township 6 N., of range 6 W. of the Willamette meridian, all in Clatsop county, Or. This case was tried in the court below before Judge Wolverton, who heard the witnesses and saw their demeanor on the stand. His opinion (Minnesota & Oregon Land & Timber Co. v. Hewitt Inv. Co. [D. C.] 201 Fed. 752) contains a very full and searching review of the testimony in the case. We have read that testimony, and have considered it in the light of the arguments submitted on behalf of the appellant for a reversal of the decree. We find no reason to differ from the learned judge in the court below in the conclusions he reached upon the evidence in the case. For the reasons there stated, the decree of the court below is affirmed.

JOHN CHURCH CO. v. FLEMING. (Circuit Court of Appeal, Fifth Circuit. March 10, 1914.) No. 2573. Appeal from the District Court of the United States for the Southern District of Georgia; Emory Speer, Judge. David M. Levy, of Cincinnati, Ohio, and A. H. Heyward, Jr., of Macon, Ga., for appellant. Wm. H. Fleming, of Augusta, Ga., for appellee. Before PARDEE, Circuit Judge, and NEWMAN and GRUBB, District Judges.

PER CURIAM. The decree appealed from, dissolving the restraining order and denying an injunction pendente lite, is affirmed, with costs.

THE KIRNWOOD. THE FLORIDA. THE COASTWISE. (Circuit Court of Appeals, Fourth Circuit. February 3, 1914.) No. 1,198. Appeal from the District Court of the United States for the Eastern District of Virginia, at Norfolk; Edmund Waddill, Jr., Judge. Leon T. Seawell, of Norfolk, Va., for appellant. Floyd Hughes and Braden Vandeventer, both of Norfolk, Va., and Edward E. Blodgett, of Boston, Mass. (Hughes & Vandeventer, of Norfolk, Va., on the brief), for appellees. Before KNAPP and WOODS, Circuit Judges, and ROSE, District Judge.

WOODS, Circuit Judge. The District Judge, after a review of the evidence held (201 Fed. 428) that the master of the steamship Kirnwood was at fault

for the collision between the steamship and the barge Florida, which occurred in Hampton Roads August 29, 1912, and resulted in the sinking and loss of the barge. There is no reason for serious difference of opinion as to the rules of law applicable to the issues made by the evidence, and no good would result from a restatement of them. There is some evidence tending to show that the master of the tug Coastwise, having the barge Florida in tow, was at fault in not keeping a lookout, in not responding to the whistle of the Kirnwood, meant to give notice of its intention to pass to the starboard of the Florida, and in changing its course in view of the approach of the Kirnwood. After careful consideration, however, we agree with the District Judge that the preponderance of the evidence requires the conclusion that the act which brought about the collision was the unwarranted attempt of the master of the Kirnwood to cut in between the tug, which was towing the barge, and a schooner which was tacking across the course of the tug with its tow. At all events, it is quite certain that the findings of the District Judge are not clearly opposed to the weight of the evidence, and, this being so, the decree must be affirmed. Affirmed.

LEONHARDT v. LYNCH. (Circuit Court of Appeals, Fourth Circuit. February 3, 1914.) No. 1199. Appeal from the District Court of the United States for the District of Maryland, at Baltimore. John C. Rose, Judge. Geo. H. Howard, of Washington, D. C., for appellant. A. V. Cushman, of Washington, D. C. (Chas. B. Mann, of Baltimore, Md., on the brief), for appellee. Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

PER CURIAM. The decree of the District Court (199 Fed. 790) is affirmed, for the reasons stated in its opinion.

MUNSON S. S. LINE v. GLASGOW NAVIGATION CO., Limited. (Circuit Court of Appeals, Second Circuit. January 21, 1914.) No. 208. Appeal from the District Court of the United States for the Southern District of New York. Suit in admiralty by the Munson Steamship Line against the Glasgow Navigation Company, Limited. On motion to file amended and supplemental libel and to take new proofs. Granted conditionally. Before LACOMBE, COXE, and WARD, Circuit Judges.

PER CURIAM. The libelant's motion for leave to file an amended and supplemental libel and to take new proofs in this court is granted, unless the parties stipulate as follows, to wit: The respondent, that it will not set up the defense of laches in the second suit brought by the libelant; and the libelant, that it will discontinue the first suit at its own costs, in which case the motion will be denied.

NEW JERSEY PORTLAND CEMENT CO. v. FREEMAN et al. (Circuit Court of Appeals, Second Circuit. January 13, 1914.) No. 200. Appeal from the District Court of the United States for the Northern District of New York. This cause comes here upon appeal from an order of the District Court, Northern District of New York, denying a motion made by defendant to dissolve a temporary restraining order enjoining defendant, pendente lite, from removing certain buildings and machinery from the mining premises of complainant. Joseph F. Brown, of Canton, N. Y., for appellant. Sturtevant & Abbott, of Gouverneur, N. Y., for appellees. Before LACOMBE, WARD, and ROGERS, Circuit Judges.

PER CURIAM. The order is affirmed, with costs, on the opinion of Judge Ray, in 207 Fed. 699.

PORTLAND GOLD MINING CO. v. STRATTON'S INDEPENDENCE. (Circuit Court of Appeals, Eighth Circuit. September 22, 1913.) No. 3795. In Error to the District Court of the United States for the District of Colorado. For opinion below, see 196 Fed. 714. Thomas, Bryant, Nye & Malburn, of Denver, Colo., for plaintiff in error. William V. Hodges and Mason A. Lewis, both of Denver, Colo., for defendant in error.

PER CURIAM. Dismissed per stipulation, each party to pay its own costs.

RECTOR et al. v. ALCORN et al. (Circuit Court of Appeals, Fifth Circuit. February 10, 1914.) No. 2449. Appeal from the District Court of the United States for the Northern District of Mississippi; Henry C. Niles, Judge. Suit by E. W. Rector and another, surviving executors of Amelia W. Alcorn, and others, against May Yates Alcorn and another. From a decree dismissing the bill, complainants appeal. Affirmed. See, also, 204 Fed. 748, 123 C. C. A. 125. William Grant and W. B. Grant, both of New Orleans, La., and J. W. Cutrer, of Clarksdale, Miss. (Cutrer & Johnston, of Clarksdale, Miss., on the brief), for appellants. Calvin Perkins and J. H. Watson, both of Memphis, Tenn. (Watson & Perkins, of Memphis, Tenn., on the brief), for appellees. Before PARDEE and SHELBY, Circuit Judges, and GRUBB, District Judge.

PER CURIAM. The controlling question in this case is one of fact—whether or not James Alcorn, now deceased, secured from his mother, Mrs. Amelia W. Alcorn, by false and fraudulent representations or undue influence, a deed dated October 14, 1895, conveying to him valuable real estate. The evidence shows that, in the negotiations that led to the execution of the deed, and in its execution, Mrs. Alcorn had the advice of counsel, and that her daughters had full knowledge of her intention and act. It also appears that there was long acquiescence in an approval of the conveyance by Mrs. Alcorn and her family. In a suit filed by her in a chancery court of Mississippi after the death of her son, James Alcorn, she asserted by the sworn bill and an affidavit filed in that cause the validity of the deed which is now assailed, and obtained thereby a temporary injunction against the widow and child of her son, James Alcorn. We have carefully examined all the evidence, but will not discuss it. It is sufficient to say that we concur in the conclusion of the District Judge, shown by his opinion in the record, that the evidence falls far short of being sufficient to authorize the cancellation of the deed. The decree dismissing the bill is affirmed.

SOUTH ATLANTIC S. S. LINE v. STEAMSHIP CO. SARK. (Circuit Court of Appeals, Fifth Circuit. February 3, 1914.) No. 2479. Appeal from District Court of the United States for the Eastern District of Louisiana; Rufus E. Foster, Judge. John D. Grace, of New Orleans, La., for appellant. George Denegre, of New Orleans, La., J. P. Blair, of New York City, and Victor Leovy, of New Orleans, La., for appellee. Before PARDEE and SHELBY, Circuit Judges, and BURNS, District Judge.

PER CURIAM. We concur with the District Judge in his opinion and decree in this case in finding the charterers liable for the wrongful statements contained in the bills of lading for which the owners of the Sark were held liable. See Field Line (Cardiff) v. South Atlantic Steamship Co., 201 Fed. 301, 119 C. C. A. 539 et seq. The decree appealed from is affirmed.

SOUTHWESTERN ENGINEERING CO. v. ÆTNA LIFE INS. CO. et al. (Circuit Court of Appeals, Eighth Circuit. June 30, 1913.) No. 3877. Appeal from the District Court of the United States, for the Eastern District of Oklahoma. Roach & Bradley, of Muskogee, Okl., for appellant. Martin,

Bush & Murry, of Tulsa, Okl., A. J. McCarthy, of Oklahoma City, Okl., and Charles A. Loomis, of Kansas City, Mo., for appellees.

PER CURIAM. Dismissed, with costs, for want of jurisdiction, pursuant to stipulation of parties, on opinion in B–R Electric & Telephone Manufacturing Co. et al. v. Ætna Life Insurance Company et al., 206 Fed. 885, 124 C. C. A. 545.

SOUTHWESTERN ENGINEERING CO. v. SOUTHWESTERN ENGINEERING CO. et al. (Circuit Court of Appeals, Eighth Circuit. June 30, 1913.) No. 128. Petition to Revise Order of the District Court of the United States for the Eastern District of Oklahoma. Charles A. Loomis, of Kansas City, Mo., for petitioner. Martin, Bush & Murry, of Tulsa, Okl., and A. J. McCarthy, of Oklahoma City, Okl., for respondents.

PER CURIAM. Order of District Court vacated and set aside, with directions for further proceedings, etc., per stipulation of parties on opinion in B–R Electric & Telephone Manufacturing Co. et al. v. Southwestern Engineering Co. et al., 206 Fed. 885, 124 C. C. A. 545.

STRATTON'S INDEPENDENCE v. HOWBERT. (Circuit Court of Appeals, Eighth Circuit. January 29, 1914.) No. 3862. In Error to the District Court of the United States for the District of Colorado. For opinion below, see 207 Fed. 419. William V. Hodges and Mason A. Lewis, both of Denver, Colo., for plaintiff in error. Harry E. Kelley, U. S. Atty., and Ralph Hartzell, Asst. U. S. Atty., both of Denver, Colo., for defendant in error.

PER CURIAM. Affirmed, on mandate of Supreme Court (231 U. S. 399, 34 Sup. Ct. 136, 58 L. Ed. ——) in response to questions certified.

WILLIAMSON v. OSENTON. (Circuit Court of Appeals, Fourth Circuit, June 7, 1913.) No. 1167. In Error to the District Court of the United States for the Southern District of West Virginia, at Charleston. W. E. Chilton and Chilton, MacCorkle & Chilton, all of Charleston, W. Va., and S. W. Walker, of Martinsburg, W. Va., for plaintiff in error. R. G. Linn, of Glenville, W. Va., C. Beverley Broun, and C. Hall, both of Charleston, W. Va., for defendant in error.

PER CURIAM. Certified to the Supreme Court on a question or proposition of law.

WOOD et al. v. UNITED STATES. (Circuit Court of Appeals, Fourth Circuit. April 19, 1913.) No. 1129. In Error to the District Court of the United States for the Eastern District of Virginia, at Norfolk. For opinion on affirmance of judgment, see 204 Fed. 55, 122 C. C. A. 369. George A. Hanson, of Richmond, Va., for plaintiffs in error. Robert H. Talley, Asst. U. S. Atty., of Richmond, Va.

PER CURIAM. Upon petition of Clarence B. Wood, a writ of error is allowed him to the Supreme Court.

ROBERTS v. KENDRICK.

(Circuit Court of Appeals, Fifth Circuit. April 15, 1914.)

No. 2598.

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

On motion to recall mandate and vacate order.

For former opinion, see 211 Fed. 970.

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

PER CURIAM. At a former day of this term the following order was entered:

"By the Court: The transcript shows that judgment was rendered on May 10, 1913, a motion for a new trial was overruled and refused July 17, 1913, and thereafter a writ of error was allowed on November 8, 1913, as follows: 'On consideration whereof, the court does allow and grant the writ of error, upon the defendant giving bond and security in the sum of $7,000; and upon the giving of said bond in said sum when it is approved by the court, the judgment herein rendered in favor of the plaintiff against the defendant shall be suspended, and supersedeas will be granted until the determination of said writ of error by the United States Circuit Court of Appeals for the Fifth Circuit.' The defendant in error on due notice moves to dissolve the supersedeas so granted, on the ground that the writ of error was not sued out and lodged in the court below within 60 days from the date of the judgment, and we are satisfied that the same should be granted upon the authority of Kitchen v. Randolph, 93 U. S. 86, 92, 23 L. Ed. 810; Sage v. Central R. R. Co., 93 U. S. 417, 23 L. Ed. 933; Title Guaranty Co. v. United States, 222 U. S. 401, 32 Sup. Ct. 168, 56 L. Ed. 248. It is therefore ordered and adjudged that the supersedeas granted in this case on November 8, 1913, be and the same is hereby vacated and annulled. Mandate to that effect may issue."

The plaintiff in error on due notice now moves the court to recall the mandate and vacate the foregoing order on the ground that the counsel for the defendant in error consented to the supersedeas and thereby and in further agreeing to the amount of the bond therefor the defendant in error was estopped from moving in this court to dismiss the supersedeas. Affidavits in support and against the present motion are submitted. It appears therefrom that the consent claimed was verbal and was given after the 60 days had elapsed, and besides affidavit of counsel for defendant in error denies the same.

Under the authorities cited in the order vacating the supersedeas after the lapse of 60 days the judge of the District Court was without authority to grant the supersedeas. If one was granted by consent of parties, it was not a legal supersedeas, and the bond given might be good as a common-law obligation; but as a legal bond and against the surety it would not be good, except as a cost bond. See Steele v. Crider (C. C.) 61 Fed. 484. On the showing made on this hearing, we find neither the consent claimed nor any estoppel.

Motion denied.

END OF CASES IN VOL. 211