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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

JUNE—JULY, 1914

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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.
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Hon. EDGAR ALDRICH, District Judge, New Hampshire.....Littleton, N. H.
Hon. ARTHUR L. BROWN, District Judge, Rhode Island.....Providence, R. I.

SECOND CIRCUIT

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Hon. JULIUS M. MAYER, District Judge, S. D. New York.....New York, N. Y.
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Hon. JAMES L. MARTIN, District Judge, Vermont.....Brattleboro, Vt.

THIRD CIRCUIT

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Hon. JOSEPH BUFFINGTON, Circuit Judge.....Pittsburg, Pa.
Hon. JOHN B. McPHERSON, Circuit Judge.....Philadelphia, Pa.
Hon. EDWARD G. BRADFORD, District Judge, Delaware.....Wilmington, Del.
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Hon. JOHN RELLSTAB, District Judge, New Jersey.....Trenton, N. J.
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Hon. CHARLES P. ORR, District Judge, W. D. Pennsylvania.....Pittsburg, Pa.

[1] Resigned June 1, 1914.

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Hon. CLARENCE W. SESSIONS, District Judge, W. D. Michigan.....Muskegon, Mich.
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Hon. JOHN E. McCALL, District Judge, W. D. Tennessee.....Memphis, Tenn.

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Hon. FRANCIS E. BAKER, Circuit Judge.....Goshen, Ind.
Hon. WILLIAM H. SEAMAN, Circuit Judge.....Sheboygan, Wis.
Hon. CHRISTIAN C. KOHLSAAT, Circuit Judge.....Chicago, Ill.

[2] Resigned May 1, 1914.

[3] Died July 12, 1914.

Hon. JULIAN W. MACK, Circuit Judge.....Chicago, Ill.
Hon. KENESAW M. LANDIS, District Judge, N. D. Illinois.....Chicago, Ill.
Hon. GEORGE A. CARPENTER, District Judge, N. D. Illinois.....Chicago, Ill.
Hon. FRANCIS M. WRIGHT, District Judge, E. D. Illinois.....Urbana, Ill.
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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.

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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

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Hon. ERSKINE M. ROSS, Circuit Judge.....Los Angeles, Cal.
Hon. WM. W. MORROW, Circuit Judge.....San Francisco, Cal.
Hon. WM. H. HUNT, Circuit Judge.....Washington, D. C.
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.
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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.

*

CASES REPORTED

CASES ON REHEARING

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

THIRD CIRCUIT.

Bernz v. Schaefer.....211 F. 973
Rehearing denied June 6, 1914.

EIGHTH CIRCUIT.

City of Harper, Kan., v. Daniels.....211 F. 57
Rehearing denied Aug. 3, 1914.

Turner v. Moore.....211 F. 466
Rehearing denied Aug. 3, 1914.

NINTH CIRCUIT.

Arctic Lumber Co. v. Borden.....211 F. 50
Rehearing denied June 1, 1914.

CASES

ARGUED AND DETERMINED

IN THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE DISTRICT COURTS

COOMER v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. March 28, 1914.)

No. 4050.

1. CRIMINAL LAW (§ 1116*)—QUESTIONS FOR REVIEW—SUFFICIENCY OF INDICTMENT.
   An indictment not demurrable on its face does not become so by the addition of a bill of particulars, since the bill of particulars is no part of the record.
   [Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2924; Dec. Dig. § 1116.*]

2. POST OFFICE (§ 48*)—OFFENSES AGAINST POSTAL LAWS—INDICTMENT.
   It was not necessary for an indictment for mailing newspapers containing obscene matter to charge that the newspapers in which the objectionable article appeared were obscene.
   [Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 67–80; Dec. Dig. § 48.*]

3. POST OFFICE (§ 48*)—OFFENSES AGAINST POSTAL LAWS—INDICTMENT.
   The omission from an indictment for mailing obscene matter, which the indictment alleges is not proper to be spread at length upon the records of the court, does not render the indictment demurrable, where the offense is so described as to reasonably inform defendant of the nature of the crime charged, though the entire article claimed to be obscene should be set out at length either in the indictment or by bill of particulars, if requested, whenever defendant is liable to be surprised by evidence for which he is unprepared.
   [Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 67–80; Dec. Dig. § 48.*]

4. POST OFFICE (§ 31*)—STATUTORY PROVISIONS—OFFENSES.
   Criminal Code, § 211 (Act March 4, 1909, c. 321, 35 Stat. 1129 [U. S. Comp. St. Supp. 1911, p. 1651]), making obscene, lewd, lascivious, or filthy matter nonmailable and prescribing the punishment for depositing such matter for mailing or delivery, is a valid exercise of the power to establish a postal system.
   [Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 50, 52; Dec. Dig. § 31.*]

5. POST OFFICE (§ 31*)—STATUTORY PROVISIONS—OFFENSES.
   Criminal Code, § 211 (Act March 4, 1909, c. 321, 35 Stat. 1129 [U. S. Comp. St. Supp. 1911, p. 1651]), making certain matter nonmailable and providing that it shall not be conveyed in the mails or delivered from any post office or by any letter carrier, and providing that whoever shall

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

knowingly deposit for mailing or delivery anything thereby declared to be nonmailable shall be punished by fine or imprisonment, applies only to the depositing of such matter in the mails and is not invalid as prohibiting the deposit of such matter in private depositories or other places over which Congress has no control.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 50, 52; Dec. Dig. § 31.*]

6. POST OFFICE (§ 31*)—STATUTORY PROVISIONS—OFFENSES.

Criminal Code, § 211 (Act March 4, 1909, c. 321, 35 Stat. 1129 [U. S. Comp. St. Supp. 1911, p. 1651]), making certain matter nonmailable and forbidding its conveyance in the mails or delivery from any post office or by any carrier and prescribing a penalty for the deposit of such matter for mailing or delivery, is not a mere direction to the post office officials, and violations thereof are punishable as crimes in view of the enacting clause, which provides that the penal laws are thereby codified, etc., and section 335, providing that all offenses punishable by death or imprisonment for a term exceeding one year shall be deemed felonies and all other offenses misdemeanors.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 50, 52; Dec. Dig. § 31.*]

7. CONSTITUTIONAL LAW (§§ 199, 250, 258*) — STATUTORY PROVISIONS — OFFENSES.

Criminal Code, § 211 (Act March 4, 1911, c. 321, 35 Stat. 1129 [U. S. Comp. St. Supp. 1911, p. 1651]), making obscene matter nonmailable and prescribing the punishment for depositing it for mailing or delivery, is not invalid as failing to provide any test of obscenity or of guilt, thereby denying due process of law, the equal protection of the laws, and the guaranty against ex post facto laws.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 551–569, 576–580, 582, 583, 711–713, 748; Dec. Dig. §§ 199, 250, 258.*]

Nonmailable matter, see notes to Timmons v. United States, 30 C. C. A. 79; McCarthy v. United States, 110 C. C. A. 548.]

In Error to the District Court of the United States for the Western District of Oklahoma; John H. Cotteral, Judge.

Hobart Coomer was convicted of an offense, and he brings error. Affirmed.

Patrick S. Nagle, of Kingfisher, Okl., for plaintiff in error.

Isaac D. Taylor, U. S. Atty., of Guthrie, Okl. (W. B. Herod, Asst. U. S. Atty., of Guthrie, Okl., on the brief), for the United States.

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

RINER, District Judge. The plaintiff in error was indicted for mailing newspapers containing obscene matter. The indictment contained two counts. The first count, omitting the formal parts, charged that the plaintiff in error, on the 12th day of June, 1912, in the county of Beckam, in the Western district of Oklahoma—

"then and there being, did then and there unlawfully, knowingly, feloniously and willfully deposit, and cause to be deposited in the post office of the United States, at Sayre, in the said county and district aforesaid, there, for mailing and conveyance through the United States mail and delivery from said post office certain printed newspapers, to wit, a large number of printed newspapers, the same being an issue of the Social Democrat, the number of which

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

is unknown to the grand jurors, then and there addressed to divers persons respectively whose names are to the grand jurors unknown, and each of which said newspapers then and there contained nonmailable matter, that is to say, certain obscene, lewd, lascivious, and filthy matter, language, and articles but which said articles, language, and printed matter is too obscene, lewd, lascivious, and filthy to be here set out and made a part of the records of this honorable court, but which said article and printed matter began as follows: 'Free Love, Edition of Social Democrat, July 10th, Order a Bundle Now. $2.00 per Hundred. Advertisers get your copy in Now. 5000 copies of this edition will be circulated. The master class has always taught, and paid their hireling teachers, preachers, authors, editors and other able idiots to teach, that woman is merely a multiplication table for the human species,' and ended as follows, to wit: 'We are going to tell you in the Free Love Edition, why the Socialists believe women are human beings. Watch for it, and read it when you get it.' Which said printed newspapers, articles and obscene, lascivious, lewd and filthy language and matter therein contained so as aforesaid, was by him the said Hobart Coomer, so deposited and caused to be deposited with the full knowledge upon his part of the printing, article and matter, aforesaid, in the said newspapers and the import thereof: Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States."

The second count is identical with the first, except that in this count the plaintiff in error is charged with mailing a different issue of the same newspaper containing the article described in the first count.

The indictment was returned by the grand jury on the 18th of January, 1913, and on the 27th day of the same month the plaintiff in error filed a demurrer to the indictment which was argued and by the court overruled. He thereupon entered a plea of not guilty and moved the court to require the government to furnish him with a bill of particulars containing a full and complete copy of the article charged in the indictment to be nonmailable matter. This was done, and on the 10th day of May, 1913, he applied for a rehearing on his demurrer to the indictment, which was granted. The court, then having before it the indictment and bill of particulars containing the printed article referred to in the indictment, after argument again overruled the demurrer, and the plaintiff in error was allowed an exception. Thereafter, and on the 19th day of May, plaintiff in error appeared in court in person and by counsel and withdrew the plea of not guilty which he had theretofore entered, entered a plea of guilty to each count of the indictment, and the court thereupon sentenced him to imprisonment in the Oklahoma county jail for the term of 60 days and to pay a fine of $100 on each count of the indictment; the sentences of imprisonment to run concurrently.

The only error assigned is "that the trial court erred in overruling the demurrer to the indictment."

By a stipulation of the parties the sole question submitted to this court for determination is whether the facts stated in the indictment, when considered in connection with the article set out in the bill of particulars, constituted an offense against the laws of the United States. In other words, was the article complained of nonmailable matter?

[1] An indictment not demurrable on its face does not become so by the addition of a bill of particulars for the reason that the bill of particulars is no part of the record. Dunlop v. United States, 165 U. S.

486, 17 Sup. Ct. 375, 41 L. Ed. 799. However, in view of the stipulation of the parties, we have considered the questions raised by counsel for plaintiff in error in his brief.

[2, 3] The first objection to the indictment discussed by counsel for plaintiff in error in his brief is that it does not charge that the newspaper in which the objectionable article appeared was obscene. This objection is without merit, as has been repeatedly decided by this court. In the case of Demolli v. United States, 144 Fed. 363, 75 C. C. A. 365, 6 L. R. A. (N. S.) 424, 7 Ann. Cas. 121, Mr. Justice Van Devanter, then Circuit Judge, speaking for this court, said:

"It is not essential to the commission of the offense prescribed by the statute that the entire contents of the newspaper, or other parcel, deposited in the mail, be objectionable in character."

It is quite sufficient if it contain an obscene, lascivious, lewd, or filthy article. United States v. Bennett, 16 Blatchf. 338, Fed. Cas. No. 14,571; Burton v. United States, 142 Fed. 57, 73 C. C. A. 243; Rosen v. United States, 161 U. S. 29, 16 Sup. Ct. 434, 480, 40 L. Ed. 606; Knowles v. United States, 170 Fed. 409, 99 C. C. A. 579. In Burton v. United States, supra, this court said:

"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."

Undoubtedly the entire article claimed to be obscene should be set out at length, either in the indictment or by a bill of particulars, if requested, as was done in this case, whenever the defendant is liable to be surprised by evidence for which he is unprepared. But the omission from the indictment of obscene matter, alleged as not proper to be spread at length upon the records of the court, where the offense is so described as to reasonably inform the defendant of the nature of the crime charged against him, does not render the indictment bad on demurrer. Rosen v. United States, 161 U. S. 29, 16 Sup. Ct. 434, 480, 40 L. Ed. 606.

It is next contended that the article complained of is not obscene, lewd, lascivious, and filthy within the meaning of those words as used in section 211 of the Criminal Code (Act March 4, 1909, c. 321, 35 Stat. 1129 [U. S. Comp. St. Supp. 1911, p. 1651]). This section of the Code differs from section 3893 of the Compiled Statutes (U. S. Comp. St. 1901, p. 2658) in that it adds, after the word "lascivious," the words "and every filthy book, pamphlet," etc. Whether the addition of these words really makes any change and has the effect of enlarging the scope of the statute it is not necessary for us to decide, for from our examination of the article, which is set out at length in the bill of particulars, we are clearly of the opinion that, applying to it the test heretofore applied by the courts in such cases, it falls within the prohibition of the statute. Rosen v. United States, 161 U. S. 29, 16 Sup. Ct. 434, 480, 40 L. Ed. 606; Rinker v. United States, 151 Fed. 760, 81 C. C. A. 379; Burton v. United States, 142 Fed. 57, 73 C. C. A. 243; United States v. Harmon (D. C.) 45 Fed. 414; Knowles v. United States, 170 Fed. 409, 95 C. C. A. 579.

[4] It is next insisted that the statute is not a law of the United States because not included within the power to establish a postal system. This question has been so often decided contrary to the contention here made that we may well pass it with the citation of a few of the many cases where the courts have had occasion to consider it. Ex parte Jackson, 96 U. S. 727, 24 L. Ed. 877; In re Rapier, 143 U. S. 110, 12 Sup. Ct. 374, 36 L. Ed. 93; United States v. Chase, 135 U. S. 255, 10 Sup. Ct. 756, 34 L. Ed. 117; Knowles v. United States, 170 Fed. 409, 95 C. C. A. 579; United States v. Harmon (D. C.) 45 Fed. 414.

[5] Again it is said that the statute is void for including nonpostal areas. And it is argued because the statute provides "and every person who shall deposit or cause to be deposited for mailing anything declared by this section to be nonmailable shall be fined," etc., without designating an authorized depository for the mail, that it attempts to make it an offense to deposit nonmailable matter anywhere, and might include private depositories or other places not related to the postal system over which Congress has no control. The statute makes certain matter nonmailable and provides that it shall not be conveyed in the mails or delivered from any post office or by any letter carrier. It further provides that whosoever shall knowingly deposit or cause to be deposited for mailing or delivery anything declared by this section to be nonmailable shall be punished as provided in the statute. Clearly the offense contemplated is the placing or causing to be placed prohibited matter in the mail. The language is, "deposit or cause to be deposited for mailing or delivery." The legislation is directed to matters over which Congress had full and complete jurisdiction, and there can be no doubt we think as to the validity of the statute.

[6] It is further suggested that even if Congress had authority it has not been exercised, because no statute prohibits the mailing of nonmailable matter. It is insisted that the statute, if anything, is a mere direction to the post office officials, and does not make a violation thereof either a felony or a misdemeanor. In the preparation of his brief counsel must have overlooked not only the enacting clause but also the provisions of section 335 of the Code. This section provides that all offenses which may be punished by imprisonment for more than one year shall be deemed felonies and all other offenses shall be deemed misdemeanors.

[7] It is also said that because of the uncertainty in the test of obscenity there is a total absence of criteria of guilt, and therefore that the statute cannot constitute due process of law; that the equality required thereby is violated; that the law is violative of the constitutional guaranty against ex post facto laws; and that the defendant is not informed of the nature of the accusation against him. Section 211 of the Criminal Code is, with a few slight changes, a re-enactment of section 3893 of the Compiled Statutes. The only change that could affect the construction heretofore placed upon section 3893 by the courts is the addition of the words "and every filthy book, pamphlet," etc. These words certainly do not tend to narrow the scope of the statute. Without discussing them separately, it is sufficient to say

that all of the questions suggested by counsel affecting the constitutionality of this section of the Code have been before the courts in construing section 3893, and by an almost unbroken line of authority have been held to be without merit.

The judgment of the District Court is affirmed.

MIDDLETON v. P. SANFORD ROSS, Inc.

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

No. 2486.

1. MASTER AND SERVANT (§ 88*)—RELATION OF PARTIES—SERVANT OF INDEPENDENT CONTRACTOR.

Where defendant had employed R. & Sons to install an engine on a dredge defendant was reconstructing, a servant of R. & Sons, who was injured while on defendant's premises just prior to the commencement of the installation of the engine by the negligence of defendant's servants, could not be regarded as a servant of defendant, but would be held to have been on the premises as an invitee to whom defendant owed a duty of ordinary care.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 119, 120; Dec. Dig. § 88.*

Who are independent contractors, see note to Atlantic Transport Co. v. Coneys, 28 C. C. A. 392.]

2. NEGLIGENCE (§ 32*)—DANGEROUS PREMISES—INVITATION OF OWNER.

An invitation of the owner or occupant of premises is implied by law where the person goes on the premises for the benefit, real or supposed, of the owner or occupant, or in a matter of mutual interest, or in the usual course of business, or for the performance of some duty.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 42–44; Dec. Dig. § 32.*]

3. NEGLIGENCE (§ 32*)—DANGEROUS PREMISES—INJURY TO INVITEE—SERVANTS OF INDEPENDENT CONTRACTOR.

The rule that the owner or occupant of premises is bound to exercise reasonable care to keep the premises in safe condition so as not to injure invitees is applicable to servants of independent contractors.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 42–44; Dec. Dig. § 32.*]

In Error to the District Court of the United States for the Southern District of Georgia; Emory Speer, Judge.

Action by Mrs. Annie Middleton against P. Sanford Ross, Incorporated. Judgment (202 Fed. 799) for defendant, and plaintiff brings error. Reversed.

The material allegations of the first count of the petition are as follows:

That P. Sanford Ross, Incorporated, is a New Jersey corporation, having an agent, office, and place of business in Chatham county, Ga.; that the petitioner is the widow of Edwin Middleton, of Chatham county, Ga., lately deceased, and claims damages from the said P. Sanford Ross, Incorporated (hereinafter called the defendant), by reason of the homicide of her husband, in the sum of $25,000; that the said defendant is engaged in the business of owning and operating dredges and other boats, and at the times hereinafter named was engaged in said business. Defendant, on the 22d day of March, 1912, was engaged in rebuilding one of its dredge boats which had been dam-

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

aged by fire, said dredge being rebuilt at a wharf in Savannah river in said county and state, near the foot of Barnard street, and the work thereon being done by and under the supervision of the defendant company.

Messrs. John Rourke & Sons, a firm of machinists, had been employed by the defendant to install an engine in said dredge boat. Petitioner's husband was in the employ of said John Rourke & Sons in the capacity of foreman, and was to have superintended the installation of said engine in said dredge after same was placed in position, coupling and installing said engine and adjusting its necessary parts. The wooden deck of said dredge was being erected and the necessary space left thereon in the forward portion thereof for the installation of said engine in the "hold" of the dredge. Said engine had been placed upon temporary beams, it being intended to take out said temporary beams and permanently install said engine on its bed. In order to "house" over said dredge and to complete the upper structure thereof, upright posts were installed by defendant along the side of said dredge on its deck at intervals of about 20 feet apart. These uprights are about 20 feet in length. The deck of said dredge is about 30 feet wide. Crosswise of said dredge, and extending from the upright posts on each side thereof, are laid crossbeams or timbers, intended to be securely fastened, and thus making the framework of the upper portion of said dredge. The framework is known as the "hog frame." Two of said upright posts at the time hereinbefore stated were erected about 20 feet aft of the place where said engines were being installed. A crossbeam about 30 feet in length and about 12x12 in size, had been placed on the top of said uprights, extending crosswise of the deck. This was intended to be permanently placed and bolted. On the wharf was located a steam-hoisting engine with derrick and fall attached, the derrick boom being movable and swinging over the dredge.

E. D. Van Winkle was the superintendent of the defendant in charge of the work of reconstructing said dredge, and was its alter ego at the time and place herein referred to. During the course of said work and on the date aforesaid, it became necessary to remove a stick of timber upon which the engine was resting. This timber was about 14 inches by 14 inches and 25 feet in length. In order to accomplish this, a wire cable was run from said derrick boom and fastened around the timber underneath said engine. Said cable was not fastened in the middle underneath said engine. Said cable was not fastened in the middle of said timber. It was not cross-tied nor balanced. The result was that when said timber was hauled by said cable and brought above the deck, one end sagged down and the lighter end thereof was projected upward. Some of the employés of the defendant caught hold of the lighter end of said stick of timber while it was being moved. As the timber was being hauled upward it got beyond the control of said men who were holding the lighter end thereof, and the heavy end sagged downward, jerking the other end from the control of said men. As said stick of timber thus jerked loose, it struck the crossbeam above described, resting on the two upright posts of the "hog frame," and knocked the same from its position, throwing it down upon the deck of said dredge with great force and violence.

Petitioner's husband was not engaged in the work of moving said stick of timber, nor did his duties require that he should take any part therein, and none of the employés of John Rourke & Sons was engaged in such work, the same being done entirely by the defendant, its servants and employés. When the work of removing said timber commenced, petitioner's husband had walked aft of the place where said work was being performed, and was standing at the side of the dredge, about 15 or 20 feet away, in what was apparently a safe place. The place where petitioner's husband stood was a safe distance away from said work and not in the course of line of work. It was on the wharf or starboard side of said vessel, by the upright posts of said "hog frame." Petitioner's husband had nothing to do with the construction or placing of said crossbeams, or in the removal of said beam from beneath the engine. While petitioner's husband was thus standing in a place of apparent safety, without warning of any kind, the crossbeam, which should have been securely fastened and bolted in position, was struck by the stick of timber being raised out of said hole of said dredge, as described in the preceding

paragraph, and fell with great force and violence, striking petitioner's husband upon the head and inflicting injuries from which he died within a short time.

At the time said injuries were received by petitioner's husband, he was in a place where he had a right to be. He did not contribute or consent to the said injuries, and could not, by the exercise of ordinary care, have avoided the same. Defendant knew of the unsafe and insecure position of said crossbeam; by the exercise of ordinary care it could have so known.

Defendant was negligent at the time and place aforesaid:

(a) In failing to provide a safe place to work in and aboard said dredge, and at the place where petitioner's husband was killed.

(b) In failing to securely fasten both ends of said crossbeam resting upon said uprights, as it should have done prior to the removal of said timber.

(c) In failing to warn petitioner's husband of the failure on its part to securely fasten and bolt the said ends of said crossbeams resting on the upright posts, and of its unsafe and insecure position.

(d) In allowing said crossbeams to lie on the top of said upright posts without fastening or support of any kind whatever so as to give notice or warning of its unsafe position and condition.

(e) In negligently and carelessly removing said stick of timber from beneath said engine bed.

(f) In failing to exercise proper care in the removal of said stick of timber by fastening said steel cable in the middle of said timber and thus equalizing its weight.

(g) In failing to cross-tie or otherwise securely fasten said cable around said stick of timber so as to prevent the slipping thereof.

(h) In failing to properly provide a safe means of removal of said stick of timber from beneath said engine bed.

(i) In failing to provide a safe method of controlling the weight of said stick of timber after it was brought above the deck of said dredge, and in failing to adopt proper precautions to prevent its striking said crossbeam.

(j) In negligently and carelessly allowing said stick of timber to strike said crossbeam.

By reason of the killing of petitioner's husband through the carelessness and negligence of the defendant, she has been damaged in the sum of $25,000. Whereupon your petitioner prays that she may have judgment against said defendant for said sum of $25,000.

The second count of the petition is substantially the same as the first count, except that it is averred, as the proximate cause of the injury, that the defendant had negligently placed a guy rope of the derrick beneath the crossbeam, so that when the timber was raised, the guy rope became taut and knocked the crossbeam down, causing the death of petitioner's husband.

The defendant filed a general demurrer, that "the petition has not set forth any legal cause of action against this defendant." The court below sustained the demurrer.

Wm. W. Osborne, Alexander A. Lawrence, and Edmund H. Abrahams, all of Savannah, Ga., for plaintiff in error.

William Garrard, of Savannah, Ga. (Garrard & Gazan, of Savannah, Ga., on the brief), for defendant in error.

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

SHELBY, Circuit Judge (after stating the facts as above). This is an action under section 4424 of the Georgia Code, brought by Mrs. Annie Middleton, a citizen of Georgia, against P. Sanford Ross, Incorporated, a New Jersey corporation, for damages for negligently causing the death of Edwin Middleton, her husband. The court below sus-

tained a general demurrer to the petition (202 Fed. 799), and that ruling is assigned as error.

The decisions cited by the trial court (Armour v. Hahn, 111 U. S. 313, 4 Sup. Ct. 433, 28 L. Ed. 440, and Kreigh v. Westinghouse, Church, Kerr & Co., 152 Fed. 120, 81 C. C. A. 338, 11 L. R. A. [N. S.] 684), are suits by a servant against his master for injuries caused by the alleged negligence of the master—cases which deal with rules applicable to the relation of master and servant. The instant case is not one that involves the relation of master and servant; that is, the relation of master and servant did not exist between the defendant corporation and the plaintiff's deceased husband. If it appears that Middleton, the decedent, was not on the premises as the servant of the defendant, and, in fact, was not the servant of the defendant—that the relation of master and servant did not exist between them—it becomes obvious that the authorities relied on to sustain the decision below are not controlling.

[1] It is alleged in the petition that the defendant corporation is engaged in the business of owning and operating dredges and other boats; that on March 22, 1912, it was engaged at a wharf in Savannah river in rebuilding one of its dredge boats that had been damaged by fire; that E. D. Van Winkle was the superintendent of the defendant in charge of the work, and "was its alter ego at the time and place herein referred to." John Rourke & Sons, a firm of machinists, were employed by the defendant to install an engine on the dredge boat. Edwin Middleton, plaintiff's deceased husband, was in the employment of John Rourke & Sons as their foreman, and was to have superintended the installation of the engine in the dredge after it was placed in position. He was not engaged in the work at the time of the accident, and none of the employés of John Rourke & Sons was then engaged in such work. The work out of which the accident occurred "was being done entirely by the defendant corporation, its servants and employés." So it is affirmatively alleged that Middleton, who was killed, was not in the employment of the defendant, but that he was in the employment of John Rourke & Sons; that is, he was the servant of John Rourke & Sons, independent contractors employed to do a specific piece of work; and the servant of such independent contractors was not the servant of the defendant. 1 Labatt's Master & Servant (2d Ed.) § 34; Otis Steel Co. v. Wingle, 152 Fed. 914, 82 C. C. A. 62. It also appears that the time had not arrived for John Rourke & Sons to begin their work of the installation of the engine. The defendant was, by moving timbers and machinery, getting the dredge ready for the engine to be installed; and, when it was ready, John Rourke & Sons, acting by their servant and foreman, Middleton, were to begin their work of installation. The decedent was undoubtedly on the premises lawfully —he was there to begin the work of installation of the engine when the defendant was ready for him to begin. Clearly the plaintiff's right of action cannot be defeated on the theory that her husband was the servant of the defendant, and that therefore those in charge of the dredge and engaged in the work, and guilty of the alleged negligence, were his fellow servants. Middleton, the decedent, was the servant

of an independent contractor, and not the servant of the defendant, the employer of the independent contractor. And he was on the premises, if not by express, certainly by implied, invitation, for he was there to install the engine when the dredge was ready for that work to be done.

The acts of negligence charged are the acts of persons employed and acting for the defendant corporation. Middleton, the decedent, was not participating in the work of getting the dredge ready for the installation of the engine, nor were his employers, John Rourke & Sons. Middleton, the decedent, was a stranger to the work then being done. His death, it is charged, was caused by the negligence of the defendant's servants.

"One who employs a servant to do his work is answerable to strangers for the negligent acts or omissions of the servant committed in the course of the service."

This rule, though modern, is now elementary. Standard Oil Co. v. Anderson, 212 U. S. 215, 220, 29 Sup. Ct. 252, 53 L. Ed. 480.

[2, 3] If the averments are not sufficient to show that Middleton, the decedent, was employed to be on the premises, they are certainly sufficient to show that he was there by invitation. Invitation of the owner or occupant is implied by law where the person goes on the premises for the benefit, real or supposed, of the owner or occupant, or in a matter of mutual interest, or in the usual course of business, or for the performance of some duty. Shearman & Redfield on Negligence (1913 Ed.) § 706; 1 Thompson on Negligence, §§ 968–972; West India & P. S. S. Co. v. Weibel, 113 Fed. 169, 51 C. C. A. 116. And the owner or person in possession of the premises owes it as a duty to those who come on the premises by invitation, express or implied, to exercise reasonable or ordinary care to keep and maintain his premises in safe condition. Indermaur v. Dames, 1 L. R., C. P. 274; Huey v. Atlanta, 8 Ga. App. 597, 70 S. E. 71; Butler v. Lewman, 115 Ga. 752, 758, 42 S. E. 98; The Montrose (D. C.) 179 Fed. 1000; Pioneer S. S. Co. v. McCann, 170 Fed. 873, 96 C. C. A. 49. And he owes such duty to independent contractors and their servants. 1 Thompson on Negligence, § 979.

We cannot, of course, foresee how the case may appear from the facts upon a trial on the merits, but we are of the opinion that the petition is not subject to a general demurrer.

Reversed.

NORDDEUTSCHER LLOYD v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. March 10, 1914.)

No. 116.

1. ALIENS (§ 59*)—PROSECUTION UNDER IMMIGRATION LAWS—BURDEN OF PROOF.

In a prosecution under Immigration Law (Act Feb. 20, 1907, c. 1134, 34 Stat. 904 [U. S. Comp. St. Supp. 1911, p. 510]) § 19, requiring aliens brought to this country in violation of law to be sent back at the expense of the owners of the vessel on which they came, and making it a misde-

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

meanor to make any charge for their return, the burden is on the government to prove that the aliens involved were brought to this country in violation of law and were ordered deported by competent authority.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 115, 116; Dec. Dig. § 59.*]

2. ALIENS (§ 57*)—OFFENSES AGAINST IMMIGRATION LAWS—ACTS CONSTITUTING.

Under Immigration Law (Act Feb. 20, 1907, c. 1134, 34 Stat. 906 [U. S. Comp. St. Supp. 1911, p. 515]) § 26, providing that any alien liable to exclusion because likely to become a public charge, or because of a physical disability other than tuberculosis or a loathsome or dangerous contagious disease, may be admitted in the discretion of the Secretary of Commerce and Labor upon the giving of a bond, the selling of return tickets to aliens who, though found by a board of special inquiry to be incapable of self-support and likely to become a public charge, were admitted by the Secretary of Commerce and Labor under bond, was not a violation of section 19, prohibiting the making of any charge for the return of aliens brought to this country in violation of law.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 114; Dec. Dig. § 57.*]

3. CRIMINAL LAW (§ 322*)—PRESUMPTIONS—REGULARITY OF OFFICIAL ACTS.

Though there was no specific proof of the various steps which brought the matter of admitting an alien under bond before the Secretary of Commerce and Labor, it appearing that he admitted them under bond, it would be presumed that the matter came before him in the regular course of official business in conformity with the immigration regulations and that he acted in conformity to law.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 728; Dec. Dig. § 322.*]

In Error to the District Court of the United States for the Southern District of New York.

This cause comes here on a writ of error to review a judgment of the District Court, Southern District of New York, sentencing plaintiff in error, which was defendant below, to pay a fine of $300 for alleged violation of section 19 of the Immigration Act of February 20, 1907. Reversed.

See, also, 186 Fed. 391; 223 U. S. 512, 32 Sup. Ct. 244, 56 L. Ed. 531.

Choate, Larocque & Mitchell (Joseph Larocque, of New York City, of counsel), for plaintiff in error.

J. E. Walker, of New York City, Asst. U. S. Atty.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge. Defendant was indicted March 3, 1911, for making a charge and taking security for the return passage of two aliens brought to this country on defendant's steamer Rhein in December, 1910. This indictment was demurred to in the lower court, where the demurrer was sustained. The Supreme Court reversed that judgment and upheld the indictment. 223 U. S. 512, 32 Sup. Ct. 244, 56 L. Ed. 531.

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

The section under which the indictment was found provides as follows:

"19. That all aliens brought to this country in violation of law shall, if practicable be immediately sent back to the country whence they respectively came on the vessels bringing them. * * * The * * * expense of the return of such aliens, shall be borne by the owner or owners of the vessels on which they respectively came; and if any * * * owner, * * * of any such vessel * * * shall make any charge for the return of any such alien, or shall take any security from him for the payment of such charge, such * * * owner, * * * shall be deemed guilty of a misdemeanor and shall, on conviction, be punished by a fine of not less than $300 for each and every such offense."

The controversy arose by reason of the fact that defendant at its office in Bremen sold to one Dossik tickets to New York and also return tickets for himself and his wife from New York to Bremen; thereafter the aliens were brought to New York on defendant's steamer Rhein.

[1, 2] The contention upon the demurrer was to the effect that whatever violation there had been of the terms of the statute was committed outside of the jurisdiction, to wit, in Germany. The demurrer conceded averments of the indictment that the Dossiks were brought to this country in violation of law and that they were ordered deported by competent authority. There was no such concession on the trial and the burden of proving these averments was on the government, since, as we have seen, the nineteenth section imposes a penalty only in the case of aliens "brought to this country in violation of law." Before considering the testimony by which it is sought to sustain these averments, it may be well to cite some passages from the Immigration Laws and Regulations. Section 2 contains a long enumeration of classes of aliens to be excluded. The first group includes among others idiots, imbeciles, insane persons, persons afflicted with tuberculosis or with loathsome or dangerous contagious disease, paupers, persons likely to become a public charge, and "persons not comprehended within any of the foregoing excluded classes who are found to be and certified by the examining surgeon—as being mentally or physically defective, such mental or physical defect being of a nature which may affect the ability of such alien to earn a living."

Section 26 provides:

"That any alien liable to be excluded because likely to become a public charge or because of physical disability other than tuberculosis or loathsome or dangerous contagious disease may, if otherwise admissible, nevertheless be admitted in the discretion of the Secretary of Commerce and Labor upon the giving of a suitable and proper bond or undertaking, approved by said Secretary," etc.

In the Immigration Regulations provision is further made for admissions under bond. Rule 20 provides that:

"Where an alien is liable to be excluded because likely to become a public charge or because of physical disability and it is found that the alien is not afflicted with tuberculosis or with a loathsome or dangerous contagious disease and that he is otherwise admissible, and, after notice of his right to do so, the alien signifies his intention of applying for admission under bond, the board of special inquiry shall not pass upon the alien's right to enter as in other cases, but shall make special finding of fact in the premises and report

the same, including the certificate of the medical examiner, to the immigration officer in charge, who shall forward the report, together with his recommendation to the Secretary of Commerce and Labor, through the Commissioner General of Immigration. If in the exercise of the discretion conferred by law, the Secretary decides to admit the alien, a bond will be required," etc.

The facts shown by the record are as follows: Some time about the latter part of November, Dossik applied in Bremen for his passage to this country. The agents of the steamship sold him round trip tickets. They testified that they did so because he told them that he and his wife were going to America to make a short visit to two of their children who were living there. Dossik testified that he told them he expected to stay with his children and not return. In the view we take of this case it is unimportant which account is correct. Upon arrival the aliens were examined by the government surgeons, who certified as to both that they were "physically defective, and such physical defect is of a nature which affects the aliens' ability to earn a living. Has senility." The aliens and these certificates next came before a board of special inquiry (December 17, 1910), which found that:

"The aliens are likely to become a public charge for the following among other reasons: They are both aged, decrepid, and incapable of self-support; they have no one in this country legally obligated to render them any assistance; while they have about $200, it is insufficient in our opinion to provide for these aged aliens; the witness, a son-in-law, appearing is in no position to give them the necessary assistance. Upon all the facts, including incidentally the medical certificates, we find that the aliens are persons suffering from physical defects of such a nature that may and will affect their ability to earn a living.

"Aliens informed of their exclusion, right of appeal and that they will be returned at the expense of the steamship company. Aliens excluded and ordered deported."

The trial judge apparently concluded that this deliverance of the board of special inquiry ended the matter, as no doubt it would if the other provisions of the statute had not been invoked. We do not concur with him because we are convinced from this record that such provisions were invoked. If strictly construed the certificate of the board was premature; it does not state that the alien was notified that he had a right to apply to the Secretary of Commerce and Labor for admission under bond. Rule 20 provides that until he has been given such notice, so that he may signify his intention of making such application, the "board of special inquiry shall not pass upon the alien's right to enter."

[3] But whether premature or not, and whether or not the statement in the board's minutes that the alien was informed of his "right of appeal" means that he was then given the notice which rule 20 requires, the fact is that the Secretary did admit the Dossiks on April 22, 1911, upon the giving of a bond in the sum of $500 for each of them. Manifestly these aliens were within the class covered by section 26, above quoted, whose admission to or exclusion from this country is determined finally, not by the action of the board of special inquiry, but by the exercise of the discretion of the Secretary. There is no specific proof of the various steps which brought the matter before that officer; but we must assume that the Secretary as a public officer acted

in conformity to law, and since it is conceded that he did exercise his discretion by admitting the aliens, upon giving a bond, it is to be presumed that the matter came before him in the regular course of official business, in conformity with the provisions of rule 20.

It appears therefore conclusively that Dossik and his wife, after being fully examined, were, in conformity to the provisions of the Immigration Act, admitted into the United States. How, in view of that fact, it can be held that in selling them return tickets the owner of the steamship made charge or took security for the return of "aliens brought to this country in violation of law," we are unable to conceive.

When the case was before the Supreme Court, it was held that, although the original acceptance of the money in Bremen was an act outside of the jurisdiction, the retention of that money here, after being advised that the aliens were to be excluded and deported, would be an act within the jurisdiction. It now appears that the so-called return ticket or "passage order" entitled the holder either to passage to Bremen or to the return of the amount paid therefor; that the defendant was at all times ready to make such repayment, provided the passage order were returned; and that this was not done because the passage order was taken from the alien by the authorities at Ellis Island and was retained by the government officers for more than two months, until after the grand jury had found this indictment. Thereupon it was returned to him with the statement that he could get some money on it. Although the disposition we have made of the other point in the case makes it unnecessary to consider the contentions of defendant as to the effect of these transactions, we note them to express our disapproval.

The judgment is reversed.

THE CATAWISSA.

THE CHEEKTOWAGA.

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

Nos. 129, 130.

1. ADMIRALTY (§ 115*)—APPEALS—PRESERVATION OF RECORD.

In admiralty suits which are heard de novo on appeal, it is important that charts referred to by witnesses, and on which locations pointed out are marked, should be preserved in the record.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 743–745; Dec. Dig. § 115.*]

2. TOWAGE (§ 11*)—COLLISION BETWEEN TOWS—MUTUAL FAULTS.

A tug, with three barges abreast in tow on two hawsers, was passing westward through Hell Gate, and was near Negro Point, where the port hawser parted, and it became necessary to anchor while straightening out the tow. While so anchored, another tug with tows came around the point from the westward on an ebb tide, and one of her tows came into collision with one of those of the disabled flotilla. *Held*, on the evidence that both tugs were in fault; the moving one for not being more carefully navigated, and the other for not hearing and answering the bend

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

signal of the first, which in the condition of the tide could not stop after rounding the point.

[Ed. Note.—For other cases, see Towage, Cent. Dig. §§ 11–23; Dec. Dig. § 11.*

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.

These causes come here upon appeals from decrees of the District Court, Southern District, of New York, holding the steam tug Catawissa solely in fault for a collision between the barge Silver Brook in tow of the Catawissa and the barge Marine in tow of the Cheektowaga.

The Cheektowaga with three barges in tow abreast on two hawsers was proceeding from the sound through Hell Gate to the westward. Somewhere in the vicinity of Negro Point Bluff, at about 5:20 a. m., the port hawser parted, whereupon, owing to the fact that all the strain came upon the starboard hawser, the barges sheered to port. In order to check this sheer, the Cheektowaga went ahead on her engines and straightened out the tow, the barge captains co-operating in this maneuver by hard aporting their wheels. This caused the barges to move forward with a sheer to starboard and to prevent them from going ashore the anchors of two of them were let go on about 30 fathoms of chain. The Cheektowaga then dropped back between the starboard barge and the shore, so close to the shore that she touched bottom more than once. Orders were given to the barges to shorten their chains and get under way, but it was found that the anchor of one had fouled the chain of another, which took some time to clear up.

Subsequent to the breaking of the hawser and before the Catawissa rounded Negro Point, the Eureka eastward bound with three loaded barges passed the flotilla apparently without difficulty. Soon afterwards the tug Mabel with three light barges westward bound also passed. The passing of the Mabel is not significant, as she was proceeding against the tide.

At about 6 a. m. the Catawissa came around Negro Point with three loaded barges abreast on a bridle hawser; from the stern of the tug to the bow of the bridle barge was from 190 to 200 feet. At Negro Point, and for a certain distance beyond, there is a set of the tide across to the Long Island shore. To counteract this the Catawissa held her head up towards Ward's Island to keep her tow off Scaly Rocks. The result was that when she straightened up, the port bow of her port barge came into collision with the starboard bow of the Cheektowaga's starboard barge. While the two tows were in collision the Fall River boat Providence passed them on the Long Island side, bound for New York. She passed so close to the nearest barge that "one could almost have stepped aboard."

The above statement of facts is a recital, somewhat condensed, of the findings of the District Judge.

Armstrong & Brown, of New York City (Pierre M. Brown, of New York City, of counsel), for appellant.

Harrington, Bigham & Englar, of New York City (Howard S. Harrington and T. Catesby Jones, both of New York City, of counsel), for appellee.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge. Concededly the width of the Cheektowaga and the barges, as they lay at anchor, including their clear-

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

ances, was 130 feet. The distance of the Cheektowaga from the shore is variously estimated at from 100 to 180 feet. The chart shows that to eastward and to westward of Negro Point Bluff the shore recedes somewhat. The amount of navigable channel left for the Catawissa, which after she had rounded Negro Point on that tide would have to go on, depends on the location of the Cheektowaga's flotilla. Two or three hundred feet to eastward or westward would make the open water greater or less.

We find nothing wrong in the make-up of either tow; no negligence attributable to the Cheektowaga in the parting of the hawser, nor in her maneuvers to break the consequent sheer, nor in anchoring two of her barges, nor in the fouling of anchor and chain.

[1] We are much impressed in this case with the testimony of the principal witnesses as to navigation, they seem to be men of large experience, exceptionally intelligent, thoroughly familiar with the locality, the movements of the water and the chart, and frank and quick in their answers to all questions. The crux of the case is the exact localities where the hawser parted and where the Cheektowaga's flotilla lay as the Catawissa approached. Apparently there is a discrepancy on this point between the witnesses from the flotilla and the navigator of the Eureka, called by the Cheektowaga. All the witnesses testified with a chart before them. Sometimes they say "here" or "there," but there is nothing to indicate that either the "here" or the "there" was marked on the chart. It is always desirable that such indefinite statements should be made definite by a mark on the chart and a letter or number. This was done in several instances, and locations marked "A," "B," "C," and "X" would be illuminative of the testimony, if we had the chart; but it is lost, and has not come up with the record. This has happened in many other cases. We would suggest that the District Judges impress upon the clerks of the District Courts and all their employés the importance of preserving all charts thus marked in evidence. It makes little difference if a libel, or an answer, or some other filed document goes astray; both sides usually have an accurate copy of it, from which a nunc pro tunc original can be reproduced. But so long as an appeal in admiralty is a new trial on the testimony, no such new trial can be fairly had unless *all* the testimony is brought up with the record.

[2] Speaking solely for himself, the writer would be inclined to the opinion that the Catawissa was free from fault, if "A," "B," "C," and "X" were where from the rest of the testimony he infers they were; but he cannot rely on his inference to reverse the findings of the District Judge, who knew just where they were. Therefore he concurs with his Associates, who are satisfied from the record as it stands that the Catawissa had sufficient space to pass, if carefully navigated, and therefore must be held in fault.

It is undisputed that the Catawissa could not see the disabled flotilla till she actually rounded Negro Point; also that when she had rounded Negro Point on this tide, she had to go on. She came up on the New York side of Blackwell's Island, and had two bends to make before reaching the point of collision. We are satisfied that she blew both

bend signals, one at Eighty-Sixth street for the turn to southward, the other opposite Hallet's Point, for the Negro Point turn to the eastward. It is the regular thing to do; there was no reason why she should not sound them, and her witnesses say she did. That the master of the Mabel did not hear them—or to be more accurate, did not, when testifying, remember that he heard them—is not persuasive. The position of the two vessels at the time was such that any signals of the Catawissa were of no interest to the Mabel; they might well be heard without being heeded or remembered.

The exchange of bend signals as we have often held is a matter of importance. The vessel who first blows them says, "I, whom you cannot see, am about to round this point in front of you." If the response be a single whistle, it means, "I, whom you are about to meet, am navigating to pass you as usual, port to port." If the response be two blasts it means, "My position is such that we can pass better starboard to starboard." If the response be an alarm it means, "I am in trouble and cannot navigate to help you; if you come around you take the risk." The importance of a prompt response to a bend signal whistle is manifest—especially so because the vessels exchanging signals are frequently invisible to each other and their exact relative positions unknown.

Neither of the Catawissa's bend whistles were heard on the Cheektowaga. The master was busy rectifying the disturbance occasioned by the parting of the hawser, and was, it may be, excusable for not personally hearing them; but we think that when he gave his undivided attention to straightening out the sheering tow, he should, knowing it was the hour for east-bound tows to come along, have stationed some one to watch out for bend signals and report them at once so that he could answer with an alarm, thus advising any east-bound tow before she rounded Negro Point that there was trouble of some sort ahead of her.

This was a fault and we are not satisfied on the proof that it did not contribute to the collision. It has been repeatedly held that the burden of proving that any particular violation of the official rules of navigation did not so contribute rests on the vessel which has violated such rule. The master of the Catawissa testifies, and there is nothing in the record to contradict him, that if he had received an alarm in response to his first bend signal, blown at Eighty-Sixth street, he could have gone in the Harlem river between Ward's Island and Mill Rock, rounded to and anchored. Also that, if he had received an alarm in response to his second bend whistle, blown opposite Hallet's Point, he could have rounded to into Pot Cove, where the Mabel was hanging on, and held his tow until the Cheektowaga came along, or he found that the channel was clear. When he heard no response at all, he was entitled to proceed around Negro Point, assuming the channel was clear; and, once he had rounded it on that tide, there was nothing to do but go on and make the best he could of the situation.

We think both vessels were in fault, and modify the decree so as to divide damages, without costs of this appeal.

OLSEN v. UNITED STATES SHIPPING CO.

UNITED STATES SHIPPING CO. v. OLSEN.

(Circuit Court of Appeals, Second Circuit. March 17, 1914.)

No. 160

1. SHIPPING (§ 49*)—CHARTER—DEDUCTION FROM CHARTER HIRE—DELAY IN FITTING.

The owner of a ship, although chartered to carry lawful merchandise, was not required to remove permanent stanchions put in for the support of the deck and riveted in place to enable the charterer to load logs 60 to 70 feet in length which was not such cargo as the vessel was constructed to carry, and the charterer is not entitled to deduct from the charter hire for time lost during a dispute as to their removal.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 187–200, 202; Dec. Dig. § 49.*]

2. SHIPPING (§ 53*) — CHARTER — DEDUCTION FROM CHARTER HIRE — EXPENSE CAUSED BY FAILURE TO LASH DECK CARGO.

Where the master of a chartered steamer after loading a part of a deckload of logs at one port started for another loading port without lashing the forward deckload, in consequence of which some of the logs were thrown off, the ship was chargeable with the expense made necessary by such failure to secure the cargo before moving, which rendered her unseaworthy in that respect.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 214–218, 225; Dec. Dig. § 53.*]

3. SHIPPING (§ 49*) — CHARTER — DEDUCTION FROM CHARTER HIRE — LOSS OF FREIGHT BECAUSE OF CARGO JETTISONED.

It is the absolute duty of the master, although his vessel is loaded by the charterer to see that the loading is so done as not to render her unseaworthy when she starts on her voyage, and where a master did not do so but permitted a deckload of logs to be so loaded as to render the ship unstable and make it necessary to jettison some of the logs during the voyage, although no bad weather was encountered, the charterer which was not the owner of the cargo was entitled to deduct from the charter hire the freight lost because of the cargo jettisoned.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 187–200, 202; Dec. Dig. § 49.*

Deductions and offsets from charter hire of vessel, see note to Tweedie Trading Co. v. George D. Emery Co., 84 C. C. A. 254.]

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

Suit in admiralty by Andr. Olsen, as owner of the steamship Bergenhus, against the United States Shipping Company, with cross-libel. From the decree, both parties appeal. Reversed.

For opinion below, see 195 Fed. 147.

Burlingham, Montgomery & Beecher, of New York City (Charles C. Burlingham and Robinson Leech, both of New York City, of counsel), for appellant United States Shipping Co.

Haight, Sandford & Smith, of New York City (Charles S. Haight and John W. Griffin, both of New York City, of counsel), for appellee Olsen.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

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

WARD, Circuit Judge. These are cross-appeals from a decree in favor of the libelant Olsen, owner, and dismissing the cross-libel of the United States Shipping Company, charterer of the steamer Bergenhus. The charter party was in the government form dated June 24, 1909, for two specified voyages "to be employed in carrying lawful merchandise," steamer to be placed at disposal of charterer at New Orleans. The charterer ordered the steamer to Mobile and Gulfport to load timber on deck and under deck. The cargo tendered was square log timbers, many of them running 60–70 feet in length. The charterer loaded the cargo.

The claims in controversy are as follows:

The libelant's are for: (1) Amount deducted by charterer from charter hire for time lost at Mobile during a dispute as to the removal of stanchions. (2) Expenses resulting from the fall of the forward deckload at Gulfport and reloading at Ship Island. (3) Amount deducted by charterer from charter hire for detention at Newport News. (4) Expense of re-stowing cargo at Newport News and of surveys. (5) Amount paid holders of bill of lading for cargo jettisoned. (6) Expenses at Aberdeen in connection with the cargo jettisoned.

Cross-libelant's claim was for freight lost on cargo jettisoned.

Of the libelant's claims the district judge disallowed the first, divided the second, and allowed the third, fourth, fifth, and sixth. He dismissed the cross-libel.

[1] The charterer requested the master to remove the stanchions in the cargo holds on the voyage from New Orleans, but he did not do so. On arriving at Mobile he refused to comply with the same request. Some of the stanchions were riveted to the decks and some were only screwed in. The stanchions were necessary for the support of the deck, but some could be safely removed if the under deck cargo were so stowed as to support it and compensate for the removal of the stanchions. There is a dispute as to whether the charterer insisted upon the removal of all stanchions. However, the master was willing to remove those which were screwed in, but that would not have been sufficient for loading the long timbers. Four days were lost before the dispute was settled and enough stanchions riveted and screwed removed to enable the charterer to load the cargo.

We do not think the owners were obliged to cut out the riveted stanchions which were a permanent part of the structure. Timber was of course lawful merchandise, but logs 60–70 feet long were not such as the ship was constructed to carry. If she had been built with permanent transverse instead of longitudinal bulkheads, the charterer could hardly have insisted on those bulkheads being taken out in order to accommodate the long timbers. The charterer deducted four days' hire, which the District Judge allowed. We think this was error because the time lost was due to the charterer's unreasonable demand. See Keyser v. Duitt, 150 Fed. 328, 80 C. C. A. 212, and Mencke v. Cargo of Sugar, 187 U. S. 248, 23 Sup. Ct. 86, 47 L. Ed. 163.

[2] The steamer went from Mobile to Gulfport to complete her loading. There she lay at a berth in the stream which was entirely safe, although for part of the time, at least, her bottom was in soft

mud. The charterer loaded timber on deck both forward and aft. The after deckload was lashed by the crew but the loading of the forward deckload was not completed before dark, so that it could not be lashed that day. The charterer was anxious to have the steamer leave on the morning tide for Ship Island, to save a day, there being but one tide a day in the Gulf. The master accordingly moved the steamer astern to pick up her after anchor, without waiting to lash the forward deckload and in backing she struck the side of the bank. Some of the wooden uprights on the port side, fixed to keep the deckload in place, broke and twenty logs were thrown off. A survey was held which recommended that 279 more logs be discharged and the whole 299 logs rafted to Ship Island, to be reloaded there. The district judge held that the expenses connected with the falling of the deckload at Gulfport should be divided between the owner and charterer, the former being at fault for not lashing the deckload and the latter for loading it. We think that it is chargeable to the owners only because the master should not have started to Ship Island until he had secured the forward deckload. The accident was not due to the striking of the bank, but to the fact that the vessel was unseaworthy as to her forward deckload, a thing which it was the duty of the master to prevent.

When the steamer arrived at Ship Island all her ballast tanks were full except No. 2, the largest, which could not be filled because it was leaking as the result of injuries sustained in loading. There was a list of 13 to 14 degrees and the master refused to take on board the logs rafted from Gulfport. At the charterer's insistence, however, a survey was held which stated that the logs could be reloaded without affecting the seaworthiness of the steamer, and the master received them on board under protest. August 5th the steamer started from Ship Island for Aberdeen via Newport News for coal, with a list to port of 11 degrees which gradually increased to 22 to 24 degrees, although no heavy weather was encountered. The next day the master called a council of his officers which decided that it was necessary for the safety of all aboard to cut the lashings of the forward deckload and let some of it go. This was done and 300 logs went over the port side, doing considerable damage to the steamer. The remainder was secured and the steamer proceeded to Newport News, where the ship was repaired, the cargo restowed, coal taken on board and the voyage resumed. The charterer deducted hire for the detention at Newport News.

[3] The consignees of the cargo at Aberdeen sued the ship owners for the value of the cargo jettisoned, who, in pursuance of correct legal advice, paid the claim. The district judge allowed all these claims of the owners on the ground that they resulted from the improper loading, which was done by the charterer and which the charterer insisted did not affect the steamer's seaworthiness. This was, in our opinion, error. It is true that when charterers load cargo against the protest of the master in such a way that it is itself damaged and/or damages other cargo, the charterer will be liable. The Centurion (D. C.) 57 Fed. 412. Likewise, when cargo loaded on deck by agree-

ment is lost because of a peril of the sea the ship will be excused. Lawrence v. Minturn, 17 How. 100, 15 L. Ed. 58. We are not willing to extend this to such a loading as makes the ship herself unseaworthy when no sea peril is encountered. It would, in our opinion, be unwise and dangerous to impair the implied warranty of seaworthiness of the ship herself. The district judge rightly held that the steamer was unseaworthy on leaving Ship Island. The jettison was caused not by sea peril, but by her own instability. It makes no difference whether this was due to the amount or the stowage of the deckload alone or also to the fact that the largest ballast tank could not be filled. All these matters were under the absolute control of the master and it was his duty to see that they were right. It was no excuse to him that the charterers did the loading; insisted upon his taking the deckload or that surveyors certified that the ship could do so safely. No doubt both thought so. That, however, did not lessen his duty, especially in view of the fact that he did not think so himself.

The owners seek to sustain the decree on various grounds. They say that the warranty of seaworthiness was satisfied if the ship was seaworthy when the voyage began, which they say was at New Orleans, as she certainly was. If this be admitted, it will be no excuse to the owners if the master subsequently made or allowed others to make the vessel unseaworthy.

Then they rely on such analogies as landsmen requiring builders or manufacturers with whom they contract to use certain material or follow certain construction which results in loss. Such relations have no resemblance to the relation of vessel and cargo or to the supreme authority of the master of a ship. There is no such warranty as that of seaworthiness and the builder or manufacturer has no such absolute authority or duty as has the master of a vessel.

They rely also on article 30 of the charter providing that the deckload shall be at the charterer's entire risk, but this does not cover a risk caused by the unseaworthiness of the vessel.

Then they say that clause 9 in which the charterers indemnify the owners against any liability arising from the bill of lading entitles the owner to recover. But the bill of lading did not increase the liability of the owners under the charter party. Indeed it restricted it. The cargo did not belong to the charterers and if it did, the owner's liability for unseaworthiness would be exactly the same.

Finally cases are cited in which charterers were owners pro hac vice and therefore could not reclaim because of unseaworthiness caused by themselves. Obviously these have no application.

It follows from the foregoing that the claims of the libel, except for detention at Mobile, should have been disallowed and that of the cross-libel for freight on the logs jettisoned should have been allowed. The decree is reversed and both parties having appealed and succeeded, without costs to either of this court. Costs of the court below to follow the usual course.

THE BRITANNIA

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

No. 154.

1. TOWAGE (§ 11*)—LIABILITY FOR INJURY TO TOW—INSUFFICIENT DEPTH OF WATER IN DOCK.

The mere presence of a wharf does not give reasonable assurance to the master of a tug that it is a proper place to tie up a tow regardless of its draft.

[Ed. Note.—For other cases, see Towage, Cent. Dig. §§ 11-23; Dec. Dig. § 11.*]

2. TOWAGE (§ 11*)—LIABILITY FOR INJURY TO TOW—INSUFFICIENT DEPTH OF WATER IN DOCK.

A tug which left a barge loaded with ice at a small wharf on Blackwell's Island to lie over night, without any inquiry as to her draft or as to depth of water where she was left, although the master of the tug knew that the bottom in the vicinity was rocky and that the water was shallow in places near the shore, *held* liable for damage to the barge by settling on the rocks in the bottom when the tide fell.

[Ed. Note.—For other cases, see Towage, Cent. Dig. §§ 11-23; Dec. Dig. § 11.*]

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

This cause comes here upon cross-appeals from a decree in favor of libelant for $813.67. The libel charges negligent towage in leaving the tow at an unsafe berth, where at low tide she grounded on a rocky bottom. The claimant appeals on the ground that no negligence has been shown on the part of the tug; libelant appeals on the ground of insufficient damages. The opinion of the District Judge will be found in 196 Fed. 553.

Hyland & Zabriskie, of New York City (Nelson Zabriskie, of New York City, of counsel), for claimant.

De Lagnel Berier and James J. Macklin, both of New York City, for libelant.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge. The Britannia about 9 p. m. took in tow the barge Doherty having on board 300 tons of ice to be delivered to the workhouse on Blackwell's Island. He arrived off the Island a few minutes before midnight. The captain of the barge says she drew loaded 9½ feet and on the night in question about 7 feet. The captain of the tug says that he "judged by what she had into her" that she drew about 5 feet; apparently he made no inquiry of her master as to her draft. He says that he proceeded up the channel on the east side of the island towards a long dock he knew of located near the workhouse. When near it he saw some persons on the shore and called out, "Where do you want this boat, she has got ice for the workhouse," to which one of them replied: "Right astern." About 500 or 600 feet below the long dock there was a small dock, which he had

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

already passed. He then asked if there was some one in authority to direct him where they wanted the boat. To this came the reply, "The watchman says you are above it, go right back there." The master of the tug then said: "The captain (of the barge) objects a little to that place." To which there came the reply, "It makes no matter, that is where we want her, you put her there and leave her there." Without further inquiry, he dropped back and made his tow fast to the small dock. The objection of the master of the tow was apparently to the size of the dock; the barge was 106 feet long the dock only 40 feet, and he feared she could not be laid up secure against changes of tide; he knew nothing about the locality himself. There were dolphins (groups of piles) to east and west of the line of the dock, and with the assistance of these the barge was laid up securely and to the satisfaction of her master. The tug then left. A few hours later the tide fell and she grounded on a rocky bottom, there being but 5, to 6, to 6½ feet along the face of the dock at low tide.

The master of the tug had been towing vessels around this harbor a little over 28 years. He was charged, of course, with the knowledge which the chart afforded and with the common knowledge of the different landing places in the harbor which navigators generally possessed. The case does not present a hidden defect about the dock such as a broken spile; apparently it was in proper condition to fulfill the service for which it was constructed. What was the common knowledge of navigators as to this dock is not shown; no one who ever used it was called. A government chart from our own files, corrected to 1912 (the small dock was built from three to five years before), is before us; but, since no witness has marked the several localities upon it, we do not refer to it as evidence on which to base our decision. It is contended on behalf of the tug that the presence of a dock apparently in proper condition is reasonable assurance that vessels may be berthed at it; also, that when her master was told by the watchman to go there, he might reasonably assume it was a safe place. As the master himself expresses it:

"When they said to leave her there, I supposed they knew it was a safe place and a dock they used. I knew it was a rocky shore, but I had no idea they would have a dock where a boat would ground on the rocks and supposed there was plenty of water there."

It is further contended that it would be unreasonable to require a tug always to take soundings before she tied her tow up at a dock of which her master had no personal knowledge. We do not hold that she should; but it is well-settled that the tug must exercise reasonable care and skill in everything relating to the work she has undertaken to perform (The Margaret, 94 U. S. 494, 24 L. Ed. 146), and what is "reasonable care" depends upon all the circumstances of the case.

[1, 2] There are several docks along this side of the island, some long, some short. None of them project far from the shore so that the width of the channel might be maintained as far as possible. The shore all along this side of the island is rocky, a fact known to the master. We cannot assent to the proposition that the mere presence of a dock gives reasonable assurance that it is a proper place to tie up

any vessel, no matter what be her draft. A dock 40 feet long might well be supposed to be intended for smaller vessels than would a dock 300 feet long. The master of the tug had been in the locality before, apparently not infrequently, but had made his landings at the long dock. He had never seen any vessel lying at the small dock, except on one occasion when there was a sand-scow there; another witness tells of sand-scows lying there, they draw from 2½ to 3 feet. Moreover, he knew that even at the long dock to which he was going there was no great depth of water. He said that a vessel drawing, what "they said this ice boat drew," 7 feet, could be docked safely only at the upper or lower end of the long dock; it would be "dangerous to place her in the middle of the dock as she would probably feel the bottom"—at low tide. We think this a suggestive circumstance. If this long dock, which he knew was in general use for landing vessels, had such scant depth of water at its face that it would be necessary to select a particular berth for a barge drawing 7 feet, it might reasonably be inferred that a smaller dock on the same shore 500 feet lower down might also have a scant depth of water at its face.

We do not mean to hold that a tug captain is ordinarily under any obligation to take personal measurements to determine the draft of his tow, or to take personal soundings to ascertain the depth of water at a dock to which he is directed to go. But when he knows that there is probably no great margin of safety between the two, it seems to us that ordinary reasonable prudence would require him at least to ask the master of the tow how much water she drew, and to ask the person who directed him to tie up at a smaller dock than the one he was going to what depth of water there was supposed to be there. The master of the Britannia did neither and for this failure under all the circumstances, to make even such a simple effort to ascertain if the berth was a safe one, on a falling tide, we think she should be held in fault.

The other branch of the case is concerned with the question of damages. Part of the damage resulted from the efforts of the wrecking company to float the barge and get her off the rocks. It being difficult to determine how much damage was attributable to the efforts of the wrecking company, the District Judge gave the libelant one-half only of the total damage shown by the survey. The facts are all very fully set forth in his opinion, which may be referred to. Without repeating them here we reach the conclusion that even if the wreckers committed an error of judgment as to the best time and the best way to get her off, the resulting damage must be attributed to the original fault of the tug in putting the barge in such a position that her removal was necessarily attended with peril. We are not satisfied that any negligence is shown in the attempt of the wrecking company to pull the barge off the rocks; we think they acted with reasonable care and prudence.

The decree should be amended so as to direct that full damages be assessed against the Britannia with costs of this appeal against the claimant.

TALIAFERRO v. UNITED STATES.

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

No. 2481.

CRIMINAL LAW (§ 369*)—EVIDENCE—OTHER OFFENSES.

In a prosecution for carrying on the business of a malt retail liquor dealer without having paid the special tax therefor, it was error to permit evidence that defendant at the time of the alleged offense was also engaged in keeping a bawdyhouse.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 822–824; Dec. Dig. § 369.*]

In Error to the District Court of the United States for the Northern District of Texas; Edward R. Meek, Judge.

Mary Taliaferro was convicted of carrying on the business of a malt retail liquor dealer without having paid the special government tax therefor, and she brings error. Reversed.

Mike E. Smith and Theodore Mack, both of Ft. Worth, Tex., for plaintiff in error.

Wm. H. Atwell, U. S. Atty., of Dallas, Tex.

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

SHELBY, Circuit Judge. The defendant (plaintiff in error here) was indicted in two counts. The first charged that she carried on the business of "a retail liquor dealer" without having paid the special tax therefor; the second that she did engage in and carry on the business of "a malt retail liquor dealer" without first having paid the special tax therefor. The jury found her not guilty on the first count, and guilty on the second count; that is, they found that she was guilty of unlawfully carrying on the business of "a malt retail liquor dealer." The court entered judgment on the verdict and sentenced her to imprisonment in the state penitentiary at Columbus, Ohio, for the period of 18 months.

The evidence, without conflict, showed that, for some time before the finding of the indictment, the defendant lived at 115½ Main street, Ft. Worth, Tex.; that she had rooms for rent, kept boarders, and had a hotel sign in front of the place. The defendant's hotel or rooms were upstairs, and on the ground floor under her rooms there was a licensed saloon where liquors were sold. The boarders or inmates of defendant's rooms often ordered drinks from the saloon, which were carried from the saloon to the defendant's place by a porter of the saloon. Several witnesses for the government testified that the defendant kept and sold spirituous and malt liquors in her hotel or rooms. This evidence, if believed by the jury, was sufficient to sustain a verdict of guilty, for she had not paid the special tax. The defendant, as a witness for herself, testified that she never made any sales of spirituous or malt liquors, and that the drinks purchased by her board-

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

ers were purchased at the saloon under her rooms. In this she was sustained by several witnesses—her chambermaid, cook, and others. In brief, there was a sharp conflict of evidence on the question as to whether or not she was engaged in the business as charged. If the jury had believed the evidence she offered, they would have been justified in finding a verdict of not guilty on both counts. The following is an excerpt from the bill of exceptions:

"The district attorney propounded to said witness the following question: 'Q. Was that (referring to the house occupied by the defendant) a questionable house, a resort for men?' To which question and answer thereto attorney for defendant objected, because the question sought to elicit an answer tending to show that the house occupied by the defendant was a house of ill fame, which was collateral, irrelevant and immaterial to any issue involved in the case against the defendant, charging her with engaging in the business of selling intoxicating liquors without a license, and was calculated to prejudice the minds of the jury against her, which objections the court overruled, and said witness was permitted to testify in answer to questions then put by the court as follows:

"Q. Was that a house of disreputable character?

"A. I don't know, Judge; I don't know about that.

"Q. Did it have a general reputation?

"A. It had a reputation, I reckon.

"Q. Did it—do you know what its reputation was? Was it a place—a house of bad repute, if you know?

"A. What do you call a bad house?

"Q. Don't you know?

"A. I never had nothing to do with it.

"Q. I am not asking you that; I am asking you whether or not the reputation of that house was bad, and whether you know or not it was bad?

"A. Well, it had a reputation, I guess, of what you call a bad house.

"Q. A house of ill fame?

"A. Yes, sir.

"To which action of the court in overruling said objections and permitting said witness to testify as hereinbefore set out, the defendant then and there in open court duly excepted."

The following excerpt from the charge to the jury is evidently a reference to the evidence quoted:

"Further, in weighing the testimony adduced here, you gentlemen cannot separate it from the atmosphere of this case, an atmosphere of low men and women in the prosecution of an unlawful calling—a calling which men, even the enforcers of the law in their uniforms, sometimes see nothing of it as it goes on. They wink at the wickedness of men and women. That is the atmosphere of this case, and it is your duty to reach, from the testimony of the witnesses who have appeared, out of that atmosphere and in this courtroom, * * * the very truth."

The question raised by the defendant's plea of "not guilty" was whether or not she was engaged in the business of a retail liquor dealer, or a retail malt liquor dealer, as charged in the indictment. If she was, she was guilty, whether she sold to moral or to immoral people. The reputation of her house as one of ill fame, if it had such reputation, was wholly immaterial. Commonwealth v. Eagan, 151 Mass. 45, 23 N. E. 494. She could not carry on the business in question without violating the law, even if her rooms were used only for strictly moral purposes; and, if they were used for immoral purposes, still she could not, on that account, be convicted of the offense charged,

without the necessary proof that she carried on the business in question. Keeping a bawdyhouse—a house of ill fame—is a criminal offense, one involving moral turpitude. Whether or not the defendant was guilty of that offense is immaterial on the question as to whether or not she was a retail liquor dealer without license. Ballowe v. Commonwealth (Ky.) 44 S. W. 646. Ordinarily, when a defendant is being tried for one offense, it is not permissible to prove the commission of another for the purpose of securing a conviction of the first. It is easy to see how such evidence may prejudice the jury against the defendant—may, in fact, lead to her conviction of the offense with which she stands charged, because the jury may believe that she, at least, is guilty of the other offense. Especially in a case where the evidence is conflicting, as in the instant case, the defendant should not have the burden of defending against a separate charge, introduced in evidence, for which she is not indicted, and which has no tendency to legally prove the specific charge for which she is on trial. In brief, the law does not allow one crime to be proved in order to raise a probability that another has been committed. Dyar v. United States, 186 Fed. 614, 621, 108 C. C. A. 478, and cases there cited.

We are of the opinion that it was error to receive evidence that the defendant was the keeper of a house of ill fame—a bawdyhouse—when she was on trial for selling liquor without having paid the special tax.

Reversed.

SEABOARD AIR LINE RY. v. RAILROAD COMMISSION OF GEORGIA et al.

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

No. 2551.

1. COURTS (§ 101*)—PRELIMINARY INJUNCTION—FEDERAL COURTS—AUTHORITY TO GRANT.

In a suit by a railroad company to annul an order of the State Railroad Commission because it violates the Constitution, requiring physical connection between complainant's railway and the railway of another company at a particular point in the state, a preliminary injunction could lawfully be granted only by the judge of the District Court and two other federal judges called to sit with him, as provided by Judicial Code, § 266 (Act March 3, 1911, c. 231, 36 Stat. 1162 [U. S. Comp. St. Supp. 1911, p. 236]).

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 344–350, 629; Dec. Dig. § 101.*]

2. COURTS (§ 101*)—HEARING ON MERITS—JURISDICTION.

Since, in a suit by a railroad company to enjoin an order of the State Railroad Commission, requiring physical connection with another line, Judicial Code, § 266 (Act March 3, 1911, c. 231, 36 Stat. 1162 [U. S. Comp. St. Supp. 1911, p. 236]), only requires that three federal judges shall pass on an application for an interlocutory injunction, where it appeared that complainant waived its prayer for an injunction pendente lite, the District Judge alone had jurisdiction to try and determine the case on its merits.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 344–350, 629; Dec. Dig. § 101.*]

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

Appeal from the District Court of the United States for the Northern District of Georgia; William T. Newman, Judge.

Suit by the Seaboard Air Line Railway against the Railroad Commission of Georgia and others. From a decree of dismissal (206 Fed. 181), complainant appeals. Affirmed.

Edgar Watkins, of Washington, D. C. (W. G. Loving, of Atlanta, Ga., on the brief), for appellant.

James K. Hines, of Atlanta, Ga., for appellees.

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

SHELBY, Circuit Judge. This is a bill in equity by the Seaboard Air Line Railway, a Virginia corporation, against the Railroad Commission of Georgia, the five members of the Commission, and its secretary and special attorney, all citizens of the state of Georgia.

[1] The purpose of the bill is to enjoin and annul an order of the Railroad Commission of Georgia, requiring the Lawrenceville Branch Railroad Company and the Seaboard Air Line Railway to provide and maintain at Lawrenceville, Ga., physical connection between said railways and sufficient and necessary track or tracks to take care of freight traffic moving between said roads. It is alleged in the bill that the Railroad Commission of Georgia has no power or right "to control, burden, or interfere with interstate commerce"; that the order "is unconstitutional and void, without the authority of said Commission, and contrary to the Constitution and laws of the United States"; that it "is illegal, and deprives complainant of its property without due process of law, and denies to the complainant the equal protection of the laws"; and that it is contrary to the Constitution and laws of the state of Georgia. It is alleged that the defendants intend to begin proceedings to enforce the order, and there is a prayer for a decree to restrain them from doing so, and a further prayer for an injunction, after final hearing, enjoining the defendants and their agents, employés, and attorneys from taking any steps to enforce the order of the Commission, and that the same be declared void. The defendants answered the bill, maintaining the validity of the Commission's order, and denying that the same was in conflict with the Constitution of the United States.

The bill was presented to the judge of the District Court, who made an order that the defendants "show cause, if any they have, before me * * * why the injunction should not be issued as prayed." Afterwards, the case came on for final hearing on the pleadings and evidence, and a final decree was entered denying the injunction and dismissing the bill. From that decree the complainant appeals and assigns the decree as error.

[2] The allegations of the bill are such as would require the judge to whom it was presented to call to sit with him two other judges to decide whether or not an interlocutory injunction should issue (Louisville & Nashville R. R. Co. v. Railroad Commission of Alabama [D. C.] 208 Fed. 35); and it would have been error for the District Court held by one judge to have ordered, or to have refused to order, an in-

terlocutory injunction. Judicial Code, § 266; Ex parte Metropolitan Water Co., 220 U. S. 539, 31 Sup. Ct. 600, 55 L. Ed. 575. But the record does not show that an interlocutory injunction was either granted or refused. The case was set down for hearing by an order for the defendants to show cause on January 25, 1913, why an injunction should not issue; but there seems to have been no order whatever as to an interlocutory injunction, and that no hearing was had on the question of the issuance of an interlocutory injunction. The only other order in the record is the final decree on pleadings and evidence refusing the injunction, dismissing the bill, and taxing the complainant with the costs, from which decree this appeal is taken.

There is no requirement in the Judicial Code, § 266, that three judges should hear the case when submitted for final decree on the pleadings and evidence. The three judges are only required to pass on the question of granting the interlocutory injunction; and if the complainant waives his prayer for an injunction pendente lite and goes to trial on the merits, having taken evidence for that purpose, and no objection is made by either party to that course, we see no reason why one judge may not proceed to try and decide the case.

On the merits of the case, a majority of the judges concur in the opinion of the District Judge which appears in the record and is reported in 206 Fed. 181. The final decree refusing the injunction and dismissing the bill is affirmed.

ZANDER et al. v. PHILLIPS.

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

No. 2577.

1. INJUNCTION (§ 1*)—REMEDY.
   Injunction in equity is an extraordinary remedy, and is granted only where it is necessary to protect the rights of litigants.
   [Ed. Note.—For other cases, see Injunction, Cent. Dig. § 1; Dec. Dig. § 1.*]

2. QUIETING TITLE (§ 32*)—INJUNCTION—RIGHT TO WRIT—LIS PENDENS.
   Since, under the doctrine of lis pendens, the filing of a suit to remove a cloud on title to certain real property described in the bill by the cancellation of certain deeds would prevent a transfer of the land pendente lite by the defendant, except subject to complainant's rights under the bill, he was not entitled to an injunction restraining defendant from transferring the land pendente lite, and this notwithstanding complainant failed to file notice, to be recorded in the mortgage office of the parish where the property was situated, as required to effect the lis pendens by Act No. 22 of 1904.
   [Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 68; Dec. Dig. § 32.*]

Appeal from the District Court of the United States for the Eastern District of Louisiana; Rufus E. Foster, Judge.

Bill by Charles Phillips against Henry L. Zander and others. From a decree overruling a demurrer to the bill and granting a preliminary injunction as prayed, defendants appeal. Reversed.

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

Wm. Winans Wall, of New Orleans, La., for appellants.

John Dymond, Jr., A. Giffen Levy, and E. Lloyd Posey, all of New Orleans, La., for appellee.

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

SHELBY, Circuit Judge. Bill in equity by Charles Phillips, a citizen of Illinois, against the board of commissioners for Lafourche Basin levee district, and six others, all citizens of Louisiana, in which Phillips, the plaintiff (appellee here), seeks to remove a cloud from title to certain real estate described in the bill, by the cancellation of deeds, and in which he also prays for an injunction pendente lite enjoining the defendants (appellants here) from selling, transferring, or in any manner disposing of the real estate described in the bill. A decree was rendered in the court below, overruling a demurrer to the bill and granting a preliminary injunction as prayed for. From this decree an appeal is taken to this court under the act allowing appeals from decrees granting injunctions pendente lite.

The only question necessarily before us by the appeal is whether or not the injunction should have been granted. We do not consider any other question.

[1, 2] The remedy by injunction in equity is an extraordinary remedy, and, of course, is granted only in cases where it is necessary to protect the rights of litigants. The bill fully describes the land in controversy, and all persons interested in the litigation are made parties. It is clear that the filing of the bill, under the rule as to lis pendens, charges with notice any one who may purchase any interest in the real estate after suit brought, and that a purchaser or incumbrancer, pending the suit, would take whatever interest he obtained, subject to the result of the suit. As a general rule, relief by injunction against a transfer of real estate by defendant which the plaintiff seeks to prevent will be refused when the effect of filing the bill, which operates as lis pendens, is to afford sufficient protection against the transfer of the property pendente lite. 1 High on Injunctions (2d Ed.) § 333; Powell v. Quinn et al., 49 Ga. 523, 529; Smith v. Malcolm, 48 Ga. 343. If the plaintiff succeeds in obtaining a decree on final hearing, it will be conclusive against any one who may purchase pending the suit. Barstow v. Beckett (C. C.) 110 Fed. 826, 827. We find nothing in this case to take it out of the general rule indicated.

On the argument of the case it was suggested that the doctrine of lis pendens was limited by Act No. 22 of 1904. Merrick's Revised Code of Louisiana (2d Ed.) page 748. The act, in brief, requires notice of the pendency of a suit, in order that it may operate as notice to third persons not parties, to be recorded in the mortgage office of the parish where the property to be affected is situated. Assuming, but not deciding, that this act would be applicable to, and that it could limit the effect of, suits pending in the federal equity courts, we see no reason why the notice may not be so recorded in conformity with the act. We do not think the failure of the plaintiff to comply with the statute would in any way add to his equitable right to an injunction.

It was also suggested that the injunction did the defendants no injury, since the lis pendens had the same effect as the injunction. But the lis pendens would not prevent the defendants from dealing with the property subject to the result of the suit, whereas the injunction prevents them from transferring their interests subject to the suit.

There may be other grounds that would have justified or required a refusal to grant the injunction and make it error to have granted the same, but we do not deem it necessary to consider them on this appeal.

The part of the decree granting the injunction is reversed.

SAVAGE v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. March 28, 1914.)

No. 4038.

1. CRIMINAL LAW (§ 1028*)—APPEAL AND ERROR—REVIEW.
   In criminal cases a federal appellate court will, in the exercise of a sound discretion, sometimes notice error in the trial, although the question was not properly raised by objection and exception.
   [Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2619, 2620; Dec. Dig. § 1028.*]

2. PROSTITUTION (§§ 4, 5*) — INTERSTATE COMMERCE — VIOLATION OF WHITE SLAVE TRAFFIC ACT—CRIMINAL PROSECUTION.
   A judgment of conviction against a defendant for violation of White Slave Traffic Act June 25, 1910, c. 395, § 2, 36 Stat. 825 (U. S. Comp. St. Supp. 1911, p. 1343), *held* supported by the evidence and without error in the instructions given.
   [Ed. Note.—For other cases, see Prostitution, Cent. Dig. §§ 4, 5; Dec. Dig. §§ 4, 5.*]

3. CRIMINAL LAW (§ 1056*)—APPEAL AND ERROR—REVIEW.
   In a criminal case an appellate court is not required to consider the correctness of instructions given to which no exceptions were taken at the trial.
   [Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2668, 2670; Dec. Dig. § 1056.*]

In Error to the District Court of the United States for the District of Minnesota; Charles A. Willard, Judge.

Criminal prosecution by the United States against George Savage. Judgment of conviction, and defendant brings error. Affirmed.

Robert L. Penney, of Minneapolis, Minn., for plaintiff in error.

Charles C. Houpt, U. S. Atty., of St. Paul, Minn., and Egbert S. Oakley, Asst. U. S. Atty., of Duluth, Minn.

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

RINER, District Judge. The plaintiff in error was jointly indicted with another, charged with violation of section 2 of the Act of June 25, 1910. The indictment charged that:

"Alice Jackson and George Savage, both late of said district, then and there being, did then and there wrongfully, unlawfully, and feloniously, know-

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

ingly cause to be transported, and aid and assist in obtaining transportation for, in interstate commerce, from the city of Chicago, in the state of Illinois, to the city of St. Paul, in the state of Minnesota, over the line of the Chicago, Burlington & Quincy Railroad, the same being then and there a railroad company engaged in interstate commerce, between the state of Illinois and the state of Minnesota, a certain woman, to wit, one Frankie Allen, which said woman was then and there so knowingly caused to be transported and aided and assisted in obtaining transportation in interstate commerce, as aforesaid, by the said Alice Jackson and George Savage, for the purpose of prostitution by her, the said Frankie Allen, which is against the peace and dignity of the United States and contrary to the form of statute in such case made and provided."

Upon arraignment the defendant entered a plea of not guilty. A trial was had, resulting in a verdict of guilty as to both defendants, and the plaintiff in error was sentenced by the court to imprisonment in the Minnesota state prison for the term of five years.

[1] No exceptions whatever were saved during the trial, either to the admission or rejection of evidence, the instructions of the court to the jury, or any part thereof. But, as stated by the Supreme Court in Crawford v. United States, 212 U. S. 183, 194, 29 Sup. Ct. 260, 264 (53 L. Ed. 465, 15 Ann. Cas. 392):

"In criminal cases courts are not inclined to be as exacting, with reference to the specific character of the objection made, as in civil cases. They will, in the exercise of a sound discretion, sometimes notice error in the trial of a criminal case, although the question was not properly raised at the trial by objection and exception. Wiborg v. United States, 163 U. S. 632, 659 [16 Sup. Ct. 1127, 1197, 41 L. Ed. 289]." Weems v. United States, 217 U. S. 349, 362, 30 Sup. Ct. 544, 54 L. Ed. 793, 19 Ann. Cas. 705.

[2] We have, therefore, examined the record for the purpose of ascertaining whether it discloses substantial evidence to support the judgment, and without here restating the testimony of the witnesses, because of its revolting character, it is sufficient to say that we find evidence ample to sustain the verdict of conviction.

[3] As already suggested, no exceptions were taken to the instructions given by the court to the jury, and we are not, therefore, called upon to consider them. Hickory v. United States, 151 U. S. 303, 14 Sup. Ct. 334, 38 L. Ed. 170; Stewart v. Wyoming Cattle Ranch Co., 128 U. S. 383, 9 Sup. Ct. 101, 32 L. Ed. 439; Lewis v. United States, 146 U. S. 370, 13 Sup. Ct. 136, 36 L. Ed. 1011. We have, however, in connection with our examination of the testimony, also examined the instructions and in our opinion they impartially, correctly, and sufficiently enlightened the jury respecting the law applicable to the case.

The judgment is affirmed.

FERNWOOD & G. R. CO. v. BESSEMER COAL, IRON & LAND CO.

(Circuit Court of Appeals, Fifth Circuit. March 24, 1914.)

No. 2596.

APPEAL AND ERROR (§ 204*)—RECEPTION OF EVIDENCE—FAILURE TO OBJECT.

An assignment of error, based on the admission of evidence to which no objection was made, which was in support of a claim pleaded in plaintiff's declaration, and where no special instruction was requested as to such demand, cannot be sustained.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1149, 1258–1272, 1274–1278, 1280, 1569; Dec. Dig. § 204.*]

In Error to the District Court of the United States for the Southern District of Mississippi; Henry C. Niles, Judge.

Action at law by the Bessemer Coal, Iron & Land Company against the Fernwood & Gulf Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Marcellus Green and Garner W. Green, both of Jackson, Miss., for plaintiff in error.

Robert H. Thompson and J. H. Thompson, both of Jackson, Miss., for defendant in error.

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

PER CURIAM. We find no error in the rulings of the court on the admission of evidence in the course of the trial, nor any reversible error in the refusal to give the special instructions to the jury requested by the defendant below.

This disposes of all the assignments of error except the fourth, which is, "The court erred in permitting proof of the expenses of the plaintiff in looking after the matters in controversy," as to which we find that the expenses of the plaintiff in looking after the matters in controversy were expressly included in the plaintiff's demand set forth in his declaration, that the evidence in relation thereto was admitted without objection, and that there was no special instruction asked in regard thereto; therefore the fourth assignment of error is not well taken.

The judgment of the District Court is affirmed.

In re TENNESSEE CONST. CO.

Appeal of AMERICAN SURETY CO. OF NEW YORK et al.

(Circuit Court of Appeals, Second Circuit. March 10, 1914.)

No. 163.

1. BANKRUPTCY (§ 91*)—INVOLUNTARY PROCEEDINGS—CORPORATION—COURTS—JURISDICTION—BURDEN OF PROOF.

Where an involuntary bankruptcy petition was filed in the bankruptcy court for the Southern District of New York against a Missouri corporation, required by Rev. St. Mo. 1909, § 3035, to have and keep a general office within the state of Missouri, the burden of proving that the corporation's principal place of business was in New York was on the petition-

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

ing creditors, under Bankr. Act, 1898, § 2, requiring that petitions in bankruptcy shall be filed in the district where the alleged bankrupts reside or have their respective domiciles or principal places of business.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 137–139; Dec. Dig. § 91.*]

2. BANKRUPTCY (§ 91*)—INVOLUNTARY PROCEEDINGS—PLACE—FOREIGN CORPORATIONS—PRINCIPAL PLACE OF BUSINESS—LOCATION—EVIDENCE.

Where an alleged bankrupt, a Missouri corporation, for a considerable time had done no business except to keep up its existence, evidence that certain of its individual officers resided in New York, that on two occasions directors' meetings were held there, and that certain letters written by its officers with reference to its affairs were "headed" at New York was insufficient to show that the corporation's principal place of business was located there, so as to confer bankruptcy jurisdiction on the federal courts located in New York.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 137–139; Dec. Dig. § 91.*]

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

In the matter of involuntary bankruptcy proceedings against the Tennessee Construction Company. From a decree dismissing the petition (207 Fed. 203), the American Surety Company of New York and others appeal. Affirmed.

The petition alleged, among other things, that petitioners were each of them creditors of the alleged bankrupt in a large amount, and that, while insolvent it had within four months committed an act of bankruptcy in consenting to the appointment of a receiver on the ground of insolvency, by the state court of Missouri.

The alleged bankrupt is a corporation organized under the laws of the state of Missouri. Soon after its formation it entered into a contract with the Tennessee Central Railroad Company to construct that railroad. It did construct the railroad, through subcontractors, and received in payment therefor securities of said Tennessee Central Railroad. These securities, together with securities of the Nashville Terminal Company, constitute almost the entire assets of the alleged bankrupt. In addition to these it is the owner of certain subsidy bonds given by the city of Nashville, Tenn. Since the completion of the railroad it has been engaged in no construction work. These securities constituted its only source of income, and for a long time prior to the filing of the petition its principal business consisted in endeavoring to conserve these assets and enhance their value. With this end in view attempts were made to reorganize the Tennessee Central Railroad.

McLaughlin, Russell, Coe & Sprague, of New York City (Frederick C. McLaughlin, of New York City, of counsel), for appellants.

Hirsch, Scheuerman & Limburg, of New York City (Morris J. Hirsch and Rudolph A. Seligmann, both of New York City, of counsel), for appellee.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

PER CURIAM. Petitions in bankruptcy are to be filed in the district where the alleged bankrupts reside or have their respective domiciles, or have had their principal places of business. Section 2. The petition alleges that the Tennessee Construction Company "has for the greater portion of the six months next preceding the date of the filing of the petition had its principal place of business in (the South-

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

ern District of New York)." This averment was controverted, and the issue thus raised is the only one in the case.

[1, 2] The Revised Statutes of Missouri provide (section 3035) that every corporation created or existing under the laws of that state shall have and keep a general office for the transaction of business, and shall have and keep such office within the state of Missouri. The burden of proving that the principal place of business of this Missouri corporation was in New York rests on the petitioning creditors, and we concur with Judge Mayer in the conclusion that they have not sustained that burden. The proposition would, in this case, be difficult to prove, because for a long time past the corporation has practically not been doing any business, except to keep on living. Quite naturally the efforts towards that end have been located, in a sense, beneath the hats of the different officers and directors who, by interviewing different persons in different places, have tried to keep it alive. The residence of these individual officers seems to us of no importance. The fact that once—perhaps twice—a directors' meeting was, as a matter of convenience, held in New York is insignificant. Nor is the "heading" of letters written by its officers in reference to its affairs at all persuasive. The "headings," like the rest of the letters, were typewritten and usually gave the office address of the particular individual who wrote the letter.

The estate of the alleged bankrupt corporation is now being administered in the courts of the state which created it, and there is nothing in this record which calls for any attempted interference with that administration.

The decree is affirmed.

SPECIALTY MACH. CO. v. ASHCROFT MFG. CO.

(Circuit Court of Appeals, Second Circuit. March 10, 1914.)

No. 183.

1. PATENTS (§ 328*)—VALIDITY—MACHINES FOR RESEATING VALVES.
   The Hazeltine reissue patent No. 13,421 (original No. 918,049), for a machine for reseating valves, *held* valid, not anticipated, and infringed.
2. PATENTS (§ 141*)—REISSUE—EFFECT.
   Reissue of a patent to narrow the claims, obtained more than two years after the granting of the original patent, it appearing that the claims as originally drawn would cover devices of the prior art, was proper.

   [Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 206–213; Dec. Dig. § 141.*]

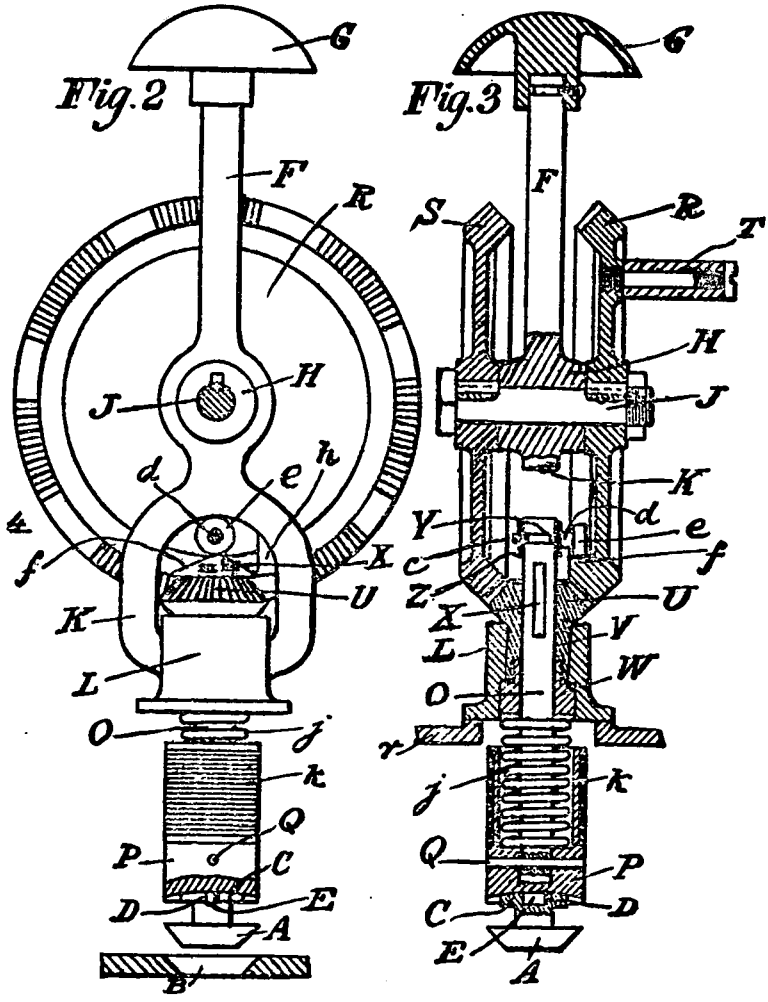
Appeal from the District Court of the United States for the Southern District of New York.

This cause comes here upon appeal from a decree of the District Court, Southern District of New York, dismissing a suit in equity for alleged infringement of reissued letters patent No. 13,421 granted May 21, 1912, to Robert H. Hazeltine, for improvements in machines for reseating valves. The original patent No. 918,049 was issued to Hazeltine on April 13, 1909. The opinion of the District Judge will be found in 205 Fed. 760.

In order to reseat a valve of the sort with which the patent is concerned, the valve is placed on its seat and is revolved under pressure back and forth.

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

Originally this was done by hand, some tool being inserted in the head of the valve to act as a handle by which to turn it. This revolution forward and back ground off foreign substances, imperfections, pits, etc. In order to insure perfection and regularity of surface, the valve is from time to time advanced on its seat, so that the revolution forth and back will not always start and end at the same place. The patentee in his specifications states that his "invention relates to machines for reseating valves, and the primary object of the invention is to enable a valve to be evenly ground and accurately seated, by positively and continuously acting devices which rotate the valve in opposite directions on its seat, and positively and progressively advance the valve periodically in one direction on its seat during rotation. Ridges and unevenness in the grinding are thus prevented, the action is positive, definite, and uniform, the progressive advancement of the valve is positive and automatic, and time is saved, since the rotation is not retarded or arrested at any stage except for the instantaneous pause at the time of reversal." Two of the drawings sufficiently illustrate the machine. Fig. 2 is an elevation of one side with the gear nearest to the observer removed; Fig. 3 is a vertical section.



A is the valve and *B* is its seat. The valve through intermediate parts, which need not be described, is connected to a driving shaft *O* which rises through the frame, terminating in a bevel pinion *U*. When in place by pressing down on the hand piece *G* the valve is kept in contact with its seat. The shaft is rotatable in its bearing *L*. It is rotated by two wheels *R*, and *S*, mounted face to face on the shaft *J*, one wheel *R* being provided with a handle *T* for rotating the wheels. These wheels are provided with mutilated bevel gears, shown in Fig. 2, but not lettered; they are called mutilated because the gear on each wheel is not continuous, there being alternately a series of teeth and a space without teeth. The wheels are mounted face to face in such way that a toothed segment on one wheel is opposite to a space without teeth on the other wheel. The gears on the wheel mesh with the bevel pinion on the top of the reciprocating driven shaft *O*. It is apparent that when a toothed segment on wheel *R* is so engaged the shaft *O* is rotated in one direction; when a toothed segment on the wheel *S* is similarly engaged the shaft *O* is rotated in the opposite direction. The specifications state that

"In the example of the invention shown a given number of successive toothed segments of the gears have the same number of teeth and subtend arcs equal in length to the arcs subtended by the blank portions of the gears falling opposite said toothed segments, so that the pinion *U* is rotated through equal arcs in opposite directions by said toothed segments. In order to periodically advance the valve on its seat, one or more consecutive toothed segments on each gear are of greater or less arc than the remaining segments, and are provided as shown with a progressively increasing or decreasing number of teeth, opposite corresponding blank spaces on the other gear, so that the pinion *U* is rotated through unequal arcs during succeeding reversals. The valve *A*, secured to the valve holder *P*, which rotates with the shaft *O*, is thus periodically advanced on its seat *B* in one direction, whether such advance occurs after intervals of reciprocation through substantially equal arcs, or whether it occurs during succeeding reversals, depending upon how many consecutive segments have a progressively increasing or decreasing number of teeth."

The claims declared on are

"8. In a machine for reseating valves, comprising continuously acting positive means for reciprocating the valve, including positive means for rotating the valve periodically through a greater arc in one direction than in the other direction during rotation, thereby positively advancing the valve progressively on its seat.

"9. A machine for reseating valves, comprising continuously acting positive means for imparting a reciprocating rotary motion to the valve, including positive means for advancing the valve periodically through a greater arc in one direction than in the opposite direction during reciprocation, thereby positively rotating the valve progressively on its seat.

"10. A machine for reseating valves, comprising continuously acting positive means for alternately rotating the valve in opposite directions on its seat, including positive means for advancing the valve periodically in one direction during rotation, thereby positively changing the position of the valve progressively relatively to its seat."

H. G. Ogden, of New York City, for appellant.

Rogers, Kennedy & Campbell, of New York City (O. Roberts, of counsel), for appellee.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge (after stating the facts as above). [1] Judge Holt evidently thought that Hazeltine's advance on the prior art was unimportant; that all he did was to substitute one kind of well-known gearing for another; that he merely used meshing cogs, instead of frictional contact, to drive the reciprocating driven shaft. We do not concur with him, and think he was misled by two models

which were introduced by the expert for the defendant as being constructed in conformity to patents in the prior art. If the Taylor patent or the Millingar patent disclosed devices such as the models represent, invention as to the subject-matter of these three claims would no doubt be negatived; but the models do not represent the disclosure of either of these prior patents.

The Taylor patent (255,208) shows a machine in which the rotation, on its longitudinal axis, of the shaft which carries the part to be ground is effected by means of a conical head on the shaft engaging with beveled flanges on driving wheels arranged face to face; this pair of driving wheels is called a pulley in the patent. Parts of the flanges of the wheels are made thicker than the rest of the flange. In consequence the cone is first engaged by one thickened flange, frictionally, and revolved in one direction, and is next engaged by the other thickened flange and revolved in the opposite direction. The model which the witness produced has not only this capacity for thus reciprocating cone-motion, but also by reason of the circumstance that the thickened part on one flange extends circumferentially further than the like part on the other flange, the position of the part to be ground is positively advanced by the action of the pulley at each revolution of the same. In other words the model has precisely the mode of operation of complainant's machine, except that the engagement with the shaft head is frictional instead of cogged. For this inequality in the length of flange, however, there is absolutely no authority in the Taylor patent. It says merely:

"The pulley is made with two like flanges *M* and *N*, one on either side, the parts of each flange being of unequal thickness, and said flanges being so arranged in respect to each other that the thick part of each flange is opposite the thin part of the other flange. The thick part of either flange extends *about* halfway around the flange, and may be a separate piece attached to the flange. The inside of each flange is beveled and made to fit the cone *D*."

There is nothing in this to indicate any difference in length between the two thickened portions. Figs. 3 and 4 of the drawings are "views of the inside of the flanges," the thickened portions are shown extending each about halfway around its flange, and are of precisely the same length. Referring to the operation of his machine Taylor says:

"The thick part of one flange rotates the cone in a given direction during about one-half of the revolution of the pulley, and the thick part of the other flange rotates the cone in the opposite direction during the remainder of the revolution."

Further down he says:

"The thick portion of each beveled flange being equal to about one-half its diameter, more or less, but not exactly one-half, will cause the cone to revolve in such a way that as (its) motion is reversed the grinding in of the plug will not commence and leave off at the same point, thus obviating excessive grinding at any point."

The meaning of this last quotation is so obvious from examination of the specifications and drawings that it would seem even an "expert" might perceive it. Since neither thickened portion extends quite halfway around its flange, there is a brief moment when one thickened

portion has let go and the other thickened portion has not yet caught on; the cone will then be free, with its last acquired motion of rotation to run on till the other thickened portion arrests and reverses it. While it thus overruns it necessarily at each revolution of the pulley shifts the position of the grinding plug on its seat, so that grinding "will not commence and leave off at the same point."

We have given so much space to this discussion in order to call attention to the fact that, although models are often helpful when descriptions and drawings are intricate, their helpfulness depends on their accuracy; when they are inaccurate, they only increase the labor involved in a study of the case. So, too, the so-called illustrative models, in which the designer has taken fragments from several prior patents and put them together as he thinks he might have done if called upon to produce a machine before the structure of the patent was disclosed, are often confusing.

The same witness testified as to the Millingar prior patent (177,873), and produced a model Exhibit B, which he said was intended to illustrate, both the Millingar and Taylor patents. This model uses toothed gears, as Millingar does, instead of the frictional engagement of Taylor. The model shows the opposite toothed segments of unequal length, so that, as in the patent in suit, there will be a positive shifting (through the action of the teeth) of the valve on its seat. He testified that the Millingar patent showed engaging segments of unequal length. The specifications of the Millingar patent disclose no such inequality; the witness assumed he had found support for his statement in one of the Millingar drawings. On cross-examination he was asked to measure the segments shown on this drawing, and admitted they were of exactly equal length. The draughtsman, however, made a mistake in drawing the teeth, putting 10 on one segment and 11 on the other. If constructed to conform to the drawing, the teeth would be of unequal thickness and the machine would not operate at all, a fact the witness was forced to admit. Certainly Millingar does not show periodical positive change of seating position.

As to another prior patent (Chadwick 430,142) the testimony of the same witness is directed, not so much to the patent, as to a model which he had constructed to illustrate it. With the experience derived from the study of the other models, we have confined our investigation to the patent itself. It shows an intricate and highly complicated machine, but apparently shifts the valve on its seat by frictional means applied at intervals by independent hand-operation. The passages of the specifications are too long to quote; they may be found on page 2, lines 22 to 57, and page 3, lines 50 to 100. It does not disclose Hazeltine's device; it is suggestive that it was 17 years after Chadwick before the positive automatic, unitary structure of the patent in suit appeared.

In Porteous (427,904) there is positive mechanism for reciprocating the valve key or plug through equal arcs, and the valve *seat* is intermittently knocked loose longitudinally from the plug for a moment, and connected frictionally to the driving mechanism, so that for a fraction of a revolution the seat and valve travel together in the same di-

rection and then co-operate again "in a fresh relative position." Mercer (322,840), a washing machine, is in a nonanalogous art. The other prior patents, which have been examined, need not be referred to; we find none of them which negatives invention.

[2] As to re-issue. The original claims will be found in the opinion below. It seems to us that the change effected by re-issue was not a broadening of the claims, but a narrowing of them, and that, therefore, the re-issue more than two years after the granting of the original patent was proper under Eames v. Andrews, 122 U. S. 40, 7 Sup. Ct. 1073, 30 L. Ed. 1064. We think that Miller v. Brass Co., 104 U. S. 350, 26 L. Ed. 783, and the other cases cited do not apply. As originally drawn the claims would cover devices of the prior art; as re-issued they were narrowed down to cover the unitary, positively acting, novel combination of Hazeltine.

There has been much discussion between the applicant and the Patent Office, but we find no action taken by the patentee which can be held to be an abandonment of claims for the device which his original application fully disclosed, or which restricted him to any particular number of mutilated segments or any specific interarrangement of them to effect a particular cycle of movement. Between the successive engagements of gear segments with beveled pinion there is a movement of advance of the valve on the seat; whether such movement occurs once in a revolution or more frequently is unimportant, the claims cover both contingencies, and we find nothing in the file wrapper to restrict them to any specific number of advances. It is understood that defendant does not dispute the charge of infringement, if the claims be not restricted to a particular cycle. But if this be an error, we have, from examination of his device, reached the conclusion that it does infringe.

The decree is reversed.

PATENTS SELLING & EXPORTING CO. ACTIESELSKABET v. DUNN.

(Circuit Court of Appeals, Second Circuit. February 10, 1914. On Motion to Reopen Case, March 4, 1914. On Amendment of Mandate, March 17, 1914.)

No. 175.

1. PATENTS (§ 328*)—VALIDITY—ANTICIPATION.
The Schiodt patent, No. 854,670, for a vacuum cleaner, *held* anticipated by the Locke and Dunn patent, No. 893,853.

2. PATENTS (§ 64*)—ANTICIPATION—PRIOR ART.
Where a foreigner was first in time to work out a particular improvement, but the holders of a subsequent conflicting patent were able to carry their date back to the filing of their application, which antedated the issuance of a patent to the foreign inventor, he, never having disclosed his invention abroad or in the United States until after the conflicting application was filed, could not carry his date back to the time of his application; and hence, as between the two, the later patent would be regarded as the prior art.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 79; Dec. Dig. § 64.*]

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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 Southern District of New York.

This cause comes here upon appeal from a decree of the District Court, Southern District of New York, holding a patent valid and infringed. The patent is No. 854,670 granted May 21, 1907, to Frederick V. Schiodt for apparatus for the extraction of dust from carpets and other articles. The opinions of the District Court will be found in 204 Fed. 99, 102.

See, also, 214 Fed. 1023.

Prindle & Wright, of New York City (E. J. Prindle, of New York City, of counsel), for appellant

Miller & Merwin, of New York City (Timothy D. Merwin and W. B. Morton, both of New York City, of counsel), for appellee.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge. Judge Hand has sufficiently discussed the patent and the prior art; we fully concur in the conclusions he reached upon the record before him. Schiodt made a very marked advance over Kenney and all other devices set forth in the record when he arranged his apparatus so that the sliming water would be carried forward with the dust and air, thus letting the machine wash itself as it did its work, instead of leaving the water in a receptacle to be gradually transformed into mud and then stopping the machine to clean out the receptacle. An advance such as that might well entitle a patentee to a liberal construction of his claims. It was certainly novel as compared with anything in the record. With Judge Hand's remarks about the nonanalogous art patents we fully concur.

But the record here differs from that in the District Court. By stipulation of the parties, presumably to avoid future litigation, there has been introduced before us an additional patent. The patent is No. 893,853 granted July 21, 1908, to Locke and Dunn for apparatus for removing dust by pneumatic suction. It is one of the patents held by us to be valid and infringed in Vacuum Engineering Company v. Dunn, 209 Fed. 219, 126 C. C. A. 313 (opinion filed November 11, 1913). The stipulation does not include the statement that application was filed on the date the Patent Office printed copy of the patent states that it was; but we assume that fact also will be stipulated since it must be easy to prove.

[1] This additional patent presents the situation under a very different aspect; the broad advance over Kenney and the others is found in Locke and Dunn and if it be prior art, as regards Schiodt the latter's claims can no longer be given a broad range; they must be confined closely to the particular combination of parts which Schiodt discloses. The question now presented is which of these two patents is to be considered prior art, as against the other. That question was substantially disposed of by our decision in the Vacuum Engineering Case.

The dates are as follows: Schiodt application filed May 3, 1905, patent issued May 21, 1907; Locke and Dunn application filed March 9, 1906, patent issued July 21, 1908.

[2] Two inventors acting independently, without any knowledge on

the part of either as to what the other was doing, discovered the same thing. Apparently Schiodt discovered it first. He lived abroad. No patent or publication in a foreign country disclosed the invention before Locke and Dunn applied here. As we pointed out in the Vacuum Engineering Case Schiodt's first disclosure in this country was not when he filed his application, but when by the issue of the patent his contribution to the art was first given to the public. We therefore held in that case that, although the foreigner was the first in time to work out the particular improvement, his patent was not "prior art" as to Locke and Dunn, as that phrase "prior art" is understood in the American law of patents.

We have therefore two independent inventors, both holding American patents. According to the date of issue Schiodt was prior, but Locke and Dunn are able to carry their date back to the filing of their application, which antedates the issue of Schiodt's patent. Schiodt, however, never having disclosed his invention abroad and not having disclosed it here until after Locke and Dunn's application, cannot carry his date back to the time of his application. As between the two, therefore, Locke and Dunn must be treated as the "prior art."

Being prior art, infringement of Schiodt's claims, which must be narrowly construed, is not made out because Dunn's device, here complained of, is much more like that of the Locke and Dunn patent than it is like Schiodt's.

The decree is reversed, with costs of this appeal, and cause remanded, with instructions to dismiss the bill.

On Motion to Reopen Case.

Motion for leave to reopen the cause and put in further testimony of prior foreign patents, and counter application of defendant to meet the new testimony by proof carrying back the date of his invention.

PER CURIAM. This cause was remanded to the District Court February 25th, and we have no jurisdiction in the matter. We could acquire such only by recalling the mandate. The better practice, however, is to leave this application and whatever proof may be offered to be passed upon in the first instance by the District Court. We are entitled to the judgment of the District Judge on all the questions which may be presented.

Motion denied.

On Amendment of Mandate.

Before LACOMBE, COXE, and WARD, Circuit Judges.

PER CURIAM. The mandate may be amended, so as to affirm the District Court on the cross-appeal, without prejudice to motions to introduce further proof as to priority of invention in the District Court.

JONES v. CASEY-HEDGES CO. et al.

(District Court, E. D. Tennessee, S. D. December 6, 1913.)

No. 1218.

1. REMOVAL OF CAUSES (§ 107*)—CAUSE OF ACTION—DETERMINATION.

Where a cause is removed before the declaration has been filed in the state court, the cause of action, for the purpose of determining a motion to remand, is to be taken as that shown by the copy of the declaration exhibited with the affidavit of plaintiff's attorney in support of the motion.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 178, 225–232, 234; Dec. Dig. § 107.*]

2. REMOVAL OF CAUSES (§ 49*)—JOINT DEFENDANTS—SEPARABLE CONTROVERSY.

Where plaintiff's declaration against a resident and nonresident defendant shows on its face a joint liability, the suit is not removable by the nonresident defendant on the ground of separable controversy, in the absence of a showing of fraudulent and merely colorable joinder of the resident defendant to defeat removal, regardless of the merits.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 95–99; Dec. Dig. § 49.*]

3. REMOVAL OF CAUSES (§ 61*)—JOINDER OF DEFENDANTS—JOINT LIABILITY—CONCLUSIVENESS.

In a suit against a resident and nonresident defendant jointly, plaintiff's allegations of joint liability are not conclusive against the nonresident defendant's right of removal, where such defendant in its petition avers that the resident defendant is not liable to plaintiff, and has been joined in bad faith and for the sole purpose of defeating a removal; and hence, if such nonliability and wrongful joinder are established, the case will be held removable as though the resident defendant had not been joined.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 115; Dec. Dig. § 61.*]

4. REMOVAL OF CAUSES (§ 89*)—ISSUES—JOINDER—GROUNDS FOR REMOVAL.

Where the petition for removal affirmatively alleges requisite jurisdictional facts showing a right of removal in defendant, and plaintiff does not join issue in some appropriate manner as to such allegations of fact in the petition, the only question presented is whether as a matter of law, on the facts stated in the petition for removal, taken in connection with the record, a case for removal was established.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 162, 165, 189, 192–195, 197, 200, 201; Dec. Dig. § 89.*]

5. REMOVAL OF CAUSES (§ 89*)—GROUNDS FOR REMOVAL—PETITION—ALLEGATIONS OF FACT—ISSUES.

Allegations of fact contained in a petition for removal on which the removability of the cause depends may be put in issue by plaintiff's plea to the jurisdiction of the federal court in the nature of a plea in abatement, or by an answer to the petition for removal.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 162, 165, 189, 192–195, 197, 200, 201; Dec. Dig. § 89.*]

6. REMOVAL OF CAUSES (§ 107*)—GROUNDS OF REMOVAL—JURISDICTIONAL AVERMENTS—ISSUES—PETITION TO REMAND.

Affirmative jurisdictional averments in a petition for removal may be put in issue by a motion to remand, if it either expressly denies the averments of the petition for removal, or is based on a ground which in effect traverses or negatives such averments, or is supported by an affidavit

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

which constitutes a denial thereof; but not by a mere general motion to remand or one in the nature of a demurrer to the petition for removal.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 178, 225–232, 234; Dec. Dig. § 107.*]

7. REMOVAL OF CAUSES (§ 107*)—GROUNDS—ISSUES—MOTION TO REMAND.

Plaintiff brought suit against a nonresident corporation and J. and another, who were residents of the same state as plaintiff. The nonresident removed the cause, alleging that the resident defendants were fraudulently joined to prevent a removal and that J. was not liable to plaintiff. He moved to remand, the motion alleging as a second ground: "Because this is a suit to recover on a tort in which it is shown that defendants C-H. Co. (the nonresident) and J. are jointly liable to plaintiff, and this being true, and it further appearing that plaintiff and said J. are," and at the time and prior to the institution of the suit were, residents of the same state, the cause is not removable. *Held*, that such motion, under all the circumstances, sufficiently traversed the averments of the petition for removal that J. was not liable to plaintiff and was improperly joined, to require the removing defendant to establish the fact.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 178, 225–232, 234; Dec. Dig. § 107.*]

8. REMOVAL OF CAUSES (§ 107*)—MOTION TO REMAND—ISSUES.

Where plaintiff's motion to remand in fact informally joined issue on the removing defendant's allegation in the petition for removal that the resident defendant was fraudulently joined to prevent a removal, but had been treated by the removing defendant as not raising an issue on such question, plaintiff would not be entitled to have the cause remanded on the pleadings, but the removing defendant would be given an opportunity to try such issue of fact.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 178, 225–232, 234; Dec. Dig. § 107.*]

9. REMOVAL OF CAUSES (§ 107*)—ISSUES—DETERMINATION.

Where an issue of fact is joined on the removal petition, application should be made to the court to determine whether the issues shall be tried on affidavit, oral testimony, depositions, or otherwise.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 178, 225–232, 234; Dec. Dig. § 107.*]

At Law. Action by Ross Jones against the Casey-Hedges Company and others. The Casey-Hedges Company having removed the cause to the federal court, plaintiff moves to remand. Denied, for further hearing on affidavits.

This is a suit for damages for personal injuries in the sum of ten thousand dollars, which was commenced by the plaintiff in the Circuit Court of Hamilton County, Tennessee, by the issuance of summons against the Casey-Hedges Co., The Casey-Hedges Manufacturing Co. and Lloyd Jones, as defendants. Before the plaintiff's declaration had been filed in the State court the defendant Casey-Hedges Co. seasonably presented to the State court, after due notice, a petition for the removal of the suit to the United States District Court, alleging that there was in said suit a controversy wholly between citizens of different States, that is, between the petitioner, a citizen and resident of the State of Ohio, and the plaintiff, a citizen and resident of the State of Tennessee, and that its co-defendants Lloyd Jones and The Casey-Hedges Manufacturing Co., both citizens and residents of Tennessee, had been fraudulently and improperly joined as co-defendants for the sole purpose of defeating the jurisdiction of the Federal Court, the petition setting forth in detail the alleged lack of connection on the part of said co-defendants with the injuries received by the plaintiff and entire absence of responsibility therefor. A transcript of the record from the State court having been filed in the Fed-

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

eral Court, the plaintiff moved to remand the case to the State court on two grounds: 1. "Because it appears that the plaintiff and one of the defendants sued, to-wit, Lloyd Jones, are both residents of said County and State, hence this court is without jurisdiction." 2. "Because this is a suit to recover on a tort, in which it is shown that defendants Casey-Hedges Company and Lloyd Jones are jointly liable to plaintiff, and this being true, and it further appearing that plaintiff and said Lloyd Jones are residents of Hamilton County, and were such residents at and prior to the institution of the suit, the defendant company is not entitled to remove this cause to this court."

Thomas S. Myers and Joe V. Williams, both of Chattanooga, Tenn., for plaintiff.

Watkins & Watkins and Anderson & Rankin, all of Chattanooga, Tenn., for defendants.

SANFORD, District Judge. [1] 1. As the petition for removal was filed before the declaration had been filed in the State Court, the cause of action is, for present purposes, to be taken as that shown by the copy of the declaration filed in the former suit in the State Court and exhibited with the affidavit of plaintiff's attorney. See, by analogy, Welch v. Railway Co. (C. C., E. D. Tenn.) 177 Fed. 760, 761.

[2] 2. This copy of the declaration shows, on its face, joint liability on the part of the non-resident defendant, the Casey-Hedges Co., and its co-defendant Lloyd Jones. And in the absence of a showing of the fraudulent and merely colorable joinder of Lloyd Jones as a defendant to defeat removal, such joint cause of action must hence be held, regardless of its final merits, as not removable to this Court by the Casey-Hedges Co. on the ground of a separable controversy. Alabama Railway v. Thompson, 200 U. S. 206, 26 Sup. Ct. 161, 50 L. Ed. 441, 4 Ann. Cas. 1147; Welch v. Railway Co. (C. C., E. D. Tenn.) supra.

[3] 3. The plaintiff's averments of joint liability are not, however, conclusive, where the non-resident defendant, in its petition for removal, avers that the resident defendant is not liable to the plaintiff and was joined as a party defendant in bad faith and for sole purpose of defeating a removal to the Federal Court; and if such non-liability and wrongful joinder be established, the case, though on its face one of joint liability, will be held removable as though such resident defendant had not been joined. Louisville Co. v. Wangelin, 132 U. S. 599, 10 Sup. Ct. 203, 33 L. Ed. 474; Wecker v. Enameling Co., 204 U. S. 176, 27 Sup. Ct. 184, 51 L. Ed. 430, 9 Ann. Cas. 757; Dishon v. Railway Co. (6th Circ.) 133 Fed. 471, 474, 66 C. C. A. 345; Hunter v. Railroad Co. (6th Circ.) 188 Fed. 645, 648, 110 C. C. A. 459; Welch v. Railway Co. (C. C., E. D. Tenn.) supra, at page 764; Lewis v. Railway Co. (C. C., E. D. Tenn.) 192 Fed. 654, 658, and cases cited.

4. The petition for removal, however, specifically and sufficiently alleges that both Lloyd Jones and the Casey-Hedges Manufacturing Co., the resident defendants, are not liable to the plaintiff and were joined as defendants in bad faith and for the sole purpose of defeating a removal to this Court. See, as to the sufficiency of such averments, the cases cited in paragraph 3 of this opinion, supra.

5. The copy of the declaration referred to hereinabove shows no

cause of action whatever against the Casey-Hedges Manufacturing Co., and it is, in effect, conceded in plaintiff's brief, that none exists. As to the joinder of such company as a co-defendant, the petition for removal must, hence, clearly be sustained.

6. As to the joinder of Lloyd Jones as a co-defendant, the question presented is primarily one of practice.

The plaintiff, without filing any plea to the jurisdiction of the court or answering the petition for removal, filed a motion to remand.

The first ground of the motion, that because it appears that the plaintiff and Lloyd Jones are both residents of this State, this Court is hence without jurisdiction, is, in effect, merely a demurrer to the petition for removal, and, in view of the allegations of the petition for removal, obviously insufficient.

The second ground of the motion, which is very inartificially framed, is as follows:

"Because this is a suit to recover on a tort in which it is shown that defendants Casey-Hedges Company and Lloyd Jones are jointly liable to plaintiff, and this being true, and it further appearing that plaintiff and said Lloyd Jones are residents of Hamilton County, and were such residents at and prior to the institution of the suit, the defendant company is not entitled to remove this cause to this court."

The plaintiff also filed on the same day the affidavit of one of its attorneys, which is not, however, referred to in the motion, averring his information and belief as to the joint liability of Jones with the removing defendant, which affidavit is accompaned by the copy of the declaration above referred to, alleging acts of negligence on the part of said Lloyd Jones concurring with that of Casey-Hedges Company in causing the injury to the plaintiff.

The Casey-Hedges Company has replied to this motion by a brief of somewhat anomalous character, in which it insists, in the first place, that the averments of fraudulent joinder in the removal petition must be held conclusive in the absence of a joinder of issue by the plaintiff by appropriate pleading, and, in the second place, has filed as exhibits attached to the brief various original pleadings in the former suit in the State Court, and also an affidavit of its auditor, supporting, it is urged, the allegations of fraudulent joinder contained in the petition.

7. The practice under petitions for removal and motions to remand is of a somewhat informal character, and some apparent contradiction exists in the authorities as to the effect of a motion to remand, in view of the fact that in ruling upon the sufficiency of motions to remand as a joinder of issue upon the petition for removal, the precise character of the particular motion has not always been specifically pointed out. See 2 Fost. Fed. Pract. (4th Ed.) pp. 1618 and 1620, and cases cited in notes. When the specific motions in the different cases are, however, considered, the following principles are, I think, clearly established without any substantial conflict of opinion:

[4] (a) Where a petition for removal affirmatively alleges the requisite jurisdictional facts showing a right of removal in the defendant, and the plaintiff does not, in some appropriate manner, join issue as to such allegations of fact, the only question presented is whether, as a

matter of law, upon the facts stated in the petition for removal, taken in connection with the record, a case for removal was made out. Kentucky v. Powers, 201 U. S. 1, 33, 34, 26 Sup. Ct. 387, 50 L. Ed. 633, 5 Ann. Cas. 692; Dishon v. Railway Co. (6th Circ.) supra, 133 Fed. at page 475, 66 C. C. A. 345; Donovan v. Wells-Fargo & Co. (8th Circ.) 169 Fed. 363, 94 C .C. A. 609, 22 L. R. A. (N. S.) 1250.

[5] (b) Under the established practice in most of the circuits such affirmative allegations of fact in the petition for removal upon which the removability of the cause depends, are usually put in issue by the plaintiff by a plea to the jurisdiction of the Federal court, in the nature of a plea in abatement. 18 Enc. Pl. & Pr. 372, and cases cited in note 2. They may, however, also be put in issue by an answer to the petition for removal. Carson v. Dunham, 121 U. S. 421, 7 Sup. Ct. 1030, 30 L. Ed. 992; Whitcomb v. Smithson, 175 U. S. 635, 636, 20 Sup. Ct. 248, 44 L. Ed. 303; Dishon v. Railway Co. (6th Circ.) supra, 133 Fed. at page 475, 66 C. C. A. 345.

[6] (c) The affirmative jurisdictional averments in the petition for removal may also, it seems, be sufficiently put in issue by a motion to remand, if such motion either expressly denies the averments of the petition for removal, or is based upon a ground which, in effect, traverses or negatives such averments, or is supported by an affidavit which constitutes a denial of such averments. Mansfield Co. v. Swan, 111 U. S. 379, 381, 384, 4 Sup. Ct. 510, 28 L. Ed. 462; Plymouth Co. v. Canal Co., 118 U. S. 264, 269, 270, 6 Sup. Ct. 1034, 30 L. Ed. 232; Morris v. Gilmer, 129 U. S. 315, 327, 9 Sup. Ct. 289, 32 L. Ed. 690; Kansas City Co. v. Herman, 187 U. S. 65, 70, 23 Sup. Ct. 24, 47 L. Ed. 76; Alabama Railway v. Thompson (U. S.) supra; Wecker v. Enameling Co. (U. S.) supra; Curnow v. Insurance Co. (C. C.) 44 Fed. 305; 18 Enc. Pl. & Pr. 374, and cases cited in notes 4 and 5.

(d) But if, on the other hand, the motion to remand does not either expressly or by necessary inference raise an issue upon the jurisdictional facts alleged in the petition for removal, as where it is merely a general motion, without stating any grounds, or where the ground upon which it is based is in effect merely a demurrer to the petition for removal, such motion, under the well established practice, is not sufficient to raise an issue upon the facts alleged in the petition. Kentucky v. Powers, supra, 201 U. S. at page 34, 26 Sup. Ct. 387, 50 L. Ed. 633, 5 Ann. Cas. 692; Hunter v. Railway Co. (6th Circ.) 188 Fed. at page 649, 110 C. C. A. 459; Dishon v. Railway Co. (6th Circ.) supra, 133 Fed. at page 475, 66 C. C. A. 345; Dow v. Bradstreet Co. (C. C.) 46 Fed. 824, 828; Durkee v. Railroad Co. (C. C.) 81 Fed. 1, 2; Carlisle v. Telephone Co. (C. C.) 116 Fed. 896, 897; Ross v. Railroad Co. (C. C.) 120 Fed. 703, 704; Kelly v. Railway Co. (C. C.) 122 Fed. 286, 289.

[7] 8. I have had great difficulty in determining whether the plaintiff's motion to remand in this case, is, in view of its highly inartificial character, to be deemed as merely in the nature of a demurrer to the petition for removal or as sufficiently traversing the allegations of fact in the petition for removal to raise an issue thereon. I have concluded, however, that as the second ground of the motion commences with the

words "Because this is a suit to recover on a tort in which it is shown that defendants Casey-Hedges Co. and Lloyd Jones are jointly liable to plaintiff, and this being true," etc., and as this motion was evidently intended to be supported by the affidavit of the plaintiff's attorneys and the copy of the declaration above referred to, it should be held as sufficiently traversing, by necessary inference, the averment of the allegations of the petition for removal that there is no liability on the part of said Lloyd Jones to the plaintiff, and that he was improperly joined as a defendant; since it necessarily follows that if it is true that said Lloyd Jones is jointly liable with the Casey-Hedges Co. to the plaintiff, as stated in the motion, he was not improperly joined as a defendant. I have been largely controlled in reaching this conclusion by the analogy to Mansfield Co. v. Swan, supra, in which it was said that a motion to remand on the ground, among others, "because the 'real and substantial controversy in the cause is between real and substantial parties who are citizens of the same State and not of different States,'" was "equivalent to a special plea to the jurisdiction of the court" (111 U. S. 381, 384, 4 Sup. Ct. 511, 512, 28 L. Ed. 462); and to Plymouth Co. v. Canal Co., supra, in which a motion to remand one ground of which was, "because * * * it does not appear that the parties to the suit were or have been wrongfully joined as such," was held, in effect, to raise an issue of fact upon the averments of fraudulent joinder contained in the petition for removal and to cast the burden of proof upon the removing defendant (118 U. S. 269, 270, 6 Sup. Ct. 1034, 1037, 30 L. Ed. 232).

[8] 9. It does not follow, however, that plaintiff's motion to remand should now be sustained, even although the effect of its informal joinder of issue upon the averments of the petition for removal casts the burden of proving the allegations of the petition upon the removing defendant, and even although in the evidence sought to be offered by the removing defendant in the anomalous form of exhibits to its brief, it has not sustained such burden of proof. It is clear that the removing defendant has not treated the motion to remand as sufficiently raising the issue of fact to cast such burden upon it; and it is not a strained inference, I think, that for that reason it has not, any more than the plaintiff, sought to show the exact facts in connection with the accident, for the purpose of enabling the court to determine whether or not the defendant Lloyd Jones had any such connection with the accident as to afford any reasonable ground of belief to the plaintiff for joining him as a co-defendant.

[9] Furthermore I think that, in the absence of a general rule of court upon the subject, proper practice requires that when issue is joined upon the averments of fact in a removal petition, application should be made to the court, as a preliminary matter, to fix the procedure to be followed in determining such issues of fact, whether by affidavit, oral testimony, depositions, or otherwise. See: Welch v. Railway Co. (C. C., E. D. Tenn.) supra, 177 Fed. at page 765; Lewis v. Railway Co. (C. C., E. D. Tenn.) supra, 192 Fed. at page 659; and, by analogy, Wetmore v. Rymer, 169 U. S. 115, 18 Sup. Ct. 293, 42 L.

Ed. 682, and McEldowney v. Card (C. C., E. D. Tenn.) 193 Fed. 475, 484.

10. On the whole, therefore, I conclude that, without acting finally upon the motion to remand at this time, an order should be entered which shall provide: that the motion to remand and the accompanying affidavit stand and be deemed as a joinder of issue upon the allegations of the removal petition as to the wrongful joinder of Lloyd Jones as a co-defendant; that if neither party shall apply for a hearing otherwise the issues under the petition for removal and motion to remand shall be heard upon affidavits, such affidavits to be filed by each party within thirty days from the entry of the order; that at the expiration of such thirty days each party shall within ten days thereafter file briefs complying with the rules of the court; and that the papers be then transmitted to me by the clerk for decision.

TRYON v. PENNSYLVANIA R. CO.

(District Court, D. New Jersey. April 15, 1914.)

1. JUDGMENT (§ 342*)—VACATION—TIME.
   A federal district court is without power to vacate or open a judgment after expiration of the term at which it was passed except to correct clerical errors, errors of mere form, or errors of fact which might have been corrected under the English writ of error coram vobis.
   [Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 668–671; Dec. Dig. § 342.*]

2. COURTS (§§ 363, 365*)—VACATION—POWER OF COURT.
   The power of a federal district court to set aside a judgment after the term, as distinguished from procedure, can neither be conferred nor withheld by the statutes of a state or the practice of the state courts.
   [Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 939–950, 952, 955, 969–971; Dec. Dig. §§ 363, 365.*]

3. JUDGMENT (§ 403*) — VACATION AFTER TERM — MODE OF RELIEF — EQUITY SUIT.
   A judgment rendered against plaintiff for want of prosecution could only be set aside after the term by suit in equity.
   [Ed. Note.—For other cases, see Judgment, Cent. Dig. § 764; Dec. Dig. § 403.*]

At Law. Action by William A. Tryon against the Pennsylvania Railroad Company. On motion to set aside a judgment and permit plaintiff to try his case on the merits. Denied.

J. Albert Homan, of Trenton, N. J., for complainant.
Vredenburgh, Wall & Carey, of Jersey City, N. J., for defendant.

HAIGHT, District Judge. The plaintiff instituted suit in the circuit court of Hudson county, N. J., to recover damages for personal injuries alleged to have been sustained by him through the negligence of the defendant. The suit was instituted in February, 1911. It was removed by the defendant to this court in March, 1911. It was subsequently noticed for trial at the September term, 1911, and again at the

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

January term, 1912, of this court. When the case was reached on the call, no one appeared on behalf of the plaintiff. Notice of a motion to dismiss the action for want of prosecution, returnable on January 22, 1912, was then served upon the plaintiff's attorney. On the latter day, no one appearing on behalf of the plaintiff, a judgment of non pros. was entered. This was during the January term, 1912, of this court. In the January term, 1914, a petition was presented on behalf of the plaintiff praying that the judgment be vacated because of the negligence of his attorney in failing to move the case for trial and in failing to respond to the notice to dismiss. On the presentation of this petition a rule to show cause was made why the judgment should not be opened and the plaintiff permitted to present his case. Depositions were taken, and upon the return of the rule the matter was argued by counsel for both parties.

[1] It is unnecessary for me to consider whether the plaintiff would be entitled to the relief which he seeks, if the motion had been made in time, because this court is without power or authority to vacate or open the judgment, as the term in which it was pronounced has passed. Sibbald v. U. S., 12 Pet. 492, 9 L. Ed. 1167; Brooks v. Burlington St. R. Co., 102 U. S. 107, 26 L. Ed. 91; Bronson v. Schulten, 104 U. S. 410, 26 L. Ed. 797, and cases there cited; Phillips v. Negley, 117 U. S. 665, 6 Sup. Ct. 901, 29 L. Ed. 1013; Hickman v. Fort Scott, 141 U. S. 415, 12 Sup. Ct. 9, 35 L. Ed. 775; Rio Grande Irrigation & Colonization Co. v. Gildersleeve, 174 U. S. 603, 19 Sup. Ct. 761, 43 L. Ed. 1103; Tubman v. Baltimore & Ohio R. Co., 190 U. S. 38, 23 Sup. Ct. 777, 47 L. Ed. 946; Gagnon v. U. S., 193 U. S. 451, 24 Sup. Ct. 510, 48 L. Ed. 745; Wetmore v. Karrick, 205 U. S. 141, 27 Sup. Ct. 434, 51 L. Ed. 745; In re Metropolitan Trust Co., 218 U. S. 312, 31 Sup. Ct. 18, 54 L. Ed. 1051. The same principle has been enunciated and applied in this district. U. S. v. Four Lorgnette Holders (D. C.) 132 Fed. 564.

The rule which has been followed in all of the above-cited cases is thus stated by Mr. Justice Miller, in Bronson v. Schulten, supra, 104 U. S. 415, 26 L. Ed. 797:

"It is a general rule of the law that all the judgments, decrees, or other orders of the courts, however conclusive in their character, are under the control of the court which pronounces them during the term at which they are rendered or entered of record, and they may then be set aside, vacated, modified, or annulled by that court.

"But it is a rule equally well established that after the term has ended all final judgments and decrees of the court pass beyond its control, unless steps be taken during that term by motion or otherwise, to set aside, modify, or correct them; and, if errors exist, they can only be corrected by such proceeding by a writ of error or appeal as may be allowed in a court which, by law, can review the decision."

There are a few exceptions to this rule, however, which may be gathered from the above-cited cases, such as the correction of clerical errors, or errors of mere form, and such errors of fact as might be corrected by the English writ of error coram vobis (for which a motion is now substituted). What might be corrected by that writ is thus stated by Mr. Justice Miller, in the same case:

"A writ which was allowed to bring before the same court in which the error was committed some matter of fact which had escaped attention, and

which was material in the proceeding. These were limited generally to the facts that one of the parties to the judgment had died before it was rendered, or was an infant and no guardian had appeared or been appointed, or was a feme covert, and the like, or error in the process through default of the clerk."

It is entirely clear that this case does not come within any of these exceptions. Here the application is, not to correct some clerical error in the judgment or any such error of fact as might be corrected by the writ of error coram vobis, but to set it aside and treat it as a nullity, to the end that the plaintiff may try his case. The same state of facts was before the Supreme Court in Tubman v. Baltimore & Ohio R. R. Co., supra, and the power of the court to open the judgment after the term had passed was denied.

It was urged that the practice in New Jersey permits a court to set aside or vacate a judgment after the term at which it was entered has expired, in a case such as this, and that the rule of the state courts in this respect should be followed by this court.

[2] The question, however, relates to the power of the court, and not the mode of procedure, and, as was said in Bronson v. Schulten, supra:

"This authority can neither be conferred upon nor withheld from the courts of the United States by the statutes of a state or the practice of its courts."

See, also, on this point, Phillips v. Negley, supra.

But even if this court could follow the practice of the state courts in this respect, it seems that no relief could be afforded to the plaintiff, because the same rule, except where changed by statute (and there is no statute in New Jersey changing this rule) prevails in New Jersey. State v. Tolla, 73 N. J. Law, 249, 63 Atl. 338; Fraley v. Feather, 46 N. J. Law, 429; State v. Gray, 37 N. J. Law, 372.

[3] If the plaintiff is entitled to any relief, it must be upon bill in equity upon grounds recognized as furnishing a title to relief. Phillips v. Negley, supra.

It follows therefore that, the motion to vacate this judgment having been made after the term at which the judgment was rendered and entered, this court has no power to vacate it, and that the motion must be denied and the rule to show cause dismissed.

STATE OF MARYLAND, to Use of GORALSKI et al., v. GENERAL STEVEDORING CO. et al.

(District Court, D. Maryland. January 26, 1914.)

Nos. 61, 65, 66, 68, 71, 85, 88, 89, 96, 106–108, 110, 113, 115, 116, 119, 121.

1. MASTER AND SERVANT (§ 315*) — INDEPENDENT CONTRACTOR — ACCIDENTAL EXPLOSION.

A steamship line, as chartered owner of a steamship, contracted to transport a cargo of coal and dynamite from Baltimore to the Isthmus of Panama. It directed the Foard Company, a corporation of Baltimore, to see that the dynamite was loaded and stowed and agreed to pay a stated sum per ton and other fees and commissions. The Foard Company em-

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

ployed the General Stevedoring Company to do the work. A foreman employed by the Stevedoring Company, superintending the stowage of dynamite in the hold, in attempting to force a case into place, negligently struck it with a bale hook, causing a small explosion, which, as shown by the weight of the testimony, set fire to the packing inside the box. The fire spread, and a few minutes later caused the explosion of the dynamite which had been stowed, wrecking the ship and causing the death of 30 persons, the injury of others, and a great loss of property. The Foard Company had previously by itself or through the Stevedoring Company loaded many vessels for the steamship line, including cargoes of dynamite, and had a high reputation in the city for capacity and efficiency. The stevedoring company on such findings of fact did not deny its liability for the damages caused by the negligence of its employé. *Held*, that the steamship line, having employed an independent contractor which it had reasonable ground to believe competent, was not liable for such damages.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1241, 1244–1253, 1255, 1256; Dec. Dig. § 315.*]

2. MASTER AND SERVANT (§ 301*)—INJURIES FROM ACCIDENTAL EXPLOSION—LIABILITY.

The Foard Company organized the General Stevedoring Company to take over the stevedoring work which had previously been a branch of its own business. It owned all of the stock, and the officers of both companies were the same. Such officers made contracts for both companies. The Foard Company kept all of the accounts of the stevedoring company in its own books, collected its accounts, placing the money in its own bank account, paid all of its bills, and every six months charged it for services exactly the amount of its net earnings, or, in case of loss, charged the same to its own profit and loss account. *Held*, that the stevedoring company had no such separate existence as to protect the Foard Company from liability for the damages caused by the negligence of its employé.

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

3. EXPLOSIVES (§ 8*)—INJURIES FROM ACCIDENTAL EXPLOSION—LIABILITY OF CARRIERS.

The collection by a steamship company of a large quantity of dynamite in a harbor for shipment is not in itself a nuisance which alone renders the company liable for any injurious consequences which may result, but it is liable only for negligence in the handling of the explosive.

[Ed. Note.—For other cases, see Explosives, Cent. Dig. §§ 4, 5; Dec. Dig. § 8.*]

4. MASTER AND SERVANT (§ 319*) — PERSONS LIABLE — NEGLIGENCE OF INDEPENDENT CONTRACTOR.

One is liable for injuries caused in the doing of work by an independent contractor employed by him if the danger of such injury is inherent in the work done, unless means are taken to prevent it, and such means are not provided for, but not where the danger lies only in the possibility that some one engaged in doing the work may do any one of a number of careless acts.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1259, 1260; Dec. Dig. § 319.*]

5. MASTER AND SERVANT (§ 120*)—MASTER'S LIABILITY FOR INJURIES TO SERVANTS—SAFE PLACE TO WORK.

The fact that an unfinished vessel on which employés of the builder were working, and which lay in an authorized anchorage ground in a harbor, was within 1,200 feet of another vessel loading with dynamite did

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

not render the builder liable for injuries to employés from an explosion of such dynamite on the ground that it furnished an unsafe place to work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 211; Dec. Dig. § 120.*]

6. MUNICIPAL CORPORATIONS (§ 849*) — LIABILITY FOR TORTS — EXERCISE OF CHARTER POWERS.

A city cannot be held liable for damage caused by an explosion of dynamite when being loaded on a ship in the harbor, because it designated the place where such loading should be done, where the location was selected by a competent official acting with due care and in good faith.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1806; Dec. Dig. § 849.*]

7. MUNICIPAL CORPORATIONS (§ 849*)—LIABILITY FOR TORTS—FAILURE TO EXERCISE CHARTER POWERS.

The provision of Acts Md. 1908, c. 148, which confers on Baltimore City the power to "provide for the preservation of the navigation of the Patapsco river and tributaries * * * and the removal therefrom of anything detrimental to navigation or health, to provide for and regulate the stationing, anchoring and moving of vessels," etc., did not require the city to make regulations governing the loading of ships with dynamite, and it cannot be held liable for injury to persons or property by an explosion of dynamite because it failed to make such regulations.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1806; Dec. Dig. § 849.*]

In Admiralty. Suits by the State of Maryland, to the use of Frances Goralski, widow, and Mary Goralski, infant, Joseph Gielner, and Andrew Gielner, against the General Stevedoring Company, the Joseph R. Foard Company of Baltimore City, the Mayor and City Council of Baltimore City, and the Munson Steamship Line, and by Gustav Lies against the same respondents and the Maryland Steel Company, with sixteen other cases. Decrees for libelants against the General Stevedoring Company and the Foard Company, and for the other respondents.

Thomas Cadwallader, J. Morfit Mullen, George Dobbin Penniman, Gans & Haman, and Charles Markell, all of Baltimore, Md., and Convers & Kirlin and Russell T. Mount, all of New York City, for libelants.

George Forbes, Joseph C. France, and W. Irvine Cross, all of Baltimore, Md., for Joseph R. Foard Co. and General Stevedoring Co.

Alexander Preston, of Baltimore, Md., for Mayor and City Council of Baltimore.

Haight, Sandford & Smith and Charles S. Haight, all of New York City, for Munson S. S. Line.

ROSE, District Judge. On the morning of March 7, 1913, the British steamship Alum Chine lay at anchor in the quarantine anchorage of the port of Baltimore. It was to the westward of the Ft. McHenry Channel leading to the city wharves. It had nearly 300 tons of dynamite on board. A score of men were busy stowing this cargo in the forward hold. Two or three minutes before 10:30 there was an explosion in their midst. It sounded something like the report of a pistol. Two or three of those nearest it were slightly hurt. All

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

in the hold were frightened. They clambered to the deck. The tug Atlantic and the launch Jerome were alongside. The fugitives sprang on them. The panic rush and the cries of fire spread the alarm to most of the 20 other persons on board. They, too, sought refuge on the smaller vessels. The latter pushed off. They reached a point of comparative safety. Smoke and flames in ever increasing volume were pouring out of the forward portion of the Chine. In their midst William Van Dyke, the master of the Atlantic, saw men on the bow of the doomed ship. By signs and gestures they appealed for help. In brief question he sought the advice of his mate, Henry M. Diggs, and his engineer, William W. Marshall. The answer was:

"While there is life there is hope; if there is any chance of saving the men, try to do it."

He turned back into what had become the very jaws of death. The tug Atlantic reached the Chine. Two men jumped from the ship to the tug. It again started away. It had gone but a few feet when at 10:40 there was a terrific explosion. The whole forward portion of the Chine was blown to pieces. All of it instantly sank. More than 20 persons on the Atlantic were killed or fatally wounded. Among the former were its captain and its first officer. Many more were seriously injured. The explosion brought wounds or death to a number on another steamer, the Jason, lying 1,200 feet away. In all more than 30 lives were lost. Much injury was done to property. Twenty-five libels seeking compensation for the death of 14 persons, for the wounding of 24 others, and for damage to the property of two corporations, have been filed. They have been heard as one case. Otherwise than in admiralty it would have been difficult to have proceeded with such directness, economy, and dispatch.

The Parties and the Issues.

The libelants may be classified as: (1) Stevedores working on or about the ship and engaged in the loading of dynamite thereon, or surviving dependents of such stevedores. (2) The owners of the ship. (3) Persons who had no contractual relation with any of the defendants, but who were lawfully in the vicinity of the ship in the prosecution of their own affairs, and who were injured by the explosion, or who are dependent upon persons in like situation who were killed by it, and owners of property which at the time of the explosion was in the neighborhood and suffered from it.

In all there are five respondents, although not all of them have been sued in every case. They are: (1) The General Stevedoring Company. (2) The Joseph R. Foard Company of Baltimore City. (3) The Munson Line. (4) The Maryland Steel Company. (5) The mayor and city council of Baltimore. They will be referred to as the "Stevedoring Company," the "Foard Company," the "Munson Line," the "Steel Company," and the "City." The steamer upon which the explosion took place will be called the "Chine."

All the respondents are corporations; four of them private, one municipal. The Stevedoring, the Foard, and the Steel Companies are incorporated under the laws of Maryland, the Munson Line under

those of New York. The last named held the Chine under a time charter. It instructed the Foard Company to have the dynamite placed on board the Chine. All the stock of the Stevedoring Company is owned by the Foard Company. The Stevedoring and the Foard Companies say the former was doing the actual work of stowing the dynamite. The libelants claim that the Munson Line and the Foard and the Stevedoring Companies are liable because they undertook to handle a dangerous explosive in a place and under conditions in which if it did explode much damage to life and property would result, and, secondly, because the explosion was caused by the negligence of persons for whose actions they are liable.

The Steel Company had built the collier Jason for the United States government. It was about to be sent on its trial trip. Those on board it were employés of the company. They or the dependents of those who were killed seek to hold it responsible because they say it did not use reasonable care to furnish them with a safe place in which to work. With the knowledge that the Chine was loaded with dynamite, it unnecessarily anchored the Jason in the vicinity.

Uncontroverted Facts.

The Chine was a steel vessel. It was built at Cardiff in 1905. It was of 1,797 gross and 1,140 net tonnage. It had a cargo capacity of about 3,000 tons of dead freight. It was about 270 feet long. It was owned by the Alum Chine Steamship Company, Limited. It had come to Baltimore to take 300 tons of dynamite to Minde, Isthmus of Panama, and 2,220 tons of bituminous coal to Port Limon, Costa Rico. The coal was shipped by the United Fruit Company to the Northern Railway Company, the dynamite by the Keystone National Powder Company to the Isthmian Canal Commission. This dynamite had been manufactured at Emporium, Pa. The Pennsylvania Railroad had brought it to Baltimore. It was put up in 12,000 boxes. Each of these held 50 pounds of dynamite. The boxes themselves and the pasteboard cartons in which the sticks of dynamite were packed brought the gross weight of each package up to 57 pounds. The explosive was of the kind known to the trade as saltpeter dynamite. 7,000 cases of it were of 45 per cent. dynamite; the other 5,000 cases of 60 per cent. dynamite. The dynamite was in sticks 8 inches long. In 1,000 cases of the 60 per cent. dynamite they were each 2 inches in diameter, in the other cases 1¼ inches. The Chine had taken on her bunker and cargo coals at the Baker-Whiteley Coal Company pier at Canton. The latter had been furnished by the Jamison Coal & Coke Company, whose mines are situated on the Alexander branch of the Pennsylvania Railroad Company. There were in all 49 car loads of it. Twenty of these came from the Jamison Company's No. 2 mine, 19 from its No. 4 mine, 5 from Hempfield mine No. 3, and 5 from the Salem colleries. Some of this coal left the mines as early as the 20th of February, some of it as late as the 28th. Seven car loads of it were delivered to the steamer on the 3d of March, the balance on the 4th and 5th. The after hold of the ship was

completely filled with coal. The forward hold was 22 feet deep. It was filled to the depth of 15 feet with coal.

There were laid lengthwise of the ship on top of the coal inch boards. They were from 8 to 12 inches wide and about 6 to 8 inches apart. At right angles across them and athwartship like boards were placed with intervals of from 4 to 6 inches between them. Wooden battens were fastened on the cargo strips. A cage to hold the dynamite was in this way constructed. Five sides of it were of wood. The top was the steel deck of the ship. The room thus formed was over 100 feet long, 36 feet wide, and approximately 7 feet high. Into it there opened two hatches—Nos. 1 and 2. Each of them was 16 feet wide. No. 1 was 20 feet long; No. 2, 24 feet. The only other openings into this hold were through two ventilators. The after of these came up through the deck immediately aft of No. 2 hatch. The forward ventilator passed up from the hold through the petty officers' quarters on the port side of the forcastle alleyway and from thence through the forecastle head. It was not shown that there were any openings in this ventilator between the hold and the place at which above the forecastle head it opened into the external air.

After the coal had been placed on board, the Chine went to the quarantine anchorage to receive the dynamite. The loading of the latter began on the morning of March 6th. A car-float was towed down from the Pennsylvania Railroad piers at Canton. On this float were the cars loaded with dynamite. When brought alongside of the ship their seals were broken. Their contents were delivered to the stevedores actually at work. For the purpose of receiving this delivery the stevedores acted as the representatives of the Foard Company, which, in its turn, was the agent of the Munson Line. The loading of the dynamite would ordinarily have been completed on the 6th. A squall, however, sprung up, the car-float broke loose and drifted down towards Ft. Carroll. It was caught by a tug and towed back to Canton. The loading of the dynamite was not resumed until the next morning, the 7th. Then the car-float was brought down by the tug Atlantic. It was made fast to the port side of the Chine in such a way that one car door was directly opposite hatch No. 1 and another hatch No. 2. A wooden chute was placed in the door of the car so as to extend over the rail of the ship to the hatch combing. A similar chute reached from the hatch combing into the hold. In these chutes were little wooden tracks. Along the tracks the boxes slid. This method of loading had been exclusively employed during the whole of the 6th and on the morning of the 7th up until a short time before the explosion. The loading through No. 1 hatch having been then nearly completed, the chute had been taken out of it, and the boxes were thereafter passed down by hand. The 60 per cent. dynamite had all been stowed on the 6th. It had been packed in the extreme forward part of the hold. The officers of the ship thought she was a little down at the stern. To correct this tendency the forward part of the hold was completely filled by the dynamite, leaving a space of from six inches to a foot between it and the deck.

When trouble was first detected on the Chine, the tug Atlantic was

lying in such a position that its bow touched and extended for a short distance along the port quarter of the car-float. The gasoline launch Jerome was lying to the stern of the float alongside the ship and between it and the tug. It was about opposite the amidship of the Chine between the bridge and the engine room. The collier Jason was anchored in the quarantine anchorage to the starboard of the Chine. The wind was blowing strong from the northwest. Both ships were swinging to it and heading about northwest. The witnesses, as usual, differ as to the distance between them. It was apparently about 1,100 or 1,200 feet. The two ships were lying substantially parallel and in such a position that the Chine, which was only about half the length of the Jason, was almost abreast of the center of the latter. The tug, Mary B. Riehl, at the time when accuracy of observation first became important, was lying alongside the port quarter of the Jason. The tug Britania was then in the dredged channel leading to the Curtis Bay coal pier. It was going east and had just passed Sledd's Point. It was about three miles distant from the Chine. The tug Curtis Bay had just come out of the oil wharf to the west of Fishing Point and was something over two miles from the Chine.

The final and disastrous explosion was admittedly the result of a fire which had broken out on the Chine at least ten minutes before the great catastrophe. The vital controversy of fact in the case is as to the origin of this fire.

Did a Blow by a Bale Hook Cause the Disaster?

The libelants say that while one Bomhardt, a foreman of the stevedores, was in the forward hold and between the two hatches, he struck a box of dynamite a hard blow with a bale hook. The slight explosion already alluded to followed. According to them it caused the fire.

There is no doubt that there was a small explosion and that it took place in the forward hold of the Chine within a foot or two of where Bomhardt was. Twenty-four witnesses testify to hearing it. It was the first thing to alarm any one on board the Chine. Whatever it was and whatever was its cause, it greatly terrified all the men who were in the hold or who were looking into the hold through the hatches. They fled so precipitately and were so panic stricken that none of them saw, or if they saw cannot remember, except in the vaguest way, the appearance of anything in the hold after it took place. They were all longshoremen or carpenters employed to aid in making snug stowage, except one gentleman who was an inspector sent by the Isthmian Canal Commission to see that the dynamite was stowed in such manner that it could be safely transported. The flight of these men, the noise and cries of fire accompaning it, and the smoke which very shortly manifested itself, spread the alarm through the ship.

There is no dispute that Bomhardt did use a bale hook upon a dynamite box within a few seconds before the small explosion took place, nor is there any contention as to the purpose for which he used it. The loading of the dynamite had been nearly completed. There were only a few hundred more cases to be stowed. At the place at which the men were working three tiers of dynamite boxes were al-

ready on top of the coal. Each box was 26½ inches long, 10 inches wide, and 8½ inches high. The stevedores who were putting the fourth tier of boxes in place had some 2 feet of dynamite beneath them. The boxes had been laid fore and aft the ship. To complete one row of this fourth tier one more box was required. One of the gang attempted to fill the vacant space with such a box. He found the box a little too long to fit in. He started to place it athwart ship. Bomhardt wanted it arranged as the others had been. In the interest of good and safe stowage it was desirable that the boxes should be closely fitted together. He was therefore right in wishing to have this box placed, if it was possible to do so, in the same direction as the others had been. He tried so to place it by performing an operation which the witnesses refer to as "marrying" this box with the one in front of it. That is to say, he lifted that end of each box nearest the other so that the lower edges of these ends came together. This left, of course, a V-shaped space between the upper parts of the box ends. He then tried to force both boxes down together into the position desired. It was cold in the hold. He had gloves on. His hands slipped, and one of the boxes fell down. He called for a bale hook. A member of his gang handed him one. He raised the box nearest to him with this hook while lifting the box farthest from him with his other hand. After he got the boxes into the marrying position, they dropped down. The end of the further box rested on the end of the nearer. He tried once more. He again used the hook.

Up to this point there is no very important difference between the account given by Bomhardt and that of the other witnesses. Some of them say that he had another man hold the farther box for him. A number of them testified that his repeated failures to accomplish his purpose made him very angry and led him to use some loud and profane language. Others quite as close do not recall those circumstances. He was inclined to be violent and boisterous. It is not possible to say whether the witnesses who testified that he appeared to be angry and was profane, or the others who recall nothing of the kind, are the more accurate. If he used such language it meant little. His employment of it would in itself have made but slight impression on those who knew him. It may be more significant that he found it difficult to accomplish his purpose and several times failed in so doing. He says that, when he got the boxes into the marrying position for the last time, he threw the hook behind him and started to force them into place. While so doing, the near end of the box farther from him exploded. He was wounded in the face. On the other hand, 13 persons, who claim to be eyewitnesses, say they saw the box explode when Bomhardt struck it the second time with the hook. These witnesses were examined in open court. Some of them were Poles or Bohemians, and some were negroes. They testified as to what they at least thought they saw. Four other persons who were in the hold at the time have been examined. Three of them were produced as witnesses for the respondents. Two of them had their backs turned to Bomhardt at the time, and while they heard the explosion do not know what caused it. The foreman of carpenters, a

Mr. Kirkham, testifies that, while he was 15 or 16 feet away from Bomhardt, he was looking at him at the time, and when the explosion happened Bomhardt did not have a bale hook. He also says that he had not seen a hook in Bomhardt's hand for ten minutes before the explosion. He appeared to be a respectable man. If the other witnesses are to be believed, there must have been a number of men around Bomhardt, some of whom were more or less directly between him and Kirkham. The latter testified at the coroner's inquest, held a few days after the explosion. If his evidence there given was correctly recorded, he at that time seemed, on account of the number of people near Bomhardt, doubtful whether he could say positively that the latter had or had not the hook in his hands. The testimony of one other person in the hold at the time has been taken. He was a Mr. Bradyhouse, an inspector representing the Isthmian Canal Commission. His business was to see that the dynamite was snugly stowed for the voyage. He was not produced in court, but by consent his testimony before the coroner was allowed to come in. He saw a flash. Unlike everybody else in the hold or near it, he heard no report. He does not say whether he saw a bale hook in Bomhardt's hands or not. He stated that he did not know what caused the explosion.

One other stevedore testified at the coroner's inquest. He had left the city before the trial of this case. When he was examined before the coroner, the respondents had no opportunity to cross-examine him. They were unwilling that the evidence he then gave should be here read. There were two other carpenters in the hold and doubtless other stevedores. Some of them may have been among those killed. At all events, they have not testified.

The overwhelming weight of the testimony is therefore that the explosion occurred when Bomhardt struck a box of dynamite with a bale hook.

The account the stevedores now give of the accident was current among them within less than 24 hours after the happening of the events described. Most of them were examined before the coroner's inquest. Their testimony was stenographically recorded. Copies of it were in the hands of counsel for the respondents before and during their examination in this case. There is nothing to indicate that any other story of the accident was ever told by any of them, although, of course, in some instances their testimony in court and before the coroner differed in details.

Bomhardt escaped on the Jerome. He at first said nothing to any one. He sat with his face in his hands. It was noticed that he was bleeding. A witness went to him, raised his head, and recognized him. He told the man who bound up his head that a case had burst. This brief colloquy took place before the final explosion. His credibility as a witness is impaired by the fact that it seems to be established that on the morning after the accident he insisted that he never used a bale hook at all.

Unless the evidence in this case is to be weighed in some unusual way, it must be found as a fact that the small explosion which ad-

mittedly took place instantly followed the last blow given by Bomhardt with a bale hook to a box of dynamite.

The respondents answer that it is impossible that such a stroke could have caused the explosion. They say that it would be extremely difficult for any one to hit a box containing dynamite with a bale hook with sufficient force to explode the contents. It would require a blow harder than any sane man who did not wish to commit suicide would have given.

Was Bomhardt Intoxicated?

There is a suggestion that Bomhardt was intoxicated. Most of the Polish and Bohemian stevedores seem to be of that impression, although only two of them go so far as to say so in so many words. None of the other witnesses on either side noticed anything unusual in his condition. He himself testifies that before going to work that morning he had gone into a saloon and taken a ten-cent drink of sherry. One of the other witnesses says he was in the habit of so doing. He himself testifies that he had not been drinking the night before. Five of the Slavic stevedores say that he took another drink out of a bottle as they were bound down on the car-float. He denies it, as does the man who they say gave him the liquor. It is not necessary to decide who are in this respect the more accurate. Bomhardt was not drunk. It is obviously impossible to say whether he was or was not more irritable and excitable than he would have been had he had nothing to drink. Those who say that he was intoxicated doubtless think so. One of the witnesses produced by the respondents knew Bomhardt well for 20 years. He said that the latter was always whooping and hollering. The inspector of the Isthmian Canal Commission testified before the coroner's inquest that on the morning of the accident the stevedores were working very rapidly. They seemed to be very anxious to get through. To his apprehension, they were acting recklessly. They would use one case of dynamite as a ram to drive another into a tight place. After marrying the boxes, they would get on them and try to force them into place with their weight. At other times they kicked the cases.

In weighing this testimony it must be remembered that Mr. Bradyhouse was not subject to cross-examination, and that this was the first occasion upon which he had seen dynamite loaded. On the other hand, Bomhardt had been engaged in loading many cargoes of dynamite. He had become familiar with it without ever having, so far as appears, received any special instruction as to its peculiar nature and dangers. He was uneducated. He was bold and pushing. His knowledge of dynamite was limited. Such a man might take chances which would not have been taken by either an absolutely inexperienced person or by one with a greater acquaintance with the explosive and its peculiarities. To Bomhardt and some of the other stevedores, the loading of dynamite appears to have been very much like the loading of anything else. It was paid for at precisely the same rate as was the loading of flour or canned goods or anything of that kind. There was the same necessity for haste if the work was to be profitably done.

Is Libelants' Theory Impossible?

The respondents further contend that whether Bomhardt was wise or foolish, careful or reckless, sane or insane, drunk or sober, it is a physical impossibility that he could have caused the destruction of the ship in the way he is alleged to have done. The explosion was powerful enough to cut the faces of two or three men. Bomhardt and some of the libelants' witnesses who were in the best position to see say that it burst the box within two or three feet of which they were. How could all this have occurred without anybody being killed or even seriously hurt? The respondents pertinently urged that it is hard to imagine how the blow that was given could have brought about the explosion. If it did, it is still harder to believe that it would not instantly have caused a much greater one.

They have examined Dr. Munroe, one of the greatest living authorities on explosives. He in general very forcibly and ably supports their contentions. He, however, states that a minute portion of the dynamite might have been exploded and produced the effect described by the witnesses. Such explosion could have set fire to the paper or the box or something else. That fire might have gradually spread into a conflagration which in a relatively few minutes blew up the ship. Such results could have followed the blow provided the dynamite was frozen or partly frozen. He believes that it was frozen. The temperatures at the time and for some days before were low enough to freeze dynamite, the freezing point of which he fixes as high as 52 degrees Fahrenheit. At the time of the explosion the temperature was about 21. Dr. Munroe finds confirmation of his opinion that the dynamite was frozen in the fact that after the catastrophe unexploded portions of sticks of it were found on the Jason. Whole boxes of it still unexploded were recovered from the water.

Respondents do not question that the dynamite was frozen. Indeed, it is a part of their case that it and all of it was frozen. They emphasize this fact because it is usually much harder to explode frozen than unfrozen dynamite. If that in the box and all of it had been frozen when Bomhardt gave the blow with the hook, it would have been more difficult to have exploded any of it than it would have been had some or all of it been unfrozen. On the other hand, if a very small portion of it had been exploded by the blow, the fact that the rest of it was frozen would account for what subsequently happened. Dr. Munroe says that frozen dynamite is a more erratic substance than the unfrozen article. It is more difficult to say definitely what it may or may not possibly do. Dynamite which has been frozen and then thawed or partly thawed and then partly frozen again is still more uncertain in its action. When dynamite which has been frozen thaws, some of the nitroglycerine is likely to exude. It may form a film upon the surface of the stick. That film is more sensitive to heat and shock than the compound mixture.

From the time the dynamite left the factory until the explosion the temperature had been both above and below its freezing point. For 24 hours or more before the disaster it had been constantly below. That the accident happened as libelants contend that it did appears

to be possible. Theoretically the chances of it so happening would be so small as to be difficult of expression in mathematical terms. Nevertheless there was an explosion. No reasoning can alter that fact, however strongly it may compel us to look elsewhere for the cause.

Was the Chine on Fire Before the Small Explosion?

Respondents say that fire broke out on the Chine before the small explosion in the hold. That explosion was itself one of the results of the conflagration which ultimately resulted in the great explosion. It was not the cause. To support this contention they have produced some 18 persons who agree in testifying that they saw smoke coming from some part of the forecastle head of the Chine before they saw smoke coming from any other part of the vessel. The wind at this time was blowing somewhat briskly from the northwest; that is, from the bow towards the stern of the ship. These witnesses were on some of the vessels already mentioned. Some of them, it is true, were two or three miles off. The larger number were not over 1,200 feet away, or perhaps materially less, and viewed the Chine from angles which it may be argued should have made it rather easy for them to say at what point above the ship's rail the smoke manifested itself. Some of these witnesses are, moreover, experienced seafaring men whose observation in such matters would be more likely to be accurate than those of less trained people.

Respondents contend that this testimony shows: First, that smoke was seen coming from the Chine before the Bomhardt incident happened; and, second, that even if there be a doubt on that point it is established that the first visible smoke which came from the vessel came from some part of the forecastle head and that such smoke could not have been the result, mediately or immediately, of the Bomhardt incident.

The evidence does not sustain the first of these contentions.

Of the 18 persons referred to, 2 were on the Atlantic. They expressly say that they saw nothing until after the cry of fire had been raised on the Chine. The captain of the Britania looked at his clock when he first saw the smoke. It was 10:34. By the same timepiece the final explosion occurred at 10:40. At least ten minutes, and probably two or three minutes more, elapsed between the small and the great explosion. Capt. Owen A. Thompson of the Curtis Bay, which was more than two miles away, first noticed the smoke at 10:30. He also recorded the explosion as taking place at 10:40. Two other witnesses in his tug, when their attention was first directed to the Chine, saw flame coming from its forecastle head. No flames were discoverable even from the Jason until some time after the small explosion must have happened. Five of the witnesses were on the Riehl. Three of them, Capt. Heywood and Messrs. Martin and Hetherton, testified that the last named was to their knowledge the first to notice smoke from the Chine. He had come down from the Jason. He discovered the smoke as he stepped aboard the tug. According to their estimate, a minute or a minute and a half later they saw men

running aft on the Chine. None of them saw the men who came up out of the hold through the two forward hatches. About two minutes after they first detected the smoke they saw the Atlantic push off. Marshall, of the Atlantic, says that the Atlantic did not leave until three to five minutes after the cry of fire was raised on the Chine. It is to be remembered that the Atlantic before leaving had pulled up alongside of the car-float so as to give the men a better chance to get aboard.

As events showed, Capt. Van Dyke and his officers were not likely to have left until they had given what they thought was sufficient opportunity to every one to escape. It was when Messrs. Martin and Hetherton saw the men of the ship's crew who had been at work on the after deck running that they urged the captain of the tug to get away from the Jason. Grassmick, the engineer of the Riehl, says he did not see the smoke until after the Riehl had gotten under way. Pierce, the mate of the Riehl, differs in recollection from Capt. Heywood and thinks the smoke from the Chine was called to the attention of the captain by a fireman about a minute before Mr. Martin came aboard. It was, unfortunately, not possible to take the testimony of the fireman in question. Pierce fixes the Atlantic's leaving at about three to five minutes after he first saw the smoke, which is precisely the same estimate made by Marshall as to the time which elapsed between the cry of fire on the Chine and the departure of the Atlantic. Pierce estimates that there was about ten minutes between the time at which he first saw smoke and the great explosion. The remaining seven witnesses who testified as to seeing smoke coming out of the forecastle head or its after bulkhead were on the Jason. Of these, three—the captain, Mr. Johnson, and the colored steward Hammond—say that when they first noticed the smoke the Riehl had already left the Jason. Quite certainly, therefore, none of them saw it before it was observed from the Riehl, and Hammond's estimate that it was four minutes after he saw the smoke before the Atlantic left must be taken in connection with that of the apparently much more accurately minded witness, Martin, that it was about two minutes. Boatswain Wilson of the Jason did not see the smoke until the Atlantic was pulling away from the Chine. He thinks this was only about five minutes before the great explosion. Chief Officer Andrews of the Jason did not notice the smoke until the Atlantic pulled off and until, as he thinks, about seven minutes before the explosion. It was he who gave the first notice to Capt. Thompson of the Jason. Engineer Winship of the same vessel heard some one say that there was fire on the Chine. He looked and saw smoke. He went below to get his engine ready to leave. He came back just before the great explosion. He does not remember seeing anybody on the decks of the Chine. He thinks it was about ten minutes between the time he first saw the smoke and the explosion.

There remains only the witness Lang. He so expressed himself in his examination in chief as to be understood to say that he saw a bunch of men getting over on the scow and that he saw the smoke about six or seven minutes before he saw the men coming from the

hatch. On cross-examination his attention was called to some testimony he was said to have given at the inquest. He thereupon explained that he had never intended to say that he ever saw more than one man coming out of the hatch and that was after the Atlantic had left. The man in question was doubtless one of those for whom the Atlantic returned. He says he had been watching the men slide the boxes down the chutes; that he kept his eyes on the Chine from the time he saw the smoke until after the explosion. It is not easy to make a connected and consistent story out of his account. It may be suggested that perhaps he meant that though he did not see the men as they climbed out of the hatches, and perhaps could not, he did see them when they ran over the scow. It is hard, however, to suppose that that was what he intended. He says the explosion occurred in five minutes after he saw the bunch of men get on the scow. He states that he had seen the smoke for from six to seven minutes before he saw the one man come out of the hatches, but according to him the man did not appear until after the Atlantic had left. When the first rush across the scow took place, the Atlantic was still by its side.

This witness, together with Anderson, Martin, Hetherton, Johnson, Winship, and Hammond, who were apparently among those who earliest noticed the smoke, saw it come out from under the forecastle or from an opening in the after bulkhead of the forecastle, or up along that after bulkhead. All these descriptions point to its coming out of the forecastle alleyway. Had there been any smoke there before the explosion in the hold, or within a minute or so afterwards, it could not have failed to have attracted the attention of some of the witnesses who were then on the ship. One of the stevedores had been to the toilet in the forecastle head, had come out through this alleyway, and had gotten as far as No. 2 hatch, and was climbing down the ladder into it, when the Bomhardt explosion took place. He must have passed out through the opening not more than a minute preceding the small explosion. He noticed no smoke or anything else to alarm him until the Bomhardt incident happened. One of the crew of the Chine was asleep in the crew's quarters in the forecastle head. He was aroused by the noise made by the escape of the men from the ship. He ran out through the opening. He did not notice any smoke or fire there. The second officer of the Chine testified that at the time of the Bomhardt explosion he was on the forecastle head eight or nine feet forward of the hatchway. He noticed nothing wrong until the small explosion in the hold.

The record contains the testimony of 36 persons who were on the Chine, of two on the car-float, of a like number on the Atlantic, and of one on the Jerome. No one of them saw or suspected anything wrong until after the small explosion in the hold took place.

Respondents point out that many of the witnesses on the Chine went through such experiences and were so excited and alarmed that their testimony is not as reliable as that of more favorably situated persons who were on the other vessels. From many standpoints the observation is doubtless just. All the testimony, however, shows that

every one on the Chine instantly fled the moment he saw or heard anything which to him suggested that anything alarming had happened. It is certain that no one did flee until after the explosion in the hold.

It is found as a fact that no one on or off the Chine saw smoke or other evidence of fire on board that ship until after the small explosion had taken place.

Respondents say that, even so, the first smoke which was seen could not have come from any fire caused by that explosion. In their view there must have been another fire which originated either prior to that explosion or at all events simultaneously with it. It was this fire which gave off the smoke which was first seen from the other ships. The four witnesses from the Britania and the Curtis Bay were too far away to make it possible for them to speak more definitely than to give their opinion that the smoke or flame came from the forward part of the Chine. Among the other 14 persons who from the other ships testify on the subject, there is considerable difference of opinion as to the place from which it did come. Two of them, Pierce and Heywood, think it came from the windlass, which was about in the center of the forecastle head 14 feet, or thereabouts, forward of the after bulkhead. Comegys and Grassmick think it came aft the windlass and out of the ventilator. Capt. Thompson of the Jason simply says it was unmistakably coming out of the forecastle, but does not specify further than to mention that he at first thought it was steam from the windlass. Nine others all in varying phrase say it came out of the after bulkhead or out of the opening in the after bulkhead; that is to say, the forecastle alleyway, or right up from the deck against the after forecastle bulkhead. This after bulkhead was 4 feet in front of hatch No. 1—14 feet in front of the strong—back of that hatch. It will be noticed that those witnesses who thought that the smoke came from the windlass put it as far forward of the after bulkhead as the after bulkhead witnesses locate it forward of the center of hatch No. 1. Precise accuracy of observation in such matters is not possible.

That the small explosion in Bomhardt's vicinity did cause a fire is absolutely established. The cry of fire from those who saw the explosion, and the rush which followed it, gave the first warning to Marshall and Comegys on the Atlantic, as well as to many persons on the Chine, that there were trouble. That no fire manifested itself in the forecastle at the time of the small explosion or for a minute or two afterwards has already been shown. Any fire subsequently breaking out there might have been caused by that which originated in the hold. There were too many people on deck about the hatches and in the hold under the hatches to have made it possible for the explosion which took place in the hold to have been caused by a spark coming down through the hatches and igniting any gases which might have been below. That possibility is negatived by the same testimony which has demonstrated that there was no visible fire in the forecastle before the Bomhardt explosion.

Respondents say that, even if so much should be found against them, it does not show that there might not have been a fire in the hold itself which preceded and caused the small explosion. This fire is supposed to have originated or to have first manifested itself in the form of smoke in the forward part of the forward hold. Much has been said of the properties of marsh gas or methane and of the circumstances under which it comes from coal and may cause explosion. It would seem, however, that it could not have produced this disaster. The expert testimony on the question seems to show that under all the conditions it was not likely that the coal in this hold would give off any dangerous quantity of it. What is, however, more conclusive is that it would not explode until it came in contact with spark or flame. What has already been said shows that there was no possibility of any such contact originating at any point above the surface of the coal. That the fire started otherwise than as a result of something that happened to the boxes of dynamite with which Bomhardt was working narrows itself by elimination to the claim that there was spontaneous combustion in the coal.

Bituminous coal under favorable conditions does sometimes spontaneously ignite. Such ignition is a recognized danger. Respondents do not claim that in the hold of ships it is what could by any fair use of language be described as a common occurrence. If it were, it would obviously be dangerous to carry dynamite in the same compartment, or perhaps in the same ship, with coal. Those who had a hand in stowing the dynamite and coal in the proximity in which they were placed on this ship would be liable for the consequences. In point of fact, however, it is the usual practice to carry dynamite on coal ships. The practice is approved by the underwriters. No evidence has been given of any accident that has ever happened therefrom. Nevertheless, if spontaneous combustion does sometimes occur in coal, it might have occurred in this coal provided the conditions necessary to it existed. The evidence does not, perhaps, altogether explain what those conditions are. Very possibly they are not fully known. None of those which are usually recognized as contributing to such a result existed in any supposedly dangerous degree in the cargo in question. None of it had been in the ship's hold more than four days; most of it a still shorter time. The temperatures in the hold were very low. Something has been said as to the possibility of the coal having been heated from the boiler room fires. The evidence shows that the hold was separated from the engine room by a steel bulkhead, then there was six inches of open air space, and then a three-inch wooden bulkhead. Moreover, this bulkhead was more than a hundred feet away from the forward ventilator. If the smoke which witnesses think they saw coming out of the forecastle came from fire in the coal, it must have come up through the forward ventilator, and that was more than a hundred feet from the engine room bulkhead, and between the two 20 men had been working some hours. Though they were working hard, the hold to them seemed very cold. That the engine room fires in any way contributed to the disaster may be dismissed from consideration.

It is suggested that spontaneous combustion did begin in the coal, not in the after part near the engine room bulkhead, but in the forward part under the forecastle head and forward of all hatches. It is surmised that pockets of coal gas or of methane had formed at intervals in the coal or under the dynamite boxes. The fire kindled in the coal ignited one of these pockets and that fired another, and so on until, just as Bomhardt struck the box with his bale hook, the explosion of one of these pockets took place immediately under the three tiers of boxes upon which he was standing; that such explosion caused the report, the smoke, the dust, or the flame, or whatever it was the men saw, and caused the injury to Bomhardt and to the one or two other men who were hurt. The theory does not sound probable. Respondents answer that the explosion did take place and that no theory of it is probable. That is true. But this theory they put forward has no evidence in its support except the testimony of witnesses that smoke came from a point forward of the hatches. But if that smoke came from the coal, as already pointed out, it could have manifested itself in the forecastle only by coming up through the forward ventilator which passed through the forecastle head. It is significant, however, that only a very few of the witnesses thought that it came from the ventilator. The large majority of those who were in a position to speak with any definiteness said, as has been already stated, that it came out of the forecastle alleyway or up against the after bulkhead of the forecastle. Smoke which came from a fire in the coal in the hole could not have shown itself there. There was a steel deck in the way.

The explanation of where the smoke came from is in fact suggested by the testimony of two of the most intelligent witnesses whom the respondents called upon to speak upon the subject. Mr. Martin said that:

"The smoke came up clinging to the bulkhead. * * * As soon as the smoke came up the forecastle bulkhead on a level with the forecastle head, it was blown by the wind aft."

And Mr. Hetherton said:

"The smoke was coming out just like you would kindle a fire, and as it came up to the height of the wind it beat it down—it kept beating it down."

Other witnesses say that it came up apparently clinging to the after forecastle bulkhead. The top of that bulkhead was some feet higher than the hatch-combings. The wind was blowing aft over the top of the forecastle head. Under such conditions it is not impossible, or perhaps very improbable, that the wind would beat down the smoke as it came from the hatches and cause an eddy or back draft which would carry it up along the forecastle bulkhead.

There were only four feet between this bulkhead and the forward part of hatch No. 1. Respondents insist that hatch No. 1 was covered so that the open part of that hatch was 14 feet from the bulkhead. They seriously question the possibility that smoke coming from hatch No. 1 could have by any back draft been forced over this 14 feet. It is, however, by no means certain that the forward part of

hatch No. 1 was covered completely, if at all. Kirkham, it is true, says:

"That partly the forward hatches were on. There was a strong-back in the center of the hatch. The forward hatches were on; I remember that well."

Two men who passed on another vessel 200 or 300 feet away some little while before the trouble claim to be positive in their recollection that the forward part of hatch No. 1 was covered, and Kaiffer, the Stevedoring Company's assistant superintendent, thinks that the forward part of hatch No. 1 was on. On the other hand, one of the colored stevedores testifies that both the hatches were open, and more significant still is the testimony of Dorgan, one of the carpenters, a witness produced by the respondents, who testifies positively that he made his escape by going up the permanent iron ladder which came up at the center of the forward end of hatch No. 1; that is, at a point which must have been directly opposite the opening of the forecastle alleyway and only four feet aft of it. I see no reason to doubt that he is entirely accurate in his testimony in this respect. It may be that all the covers had been put on the forward section of No. 1 hatch except those which covered this ladder, and that they had been left off for convenience of ascent and descent. If such was the case, there would be the greater probability that the smoke from the fire starting in the hold at the time of the Bomhardt incident might have manifested itself where it did to observers at a distance. It must be borne in mind that most, if not all, these observers were unable to see the hatches themselves because of the well deck construction of the ship.

It should be found as a fact that whatever fire was on the ship originated at the time and place at which Bomhardt struck the dynamite box with his bale hook.

By a fair preponderance of evidence the libelants have shown that the disaster happened because he did strike the box with that hook. If the results which followed were probable ones, or even such as would happen on an appreciable minority of occasions when the circumstances were similar, the libelants' contention would be made out beyond a reasonable doubt. There is, in fact, a reasonable doubt. It rests, however, solely upon the improbability that there could have occurred all the circumstances which would have made it possible for Bomhardt's act, in the first place, to have set off some dynamite, and, in the second place, to have set off so little as was in the first instance actually exploded. This consideration is entitled to great weight. Nevertheless, as the evidence seems to show that such a result of what he did is not impossible, it must be held that the libelants have made out their case to the extent that the law requires.

It remains to consider how far the facts already found entail liability on the various respondents.

The Stevedoring Company.

The Stevedoring Company does not question that upon those findings it is responsible to such of the libelants as can show that they suffered by the explosion. It has expressly stated that it does not

desire to set up against any of them the defense that the act which did them harm was that of their fellow servant.

Munson Line.

[1] The Munson Line had undertaken to transport coal and dynamite from Baltimore to Central America. For that purpose it had ordered the Chine to Baltimore. It had directed the Foard Company, as usual with its ships sailing from Baltimore, to act for it in such matters as required action in that city, and specifically to see that the shipment of dynamite was stowed on board. It did not exercise, or attempt to exercise, any control over the Foard Company as to whom the latter should employ to do the loading, or in what manner the loading should be done. For doing this work the Foard Company was to be paid a certain number of cents per ton of dynamite loaded and certain other fees and commissions. In short, the Foard Company was employed as an independent contractor to cause the dynamite to be loaded on the Chine. This was so whatever knowledge the Munson Line had or did not have of the independent existence of the Stevedoring Company, or whatever was its conceptions of the relations between the Foard and the Stevedoring Companies. Libelants say that nevertheless the Munson Line is liable for the consequences of Bomhardt's act, and that for three reasons:

(1) That the Foard Company was not reasonably competent to load dynamite and that the Munson Line had no sufficient cause to believe it competent.

The Foard Company, either by itself or through its subsidiary company, had for years done a large part of the stevedoring business of Baltimore. It had a high reputation for capacity and efficiency. It had previously loaded many cargoes of dynamite for the Munson Line and, so far as the record shows, without accident or trouble of any kind. It may be that it had not given sufficient study to the precautions which should be taken in the loading of dynamite, especially with reference to the selection of the individuals who were to do the loading or as to the discipline which it was necessary to maintain among them. Their standing and reputation, however, was at least as high as those of any other Baltimore concern.

There is nothing in the record to charge the Munson Line with having employed some one whom it either knew to be incompetent or whom it had reasonable ground to believe was otherwise than competent.

[3] 2. That the Munson Line caused dynamite to be handled in the harbor of Baltimore, and it thereby became responsible for all damage which might be suffered as the result of an explosion in that dynamite.

This alleged liability is based upon the assumption that the collection of large quantities of dynamite is in itself a nuisance, for any injurious results of which he who caused or maintained it must answer. This contention rests upon the doctrine enunciated in Rylands v. Fletcher, 3 House of Lords, 330, and in the cases which followed it. Judge Holt has so recently decided this question adversely to the libel-

ants that nothing further need be said upon the subject. The Ingrid (D. C.) 195 Fed. 596.

[4] 3. Libelants say that the handling of large quantities of dynamite in a frequented harbor is dangerous business. One who directs it to be done remains liable for the negligent acts of those who do it, although such negligence is that of the servant of an independent contractor. There are a number of conditions under which he who directs a thing to be done remains liable for any harm which results to others through the negligent doing of it. The fact that the work is being done by an independent contractor does not excuse him.

Some of these conditions need not be here considered. The Munson Line was not bound by statute or by contract to prevent accidents or to make good the damage which might happen because of the loading of the dynamite. Such cases as Hole v. Sittingbourne Railway, 6 H. & N. 488, and St. Paul Water Co. v. Ware, 16 Wall. 566, 21 L. Ed. 485, are therefore not in point.

The loading of the dynamite did not necessarily require the disturbance of the bed of any highway or the placing of any obstruction in it.

The discussion found in the opinions of the courts in Woodman v. Metropolitan Railroad, 149 Mass. 335, 21 N. E. 482, 4 L. R. A. 213, 14 Am. St. Rep. 427, Chicago City v. Robbins, 2 Black, 418, 17 L. Ed. 298, Id., 4 Wall. 679, 18 L. Ed. 427, Penny v. Wimbledon Urban Council, Law Reports (1899) 2 Q. B. Div., 76, and like cases, are instructive. They are not directly in point. Still less applicable are those which enforce the liability of one who causes lateral support to be withdrawn from his neighbor's foundation. Bonaparte v. Wiseman, 89 Md. 21, 42 Atl. 918, 44 L. R. A. 482.

The rule applicable to the class of cases with which we are now dealing is usually stated to be that the defendant is liable when he—

"directs an act to be done from which injurious consequences will result, unless means are taken to prevent them in the shape of additional work, but omits to direct the latter to be done as part of the work to be executed. * * * He is therefore not in the position of a man who has simply authorized and contracted for the execution of a work from which, if executed with due care, no injury can arise and who is therefore not to be held responsible if, while the work is going on, injury arises from the negligence of the contractor or his servants. * * * There is an obvious difference between committing work to a contractor to be executed from which, if properly done, no injurious consequences can arise, and handing over to him work to be done from which mischievous consequences will arise, unless preventative measures are adopted. While it may be just to hold the party authorizing the work in the former case exempt from liability for injury resulting from negligence which he had no reason to anticipate, there is, on the other hand, good ground for holding him liable for injury caused by an act certain to be attended with injurious consequences if such consequences are not in fact prevented, no matter through whose default the omission to take the necessary measures for such prevention may arise." Lord Cockburn, Bower v. Peate, Law Reports, 1 Q. B. Div. 321.

In slightly different forms of words the same distinction has been made in numerous cases by state and federal courts in this country, as, for illustration, by Judge, now Mr. Justice, Holmes, in Woodman v. Metropolitan Railroad, supra. Mayor and City Council of Baltimore v. O'Donnell, 53 Md. 118, 36 Am. Rep. 395.

Lord Cockburn's language is quoted with approval by Judge Gray in the case principally relied on by libelants. Doll v. Ribetti, 203 Fed. 593, 121 C. C. A. 621. If it be a full statement of the applicable law, the Munson Line is not liable.

No additional work was required to be done in order to prevent the disaster. This, according to the theory of the libelants, resulted from the doing of an affirmative act altogether unnecessary and highly reckless. The rule is not infrequently put in different words. It is said that he who directs the doing of dangerous work is liable for accidents which happen in its doing. Sometimes courts who so say intend nothing more than to paraphrase Lord Cockburn's language. The word "dangerous" in this connection may, however, mean different things. It may be limited to undertakings which when executed skillfully and without any negligence whatever will or may endanger the person and property of another. When so used, "dangerous work" means the kind of work, the responsibility for taking additional precautions to avoid the necessary consequences of which Lord Cockburn said could not be shifted. It may mean work in the doing of which there is obvious likelihood that those who actually execute it will do carelessly something which must be done. It may be both possible and customary to take in advance measures which will prevent injurious consequences from such easily foreseen negligence. There are well-considered cases which hold that he who in the first instance directs that kind of work to be done and does not see that such precautions are taken is answerable for harm actually done and which such precautions would have prevented.

In Doll v. Ribetti, supra, the occupant of a building in Pittsburgh was held responsible for the injury done a passer-by by the fall of a man who was engaged in cleaning a fourth story window. The evidence showed that in that city persons who were engaged at such heights in washing the outside of windows were usually protected by belts, the ends of which were secured in hooks placed in the sides of the windows for that purpose. There were no such hooks in this case and the window cleaner was not in any way secured. The occupant of the building might easily have made sure that he was. He was directly employed by a concern which made a business of cleaning windows and had a contract with the defendant to clean them at fixed intervals. The test of liability actually applied in this case is more severe than that laid down in Bower v. Peate, supra. Cleaning the windows did not necessarily change anything or bring about any consequences which in themselves were dangerous unless guarded against. There was danger, unquestionably, that a person cleaning the outside of such a window might fall to the pavement.

This case in its facts is, perhaps, not easily distinguished from that of Davis v. Whiting & Son Co., 201 Mass. 92, 87 N. E. 199. There the owner of a building contracted to have some painting done on its building. The painters were pulling up a scaffold upon which to work. They negligently struck a shutter and knocked it out of place. It fell to the sidewalk and injured a passer-by. The jury found that the performance of the contract was necessarily attended with danger to

passers-by, yet it was held that the owner was not liable. It was said that the danger incident to doing difficult work where an injury may result from the lack of exercise of skill and care, or even from pure accident, is a different kind of danger from that for which the cases allow a recovery.

In such matters it is very difficult to draw the line. As was said by Judge Holmes in Woodman v. Metropolitan Railroad, supra, "exactly how far the principle should be carried is a question of nicety."

In Doll v. Ribetti the only danger to passers-by was that the cleaner would fall. He might fall, although he was not to any appreciable degree negligent. A simple precaution would have eliminated that danger.

In Davis v. Whiting & Son Co. the work was dangerous to the users of the streets only in that it afforded many opportunities for various sorts of negligence upon the part of the workman. Any of these might harm others. If the work was properly done, nobody would be hurt.

The adjective "dangerous" may have in this connection still a third significance. It may imply, not that there is any danger if the work be carefully done, and not that there is any special difficulty in doing it carefully, but merely that if anybody be careless the consequences to others may be grave.

In order to have held the defendant in Davis v. Whiting, it perhaps would have been necessary to give to the word "dangerous" its last meaning. That well-considered cases have not been willing to do. Where the danger is not inherent in the work done, but lies solely in the possibility that some one engaged in doing it will do any one of an indefinite number of careless acts, the defense of independent contractor, if otherwise available, is sufficient. The negligence in such cases is in the language of the authorities collateral or casual, and not inherent. They say it cannot be anticipated or guarded against.

There is nothing in this record to charge the Munson Line with notice that the stevedores employed by the Foard Company were permitted to use bale hooks, or, in point of fact, did use them. In the absence of such notice it could not reasonably have supposed that the Foard Company would put in charge of the work a man who would hit a box of dynamite with a cargo hook. There was nothing that it was called upon to guard against. It cannot be held liable for the consequences of Bomhardt's act.

The Foard Company.

[2] The Foard Company denies liability. It says it did not employ Bomhardt. He served the Stevedoring Company. The latter was an independent contractor, for the defaults of whose servants the Foard Company is not answerable. It has already been held that such defense when applicable is sufficient.

The libelants, however, contend that the Foard Company stood in such a relation to the Stevedoring Company as to be responsible for the negligent acts of the latter's servants, whether the work in which

they were employed was or was not of a specially dangerous character, and that in any event the Foard Company must respond in damages for the consequences of what Bomhardt did because it knew that no effective measures were taken by the Stevedoring Company to prevent the use of bale hooks upon dynamite cases.

What were the relations between the Foard Company and the Stevedoring Company? Prior to July, 1910, the Foard Company had itself carried on an extensive stevedoring business. In that month it caused the incorporation of the Stevedoring Company. In the succeeding January at the annual meeting of the stockholders of the Foard Company the president stated that it had been deemed advisable from many standpoints to divorce the stevedoring business from the general business of the company and for that purpose the Stevedoring Company had been organized. The minutes of the Foard Company neither then nor subsequently made any further explanation as to what those standpoints were. The then president of the company died in June, 1911. No witness attempts to tell precisely what purpose the Foard Company had in mind other than may be inferred from the president's statement.

The authorized capital of the Stevedoring Company is $2,000. All this was subscribed for by three employés of the Foard Company. The stock was paid for in cash; the money being furnished by the Foard Company. The certificates of stock were issued to the nominal subscribers, but were by them indorsed in blank and delivered to the Foard Company, which has since held them all. No other person than the Foard Company has ever had any interest as stockholder in the Stevedoring Company. The three persons in whose names the stock stood have always been the sole directors of the company. One of them has been its president, another its secretary, the third its treasurer. At the time of its formation its president was the secretary of the Foard Company. Since October, 1911, the president, secretary, and treasurer of the Stevedoring Company have respectively held the like offices with the Foard Company.

When the Stevedoring Company was organized, the Foard Company sold it its stevedoring gear for $1,450. Some nine months after, the insurance policies on this gear were transferred from the name of the Foard Company to that of the Stevedoring Company. The Foard Company had regularly in its salaried employ a superintendent and certain other persons whose whole time was given to the stevedoring portion of its business. It habitually employed certain foremen of stevedores and quite regularly many individual longshoremen. These persons were, however, as a rule paid only for the time during which they were actually at work. Both these salaried employés and those who were paid for the work done were thereafter on the books of the Foard Company designated as employés of the Stevedoring Company. The change in the name of their employer was known to the salaried men, the foremen of the stevedoring gangs, and to many of the working stevedores. The identification checks given to the members of the gangs and the envelopes in which they received their pay hereafter bore the name of the Stevedoring Company. Some of the stevedores

examined at the trial testified, and doubtless with truth, that they supposed they were still working for the Foard Company. Such an opinion on their part was natural enough. Nevertheless it cannot be said as to them there was any holding out of the Foard Company as their employer.

When the Stevedoring Company was first organized, there were the usual corporate meetings for the purposes of organization. Since August, 1910, however, no meeting of either the stockholders or directors of that company has ever been held. It has never handled its own current funds. The expenses of doing its stevedoring business were paid by the Foard Company. The compensation for the stevedoring work it did was received by the Foard Company and deposited in the latter's bank account. The Stevedoring Company has never paid its officers any compensation. It has never paid anything for office rent, bookkeeping, or telephone service. All these were furnished by the Foard Company. The latter has always taken the greater part of the profits of the Stevedoring Company as compensation for its services in managing that company. The agreement under which this was done has never been reduced to writing. The witness who has been secretary and director of the Stevedoring Company since its organization, and for the last two years has been secretary of the Foard Company as well, frankly admits that he does not know what the agreement was. The gentleman who has been president of the Stevedoring Company since it was organized, and has for two years past been the president of the Foard Company, says he made the agreement verbally with Mr. Foard, the then president of the Foard Company. He states that the Stevedoring Company was to pay the Foard Company for soliciting business or throwing any business it could to the Stevedoring Company, or financing, to the extent that it deemed proper and prudent, a sum approximating the Stevedoring Company's net profits during the year. No figures were named. Precisely what was meant by a sum approximating the net profits is not defined.

It is highly probable that Mr. Foard never made his plans quite clear to any one else, if indeed they had been settled in his own mind. During his lifetime the Foard Company kept in its books only such accounts as showed what sums it had received for the Stevedoring Company and what disbursements it had made on account of that company. It did not there enter the payments that were made by the Stevedoring Company out of the $2,000 which had been orignally paid in for its capital stock. On December 31, 1910, the books of the Foard Company showed that the Stevedoring Company had made a net profit on operations of $6,517.40. This sum the Foard Company paid into the bank account of the Stevedoring Company and received from the latter a check for $5,000 "for securing, financing and managing the business" of the Stevedoring Company for six months. The difference between these checks, $1,517.40, represented what the Stevedoring Company took for itself after compensating the Foard Company. Before the 30th of the next June Mr. Foard was dead. Whatever plan he had for determining the relations of the two companies to each

other died with him. Thereafter a new method of bookkeeping was adopted. In the bank account of the Stevedoring Company there never were but two deposits. The last of these was on the 4th of January, 1911, and against it there never were drawn more than nine checks; the latest in date being October 31, 1911.

After Mr. Foard's death the practice, or the form, of charging the Stevedoring Company a definite round sum for the Foard Company's services was abandoned, and at the end of every six months' period it was charged for services in managing, soliciting, and securing business precisely the amount of the net profits of the Stevedoring Company for the period, neither more nor less. All the Stevedoring Company payments were made by the Foard Company. If they were such payments as were convenient to be made by check they were made by the Foard Company's checks. When cash was required, as for pay rolls, the Foard Company drew the necessary amount of money out of bank. It was distributed in pay envelopes by the gentleman who was the treasurer of both companies. All entries of payments and disbursements were made upon the Foard Company's books. Upon the Foard Company's ledger there were ten accounts designated on account of General Stevedoring Company. Nine of these accounts had to do with various departments of the stevedoring business; as, for illustration, gear account, ore discharge account, foremen, and so on. Once every six months the balances of these accounts were combined into another account which was called "Current Account, Account General Stevedoring Company." This account showed the net gains or losses of the stevedoring operations for the six months. It was balanced when there was a profit by carrying the precise amount thereof into the profit and loss account of the Foard Company. When, as happened in the year 1912, there was a net loss, the account was closed by carrying that net loss as a charge against the profit and loss account of the Foard Company. Except in two particulars, the accounts of the Stevedoring Company were kept precisely as they necessarily would have been kept had the business been directly conducted by the Foard Company. These were: First, at the head of each of the accounts was written the words "Account General Stevedoring Company"; second, the current account was not absolutely essential if the Foard Company had been running the stevedoring business itself, but even then it would have been highly convenient as showing in one consolidated account on the books the net result of all stevedoring operations. It was never possible to take a trial balance of the Foard Company books without including the balances of the Stevedoring Company accounts. When the Stevedoring Company lost money, as it did, when the Foard Company paid out more for it than it took in, it was not treated on the Foard Company's books as a debtor of the Foard Company. The sum due by it was not included in the assets of the Foard Company as an account receivable. It was simply dealt with as it would have been had the loss been the loss of the Foard Company. There are no writings which define in what the "managing" for which the Foard Company charged consisted. Counsel for the company suggest that it was merely a somewhat inapt designation to cover the furnishing of the

services of the Foard Company's officers and employés, its bookkeeping, its telephone, and its office. It is probably utterly impossible for any one to say now of what it did consist or was supposed to consist. What Mr. Foard meant by it no one knows. Those who came after him quite clearly did not.

For nearly two years prior to the disaster the officers of the two companies were precisely the same. They never thought, and in the nature of things never could think, in what capacity they were acting at any particular time, whether as the officer of one company or that of the other. Much stress is laid on the fact that the bills for stevedoring services were always rendered on the bill heads of the General Stevedoring Company and that it had letter heads of its own. On the other hand, letters written upon the Foard Company's letter heads to the Munson Line and in evidence in this case show not only that the Foard Company discussed the stevedoring rates with the Munson Line precisely as it would have discussed them had the Foard Company been doing the stevedoring business directly, but that it used repeatedly such expressions as "our outward stevedoring bill," "our people would really have to have more money for loading your ships," "we have charged," "our Mr. Wagner" (he was nominally the superintendent of the General Stevedoring Company), "our superintendent," stevedoring "cost us," "our foreman advises," "we make it a practice before commencing loading or discharging a vessel to inspect her gear both for the protection of our stevedoring organization and for the protection of the ship and other interests," "we will be glad to put on our stevedoring organization at about 22 cents per ton." Mr. Bromell of the Munson Line, for whom the Foard Company handled on an average perhaps a ship a week, said he always understood that the Foard Company was doing the stevedoring work, although he did remember that the Foard Company when submitting vouchers for their accounts would sometimes attach stevedoring bills made out on the bill heads of the General Stevedoring Company and to that company. On the other hand, the stevedoring licenses required to be taken out by the City Code were taken out in the name of the president or superintendent of the Stevedoring Company as such, and city and state taxes were regularly paid upon its capital stock.

Upon this state of facts, is the Foard Company liable for the consequences of Bomhardt's negligence?

It says that Bomhardt was not in its employ, and unless he was it is not liable for what he did. Standard Oil Co. v. Anderson, 212 U. S. 220, 29 Sup. Ct. 252, 53 L. Ed. 480; Murray v. Currie, Law Reports, 6 Common Pleas, 24.

The Stevedoring Company was duly incorporated. It was a legal entity. It had a life separate from that of the owner of its stock. Old Dominion Copper Co. v. Lewisohn, 210 U. S. 212, 28 Sup. Ct. 634, 52 L. Ed. 1025.

The fact that the Foard Company was the sole owner of the stock of the Stevedoring Company did not make it liable for its acts or defaults. Saloman v. Saloman & Co., Law Reports (1897) Appeal Cases, 22.

That the same individuals served both companies did not make one company responsible for the acts of an officer committed in the course of the discharge of his duties to the other. Peterson v. Chicago, Rock Island & Pacific R. R. Co., 205 U. S. 364, 27 Sup. Ct. 513, 51 L. Ed. 841.

The statement made by the Court of Appeals of Maryland in Swift v. Smith, 65 Md. 428, 5 Atl. 534, 57 Am. Rep. 336, that the purchase by a single person of all the stock of a corporation for the time being virtually suspends its operation as a corporation is said to have been unnecessary to the decision in that case. It is argued that it never had any other foundation than the assumed impossibility of holding a corporate meeting when there was only one person qualified to meet. That there is such an impossibility is asserted to be now an exploded idea. East v. Bennett, Law Reports (1911) 1 Chancery, 163.

The decision of this case does not require the discussion of any of these propositions nor of their limitations if they have any. The acquirement by a single individual or corporation of all the stock of another corporation does not suspend the corporate life. It may not even raise a presumption that such life is so suspended. The sole owner of all the stock of a corporation may suspend its corporate life if he be so minded, at least in so far as its separate existence is a protection to him. Without so suspending it for all purposes he may take into his hands such part of the corporate activities as to make himself responsible for the consequences of some of the things which may be in a sense done in the corporate name. One who does not own all or any of the stock of a corporation may do things which will entail such liability upon him.

Since the death of Mr. Foard, if not before, the corporate life of the Stevedoring Company has been in large part suspended. It never in due form took any corporate action. Neither its directors nor its stockholders ever came together. Since October, 1911, it has never handled a dollar of money, unless the handing by its superintendent to its stevedores of pay envelopes which had been filled by the Foard Company can be said to be handling money.

The distinction between a corporation and the owner of all the stock in the corporation is in one sense at all times formal rather than of the substance of things. It appears more unreal than ever when contrasted with such verities as the destruction of tens, if not hundreds, of thousands of dollars' worth of property, the wounding and maiming of suffering human bodies, and the extinguishment of 30 lives. Nevertheless, the legal fiction of the separate being of the corporation serves many highly beneficial purposes in modern life. It is for the Legislature to say when and how such artificial existences may be called into being. When the requirements so imposed have been met, the courts must recognize and uphold the distinction between the corporation and its stockholders. Saloman v. Saloman & Co., supra.

It is, however, not asking too much to require that those who would seek protection behind the corporate form shall themselves respect the corporate existence. In such cases as those with which we are dealing it is not unfair to require something more than paying a few dollars annually as taxes on corporate stock, having the corporate

title inserted in the stevedoring license, which in any event would have had to have been obtained, printing the corporate name on some bill heads, letter heads, and pay envelopes, stamping it on some metal checks, and writing it at the top of some accounts, kept otherwise precisely as they would in any event have been kept. There may be circumstances under which those things, or even some of them, would be sufficient. In this case they are not. It may be that having corporate meetings, receiving its own earnings, and then disbursing them as dividends, are very formal things. They are matters of ritual rather than of substance. But it is not open to these who rely upon the defense the Foard Company here sets up to make light of such formal and ritualistic observances. It accepted large payments for managing the Stevedoring Company. It actually managed it in every conceivable way. Whether it be held that the Foard Company suspended the corporate life of the Stevedoring Company and took its place, or whether what was done be described as the Foard Company's taking over the business of the Stevedoring Company and carrying it on upon an agreement that it was to get all the profits, if any were made, and to pay all the losses if any were suffered, the result will be the same.

The Foard Company must be held liable for the consequences of Bomhardt's negligence.

It is clearly established that the Foard Company was well aware that its stevedores occasionally used bale hooks on dynamite cases. Sometimes orders were issued against the use of such hooks, but to the knowledge of the Foard Company no real and vigorous attempt to enforce them were made. Doubtless a bale hook may be used upon a box of dynamite in a perfectly safe way. The evidence produces an abiding conviction that it is unsafe and improper to permit the use of such hooks by the kind of men who are either the members or the foreman of ordinary longshoremen gangs. The evidence of Mr. Slack, the president of both the Foard and the Stevedoring Companies, leads to the conclusion that the Foard Company undertook the handling of dynamite with a somewhat insufficient inquiry as to all the dangers which should be guarded against and as to the best way to ward them off. It did make inquiries. It does not seem to have gone to the original or best sources of information upon such questions, nor to have made certain that it obtained precise information as to the practice which had been followed by those most experienced in the handling of dynamite and other explosives. Such lack of proper study of the subject did not contribute to the disaster except to the extent to which it may have played its part in leading the Foard Company to tolerate the use of bale hooks. As already pointed out, the liability of that company rests on other grounds than its mere knowledge that they were used.

Like the Stevedoring Company, the Foard Company expressly declines to set up the defense that some of the libelants were Bomhardt's fellow servants. All its assets will be insufficient to meet the claims of those against whom the defense of fellow servant cannot be made. It feels that those who were actually doing the work, or the de-

pendents of those who are dead, have suffered as much and are as much entitled to such compensation as may be made as are any of the others who were injured.

The Steel Company.

[5] Those of the libelants who seek recovery from the Steel Company do not charge that it had any part in bringing about the explosion. They say, however, that they were its employés; that it was bound to furnish them with a reasonably safe place in which to work; that it violated this obligation to them when it anchored the Jason within 1,200 feet of the dynamite laden vessel. An explosion followed. They were hurt. They are entitled to recovery from their employer.

This contention seems to assume that the collection of dynamite in large quantities is a nuisance. If it is not, there would seem to be no legal obligation upon any one to keep away from its vicinity. In any event, the Jason was anchored in the designated anchorage grounds. It can hardly be said that as a matter of law other vessels must vacate those grounds during all times in which a dynamite ship is anchored in them upon peril of becoming liable to all on board for such damage as may be done by an explosion.

No recovery can be had against the Steel Company.

City.

Some of the persons for whose wounds or death a recovery is sought against the city were members of the longshoremen gang stowing the dynamite. The city denied its liability to them. It raised the question by exceptions to their libels filed against it. These exceptions were sustained. The reasons for so doing were fully stated in Zywicki v. Joseph R. Foard Co. et al. (D. C.) 206 Fed. 975. They need not be repeated here.

[6] Others who have brought their libels against the city were not on the Chine and were not in any way concerned in loading the dynamite. They or their possessions were at the time of the explosion lawfully upon the navigable waters of the Patapsco. They say that the city is liable to them because of what it did and also because of what it did not do. The sin of commission was the sending of the Chine to load in a place which was dangerous to others. Prior to February, 1911, ships which carried dynamite from Baltimore took it on board at the railroad piers. The great explosion at Communipaw then took place. The municipal authorities were alarmed. They insisted that the loading of ships with such explosives should thereafter be done at a greater distance from the city. They named the quarantine anchorage as the place. The Foard Company, without conceding the authority of the city to give such direction, obeyed it. Thereafter the dynamite laden cars were placed on car-floats and towed to quarantine. Their contents were there transferred to the ships. Libelants claim that this place was unsuited for the purpose. In their view handling dynamite there caused unnecessary danger to persons and property. They contend that the city is answerable for the consequences. No state legislation can relieve it of liability.

Workman v. New York City, 179 U. S. 552, 21 Sup. Ct. 212, 45 L. Ed. 314.

It may be assumed that it cannot. In this case it is unnecessary so to decide.

As has already been pointed out, the handling of dynamite for a lawful purpose is not in itself a nuisance. The Interstate Commerce Commission is authorized by statute to regulate the transportation of explosives by interstate railroad carriers. They have exercised the authority. In so doing they declare:

"As the use of certain explosives is essential to various business activities throughout the country, it is the duty of interstate railroad carriers to transport such explosives under proper regulations."

It may well be that whoever selects a place for the loading of dynamite is bound in so doing to use due and reasonable care. In choosing the locality for such handling more than one factor must be taken into account. The car-floats cannot safely be required to traverse waters liable to be roughened by wind or tide. To avoid risk of collision in fogs or from other causes, their trips along much used channels should be short. The transfer should be made where both ship and float can lie in smooth water. The loading should be done where such an accident will do the minimum of harm. It should not be near a thickly peopled shore. The ideal spot would be one very near the city but within half a mile of which nobody ever comes. Like most other ideals, it cannot be attained. In trying to come as near to it as possible the city must use due care and exercise sound judgment. If it does, the fact that it named the place does not make it responsible to those who may be injured by an explosion. It matters not that after the event a judge or a jury may think that, all things considered, it is possible that a better choice might have been made. Upon the facts here in evidence the city seems to have chosen wisely. In any event, the selection was made by a competent official acting with due care and in good faith. The city incurred no liability thereby.

[7] The fault of omission is said to consist in a failure to exercise the authority conferred upon the city by the General Assembly of Maryland by the Act of 1908, c. 148, p. 585. The relevant portions of that statute declare that the city shall have the power "to provide for the preservation of the navigation of the Patapsco river and tributaries, * * * and the removal therefrom of anything detrimental to navigation or health. To provide for and regulate the stationing, anchoring and moving of vessels or other water craft, and to provide for the appointment of such officers and employés as may be necessary to execute the aforegoing powers."

But for this enactment the city could exercise no authority over the spot at which the explosion took place. That was several miles outside of the corporate limits. It was, however, on the Patapsco river, and therefore upon the waters over which by the act in question the city's jurisdiction was extended for the purposes therein specified. The Circuit Court of Appeals for this circuit has held that the power thereby given imposed obligations as well. State of Maryland, Use of Pryor, v. Miller, 194 Fed. 775, 114 C. C. A. 495.

Miller had obtained a permit from the city to erect a bulkhead in the navigable waters of the Patapsco. He had caused piles to be driven. In the usual manner he had sawed off their tops some inches below the water line. He had failed to cap them. He left them for six weeks or more a danger to navigation. A launch struck them. Five people were drowned and some others injured. It was ruled that the city was liable for the consequences of such an obstruction placed or allowed to remain in the waters of the Patapsco river with its knowledge, or opportunity of knowledge, or by and with its authority and consent, precisely as it would have been for the damage done by a nuisance allowed upon a street or other highway. The opinion in that case was handed down on the 15th of December, 1911. Some three months later the Legislature of Maryland by the Act of 1912, c. 32, attempted to add a new section to the Code of Public Local Laws relating to Baltimore City. This section reads:

"Provided, however, that except in regard to docks and wharves owned by the mayor and city council of Baltimore, nothing contained in any section or provision of this article shall be construed to impose any duty upon the mayor and city council of Baltimore to any person or corporation using the Patapsco river, or any branch or tributary thereof, in regard to the safety thereof, or to render the said mayor and city council of Baltimore liable for any loss of life or injury or damage to person or property by reason of any obstruction in, or unsafe condition of, any part of said river or of said branches or tributaries, or either of them."

The libelants contend that this act is invalid as being in conflict with both the provisions of section 29 of article 3 of the state Constitution, which declares, among other things:

"That every law enacted by the General Assembly shall embrace but one subject, and that shall be described in its title."

They say that the act, besides adding the new section to the Code of Public Local Laws, also dealt with the powers of the city to regulate the use of streets and sidewalks, telegraph, trolley and electric light poles, telegraph and electric light wires, and the planting, trimming, and destroying of trees. It changed the laws with reference to the abatement of taxation for the purpose of encouraging manufacturers. In a number of important respects it recast the law governing the condemning and opening of streets and the court procedure in such matters. It established a municipal ferry. These various subjects were about as unrelated as they could be. Their sole bond of connection was that they all involved changes in the Code of Public Local Laws relating to Baltimore City.

Obviously there were various provisions of the city charter and of the local laws which the municipal authorities desired to amend. They threw these various amendments, though they related to many different and incongruous subjects, into one act. Many of them are not a part of the municipal charter. They are state laws whose operation is limited to municipal territory. In Maryland there are 24 such local codes. In the statute in question are provisions amending both the municipal charter proper and the local code.

Baltimore City contains five-twelfths of the population of the state and more than half of its wealth. The Code of Local Laws relating

to it has about 900 sections. They deal with all sorts of matters. Some of them impose upon individuals penalties for offenses which may amount to imprisonment for more or less considerable, though usually relatively brief, periods; others relate to property matters and interests of great value and importance. An act which avowedly is intended to amend and re-enact as a whole the local code or the city charter, or both together, puts every one on notice. The one under consideration does not profess to be and is not a comprehensive amendment or re-enactment of either. It is merely a series of unrelated measures changing various provisions in each. It offends against the spirit, and perhaps against the letter, of the constitutional provision.

The libelants are equally insistent that the title of the act of 1912 does not describe, or in any way indicate or even suggest, that anything in it was intended to modify the provision of chapter 148 of the Acts of 1908. It is true that in the body of the act two attempts to effect this modification are made. The second of these in the order in which they appear in the act is the provision for adding the new section 469, already quoted, to the Code of Public Local Laws. The first is in the portion of the act which immediately follows the enacting clause. A copy of the act of 1908 with the insertion of three words in one place and the addition of a proviso which is in substance identical with the new section 469, but the phraseology of which is slightly different, is there inserted. How this re-enactment of the act of 1908 with amendments came into the act of 1912 does not appear. At first blush it might seem that it was the form in which the Legislature intended to re-enact sections 828 and 829 of the Code of Public Local Laws, for the sentence of the enacting clause immediately preceding the copy of the act of 1908 is "and that sections 828 and 829 of article 4 of the Code of Public Local Laws of Maryland, title 'City of Baltimore,' subtitle 'Miscellaneous Laws,' be and they are hereby repealed and re-enacted with amendments so as to read as follows." Quite obviously, that was not the legislative meaning, for sections 828 and 829 in their re-enacted form are found at the very end of the act of 1912. Conceivably two acts amending the act of 1908 may have been drafted. An attempt may have been made to combine them in one measure and in the effort some clerical blunders were made. However that may be, in the title itself there is no reference to any purpose to repeal and re-enact chapter 148 of the Acts of 1908. There is no indication that the Legislature intended in any wise to deal with the city's liability for torts on the waters of the Patapsco and its tributaries. The only reference to the new section to be numbered 469 is the statement in the title that one of the purposes of the act is "to add a new section to article 4 of the Code of Public Local Laws of Maryland, title 'City of Baltimore,' subtitle 'Miscellaneous Local Laws,' under the heading harbor, docks and wharves as amended by the Act of 1908, chapter 170, said new section to be numbered 469 and to follow 468." Chapter 170 of the act of 1908 related to the harbor board and to some extent to its power over wharves, etc. It did not deal with the same matters as those

with which chapter 148 were concerned. Section 468 of the Code of Public Local Laws, after which the new section is to come, provides a penalty on any vessel which lies at a wharf in such manner as to improperly obstruct another vessel.

The constitutional requirement in question has been many times considered by the Court of Appeals of this state. From the nature of the subject it has been difficult or impossible to lay down any very definite rule of interpretation. It is mandatory in its requirements, but such construction will be given to it as not unduly to hamper or limit the Legislature.

If several sections of the law refer to and are germane to the same subject-matter which is described in its title, it is considered as embracing a single subject and as satisfying the requirements of the Constitution in this respect. Baltimore v. Reitz, 50 Md. 574; State v. Loden, 117 Md. 384, 83 Atl. 564, 40 L. R. A. (N. S.) 193.

It was intended to exclude all foreign, irrelevant, or discordant matter from the statute and to confine the statute to the single subject disclosed in the title. The Court of Appeals has on many occasions stricken down legislation because of the failure of the title to conform to the constitutional requirement. Curtis v. Mactier, 115 Md. 388, 80 Atl. 1066; Kafka v. Wilkinson, 99 Md. 238, 57 Atl. 617.

The objection thus made to the constitutionality of the act of 1912 is obviously serious. Unless the case imperatively requires, a federal court will not adjudge a state statute to be in conflict with the Constitution of the state before that question has been considered by the state tribunals to which it properly belongs. Louisville & Nashville Ry. Co. v. Garrett, 231 U. S. 305, 34 Sup. Ct. 48, 58 L. Ed. ——.

Libelants say that the act in question is in any event invalid because it is in conflict with the Constitution of the United States. They argue that the right to recover full compensation for wrongs suffered may not be taken away. They cite various cases which held invalid an act of Congress exempting military officers from liability for false arrest as well as certain state enactments limiting recovery in libel actions against newspapers to the actual pecuniary damage suffered or prescribing maximum sums for which in suits for personal injuries a judgment might be given. Griffin v. Wilcox, 21 Ind. 373; Park v. Detroit Free Press, 72 Mich. 560, 40 N. W. 731, 1 L. R. A. 599, 16 Am. St. Rep. 544; Passenger Ry. Co. v. Boudrou, 92 Pa. 481, 37 Am. Rep. 707.

If the Legislature had attempted to relieve the city from liability for something it had done or affirmatively permitted to be done, such decisions might be more or less in point.

The liability of the city of Baltimore in this case, however, rests entirely upon the grant of authority made by the act of 1908 and upon the assumption that the Legislature when it gave the power intended to impose the correlative duty. The principles laid down in the cases above cited may be sound and it may be competent for the Legislature to say to the city: "You may exercise, if you see fit, certain powers; but if you do not see fit to exercise them you will not be liable for failure so to do." It may be that it would be beyond the legis-

lative competence to tell the city, "You may exercise these powers, but if you do exercise them to any one's hurt you shall be free from liability." It may be argued that the Legislature could not permit the city to employ some one to do something for its convenience or permit some one to do something for his own, without taking proper precautions to prevent injury which, from the nature of the thing to be done, would happen unless such precautions were taken; as, for example, perhaps the Legislature might not be free to authorize the city to permit some one to drive a pile in navigable water and yet relieve the city from all obligation to see to it that the necessary precautions were taken to prevent such pile from becoming an obstruction to navigation.

As has already been seen, whoever directs such work to be done remains liable for the failure of any employé of those doing the work to take such precautions. In this case, however, no expression of opinion on such questions is required. The alleged defaults of the city now under consideration are not those of commission, but of omission. The city of Baltimore did not direct the shipment of dynamite to Panama. As a lawful article of interstate commerce it is at least doubtful whether it could have prevented such shipment if it had wished to do so.

It has been already shown that the city is not liable merely because it designated the place at which the Chine should lie to take dynamite on board. In no proper sense did the city either cause or permit the loading of the dynamite. The power of the Legislature to absolve the city from liability for anything which it has done is not involved in this case.

Before passing upon the contention that the act of 1912 is in conflict with the Constitution of Maryland, it will be necessary to inquire whether the city would have been liable had the statute of 1908 remained unchanged. The argument for the libelants is that the act last mentioned gave the city power to regulate such loading, and that for any damage which resulted from failure effectively to exercise that authority it is liable. It is doubtful whether the act in question confers upon the city the power to regulate the loading of ships wherever it is possible that accidents may happen in the course of such loading which may endanger persons using navigable waters. There is no such grant in specific terms. Libelants rely on the language "to provide for the preservation of the navigation of the Patapsco river and tributaries, including the establishment of lines throughout the entire length of said Patapsco River and tributaries, beyond which line no piers, bulkhead, wharves, pilings, structures, obstructions or extensions of any character may be built, erected, constructed, made or extend and to provide for the improving, cleaning and deepening of said river and tributaries, and the removal therefrom of anything detrimental to navigation or health." They say that to preserve navigation and to remove anything detrimental thereto or to health includes the authority to regulate the loading of explosives. The collocation in which those two phrases are used, however, seems strongly to suggest that what the Legislature had in mind was to confer upon the

city the power to prevent obstructions being put in the harbor and to remove such obstructions to health and navigation as might at any time exist in it.

In the absence of congressional legislation upon the subject, the state may doubtless authorize its municipalities to regulate the loading of explosives even upon vessels bound to foreign ports. To some extent Congress has acted in this matter. It has provided for the regulation of the transportation of such explosives by interstate carriers by rail. There are some federal statutes relating to the transportation of such explosives upon the water, as, for example, sections 4472, 5353, 5354, and 5355, of the Revised Statutes (U. S. Comp. St. 1901, pp. 3050, 3637, 3638). The last has been amended by the Act of February 27, 1877, c. 69, 19 Stat. 252, and the Act of February 20, 1901, c. 386, 31 Stat. 799 (U. S. Comp. St. 1901, p. 3050). Whether the failure of Congress to do more is to be understood as an expression of its judgment that enough had been done need not be here inquired into.

According to libelants' theory the disaster happened because Bomhardt struck a box of dynamite with a bale hook. If the city is liable at all, it must be because it failed to do something which would have prevented such use of the hook. Libelants say it might have required all persons employed in handling dynamite, or all persons having charge of gangs of men engaged in such handling, to establish in some way their fitness to do the work carefully and skillfully. They argue if such requirements had been in force Bomhardt would not have been in charge of the handling of this dynamite. Bomhardt is loud-mouthed; he is not a teetotaler; it is possible, although not proved, that on occasion he may have even become intoxicated, but he certainly was not a drunkard. He doubtless could have shown quite as many qualifications for taking charge of men engaged in loading dynamite as municipalities usually require of those who seek municipal office or employment of similar grades. It is suggested that if he had been required to obtain a permit, the danger of handling dynamite, and especially of using in the handling such instruments as bale hooks, might have been brought more forcibly to his attention. The liability of the city cannot be made to depend on mere possibilities of this character. It is argued that the city was bound to enact an ordinance prohibiting the use of bale hooks. After almost every disaster it appears that a contributing cause was the doing of something which might have been forbidden if the authorities had thought to forbid it. Does every such failure of the municipality to anticipate that individuals on private property will conduct their business in some way from which an accident may result entail upon it liability to all persons on the highways who are injured by an accident so produced? No cases have been cited which go to any such length. The degree to which regulation of industry may be wisely pushed may frequently be a question of great doubt and difficulty. It may be highly to the advantage of the public that the municipality shall be given powers of regulation. Many municipalities will be compelled to decline such powers if the taking of them imposes an obligation

to use them in every way which will tend to prevent accident to those traveling the highways, no matter how costly, or, from many standpoints, impolitic, the imposition of such regulations may be. Municipalities may be required to keep the highways free of dangers and obstructions. That may well involve an obligation to compel abutting proprietors to remove from their premises conditions which constitute an obvious menace to the safety of those using the highway. Havre de Grace v. Fletcher, 112 Md. 562, 77 Atl. 114. It does not require a municipality at its peril to regulate and inspect industries carried on on ships or in factories for the purpose of preventing the doing of foolish or reckless acts which may result in damage to passers-by.

In this case it is by no means certain that municipal inspection would have prevented the accident unless it had gone so far as to prohibit any handling of dynamite except in the immediate presence of the official inspectors. Whether such a rigid system of inspection is required is a matter for the people, acting through their municipal or legislative representatives rather than for the courts.

It follows that as against the city the libels must be dismissed.

Conclusion.

The conclusions here reached are disastrous to the Foard Company. They will give little satisfaction to the libelants. The findings of fact as to the cause of the accident and the relations between the Foard and the Stevedoring Companies require a decree which will sweep away all the accumulations of years of honest industry. To the Foard Company this must seem very hard. Those connected with it do not believe that the accident could have been caused by Bomhardt. They do not see how they could have done anything other than they did except to have made sure that bale hooks were not used at all. They do not think the bale hook had anything to do with the catastrophe; but, if there had been no bale hooks there, libelants' witnesses could not have thought otherwise. To them the Foard Company seems called on to pay a high price for a very trifling error of judgment. On the other hand, if the decree here made shall be affirmed above, all that the Foard and the Stevedoring Companies have will make good to the libelants but a fraction of what they have lost. It is no comfort to them to tell them that dynamite is necessary to modern industry. Few of them had an appreciable interest in shipping the dynamite to the Isthmus. Many of them had none at all except that which they shared with everybody else. What happened at Communipaw and to the Chine shows how widespread disaster an explosion of dynamite may cause. That they should bear the loss does not seem fair to them. It is natural that they should feel that every one who had a part in causing the dynamite to be stowed on the ship should be liable to them. On the other hand, what has been said shows that it does not seem to be in accordance either with natural justice or with settled legal principles to make every one who has any part in the handling of the dynamite answerable for all the consequences of an explosion, although he was not in fault either in person or through some one for whom under the ordinary rules of law he

must answer. It may be that some day the law will be so moulded that more exact and complete equity may be done. Public opinion has apparently come to the conclusion that workmen should be indemnified against the pecuniary consequences of accidents suffered by them in the course of their employment. Hereafter a step further may be taken. It may then seem just to compensate all persons who without fault of their own suffer from industrial accidents. Such a policy may be wise. Even if it be, courts would not be now justified in holding liable for the consequences of the accident him who directs the shipment of an explosive or who knowingly and willfully takes any part in such shipment or permits it having power to prevent it. Whether indemnification shall be given at all, and if so how, is a complex problem. It is for the Legislature to work out. In this case the court may not impose the burden upon either the city or upon any person or corporation who was no more directly responsible for the explosion than was the Munson Line.

It follows that the libels against the Munson Line, the Steel Company, and the city must be dismissed, and that both the Stevedoring and the Foard Companies must be held liable to all persons who have suffered legal damage as the result of the explosion, and who have filed their libels in this case. In some instances an agreement as to the amount of these damages may be arrived at. In others time and expense may be saved by assessing them in open court. For still others a reference may be necessary.

ST. LOUIS & S. F. R. CO. et al. v. CITY OF TULSA et al.

(District Court, E. D. Oklahoma. April 8, 1914.)

Equity No. 2031.

1. EMINENT DOMAIN (§ 274*)—REMEDIES OF OWNER OF PROPERTY—INJUNCTION TO RESTRAIN TAKING.

   If the right of a municipal or other corporation to condemn property for a public use does not exist, injunction to restrain proceedings for such condemnation is the proper remedy.

   [Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 753, 765–768; Dec. Dig. § 274.*]

2. EMINENT DOMAIN (§ 47*)—PROPERTY SUBJECT TO APPROPRIATION—PROPERTY PREVIOUSLY DEVOTED TO PUBLIC USE—EXTENSION OF STREET ACROSS RAILROAD YARDS.

   Under general statutes authorizing a city to condemn right of way over property or right of way previously acquired for a public use by any other corporation, where not inconsistent with the purposes for which the property was taken or acquired by the latter, the city has no power to condemn right of way for the extension of a street across the station yards of a railroad company, however the land was acquired, upon which it maintains numerous tracks and switches for the moving and storage of cars, where such extension would necessitate the moving of switches and switch stands and leading tracks and compel the shortening of the yard tracks to the inconvenience of the company and the detriment of its business.

   [Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 107–120; Dec. Dig. § 47.*]

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

In Equity. Suit by the St. Louis & San Francisco Railroad Company and others against the City of Tulsa and others. On motion for preliminary injunction. Motion granted.

R. A. Kleinschmidt and Fred E. Suits, both of Oklahoma City, Okl., for complainants.

John R. Ramsey and John R. Woodard, both of Tulsa, Okl., for respondents.

CAMPBELL, District Judge. The question now presented arises upon application of the plaintiffs for a temporary injunction pending final decree to prevent the defendants from proceeding in the state court to condemn that portion of plaintiffs' right of way which would fall within the lines of Frankfort avenue in the city of Tulsa if the same were extended across the plaintiffs' right of way.

By resolution of its commissioners, the city of Tulsa has provided for the extension of Frankfort avenue over plaintiffs' right of way and has directed its attorney to institute condemnation proceedings in the proper state court to condemn for the use of said Frankfort avenue so extended that portion of the plaintiffs' right of way falling within the same. It appears from brief of counsel for defendants that the charter of the city of Tulsa gives the city the right to condemn property for public purposes when deemed expedient whether such property be within or outside of the city. Among its other powers in the charter it has the right to extend streets. The charter further provides that the procedure for the condemnation of property by the city shall be governed and controlled by the state laws in force in reference to condemnation of right of way for railways, and the assessment of damages therefor; the city occupying, in such proceeding, the position of the railroad company. It does not appear that the charter specifically gives the city the right to condemn, for any public use of the city, property already devoted to another public use; but it is provided in the charter that the city shall have and exercise all powers of municipal government not prohibited to it by the charter or by some general law of the state of Oklahoma or by the provision of the Constitution of the state. The charter further provides that all questions arising in administering the city government, not provided for in the charter, shall be governed by the state laws in such case made and provided. By section 599, Revised Laws of Oklahoma 1910, it is provided that cities may take private property for public use; but in such case the city shall make the person or persons whose property shall be taken or injured thereby adequate compensation therefor, to be determined as provided by law for the condemnation of property for railway purposes. In sections 1400 to 1410, inclusive, of 1910 Revised Laws of Oklahoma, is found the procedure by which railway companies may condemn property for railway purposes, section 1404 of which reads:

"The provisions of this article with reference to eminent domain shall apply to all corporations having the right of eminent domain, and all such corporations shall have the right, under the provisions of this article, to acquire right of way over, along or across the property or right of way of any other such corporation, not inconsistent with the purposes for which such property

was taken or acquired. In all cases of condemnation of property for either public or private use, the determination of the character of the use shall be a judicial question; and the procedure shall be as provided herein: Provided, that in case any corporation or municipality authorized to exercise the right of eminent domain shall have taken and occupied, for purposes for which it might have resorted to condemnation proceedings, as provided in this article, any land, without having purchased or condemned the same, the damage thereby inflicted upon the owner of such land shall be determined in the manner provided in this article for condemnation proceedings."

It is clear from a reading of the foregoing section that municipal corporations fall within its terms, being, as we have seen, corporations having the right of eminent domain for certain purposes. It is also clear that the exercise by the city of the right of eminent domain over property of any other corporation having right of eminent domain, which property is already devoted to a public use, is limited to such taking as is not inconsistent with the purposes for which such property already devoted to public use was taken or acquired.

[1] Therefore, if the extension of Frankfort avenue across the plaintiff's right of way would be inconsistent with the purposes for which the plaintiffs acquired and are now using the right of way at that point, then it cannot be said that the city has the right to extend the street as it is proposed to do. If the right does not exist, then injunction is the proper remedy. 15 Cyc. p. 988; Lewis on Eminent Domain (3d Ed.) §§ 901, 902, and 918; High on Injunctions, § 597; C., R. I. & P. Ry. Co. v. Williams (C. C.) 148 Fed. 442, and cases cited.

[2] It is immaterial whether the railroad company's right of way was acquired by purchase or by regular condemnation proceedings. It is presumed to have been lawfully acquired by the railway company, and is actually devoted to and needed for the public use, within the legitimate exercise of its corporate franchises. The question for the court, when it arises in a judicial investigation of this character, is not how the land was acquired, but how it is used or whether it is necessary for a public purpose. Matter of Rochester Water Commissioners, 66 N. Y. 413. If the use to which the city will devote the property by the extension of the street is inconsistent with the use to which the railroad company is now devoting it, then the right of the city to extend the street across the right of way does not exist. Minnesota & St. Louis R. Co. v. Village of Hartland, 85 Minn. 76, 88 N. W. 423. The question of inconsistency involves the question as to whether the evidence shows that the opening of the proposed street will destroy or essentially impair the use of the right of way and depot grounds in question for the purpose to which they are now devoted. In Cincinnati, W. & M. R. Co. v. City of Anderson, 139 Ind. 490, 38 N. E. 167, 47 Am. St. Rep. 285, it is said:

"Immediately south of the projected street, parallel with said tracks and a part of said yard, the appellant owned ground upon which such water tank, coal dock, turntable, and roundhouse could have been located, and, with changes in some of the side tracks mentioned, could have been used as conveniently and practically with the same advantages, excepting the necessity of keeping said projected extension free from standing cars, and the said added hazards by reason of the crossing and recrossing by the public of the appellant's tracks. * * * Under the general law permitting cities to es-

tablish streets, we have no doubt of the implied power to extend streets transversely across the right of way of a railroad, when in doing so the uses for which such right of way is employed are not materially injured or destroyed, and where such uses and those for a street may coexist without impairment of the first uses. But where such uses cannot so coexist, or where the first use is materially impaired or destroyed, it is well settled in this state and elsewhere that the second public use will be denied. Lake Erie & W. Ry. Co. v. Town of Boswell, 137 Ind. 336, 36 N. E. 1103; City of Ft. Wayne v. Lake Shore & M. S. Ry. Co., 132 Ind. 558, 32 N. E. 215 [18 L. R. A. 367, 32 Am. St. Rep. 277]; City of Seymour v. Jeffersonville, M. & I. R. Co., 126 Ind. 466, 26 N. E. 188; City of Valparaiso v. Chicago & G. T. Ry. Co., 123 Ind. 467, 24 N. E. 249; Railroad Co. v. Williamson, 91 N. Y. 552; In re City of Buffalo, 68 N. Y. 167; In re Boston & A. R. Co., 53 N. Y. 577; Railroad Co. v. Bronnell, 24 N. Y. 345; Milwaukee & St. P. Ry. Co. v. City of Faribault, 23 Minn. 167; Railroad Co. v. Muder, 49 Mo. 165; Mohawk & H. R. Co. v. Archer, 6 Paige [N. Y.] 83; St. Paul Union Depot Co. v. City of St. Paul, 30 Minn. 359, 15 N. W. 684; New Jersey Southern R. Co. v. Long Branch Com'rs, 39 N. J. Law, 28."

The court, in passing on the case, said:

"The theory of the appellee, and that adopted by the circuit court, is that such buildings and structures are not indispensable, for the reason that they may be conveniently located elsewhere, and, after relocation, the uses of the street and the railway may coexist. This theory is not new, but, if adopted by any of the adjudged cases, the fact has not been discovered by us. On the contrary, numerous cases have denied it. In Railroad Co. v. Kip [46 N. Y. 546, 7 Am. Rep. 385], supra, it was said: 'It is claimed that there are other lands in the same vicinity, equally adapted to the use of the applicant, as those sought to be acquired by these proceedings, and which possibly might be acquired by purchase from the owners. But such objections to these proceedings are untenable. The location of the buildings of the company is within the discretion of the managers, and courts cannot supervise it.' In New York Cent. & H. R. Co. v. Metropolitan G. L. Co., 5 Hun, 201, it was said: 'Upon the point that the lands proposed to be taken are not necessary, because it might be practicable for the respondents to lay their tracks upon their own lands, by adopting another curve, we are not prepared to concur with the applicant's counsel. It is not a question of possibilities, nor of strict practicabilities within the opinion of engineers. No route was ever surveyed for a railroad which was not open to such objections, and if the right to take lands was to be determined by the conflicting evidence, whether, after all, the tracks might not, with greater or equal convenience, be laid elsewhere, the construction of a road would be attended with the most serious embarrassments. Reasonable necessity must be shown, but a reasonable discretion must be allowed to the officer who locates the tracks of a railroad, for it cannot be presumed that the corporation is unnecessarily incurring heavy expenses in obtaining lands, when those it already has would answer its purpose.' In Eldridge v. Smith, 34 Vt. 484, it was held that: 'When land is taken for a legitimate railroad use by the railroad company, the judgment of the officers of the road, unless clearly beyond any just necessity, is regarded as conclusive.' We may add that if roundhouses, water tanks, coal docks, or other necessary uses of a railway may be disturbed and relocated, or their location destroyed, it becomes a matter of extreme difficulty, if not an impossibility, to discriminate between such right and the right to require tracks to be removed for the benefit of other public uses; and further, if the removal of such buildings and structures may be required to appropriate their location to other public uses, it would be difficult to determine why depots should not be subject to the same rule. Another difficulty in adopting the theory contended for by the appellee is that the rule could not be made to depend upon the proximity of the old to the new location, for if the removal were required, and there were no ground for the new location in the immediate vicinity, public necessity, in pressing its demand for a street crossing, could insist with force that remote situations afforded equal or better facilities for

the convenient and safe employment of the uses sought to be superseded. Without legislative sanction, it is our opinion that such uses cannot be destroyed upon the mere discovery that they may be enjoyed at some place other than the point of their location."

In State (N. Y. & S. W. R. Co., prosecutor) v. Mayor of City of Patterson, 61 N. J. Law, 408, 39 Atl. 680, an ordinance of the city of Patterson provided for the extension of an avenue 70 feet wide through the freight yards of the railway company. These yards, a hundred feet in width, extended for a distance of 1,087 feet between two streets in the city already provided with grade crossings. The street proposed to be so extended would cross said yards about midway between the two existing streets. The railway company's freight house was located within these yards, as well as its freight yards and its main double tracks. It was used exclusively for such tracks and as a freight yard, the incoming freight being put on the side tracks and deposited there for consignees to go with their teams and remove it, and the sidings were built with special adaptation to that purpose. The company had no other yards or yard facilities in the city that could be used in place of these. The proposed street did not interfere with the freight depot but only crossed the several tracks at grade. It was held in that case that while the city charter only gave the city the general power to lay out, open, vacate, straighten, widen, or alter any street, and to take such lands and real estate as might be necessary therefor, upon making compensation in the manner provided, no special provision being made for taking the lands of the railroad company, there could be no doubt that under this general authority the state might lay out a street over the right of way of a railroad corporation, but that the case involved more than that. The court in conclusion said:

"The railroad company cannot be deprived of the beneficial use of its freight yard, and be constrained to transact its freight business elsewhere, unless clear authority is given to the city of Patterson to require it to do so. No such authority appears in this case, and it cannot be inferred from the general power given to lay out and open streets. Until the Legislature bestows such powers upon the municipality, the company cannot be compelled to abandon its freight yard, and seek another locality for the transaction of its daily business. The ordinance is without authority, and should be set aside."

As late as 1905 the Supreme Court of Appeals of Virginia, in the case of Richmond, R. & P. R. Co. v. Johnston et al., 103 Va. 456, 49 S. E. 496, had a similar question before it; the case presenting much the same physical conditions existing here, with the inconsistency of uses proposed not so strongly marked as it is under the facts presented in the case at bar. It is stated in the opinion that:

"The Richmond, Fredericksburg & Potomac Railroad Company and the Chesapeake & Ohio Railway Company operate lines of railroad from the city of Richmond, in a northerly direction, into and beyond the county of Henrico. A short distance beyond the city limits a public thoroughfare was constructed between the two roads, and it became desirable, with a view to its extension, to cross the tracks of the Richmond, Fredericksburg & Potomac Railroad. This company had purchased a parcel of ground from Lewis Ginter, containing about nine acres, for which it paid the sum of $6,714.75, and received a deed dated November, 1891, which was admitted to record on the

1st day of February, 1892. This plat of ground is 120 feet in width and 3,250 feet in length, and is adjacent to the original right of way upon which the principal tracks of the railroad company are laid, and the purpose was to lay down upon it switches and other conveniences for the storing of cars and making up and shifting of trains."

In a petition on behalf of the city for an extension of the highway in question, it was stated that it had become necessary to the public generally, in view of the fact that the railroad had blocked up a private road which had been used by the public generally for a long period of years as a convenient outlet for travel to and from certain portions of the county. The road was ordered opened by the lower court and appeal taken by the railroad company. The law applicable to such cases is well stated by the court in the following excerpt from the opinion:

"Two questions are presented for decision, the first, as to the propriety of the condemnation of the railroad property under the circumstances disclosed in this record, and, secondly, as to the adequacy of the compensation awarded.

"Section 1095 of the Code of 1887 provides that: 'Every railroad hereafter constructed across a county road, street, or other highway; and every county road, street or other highway hereafter constructed across a railroad shall, as far as practicable, pass at surface grade, or pass beneath or above any existing structure at a sufficient depression or elevation, as the case may be, with easy grades, so as to admit of safe and speedy travel over each.'

"Section 1096: 'At every existing crossing such as is mentioned in the preceding section, the grade of the work last constructed, to the full width of the railroad land, shall be made sufficiently smooth and level to admit of safe and speedy travel over such crossing. Where such improvement is to be made in a railroad, it shall be made by the corporation, company, or person operating the same. Where it is to be made in a county road, street, or other highway, it shall be made by the authorities having the control of such county road, street, or other highway and charged with the duty of keeping the same in order.'

"Acting under the authority conferred by these sections, the county authorities of Henrico seek to construct a public thoroughfare across the land of the railroad company, purchased for and devoted to the uses of a railroad yard, through which numerous trains engaged in freight and passenger traffic are passing, and in which engines are to be constantly employed in shifting cars and in making up trains. Under such conditions it would be well-nigh impossible to construct a crossing at surface grade so as to admit of safe and speedy travel, and it was therefore urged with much force that this consideration alone should defeat the petition for opening the road, as being inconsistent with proper regard for the safety of the traveling public, whether upon the proposed highway or along the railroad tracks.

"We shall not, however, rest the decision of the case upon that point. We do not question the power of the state, in the exercise of its right of eminent domain, to condemn land already condemned and appropriated to a public use. The general statute which we have quoted is ample authority for crossing a railway with a public highway, or a public highway with a railway; the safety of the public being carefully protected. But the better opinion seems to be that a general power of condemnation, such as is found in sections 1095 and 1096 of the Code of 1887, which authorizes the crossing of the tracks of a railway company by a highway, or of a highway by the tracks of a railway company, is insufficient to authorize the condemnation of property purchased and used by a railroad company for depots, stations, and railroad yards. The power to condemn any and all such property is recognized, but the authorities seem uniformly to hold that it must be exercised in obedience to a statute which specifically authorizes its condemnation, and that general language, such as is used in the sections we have quoted, is insufficient to that end.

"In Lewis on Eminent Domain (2d Ed.) p. 266, it is said: 'A general authority to lay out highways and streets is sufficient to authorize a layout across the right of way of a railroad. It makes no difference that the railroad company owns its right of way in fee. An authority to lay out a highway across the track of a railroad company is authority to cross all the tracks at any place. But, under a general authority to lay out highways, a part of the right of way of a railroad cannot be taken longitudinally, nor can the way be laid through depot buildings, and grounds, shops, and the like, which are devoted to special uses in connection with the road, and necessary to its operation and in constant use in connection therewith, and which would be materially impaired or destroyed by the taking. But the rule must receive a reasonable application, and a slight interference with the platform of a depot will not prevent the establishment of a highway.'

"In Elliott on Roads and Streets (2d Ed.) at section 218, it is said: 'The power to take property for public use is not restricted to property upon which the right has not been exercised, but it extends to property previously appropriated. Land which has been seized for one public purpose may be taken for another, whenever the public necessity requires. A street may be laid upon a turnpike or on a railroad, or a canal may be seized for that purpose. The Legislature has supreme power over the subject, limited only by the constitutional provisions, and, when it exercises this authority, the presumption is that the former use has become less beneficial to the public, and that the necessity of the public demands the appropriation of the property to the new use.'

"Section 219: 'The right of eminent domain is a dominant legislative power, only called into exercise by the enactment of a valid statute, and, when a party asserts a right to seize land previously appropriated to a public use, he must sustain his claim by producing a statute clearly conferring the asserted authority. It will not be presumed, in the absence of such a statute, that the Legislature intended to again seize property which had been once appropriated. The authority to take property seized and appropriated to another public use may be implied from the language of the statute, but this can only be so where the words employed and the evident intent of the statute make it clearly the duty of the courts to give force to the implication. The intent of the Legislature to destroy the rights granted by former statutes must unequivocally appear. A grant of authority to appropriate land seized under former statutes, or previously seized for public use, cannot ordinarily be inferred from a mere general grant. The general rule is that if the two uses are not inconsistent, and both may stand together without material impairment of the first, authority for the second use may be implied from a general grant; but, if they cannot coexist without material impairment of the first, authority to take for the second cannot be implied from a mere general grant of authority to condemn.' See, also, Dillon on Mun. Corp. par. 688.

"In this case it seems to be plain that the uses are inconsistent, and that they cannot stand together without a material impairment of the rights of the railroad company. The trains engaged in the transportation of passengers and freight over a great through line are of themselves so numerous as to render a crossing at grade extremely perilous. It is a matter of common knowledge that grade crossings are the cause of a large portion of the accidents which put life and property in jeopardy. How much more dangerous would be the passage along a broad thoroughfare or boulevard intended especially as a pleasure drive, which crosses at grade not only the ordinary business tracks of the railroad, but the numerous switches covering the yard of a railroad company used for storing and shifting its cars and making up its trains? It does not require the testimony of expert witnesses, for it is a matter of common knowledge that the use of the thoroughfare and of the railroad under such conditions would each be attended with constant and inevitable danger."

The court then cites approvingly Prospect Park & Coney Island R. R. Co. v. Williamson, 91 N. Y. 552; Matter of City of Buffalo, 68 N. Y. 167; Boston & Albany R. Co. v. Village of Greenbush, 52

N. Y. 510; Milwaukee & St. P. R. Co. v. City of Faribault, 23 Minn. 167; St. Paul Depot Co. v. St. Paul, 30 Minn. 359, 15 N. W. 684; Rochester Water Commissioners, 66 N. Y. 413; Yates v. Van de Bogert, 56 N. Y. 526. Concluding, the court say:

"The language employed in the sections of the Code relied upon as conferring authority to condemn the property in controversy is of a most general description. They obviously contemplate the crossing of tracks devoted to railway traffic, and not to property which railroads may lawfully, and must of necessity, acquire, such as depots, warehouses, yards for the shifting and making up of trains, and other like purposes incident to their duties. We repeat that we do not question the power of the Legislature to authorize the condemnation of the property in question for the purposes set forth in this record, but we are of opinion that no such power now exists, either by the express authority of the Legislature, or by necessary implication from any general power of condemnation for the construction of highways, and we think it may with much propriety be left with the Legislature to say whether or not Laburnum avenue should be permitted to cross the tracks and yard of the plaintiff in error at the point indicated, and, if so, under what limitations, restrictions, and conditions, in order that the public safety and convenience in the use of the avenue and of the railroad may be guarded and protected.

"Having reached the conclusion that there was no power to condemn in the case before us, it is, of course, unnecessary to discuss the question of compensation."

In Southern Kansas Railway Co. v. Oklahoma City, 12 Okl. 82, 69 Pac. 1050, was this situation: The railroad was constructed and the right of way and station grounds acquired under authority granted by act of Congress (Act July 4, 1884, c. 179, 23 Stat. 73). Section 9 of this act, among other things, provided that the railroad company should construct and maintain continually all road and highway crossings over the railway wherever the same had been then laid out, or might thereafter cross said railway's right of way, or might be by the proper authorities laid out across the same. First street in Oklahoma City, if extended across the railway company's right of way, would cross the same immediately north of the north end of the company's depot and station grounds, occupied at the time by a number of switch and passing tracks, as well as the passenger and freight depots. Within the lines of First street, as extended, there was a switch stand controlling three tracks lying upon said station ground. On the right of way affected by First street was also the main line of railway and a portion of an interlocking system made necessary by the crossing of another railway company's tracks immediately north of First street. Several blocks to the south of First street was California avenue, which the city also desired to extend across the right of way. California avenue, as extended, would pass through the station grounds, over the main track and a number of side tracks, and would also take in a portion of the passenger depot platform. Under authority of section 9 of the act above quoted, the city, by ordinance to that effect, sought to extend First street and California avenue across the right of way and compel the company to establish and maintain such crossings. The company refused to comply, and the city proceeded to open up the crossings, but injunction proceedings were begun by the railroad company. The trial court held that, as to First street, the

city had the right to proceed to open it up, but, as to California avenue, the injunction should be granted. From the decision of that court, as to First street, the railway company appealed. In passing upon this case, the Supreme Court of Oklahoma territory said in part:

"We think that section 9 of the act above quoted imposes a condition upon the general grant, and the railway company accepted its grant subject to such conditions, and it is the duty of such company, and it may be required by the proper authorities, to open, construct, and maintain, at its own expense, any highway or street crossings without condemnation proceedings, and without compensation or claim for damages, whenever the same may be done without destroying or materially impairing the use for which Congress granted their right of way. The right of the public to cross over the right of way, roadbed, tracks, sidings, or other surface improvements is not so inconsistent with the use granted to the railway company at points beyond the station limits as to entitle the company to compensation or damages; such inconveniences or burdens as are incident to the use of such crossings by the public the company voluntarily assumed by the acceptance of the grant, and with the express condition and limitation imposed by section 9 of said act. * * * But, in our judgment, the provision of the act of Congress defining and imposing such conditions must be construed in connection with the purpose of the general grant; and these provisions must be interpreted with reference to the fundamental and paramount rights of eminent domain and due process of law. The grant of the railway company is contained in sections 1 and 2, and, by transposing and bringing the same together, will read as follows: 'That a right of way of one hundred feet in width through said Indian Territory is hereby granted for said main line and branch to the Southern Kansas Railway Company, and a strip of land two hundred feet in width, and a length of three thousand feet in addition to right of way, is granted for stations for every ten miles of road, with the right to construct, use and maintain such tracks, turnouts and sidings as said railway company may deem it to their interests to construct along and upon the right of way and depot grounds hereby granted.' It will thus be seen that Congress makes an express distinction between the 'right of way' and the 'depot grounds,' and gives the railway company the right to 'construct, use, and maintain such tracks, turnouts and sidings as said company deem it to their interests to construct along and upon the right of way.' Pursuant to this grant, the company had the unquestioned right, not only to construct its main tracks, but to construct and maintain such turnouts and sidings, at any point on its right of way, as it might deem expedient or to its best interests. And, in order for the proper and ordinary operation and use of its turnouts, sidings, and switches, it had the right to construct and erect, on such right of way, such switch stands, posts, and other mechanical appliances as were necessary for a safe and convenient operation of the turnouts and sidings.

"In imposing the condition that the railway company shall open, construct, and maintain all necessary road and highway crossings, we do not think that Congress intended that any of the company's property constructed and erected for its use, and within the terms of the grant, should be so appropriated by such crossings as to destroy its use, or materially impair its use, for railway purposes, without just compensation. A crossing may be constructed and maintained across a railway right of way and over and across its roadbeds, tracks, and sidings without destroying the use of the property or materially impairing its use for railway purposes. It is true that the opening of a street and extending a crossing over a railway company's right of way may result in inconvenience to the railway company as well as the public; it may occasion delays; it may require additional expenses to maintain gates and flagmen; and it may be difficult to construct approaches, grades, and guards; and yet the company cannot complain of any of these inconveniences or incidental expenses which may result therefrom, because the company accepted the grant subject to such conditions. And hence its grant is burdened with these essential requirements, which are in the nature of police regulations,

when the proper public authorities deem it necessary to lay out a public road, highway, or street across the right of way; and these burdens must be borne without additional compensation. In our opinion, such uses by the public are not inconsistent with the prior uses granted the railway company, and the company and the public must enjoy the rights and privileges, and as a consequence must bear the additional expenses, burdens, and inconveniences resulting therefrom.

"This, then, is the general rule, but we think this general rule has a clear and well-defined limitation, which must be applied to the case at bar. This rule does not apply where the property of the company, which was properly constructed within the terms of its grant, for the operation of its tracks and sidings, will, by the laying out and extending of the street across such right of way, be destroyed or materially impaired, and thereby be required to be removed, and its use abandoned. We have already shown that the company had the right, by the express terms of its grant, to lay the sidings and turnouts at the point where the city proposes to open First street, and, if necessary, to operate such sidings and turnouts. It had the right to erect switch stands, and the necessary mechanism for operating the switches. The trial court specifically found that the opening of First street for travel will necessitate the shortening of the side tracks and turnouts, and the rearrangement of all the side tracks converging into First street. This, then, will, to the extent that the company is required to shorten its side tracks and turnouts and the rearrangement of the same, be not only a material impairment, but an actual destruction, of its property rights. The use of the crossing for a public street will therefore, to that extent, be inconsistent with the use to which the railway company has appropriated its right of way, within the terms of the grant, and to such extent, we think, it is an appropriation of private property for public use without just compensation, and is therefore forbidden by the fifth amendment to the federal Constitution, and was not contemplated by the conditions imposed in the grant, and is inconsistent therewith. * * *

"Since the facts as found by the trial court show that the construction of a street crossing at First street will necessitate a serious impairment or destruction or removal of valuable property of the railroad company, and of a character it had a right to construct under the express terms of its grant, we are of the opinion that, in so far as such will be the result, the impairment, removal, or destruction of such property without just compensation constitutes a taking of private property for public uses without just compensation, and is therefore in violation of the rights guaranteed to the company by the Constitution of the United States."

It is therefore seen that the Supreme Court of Oklahoma Territory held that notwithstanding the provisions of section 9 of the act under which the railway company secured its right of way, which required that it should establish and maintain at its own expense highway crossings over its tracks and right of way wherever highways existed at the time of the construction of the railway or might thereafter be laid out by proper authorities, this provision should be construed as only requiring this at places outside of its station grounds, and where such crossings, while resulting in more or less inconvenience and expense to the railway company, would not destroy or materially impair any portion of the railway property involved, and thereby require its removal or the abandonment of its use for the purposes to which it had been theretofore devoted. It was accordingly held that as to First street, inasmuch as the establishment of the highway crossing necessitated the removal of the switch stand and the readjustment of the tracks involved, the railway company was entitled to be compensated in damages therefor, and that the city must first make just compensation to the railway company for such damages, or proceed

by condemnation to have such damages ascertained. It was distinctly held also in this case that, because the extension of First street across the railway company's right of way necessitated the removal of the switch stand and the readjustment of the tracks which the railway company had rightfully established there, the use of that portion of the right of way for highway purposes was inconsistent with the public use to which the railway company had already devoted it.

The city of Tulsa has a population of probably 25,000 or 30,000. The main line of the Frisco railway to points in Oklahoma and Texas passes through the city, and that this railway company has an extensive business, with patrons at Tulsa and vicinity, is evidenced by the fact that there are more than 700 cars handled and switched in the yards there each day. To accommodate the switching, storage, and otherwise handling of cars there, the railway company has established yards extending from a point west of Main street to a point east of the proposed extension of Frankfort avenue. These yards cover a length of about eight or nine blocks, and are occupied by numerous storage, passing, switching, and transfer tracks, as well as the company's main line of railway, and its passenger and freight depots and platforms. From west to east, the yards are now crossed by Main street, Cincinnati avenue, and Elgin avenue, each open to both pedestrians and vehicles, and Boston avenue open to pedestrians. Frankfort avenue is one block east of Elgin avenue. At each end of the yards is what is known as a lead or ladder track, leading from the main line to the several tracks, constituting the yards as above described, a switch stand being necessary at each point in the ladder track where one of the yard tracks diverges from it. A portion of the ladder track on the west end is affected by the Main street crossing. In the vicinity of Main street and Cincinnati avenue is by far the most populous part of the city, and consequently by far the heavier street traffic. On account of this and the consequent interference and hazard arising therefrom, it is the custom of the railroad company to do at least 99 per cent. of its switching and shifting of cars to and from the several yard tracks over the lead or ladder track at the east end of the yards. The proposed extension of Frankfort avenue will cross the lead or ladder track at the east end of the yard and include two switch stands. The establishment of this street across the company's property will compel it to remove this lead or ladder track either to the east or the west. Because of a Santa Fé connecting track and the crossing of the Midland Valley, Missouri, Kansas & Texas, and the Frisco railways, a short distance east of its present location, this lead or ladder track cannot be successfully operated, if moved to the east. If moved to the west, it will considerably shorten the present yard facilities, and be so located that the handling of cars to and from the various yard tracks in the large number which the business of the company there requires will seriously conflict with the traffic upon the street, and is practically impossible without repeated violations of the ordinance of the city which prohibits the blocking of street crossings by trains for a period exceeding five minutes. The present yard facilities are inadequate for the busi-

ness of the company, and, of course, to shorten the yards and reduce the storage and switching space would merely intensify this trouble. It will, of course, not be contended that the switch stands or the lead or ladder track can be successfully operated in the street. So far as they are concerned, it is manifest that if the street is opened up across the right of way, as desired by the city, they will have to be removed to another location, and, to that extent at least, the existence of the street will be inconsistent with the uses to which the railroad company is now devoting this property. No question is made, nor can be made, that this ladder track and the switch stands are necessary adjuncts to the railroad facilities for the handling of its business. The railroad company had a perfect right to place them where they are now, the matter of determining their location within the limits of the right of way is within the province of the proper officers of the company, in the exercise of their judgment as to where they will best serve the interest of the company in handling the business of its patrons, and presumably they were so located in the exercise of such judgment.

In view of the foregoing facts developed at the hearing in this case, I am clearly of the opinion that the public use, to which the portion of the railway company's property involved in this case is sought to be devoted by the city of Tulsa, is inconsistent with the public use for which it was acquired by the railway company and to which it is now devoted.

The temporary injunction prayed will therefore be granted, with injunction bond fixed in the sum of $5,000. Counsel may prepare and present order pursuant to this opinion.

A. B. DICK CO. v. FULLER.

(District Court, S. D. New York. March 12, 1914.)

Nos. 9–55.

1. CONTRACTS (§ 202*)—CONSTRUCTION—INVENTIONS—IMPROVEMENTS.

Where a contract required defendant to disclose promptly to plaintiff any and all inventions made or acquired by him during the life of the agreement and that defendant would not engage in the manufacture and sale of material or processes of the class or character illustrated by the inventions, to wit, stencil paper and processes and methods of preparing and using the same, without plaintiff's consent, no distinction should be drawn between the words "inventions" and "improvements," but the covenant should be construed as embracing any and all inventions relating to stencil paper and processes or methods for preparing, producing, and using it.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 918–928; Dec. Dig. § 202.*]

2. CONTRACTS (§ 117*)—ILLEGALITY—RESTRAINT OF TRADE.

A contract by which defendant agreed that during the operation thereof for a specified term he would not engage in the manufacture or sale of material or processes connected with the stencil paper trade was not objectionable as in restraint of trade, under the rule that a restraint not

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

larger than is requisite for the necessary protection of the party with whom the contract is made is not illegal.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 554–569; Dec. Dig. § 117.*]

3. CONTRACTS (§ 22*)—EXECUTION—EVIDENCE.

Where a contract bound defendant to promptly disclose to plaintiff any and all inventions made or acquired by him during the life of the agreement with reference to stencil paper and processes of similar character, but did not require defendant to make any inventions or do any development work toward new inventions or improvements in stencil making, and thereafter plaintiff promised to compensate defendant if he was successful in inventing a stencil sheet that did not require wetting, defendant having acted on such inducements and produced such a sheet, there was a valid contract to pay him reasonable compensation during the period he was so employed.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 67, 82–92, 104–108; Dec. Dig. § 22.*]

4. CONTRACTS (§ 312*)—MODIFICATION—REPUDIATION—SUIT FOR SPECIFIC PERFORMANCE.

Where complainant instituted suit for specific performance of a contract by which defendant agreed to disclose subsequent inventions and improvements in the stencil paper art, such suit did not constitute a repudiation by plaintiff of a modification of the contract by which plaintiff agreed to compensate defendant for services in successfully producing an improved stencil sheet which did not require wetting.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1279½; Dec. Dig. § 312.*]

5. CONTRACTS (§ 22*)—MODIFICATION—BINDING CHARACTER—TIME.

Where defendant agreed to disclose to complainant subsequent inventions and improvements in the stencil paper art, but did not agree to make any improvements, and thereafter the contract was modified by complainant promising to compensate defendant if he should be successful in inventing a stencil sheet that did not require wetting, complainant's promise pursuant to such modification became binding when defendant commenced work in reliance thereon.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 67, 82–92, 104–108; Dec. Dig. § 22.*]

In Equity. Suit for specific performance of a contract by the A. B. Dick Company against Louis E. Fuller. On final hearing. Decree for complainant.

See, also, 198 Fed. 404.

This is a suit to enforce specific performance of a contract between the parties and to restrain the breach thereof. The contract is dated May 12, 1911, and was to take effect upon the exercise by complainant of an option therein granted to purchase from defendant for $7,500 his 225 shares of stock in the Dermatpye Company; that company and one Dwight who owned the remaining shares of its stock also being parties to the contract. The option was duly exercised before it expired, thereby bringing into full force and effect the covenants in sections 8 and 9 of the contract upon which the present suit is based.

Under section 8 Fuller agreed to disclose "promptly" and "without further consideration" than that stated "any and all inventions" by him made or acquired, in whole or in part, before or during the life of the agreement, "in or relating to stencil paper and processes or methods for preparing, producing and using the same."

In section 9 Fuller also covenanted, during the operation of the contract, not to engage "directly or indirectly * * * or become interested in the

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

manufacture, use or sale of material or processes of the class or character illustrated by the inventions" just referred to.

On June 28, 1912, the A. B. Dick Company entered into a contract with the Rapid Addressing Machine Company, wherein the Rapid Company covenanted that for the period of 17 years it would make, sell, or use no stencil material of any kind whatsoever save in the form of cards for addressing machines, and that it would do all and every lawful act and thing within its power to assure that no such material by it sold or otherwise handled should be put to any use other than that just defined, to the end that no stencil material handled by it should be used or resold in competition with stencil material produced, sold or handled by the Dick Company. On its part the Dick Company agreed that it would, during the same period and depending upon the faithful performance by the Rapid Company of its covenants, make, use, or sell no stencil material of any kind or character whatsoever for use as cards for addressing machines, and that it would do all and every lawful act and thing within its power to assure that no such material by it handled should be used for the production of cards for addressing machines.

The original bill was demurred to. Judge Hand overruled the demurrer, expressly holding that Fuller's covenant to disclose all future inventions relating to stencil paper was valid but not passing upon the covenant not to engage in business. Subsequent to the contract of May 12, 1911, Fuller disclosed to complainant through his attorneys an improvement relating to curing stencil paper without exposure to light. His attorneys then stated: "Mr. Fuller has always felt obligated to advise the A. B. Dick Company of any actual improvements, strictly so called, on the Dermatype stencil. He considers this such an improvement." Defendant concedes that subsequent to the contract of May 12, 1911, he made an invention or inventions in or relating to stencil paper and processes or methods for preparing, producing, or using the same. Complainant demanded both orally and in writing the turning over of defendant's inventions. Defendant was willing to turn over any "improvement," and the position he assumed in his pleadings and on the trial was that section 8 was valid so far as it related to improvements, but that the inventions which he refused to disclose were not within the perview of section 8 of the contract.

Defendant set up violation of the Sherman Anti-Trust Law, in that in May, 1911, the A. B. Dick Company owned and controlled at least 90 per cent. of the wax stencil and stencil duplication business throughout the United States, and also challenged the validity of section 9 of the contract, contending that it amounted to unreasonable restraint and was so against public policy. He also alleged that after the contract of May 12, 1911, complainant agreed with defendant that, for and in consideration that he would invent a stencil paper that could be used without moistening, complainant would pay defendant a reasonable sum therefor, and that on or about October 31, 1911, and many times thereafter complainant promised and agreed with defendant that for and in consideration that defendant would do work for the benefit of complainant and particularly in investigating the possibility of inventing a stencil paper that could be used without moistening, and in experimenting for that purpose, the complainant would pay to the defendant a reasonable sum for such work. Defendant also alleges demand and refusal.

Walter C. Noyes and Samuel Owen Edmonds, both of New York City, for plaintiff.

Harry W. Mack, of New York City, for defendant.

HUNT, Circuit Judge (after stating the facts as above). Section 8 of the contract of May 12, 1911, when considered with relation to the thing or subject-matter involved—stencil paper and processes or methods for preparing, producing, and using the same—requires defendant without further consideration than was stated in the agreement to disclose promptly to the plaintiff any and all inventions made

or acquired by him during the life of the agreement, and to do certain other things not necessary to be here stated. For this covenant there was consideration and a limitation to the life of the whole agreement.

By section 9 the defendant agreed that during the operation of the agreement he would not engage in the manufacture or sale of material or processes of the class or character illustrated by the inventions in certain applications referred to in section 8, without the consent of the plaintiff.

[1] I cannot regard it as of vital importance to the suit that nice distinctions shall be drawn between the words "inventions" and "improvements." The covenant of section 8 embraces any and all inventions having relation to stencil paper and processes or methods for preparing, producing, and using the same. Earlier and later discoveries were stencil sheets adapted for the production of multiple copies, and there is direct relation in the subject-matter of the inventions last made to stencil paper; hence the comprehensiveness of the word "invention" includes such invention whether here called invention or improvement.

[2] The $7,500 paid as purchase price of the stock of the Dermatype Company was a substantial and presumably fair consideration for the covenants of the defendant to do those things required by sections 8 and 9 and other covenants of the agreement. As I read the cases it is not always illegal for one for a consideration to exclude himself for a time from making, using, or selling material or processes of a class or character of a particular kind. For example, where the purchaser of a thing to protect himself from the destruction of the thing bought agrees with the seller that he shall not use any new invention of his for producing a product which will in effect destroy the value of the property purchased, there is no restraint which will invalidate the contract. Aspinwall Mfg. Co. v. Gill (C. C.) 32 Fed. 697; Fowle v. Park, 131 U. S. 88, 9 Sup. Ct. 658, 33 L. Ed. 67; Mississippi Glass Co. v. Franzen, 143 Fed. 501, 74 C. C. A. 135, 6 Ann. Cas. 707. Nor is it illegal restraint where the restraint imposed is not larger than is requisite for the necessary protection of the party with whom the contract is made. Oregon Steam Navigation Co. v. Winsor, 20 Wall. 64, 22 L. Ed. 315.

The evidence goes to show effective competition with the Underwood Typewriter Company, and also that there are numerous other competitors. The license restrictions which attach to sales made by complainant do not violate the rules laid down by the Supreme Court in Henry v. Dick, 224 U. S. 1, 32 Sup. Ct. 364, 56 L. Ed. 645, Ann. Cas. 1913D, 880.

Some of the provisions of the contract between plaintiff and the Rapid Addressing Machine Company, dated June 28, 1912, together with the evidence of the acts of the plaintiff, seem to draw the case close to the line of violation of sections 1 and 2 of the Anti-Trust Law. U. S. Shoe Co. v. La Chapelle, 212 Mass. 467, 99 N. E. 289, Ann. Cas. 1913D, 715; Bauer v. O'Donnell, 229 U. S. 1, 33 Sup. Ct. 616, 57 L. Ed. 1041. On the other hand, the legal patent monopoly upon which I should say plaintiff's business has largely been built

up does not lead to the conclusion that monopoly and restraint of trade in contravention of law exist. Park v. Hartman, 153 Fed. 24, 82 C. C. A. 158, 12 L. R. A. (N. S.) 135.

[3] Was there a supplemental or new contract, or was there any agreement for compensation? My reading of the evidence satisfies me that there was no agreement of any kind and no intention to make any agreement modifying section 8 of the contract of May 12, 1911. Mr. Fuller covenanted, among other things, to disclose any and all inventions by him made or acquired during the life of the agreement. This I think is very clear. But while this is true, both Mr. Dick and Mr. Fuller well knew that under the contract there was no obligation whatsoever resting upon Mr. Fuller to make any investigations or to do any development work toward the making of inventions or improvements in stencil making. Mr. Dick felt, though, that a dry stencil sheet would be of decided value, and he was anxious to procure such. He was therefore very ready to listen to Mr. Fuller's suggestions of possible new inventions in that direction and to encourage him to put forth his energies toward perfecting such an improvement in the art. As stimulus for such exertion, Mr. Dick in June and October, 1911, gave Mr. Fuller to understand and meant to have him understand that if he was successful in inventing a stencil sheet that did not have to be wet and would disclose, as he was obliged to do, he would compensate him. Such compensation was afterwards well described by Mr. Dick in his letter of January 29, 1912, as "for working out improvements or new inventions for our (A. B. Dick Company's) benefit," and was not to be for the turning over of any inventions when made or otherwise to interfere with the previously made contract obligations. Mr. Dick refers to this agreement of May 12, 1911, in his letter of August 6, 1913. Mr. Fuller acted upon Mr. Dick's inducements and in consideration thereof aroused and utilized his energy with apparent success. Thus there was an agreement which is not to be regarded as a mere executory promise without a consideration, but as one founded upon valid consideration and which is capable of enforcement. The services rendered by defendant in the Belknap interference were outside of this immediate matter. For what defendant did in that he was paid in full.

There is no reason why under the pleadings as amended defendant cannot recover herein for the value of his services rendered in working for the benefit of the plaintiff, provided he has succeeded in his invention and makes disclosure. Under the evidence, defendant gave part of his time toward perfecting stencil plate improvements from about September 1, 1911, until January 20, 1912. A reasonable compensation for his time is at the rate of $200 a month for the period specified, or $933. Thereafter he resumed experimental work on February 9, 1912, and except for "a few months" for vacation during hot weather he continued his work until the 25th of July, 1913, when he announced to the Dick Company that he had made an invention of a dry process stencil sheet. Deducting two months for vacation, we have a period of 15½ months, and at $200 a month his compensa-

tion for this latter period would be $3,100; and for both periods a total of $4,033.

[4, 5] The contention that the bringing of the suit was a repudiation by plaintiff of such an agreement for compensation as I find was made does not seem to me to be sound. The promise of plaintiff became binding when defendant began work in reliance upon it. Miller v. McKenzie, 95 N. Y. 575, 47 Am. Rep. 85. Mr. Dick, as late as August 28, 1913, appears to have been ready and willing to make a substantial payment to the defendant for his "time and expenses spent in working on these inventions," provided, of course, that he found such inventions to be of commercial value and that his company was not further delayed and put to further expense in enforcing its rights under the contract. The telegram of August 5th signed by the Dick Company and Mr. Dick's letter of August 6th also go to show that there had been some arrangement for compensation.

Plaintiff is entitled to a decree. The decree should be so drawn that it will not become absolute until plaintiff shall have paid the money hereinbefore found to be due to the defendant by way of compensation; and plaintiff shall have a right to ascertain whether the inventions are patentable and practical. Plaintiff is requested to draw a decree along these lines.

MAINE NORTHWESTERN DEVELOPMENT CO. v. NORTHERN COMMERCIAL CO.

(District Court, W. D. Washington, N. D. March 25, 1914.)

No. 2117.

1. CONTRACTS (§ 94*)—VALIDITY—FRAUD.

The rule that a party when sued at law on his solemnly executed contract may not defend on the ground of fraud unconnected with its execution is based on the common law that a party to a sealed instrument is bound by its recitals when it is introduced in a court of law, and may not attack it for fraud except when connected with the execution of the instrument in such a way as to render it not the party's deed.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 420–430, 1160, 1164, 1165; Dec. Dig. § 94.*]

2. CONTRACTS (§ 328*)—DEFENSES—FRAUD.

Where fraud relates to the consideration or inducement for the execution of a contract rather than to the execution of the contract itself, the defrauded party's remedy is by suit in equity to set the instrument aside.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1571–1584; Dec. Dig. § 328.*]

3. CONTRACTS (§ 328*)—DEFENSES—FRAUD.

Fraud inducing the execution of a contract which is of such a nature as to render it against public policy or illegal is available as a defense to an action on the contract at law.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1571–1584; Dec. Dig. § 328.*]

4. CORPORATIONS (§ 90*)—STOCK SUBSCRIPTION CONTRACT—DEFENSES—FRAUD.

Where, in a suit on a stock subscription contract, defendant pleaded that the contract was void for fraud in that R., who was president and managing director of plaintiff corporation and who obtained the contract

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

for plaintiff was at the same time acting in his own interest, which fraud plaintiff admitted, such facts constituted a valid defense at law.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 245, 383–419; Dec. Dig. § 90.*]

Action by the Maine Northwestern Development Company against the Northern Commercial Company. On motion to strike an affirmative defense. Denied.

William H. Gorham, of Seattle, Wash., for plaintiff.

Bogle, Graves, Merritt & Bogle, of Seattle, Wash., for defendant.

NETERER, District Judge. This is an action upon an assessment levied upon subscribers to the stock of the plaintiff corporation. The plaintiff has moved to strike the following portion of the first affirmative defense of the defendant corporation:

"That at the time of the alleged subscription to the capital stock of said plaintiff, the said John Rosene described in Exhibit A attached to the complaint herein was the promoter and managing director of plaintiff, and was at the same time also president of this defendant. That the said Rosene as such promoter of the plaintiff company, and by virtue of certain contracts and agreements entered into between the promoters of said plaintiff company and the said John Rosene, and entered into between the said Rosene and the said plaintiff company, was personally interested in procuring subscriptions to the preferred stock of the plaintiff company, * * * and was made by him in furtherance of his personal interest in the plaintiff company, and to benefit himself as a promoter and contractor therewith, and at a time when he was its managing director."

Plaintiff contends that the above constitutes an equitable defense and as such cannot be interposed in an action at law. Many authorities are cited by plaintiff to prove that the alleged action of the defendant's president was a breach of a fiduciary obligation, and thus that it amounts to fraud and cannot be pleaded as a defense in this action.

[1] I cannot understand that the plaintiff seriously contends that fraud is always an equitable defense and may never be pleaded at law. The authorities cited are merely to the effect that a party when sued at law upon his own solemnly executed contract may not defend upon the ground of fraud unconnected with its execution. This holding is based upon the common-law rule that a party to a sealed instrument was bound by its recitals when it was introduced in a court of law, and could attack it for fraud only where such fraud was connected with the execution of the instrument in such a way as to render it not the deed of the party. Hill v. Northern Pac. Ry. Co. (C. C.) 104 Fed. 754; Pacific Mut. Life Ins. Co. v Webb, 157 Fed. 155, 84 C. C. A. 603, 13 Ann. Cas. 752; Levi v. Mathews, 145 Fed. 152, 76 C. C. A. 122; Hill v. Northern Pac. Ry. Co., 113 Fed. 914, 51 C. C. A. 544; George v. Tate, 102 U. S. 564, 26 L. Ed. 232.

[2] The proper procedure, according to these authorities, where the fraud relates merely to the consideration or inducement to contract, is for the party defrauded to apply to a court of equity which might set aside the instrument upon such terms as might be deemed just; whereas, a court of law would be limited to the validity or invalidity of the deed. Hartshorn v. Day, 19 How. 211, 223, 15 L. Ed. 605.

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

[3] But there is no such magic in the word "fraud" as to rob a court of law of jurisdiction, irrespective of the nature of the fraud charged. Where the fraud is of such a nature as to render the contract against public policy or illegal courts of law have universally refused to enforce it. 9 Cyc. 465; Woodstock Co. v. Extension Co., 129 U. S. 643, 9 Sup. Ct. 402, 32 L. Ed. 819; West v. Camden, 135 U. S. 507, 10 Sup. Ct. 838, 34 L. Ed. 254. To wave aside such a defense on the ground that it was a matter for equitable cognizance alone would be to make a court of law a potent agency in the accomplishment of illegal and unlawful designs.

[4] Plaintiff's counsel occupies the unique position of asking the court to enforce a contract which he zealously contends is fraudulent; and, to bring the defense pleaded by defendant within the meaning of the word fraud, he quotes good law and sound morals, neither of which are beyond the province of this court to recognize and enforce. From Twin-Lick Co. v. Marbury, 91 U. S. 587, 23 L. Ed. 328, he gleans the following:

"That a director of a joint-stock corporation occupies one of those fiduciary relations where his dealings with the subject-matter of his trust or agency, and with the beneficiary or party whose interest is confided to his care, is viewed with jealousy by the courts, and may be set aside on slight grounds, is a doctrine founded on the soundest morality, and which has received the clearest recognition in this court and in others."

He also incorporates in his brief the following from Wardell v. U. P. R. R. Co., 103 U. S. 651, 26 L. Ed. 509:

"It is among the rudiments of the law that the same person cannot act for himself and at the same time, with respect to the same matter, as the agent for another whose interests are conflicting. Thus a person cannot be a purchaser of property and at the same time the agent of the vendor. The two positions impose different obligations, and their union would at once raise a conflict between interest and duty; and, 'constituted as humanity is, in the majority of cases duty would be overborne in the struggle.' Marsh v. Whitmore, 21 Wall. 183 [22 L. Ed. 482]. The law therefore will always condemn the transaction of a party on his own behalf when, in respect to the matter concerned, he is the agent of others, and will release against them whenever their enforcement is seasonably resisted."

Plaintiff cites other authorities to bring such a defense as that here pleaded within the category of fraud. It is therefore unnecessary to discuss the effect of the facts pleaded upon the contract. While some respectable authority might be found to the effect that a contract made by the manager of one corporation with another corporation of which he is also manager is not wholly void and may be enforced where the party seeking its enforcement shows its fairness by clear and convincing proof (Geddes v. Anaconda Copper Mining Co. (D. C.) 197 Fed. 860), yet, where the party upon whom this burden is cast admits the fraud, it will hardly be contended that the contract should be enforced by a court of law or any other court. 2 Thompson on Corporations, § 1242. Of course, such an admission is merely for the purposes of argument on the motion; but, where the relationship pleaded is such as to throw upon the plaintiff as a matter of law the burden of showing absence of fraud, plaintiff's admission of fraud makes the defense which it moves to strike a perfect defense against its right of action.

Of agreements such as that here alleged, which tend to promote a breach of duty of persons who stand to others in a fiduciary relation, 9 Cyc. 474, says:

"While it is often said that such agreements are against public policy, because it is the policy of the law to secure fidelity in the discharge of their duties by all persons holding such positions of trust and confidence, yet it is more accurate to say that such agreements, tending to cause unfaithful conduct by fiduciaries, are illegal, because they are in effect agreements to wrong or defraud the persons whose interest the fiduciaries have in charge."

It would indeed be a harsh system of jurisprudence that would lend any of its courts to the enforcement of contracts in violation of fiduciary relations. While the distinction between law and equity is studiously preserved in our federal system, that distinction does not go to the extent of compelling one court to enforce agreements which the other would abhor. Both are established to promote the well-being of society, and this may not be promoted by encouraging the violation of the most sacred duties known to the law.

It is unnecessary to discuss the other portion of the motion to strike. The motion is denied.

INTERMELA et al. v. PERKINS.

(District Court, W. D. Washington, N. D. April 20, 1914.)

No. 32.

1. COURTS (§ 342*)—LAW AND EQUITY—DISTINCTION—EQUITABLE DEFENSES.
The distinction between the systems of law and equity is preserved in the federal courts, and purely equitable defenses may not be interposed in an action at law.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 912, 913; Dec. Dig. § 342.*]

2. JUDGMENT (§ 408*)—ENFORCEMENT—INJUNCTION.
Equity will enjoin the enforcement of a judgment only when it would be against conscience to enforce it and the particular matter relied on could not have been set up as a defense in the action at law.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 772; Dec. Dig. § 408.*]

3. JUDGMENT (§ 423*)—ENFORCEMENT—INJUNCTION—GROUNDS.
Where a judgment against a city treasurer for damages for failure to pay a warrant of the city on presentation was affirmed on appeal, the fact that certain defenses were not considered in that case either by the trial or appellate court constituted a mere error of law and did not authorize an injunction to restrain the collection of the judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 797-801; Dec. Dig. § 423.*]

4. JUDGMENT (§ 408*)—ENFORCEMENT—INJUNCTION—GROUNDS—DEFENSES.
Where judgment at law was recovered against a city treasurer for failure to pay a warrant drawn on a specified fund, when it was presented to him for payment, the fact that payment was properly refused because the city's constitutional debt limit had already been reached, and the warrant was therefore void, and that the same was fraudulently issued by the city council for a debt for which the city was not liable, were available as de-

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

fenses at law, and hence did not constitute ground for restraining the enforcement of the judgment without reference to whether they were in fact pleaded or considered in the action at law.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 772; Dec. Dig. § 408.*]

Suit by Charles L. Intermela and the American Surety Company against David Perkins to enjoin the collection of a judgment at law. On motion to dismiss. Granted.

U. B. Gnagey, of Port Townsend, Wash., and Hastings & Stedman, of Seattle, Wash., for plaintiffs.

Charles E. Shepard, of Seattle, Wash., for defendant.

NETERER, District Judge. This is a suit in equity to enjoin the collection of a judgment at law. Plaintiff Intermela was treasurer of the city of Port Townsend from January, 1909, till January, 1914, and the plaintiff American Surety Company was surety on his official bond. The judgment the collection of which is sought to be enjoined was rendered in an action for damages for the failure of said Intermela as treasurer to pay a warrant of the city of Port Townsend drawn on the "General Indebtedness Fund" of said city when the same was presented for payment December 1, 1910. An appeal was taken to the Circuit Court of Appeals, which affirmed the judgment; and a petition for a writ of certiorari was dismissed by the Supreme Court. Paragraph 5 of the bill alleges:

"That in said action * * * these plaintiffs as defendants therein set up certain legal defenses which they considered sufficient to defeat said action, but both the lower court and the Circuit Court of Appeals held said defenses insufficient and overruled the same."

It is then alleged that the warrant in question was issued fraudulently by the city council in payment of a judgment of the superior court in an action brought by the holder of a warrant on a special improvement district fund; that before the rendition of this judgment the Supreme Court of the State of Washington, in the case of German American Savings Bank v. Spokane, 17 Wash. 315, 49 Pac. 542, 38 L. R. A. 259, decided that under no circumstances should a city be held liable in the state of Washington on a street grade warrant of the kind and character of the one sued on; that the judge who entered the same knew, and the city council was aware, that the city was not liable on such warrants; that an appeal was perfected, but before the record was sent to the Supreme Court the city council at a secret meeting agreed with the judgment creditor to pay the judgment by a warrant drawn on the general indebtedness fund of the city. It is also alleged that at the time of the issuance of the warrant the constitutional debt limit of the city had been reached, and that the warrant was therefore void.

Defendant answers and files his motion to dismiss on the ground, among others, that the judgment referred to in the bill became res judicata as to the parties herein and the issue tendered; that the judg-

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

ment rendered in said cause perpetually barred all defenses which were or might have been pleaded.

[1] It is contended by the plaintiffs here that they could not avail themselves of the facts alleged in the bill as a defense to the action at law, inasmuch as they constituted defenses cognizable in equity alone. The distinction between the courts of law and equity is preserved in the federal system and purely equitable defenses may not be interposed in an action at law. Hill v. Northern Pac. Ry. Co. (C. C.) 104 Fed. 754; Pacific Mut. Life Ins. Co. v. Webb, 157 Fed. 155, 84 C. C. A. 603, 13 Ann. Cas. 752; Levi v. Mathews, 145 Fed. 153, 76 C. C. A. 122; Hill v. Northern Pac. Ry. Co., 113 Fed. 914, 51 C. C. A. 544; George v. Tate, 102 U. S. 564, 26 L. Ed. 232.

[2, 3] A court of equity will interfere with the execution of a judgment at law only where it would be against conscience to enforce it and where the particular matter relied upon in the bill for an injunction could not have been set up as a defense in the action at law. The fact that the defenses may not have been considered by the trial court or the Circuit Court of Appeals is immaterial. This amounts merely to a contention that the law court erred, and with such contention a court of equity is not concerned. If the defenses might have been considered, if they were such as could have been given effect by a court of law, they were determined by the judgment regardless of whether or not they were interposed by the defendants or considered by the court. 16 Am. & Eng. Encyc. of Law; Cromwell v. County of Sac, 94 U. S. 351, 24 L. Ed. 195; Stockton v. Ford, 18 How. 418, 15 L. Ed. 395; Mitchell v. First Nat. Bank Chicago, 180 U. S. 471, 480, 21 Sup. Ct. 418, 45 L. Ed. 627.

[4] Applying these principles to the case at bar, it is clear that the facts alleged in the bill are not such as to warrant this court in enjoining the execution of the judgment at law. If by reason of the fact that the constitutional debt limit of the city had been reached the warrant was void, no action could be maintained upon it either at law or in equity. A void instrument is a mere nullity giving rise to no rights legal or equitable. The fact that there may have been a breach of trust connected with its issuance cannot vary its effect. It would be paradoxical to say that the instrument was thereby rendered more void, or that it acquired any validity from the fraud.

It is also evident that, if the city council committed a breach of trust in issuing the warrant for an indebtedness for which the city was not legally liable, the fraud could be set up as well in a legal as in an equitable action. In Maine Northwestern Development Co. v. Northern Commercial Co., 213 Fed. 103, filed in this court March 25, 1914, where a motion was made to strike an affirmative defense of fraud, the court said:

> "There is no such magic in the word 'fraud' as to rob a court of law of jurisdiction, irrespective of the nature of the fraud charged. Where the fraud is of such a nature as to render the contract against public policy or illegal courts of law have universally refused to enforce it." 9 Cyc. 465; Woodstock Iron Co. v. Extension Co., 129 U. S. 643, 9 Sup. Ct. 402, 32 L. Ed. 819; West v. Camden, 135 U. S. 507, 10 Sup. Ct. 838, 34 L. Ed. 254.

A plea that the enforcement of a particular agreement would tend to encourage public officers in the violation of the trust reposed in them would meet with just as much consideration in a court of law as in a court of equity. Grand Chute v. Winegar, 15 Wall. 373, 21 L. Ed. 174. Such a plea was actually made in the action here in question. It was determined finally by the judgment entered therein. We cannot re-examine the question as to whether the determination on the former trial was right. There must be an end to litigation somewhere. United States v. Throckmorton, 98 U. S. 61, 25 L. Ed. 93; Vance v. Burbank, 101 U. S. 514, 25 L. Ed. 929.

An order may be entered dismissing the action.

POWER & IRRIGATION CO. OF CLEAR LAKE v. BANK OF WOODLAND et al.

(District Court, N. D. California, Second Division. April 1, 1914.)

No. 15,656.

COURTS (§ 312*)—FEDERAL COURTS—JURISDICTION—ASSIGNED CLAIMS—"CHOSE IN ACTION."

Where plaintiff, a nonresident, sued on a claim assigned by a citizen of the same state as defendants to recover money paid under a contract to purchase corporate stock, which defendants had attempted to rescind without restoring the amount received as required by Civ. Code Cal. § 1691, plaintiff's right to recover was a "chose in action," and hence jurisdiction did not appear under Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1091 [U. S. Comp. St. Supp. 1911, p. 135]) § 24, providing that no District Court shall have cognizance of any suit to recover on a "chose in action" in favor of an assignee, unless the suit might have been prosecuted in such court to recover on the chose in action if no assignment had been made.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 865–875; Dec. Dig. § 312.*

For other definitions, see Words and Phrases, vol. 2, pp. 1144–1148; vol. 8, p. 7602.]

At Law. Action by the Power & Irrigation Company of Clear Lake, an Arizona corporation, against the Bank of Woodland and others. On demurrer to complaint. Sustained.

Charles S. Wheeler and John F. Bowie, both of San Francisco, Cal., for plaintiff.

A. E. Shaw, Bert Schlesinger, Denson, Cooley & Denson, Theodore A. Bell, and Mastick & Partridge, all of San Francisco, Cal., for defendants.

DOOLING, District Judge. Plaintiff is a corporation organized and existing under the laws of Arizona. The complaint contains three counts. The first count avers that on March 24, 1912, the defendants were indebted to one E. P. Vandercook in the sum of $167,429.30 for money had and received by them of and from said Vandercook to and for his use and benefit, and that said Vandercook had

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

assigned to plaintiff his said claim and demand against defendants, and that plaintiff is now the lawful owner and holder thereof.

The second count alleges that on March 24, 1912, the defendants became indebted to said Vandercook at the special instance and request of the defendants and for their use and benefit, and that Vandercook had assigned his claim and demand against defendants to plaintiff, who is now the lawful owner and holder thereof.

The third count recites: That in January, 1907, the defendants entered into an agreement in writing with said Vandercook whereby he agreed to buy, and they agreed to sell, 9,860 shares of the capital stock of the Yolo County Consolidated Water Company at the agreed price of $45 per share, payable as follows: $91,250 down, and $3.33 a share to be paid on each of the following dates: January 15, 1908, July 15, 1908, and January 15, 1909, and the remainder, amounting to $258,750, in the bonds of a corporation known as the Central California Power Company. That the said capital stock of the Yolo County Consolidated Water Company should be properly indorsed and placed in escrow and there remain to be delivered to said Vandercook in accordance with said agreement. That the said bonds of said Central California Power Company should also be placed in escrow, there to remain until all the cash payments had been made, and until such bonds should have a market value of 90 per cent. of their par value, when said bonds were to be delivered to defendants and the stock of the Yolo County Consolidated Water Company was to be delivered to said Vandercook. Said agreement also provided that said Vandercook might pay out certain moneys for contracts or options held by said Yolo County Consolidated Water Company, and for extensions thereof, and that such payments made by him should be in the name and for the use of said company. It was also agreed that if said Vandercook failed to make any of the payments at the time the same became due, or should fail to perform his part of the agreement, he should lose all rights to purchase said stock, and all moneys paid thereon should be retained as a consideration for the execution of said agreement; that said Vandercook should have no right to recover any portion of said payments.

The complaint further avers: That pursuant to said agreement said Vandercook deposited in escrow the bonds of the said Central California Power Company, and, during the life of the agreement, paid to defendants or for them in accordance therewith various amounts aggregating $207,396.37. That after said payments had so been made, and while said agreement was in full force and effect, the defendants rescinded the same, and notified Vandercook thereof in writing, declaring the same to be rescinded, and null and void, and further notified Vandercook that they would no longer be bound by said agreement nor perform any of the acts to be performed by them thereunder. That thereupon the defendants received from the escrow holder the said 9,860 shares of stock of the Yolo County Consolidated Water Company, and sold and transferred them to some person other than Vandercook or the plaintiff. That notwithstanding these facts no part of the moneys paid to or for defendants by said Vandercook

has been repaid That after the rescission, cancellation, and annulment of the contract as aforesaid, the said Vandercook sold, transferred, assigned, and set over to plaintiff all of his rights, claims, and interests of every kind whatever to recover of and from the said defendants all of the aforesaid sums, and that plaintiff is now the lawful owner and holder of said claims; the total amount sued for here including interest being $284,557.09.

The substance of the complaint is thus fully set out because the jurisdiction of the court is challenged by demurrer, on the ground that recovery is sought upon "a chose in action," and that as plaintiff's assignor, being a citizen of this state, could not have maintained an action in this court, his assignee, the plaintiff, cannot do so, although a citizen of another state. The question thus presented is whether the facts alleged in the complaint bring the case within the following provisions of section 24 of the Judicial Code:

"No District Court shall have cognizance of any suit * * * to recover upon any promissory note or other chose in action in favor of any assignee, * * * unless such suit might have been prosecuted in such court to recover upon said note or other chose in action if no assignment had been made."

This section is of comparatively recent enactment, the provisions of former sections being that no assignee could recover "the contents of a chose in action" where his assignor could not do so. The phrase "contents of a chose in action" has been before the courts many times for interpretation as applied to particular facts. Nowhere, however, in the adjudicated cases have I been able to find such definition of "a chose in action" as could be relied upon for application in the present case, unless it be in the following language of the Supreme Court, in Bushnell v. Kennedy, 76 U. S. (9 Wall.) 390, 19 L. Ed. 736:

"That the indebtedness here was a chose in action cannot be doubted; for under that comprehensive description are included all debts and all claims for damages for breach of contract, or for torts connected with contracts."

Much confusion arose in the earlier cases because of the use of the words "to recover the contents of a chose in action." These words have been omitted from the section of the Judiciary Act above quoted, and in their place we have the words "to recover upon a chose in action." That the claim here assigned is a chose in action I have not the slightest doubt. It must be remembered we are not dealing with the words "contents of a chose in action," which would imply a subsisting contract having contents capable of recovery. But even if we were, the facts set out show that plaintiff is relying upon the contract pleaded by it, and defendants' failure to carry it out. Defendants' defense, if they have any, must also be based upon the contract and upon the failure of plaintiff's assignor to carry it out. The averment that defendants rescinded the contract serves only to confuse the present question, for if we take the averments of the complaint together we will see that all that is really pleaded is that defendants have attempted to rescind the contract, as no rescission can be accomplished under the circumstances shown here until the party rescinding has restored "to the other party everything of value * * *

received from him under the contract." Civil Code Cal. § 1691. I am satisfied that plaintiff is suing upon a chose in action, and that, as its assignor could not maintain the action in this court, plaintiff cannot do so.

The demurrer will therefore be sustained.

Ex parte WONG TUEY HING.

(District Court, N. D. California, First Division. April 16, 1914.)

No. 15,485.

1. ALIENS (§ 54*)—DEPORTATION—WARRANT—GROUNDS—HEARING.
A warrant for the deportation of an alien cannot be sustained on a ground concerning which he has been accorded no hearing.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 112; Dec. Dig. § 54.*]

2. ALIENS (§ 32*)—CHINESE PERSONS—RIGHT TO RE-ENTER.
Chinese Regulations, Rule 3, provides that Chinese aliens shall be examined as to their right of admission under the law governing immigration as well as under the laws relating to the exclusion of Chinese, first, to determine their right to enter as ordinary aliens, and then their status under the Chinese exclusion laws and regulations. *Held*, that where a Chinese resident of the United States, in preinvestigation proceedings in advance of his departure from the United States on a trip to China, complied with every requirement of the law to establish his status as a Chinese person entitled to depart from and return to the United States, and the immigration officers at that time failed to inquire into his status as an ordinary alien, an examination as to his right to re-enter the United States should be limited to his rights under the Chinese exclusion laws and regulations.

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

3. ALIENS (§ 27*)—CHINESE PERSONS—RIGHT TO RE-ENTER—HEARING.
The Chinese Exclusion Law (Act Sept. 13, 1888, c. 1015, § 13, 25 Stat. 479 [U. S. Comp. St. 1901, p. 1317]) provides that any Chinese person found unlawfully in the United States may be arrested on a warrant issued on a complaint filed by any party on behalf of the United States, by any justice, judge, or commissioner of a United States court, or before any United States court, and when convicted on a hearing, shall be removed to the country whence he came, etc. *Held*, that where a Chinese alien had complied with all the laws and regulations governing his right to depart from the United States and return thereto on a preinvestigation before departing, under the Chinese exclusion laws, he could not be deported after readmission into the United States on the ground that his original entry had been surreptitious in violation of the Immigration Law (Act Cong. Feb. 20, 1907, c. 1134, 34 Stat. 898 [U. S. Comp. St. Supp. 1911, p. 499]) without a hearing before a justice, judge or commissioner.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 85-87; Dec. Dig. § 27.*]

Application for writ of habeas corpus by Wong Tuey Hing, sometimes known as Gin Nom, a Chinese person, to obtain his discharge from custody under deportation warrant. Writ granted. Petitioner discharged.

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

George A. McGowan, of San Francisco, Cal., for petitioner.
John W. Preston, U. S. Atty., and Walter E. Hettman, Asst. U. S. Atty., both of San Francisco, Cal., for respondent.

DOOLING, District Judge. [1] Petitioner, a Chinese alien, was arrested by virtue of a warrant signed by the acting Secretary of Labor, as a person found in the United States in violation of the Act of Congress of February 20, 1907, c. 1134, 34 Stat. 898 (U. S. Comp. St. Supp. 1911, p. 499), generally known as the Immigration Act, "in that he entered at a time and place other than as designated by the immigration officers thereby entering without inspection." After several hearings before the immigration officers he was by the acting Secretary of Labor ordered deported; the reason for such action being stated in the warrant of deportation as follows:

"That said alien is a member of the excluded classes in that he was a person likely to become a public charge at the time of his entry into the United States; and that he is unlawfully within the United States in that he secured admission by means of false and misleading statements, thereby entering without inspection."

The first reason assigned, "that he was a person likely to become a public charge," etc., must be wholly disregarded, because as to it the petitioner at no time was accorded any hearing whatever; such charge never appearing at any stage of the proceeding until it was incorporated in the warrant of deportation. As to the second reason, "that he is unlawfully within the United States in that he secured admission by means of false and misleading statements, thereby entering without inspection," the facts as claimed by the immigration officers are as follows: That petitioner is an alien, native and subject of China; that his name is Gin Nom, in which name he held a Chinese laborer's certificate of residence duly and properly issued to him at San Luis Obispo on March 17, 1894; that after preinvestigation, as allowed by rule 15 of the regulations governing the admission of Chinese, by the San Francisco office, he departed from San Francisco on December 27, 1910, as a merchant of Santa Rosa, Cal., under the name of Wong Tuey Hing, and returned through the same port on September 12, 1912, and was then admitted by the immigration officers as a returning Chinese merchant by virtue of his preinvestigation certificate; that instead of being a merchant he was in fact a laborer in the Eagle Restaurant at Tucson, Ariz., for several years prior to the time he departed for China, and had been employed as a laborer since his return to the United States, and had never in fact possessed a bona fide mercantile status.

It will thus be seen that his right to remain here as a laborer would be unquestioned were it not for his departure from the country and return thereto as a merchant, but it may be added in passing that upon his arrest in the present proceeding his laborer's certificate was taken from him by the immigration officers and canceled. Petitioner upon his hearing strongly insisted that, when he procured his certificate as a merchant upon his preinvestigation before departing for China, he did actually own an interest in a store at Santa Rosa

[2] I am of the opinion that if petitioner is unlawfully in this country it is not because of his being an alien, but because he is a Chinese alien; that is to say, if he is unlawfully here, it is not because of the provisions of the immigration law, but because of the provisions of the Chinese exclusion laws. If he entered without inspection as the warrant of deportation recites, it was because the immigration officers did not desire to inspect him, not because he prevented them from doing so.

Rule 3 of the regulations governing the admission of Chinese provides as follows:

"Chinese aliens shall be examined as to their right to admission to the United States under the provisions of the law regulating immigration as well as under the laws relating to the exclusion of Chinese. As the immigration act relates to aliens in general, the status of Chinese applying for admission must first be determined in accordance with the terms of that law and of the regulations drawn in pursuance thereof; then, if found admissible under such law and regulations, their status under the Chinese exclusion laws and regulations shall be determined."

It is evident therefore that, if the immigration officers failed to inquire into petitioner's status as an alien as distinguished from his status as a Chinese alien, they did so in violation of this rule, and cannot now hold petitioner responsible therefor. He complied with every requirement of the law to establish his status as a Chinese entitled to depart from and return to this country. If that status is to be inquired into again a year after his re-entry into the country, it should be inquired into under the exclusion laws and not under the immigration act.

[3] The Exclusion Law (Act Sept. 13, 1888, c. 1015, § 13, 25 Stat. 479 (U. S. Comp. St. 1901, p. 1317) provides:

"That any Chinese person, or person of Chinese descent, found unlawfully in the United States, or its territories, may be arrested upon a warrant issued upon a complaint, under oath, filed by any party on behalf of the United States, by any justice, judge, or commissioner of any United States court, returnable before any justice, judge, or commissioner of a United States court, or before any United States court, and when convicted, upon a hearing, and found and adjudged to be one not lawfully entitled to be or remain in the United States, such person shall be removed from the United States to the country whence he came. 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."

Before petitioner may lawfully be deported because of the matters here involved he is entitled to a hearing before a justice, judge, or commissioner, and, as he has not been accorded such hearing, it is ordered that he be discharged.

In re GOLDSTEIN.

(District Court, D. Connecticut. April 18, 1914.)

No. 3324.

1. BANKRUPTCY (§ 377*)—COMPOSITION—REQUISITES—ACCEPTANCE—MAJORITY OF CREDITORS.

Under Bankr. Act July 1, 1898, c. 541, § 12b, 30 Stat. 549 (U. S. Comp. St. 1901, p. 3427), providing that an application for the confirmation of a composition may be filed after it has been accepted in writing by a majority in number of all creditors whose claims have been allowed, which number must represent a majority in amount of such claims, etc., a proposition for composition must be accepted in writing by a majority of the bankrupt's creditors, both in number and amount, before the court can order confirmation.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 586–588; Dec. Dig. § 377.*]

2. BANKRUPTCY (§ 377*)—COMPOSITION—CONFIRMATION.

Where a proposed composition between a bankrupt and his creditors has not been assented to by a majority, both in number and amount, of the bankrupt's creditors, the court cannot compel those who have not consented to accept the proposition.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 586–588; Dec. Dig. § 377.*]

3. BANKRUPTCY (§ 382*)—PROPOSED COMPOSITION—BEST INTERESTS OF CREDITORS—BURDEN OF PROOF.

It is only after a proposed composition has been assented to by a majority of the bankrupt's creditors, both in number and amount, that it becomes prima facie evidence that the composition is for the best interests of all creditors and the burden is imposed on the minority to show the contrary.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 592; Dec. Dig. § 382.*]

In Bankruptcy. In the matter of bankruptcy proceedings of Sarah Horwitz Goldstein. On appeal from a recommendation of a special master that a composition be not confirmed. Report sustained.

I. Henry Mag, of Meriden, Conn., for petitioning creditors.
Patrick T. O'Brien, of Meriden, Conn., for respondent.

THOMAS, District Judge. This case comes before the court on an appeal from the report of the special master recommending that a composition of 35 per cent. be not confirmed on the ground that a majority in number of creditors and a majority in amount oppose it, and because the written statement signed by the bankrupt prior to bankruptcy was not an accurate statement of her financial condition.

The petitioner was adjudicated a bankrupt on the 29th of January, 1914, and on the 21st of February, 1914, filed a petition with the master for the confirmation of a composition of 35 per cent. On the 11th of April, 1913, the petitioner signed a statement representing herself as solvent, but no evidence appeared before the master proving or tending to prove that she was at the time of making or signing such a statement in fact insolvent. There were 34 claims filed and allowed, representing a total indebtedness of $5,500. Of these, ten favor the

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

acceptance of the composition, and eleven oppose it. Slightly more than one-half in amount oppose the composition.

After a full hearing had, the master finds from the evidence as follows:

"In my judgment the estate in bankruptcy will not pay more than 35 per cent.," and, "while I think it would be for the best interest of the creditors that the composition be confirmed, I feel obliged to recommend that it be not confirmed, on the ground of the number and amount of creditors opposing it, and especially of the written statements signed by the bankrupt."

The only question here presented is whether the court can order the creditors to accept the composition offered, in view of the number and character of the objectors.

[1] Any proposition of settlement which is made by a bankrupt to his creditors must first be accepted in writing by a majority of them, both in number and amount, before the court can order a confirmation of such offer. In re Rider (D. C.) 96 Fed. 808.

The underlying principle which seems to govern cases of this kind is that the court cannot compel a debtor to accept less than his claim and thus deprive him of the right to take any action looking to the securing of the balance thereof, as it is near the border line where a man is deprived of his property without due compensation.

[2] A composition is permitted by the bankruptcy law only in such a case as shows that the bankrupt has fully complied with all the requirements of section 12 of the Bankruptcy Act. Therefore as this case does not disclose a complete compliance therewith, those of her creditors who have not consented to accept her proposition cannot be compelled to do so by the court. In re Godwin (D. C.) 122 Fed. 111.

In Collier on Bankruptcy (9th Ed.) 298, the author says:

"The intention clearly is to prevent one who could not otherwise get a discharge from securing its equivalent through a composition offer." In re Comstock (C. C.) 154 Fed. 747.

Judge McPherson in the Eastern District of Pennsylvania in the Godwin Case said:

"It is very likely that the creditors may lose by the defeat of the proposed composition; but this consideration cannot be allowed to influence the court in deciding whether the bankrupt has" complied with all the conditions necessary to obtain a confirmation. In re Godwin (D. C.) 122 Fed. 111.

In the ninth edition of Collier on Bankruptcy, p. 288, concerning the construction which should be given to section 12 of the Act of 1898, the text states the rule as follows:

"Since it is in derogation of the common law and compels any dissenting creditor to accept the percentage accepted by the majority and deprives them of their remedies on the balance thereafter this section is strictly construed."

And the principle underlying the statement in the text is upheld by the cases. Broadway Trust Co. v. Manheim, 47 Misc. Rep. 415, 95 N. Y. Supp. 93, 14 Am. Bankr. Rep. 122; In re Rider (D. C.) 96 Fed. 808.

[3] Had a majority of the creditors in this case accepted the bankrupt's offer in writing, and then requested the court to confirm the composition settlement, it would then have been necessary for the

dissenting minority to show substantial reasons why the court should not order its confirmation, as the mere approval by a majority of the creditors would in fact, and of itself alone, be prima facie evidence that the composition offer was for the best interests of all creditors (In re Barde [D. C.] 207 Fed. 654), and then it would have been the duty of the court to order the confirmation, unless the minority objectors had sustained the burden of proof, which would then have been cast upon them to show either that it was not for the best interests of the creditors, or some other clear and valid reason why the court should not confirm it. In re McLellan (D. C.) 204 Fed. 483; In re Schaffer (D. C.) 169 Fed. 726; Union Furn. Co. v. Walker-Cooley Furn. Co. (D. C.) 206 Fed. 217.

Even in such a case it would be the duty of the court to ascertain all of the facts, and the court would first have to be fully satisfied that the bankrupt came clearly within the provisions of section 12 of the act, before a confirmation could be ordered.

Let an order be entered sustaining the report of the special master and denying the petition for confirmation of composition.

Decree accordingly.

THE EDWARD J. BERWIND.

(District Court, E. D. New York. March 27, 1914.)

COLLISION (§ 100*)—STEAM VESSELS IN FOG—EXCESSIVE SPEED.

A tug, proceeding from the Brooklyn shore to pass around the Battery in the early morning in a fog, *held*, on the evidence, solely in fault for a collision with another tug which was coming around the Battery from North river to a pier a short distance above the Battery, on the ground that she was going at excessive speed.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 213–215; Dec. Dig. § 100.*]

In Admiralty. Suit for collision by John Carroll, as owner of the steam tug Seven Brothers, against the steam tug Edward J. Berwind. Decree for libelant.

Foley & Martin, of New York City, for libelant.

Harrington, Bigham & Englar, of New York City, for claimant.

CHATFIELD, District Judge. The Berwind is a large powerful tug, which upon the morning of March 31, 1913, started from Congress street, Brooklyn, to proceed between Governors Island and the Battery on the way to the North river, at about 7 o'clock. The Seven Brothers, a smaller tug belonging to the libelant, came down the Hudson river and around the Battery, to go to a pier just above the ferry slips on the Manhattan shore at that point. A heavy fog prevented navigation earlier in the day, but as daylight came on and the fog lifted, the Manhattan shore could be slightly discerned from the Brooklyn side, and the Berwind, preceded by the Transport, decided that it would be possible to proceed. They therefore left the Brook-

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

lyn shore and, as they neared New York, the fog again shut down, rendering it impossible to see more than a few boat lengths ahead. Governors Island was invisible from the Battery.

The witnesses upon the Seven Brothers, a reporter attached to the wireless station between the revenue cutter slip and the Staten Island Ferry piers, and two men upon a Staten Island ferryboat, testify that the Berwind, going at considerable speed, passed close by the slip of the Staten Island ferry and struck the Seven Brothers, having starboarded her helm just before the collision. These witnesses agree that the Berwind had headed on a course slightly toward the Battery before this change of helm, and that immediately after the collision the Berwind, with the Seven Brothers impinged on her stem, turned toward the New York shore in a circle, until the Seven Brothers sank, after her crew had climbed upon the Berwind. Later a small boat, from which a dog belonging to the captain was rescued, had floated off from the upper deck.

It appears that the Seven Brothers was following a course parallel to the Battery shore at about the same distance therefrom as that pursued by the Berwind in the opposite direction. Both boats were sounding fog whistles, and the captain of the Seven Brothers, upon reaching the proximity of the Berwind, stopped his engines and then porting his helm reversed.

All of the witnesses substantially agree that if the Berwind had not sheered to port and the Seven Brothers had continued under a port helm, collision probably would have been averted. The speed of the Berwind and her turn to port brought her out into the stream in a position to strike the Seven Brothers substantially amidships, at a time when the Seven Brothers was backing to avert collision from the sheer of the Berwind. The effect of the working of the Seven Brothers' engines while the boat was impaled upon the bow of the Berwind, and also the movement of the Berwind with her wheel to port, in order to lessen the effect of collision, carried the Seven Brothers around in a circle to the point of sinking.

A deck hand, acting as watchman upon the bow of the Berwind, reported the Seven Brothers as soon as she was made out in the fog, and when she was about 200 feet away.

No fault can be found with the lookout and one of the witnesses for the libelant testified that this lookout actually called to the pilot of the Berwind to go back as soon as the Seven Brothers was discovered, accompanying his warning with violent motions of the hands, and that he later referred to the captain of the Berwind in contemptuous language and stated that he had told him to go back.

The captain of the other vessel, the Transport, had left Brooklyn with the Berwind, but ran in along the Battery and waited for the fog to lift. He is very uncertain about the boats and matters testified to by the other witnesses in the case, but is extremely positive as to his distance from the Barge Office and as to the movements of the Berwind. According to his testimony the Berwind was close to the Staten Island Ferry slips when coming around toward the Barge Office and was continually headed in toward shore after reaching that

point. His testimony is apparently the basis for the defense that the Seven Brothers, by reversing and backing before the collision, put herself across the bow of the Berwind.

But it is impossible to conclude from the testimony as a whole that the Seven Brothers backed a sufficient distance after her engines were reversed to get across the bow of the Berwind, if the Berwind had not sheered to port and if she had not had considerable headway. If the Berwind was headed inshore, and if the Seven Brothers was originally out far enough to clear the Berwind when holding her course, then the Seven Brothers would not have needed to reverse to keep out of the way. On the contrary, the Berwind is plainly shown to have been feeling her way around the Battery, going as close to the piers as she dared, and then working offshore from time to time, but all the while proceeding at a rate which in the fog then prevailing made her movements unsafe.

The boats heard each other's whistles, their relative position was known, and if the Berwind had slowed down when the Seven Brothers' whistle indicated the presence of another boat, no accident could have happened. Instead of so doing, she took the whistle of the Seven Brothers as an indication of a course on which to proceed at considerable speed, when she was not able because of the fog to navigate with safety. The mere suggested possibility that the Seven Brothers might have gotten out of the way if she had not reversed, and that she could thus have escaped the result of the Berwind's negligence, is no defense.

The narrow channel rule does not apply, for the movements of the vessels controlled the situation, and not their general position before the necessity arose to apply the general rules of passing and of navigating in a fog.

The libelant may have a decree.

Ex parte UNG KING IENG.

(District Court, N. D. California, First Division. April 1, 1914.)

No. 15,496.

ALIENS (§ 32*)—DEPORTATION—FAIR HEARING—WITNESSES—CROSS-EXAMINATION.

Where, after counsel had been retained for an alien in deportation proceedings, he was notified that on a specified day certain witnesses would be examined before the inspector, and counsel attended, but was denied the right to put any questions to such witnesses on cross-examination, to meet the evidence presented by the government, the alien was not accorded a fair hearing before the immigration officers.

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

Petition for writ of habeas corpus for discharge of one Ung King Ieng, a Chinese alien, sometimes referred to as Lin How. On demurrer to petition. Overruled, and writ allowed.

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

George A. McGowan, of San Francisco, Cal., for petitioner.
John W. Preston, U. S. Atty., and Walter E. Hettman, Asst. U. S. Atty., both of San Francisco, Cal., for respondent.

DOOLING, District Judge. The petition for a writ of habeas corpus herein shows: That petitioner, an alien Chinese woman, was admitted into this country in November, 1909, as the wife of a native-born citizen of the United States, and has resided here ever since said date. That in April, 1913, she was arrested, charged with being a prostitute, and with having been found practicing prostitution subsequent to her entry into the United States. That after the usual preliminary hearing she was advised of her right to counsel, and that after she had been so advised, counsel did appear for her, and on June 9, 1913, the said counsel received from the Commissioner of Immigration the following notice:

"Sir: In re the case of Lin How, alias Ung King Ying, you are advised that Inspector Chadney will be at the office of the district attorney, San Jose, Cal., on Wednesday, the 11th instant, at 11:00 a. m., for the purpose of taking the statements of witnesses that will appear in the said case at that time."

That pursuant to said notice the said counsel for petitioner proceeded to San Jose on the day named, and that at the time and place mentioned therein J. B. Peckham, John Charles Hines, Frank H. Ross, and Roy Starbird were each duly sworn by Inspector Chadney, and examined by him by question and answer at some length; each giving material testimony bearing upon the reputation of the house in which petitioner had been found and arrested. At the close of the examination of each of said witnesses by the inspector, counsel for petitioner, who was present in response to the notice above set forth, requested that he be permitted to ask some questions by way of cross-examination of each of them, which request was, by the said inspector, denied. To this denial counsel each time entered a formal protest. This denial is now claimed by petitioner to have deprived her of the fair and impartial hearing to which she was entitled. A number of other matters set out in the petition are also relied upon by petitioner as having deprived her of a fair hearing, but to my mind they are of minor importance. To this petition a demurrer has been interposed, thus presenting fairly for determination the following question:

"Has an alien been accorded a fair hearing, within the meaning of the adjudicated cases, who has been prevented by the immigration officers from putting any questions whatever to witnesses actually present and testifying against her, at a hearing held after such alien had been accorded the right of counsel, and when such counsel was in attendance claiming the right to put such questions in order to meet the evidence presented by the government?"

In the case of Low Wah Suey v. Backus, 225 U. S. 460, 32 Sup. Ct. 734, 56 L. Ed. 1165, the Supreme Court says:

"The statute does not give authority to issue process to compel the attendance of witnesses. It does not appear * * * that any witnesses offered on behalf of the petitioner were not heard, or that anything was done to prevent the production of such witnesses"

—and for these reasons held that the claim of unfairness in that case, based upon the failure of the immigration officers to take steps to procure the attendance of witnesses on behalf of petitioner, was unfounded. But that is a very different state of affairs from that disclosed here. There is no question here of the power of the immigration officers to compel the attendance of witnesses, for the witnesses were actually in attendance. There is no question here of presenting the case on ex parte affidavits, because that was not done. At a formal hearing, of which petitioner's counsel had been given notice, and which he attended in the interests of his client, four witnesses were present, not for the purpose of signing affidavits, but for the purpose of testifying orally by question and answer. They so testified, and their testimony was taken down by a stenographer.

The petitioner had no power to produce these witnesses, and if she desired to prove anything by them, or if she desired to test their knowledge of the facts to which they had testified against her, it seems to me that ordinary fairness required that she be permitted to do so. It was suggested at the argument of this question before the court that it would be a "nuisance" to permit cross-examination. Perhaps it would, but to the petitioner the whole proceeding was probably a nuisance. The rights of the petitioner may not be wholly measured by the convenience or inconvenience to the immigration officers in affording her a fair hearing. Their efforts should be directed to the ascertainment of the truth. They have vast powers accorded them by the law, and these powers should be fairly exercised. It is not necessary, of course, that prolonged cross-examinations be permitted. Much must be left to the discretion of the officer. But I am firmly of the opinion that, when the officer in this case refused to permit the petitioner's counsel to ask a single question of witnesses in attendance and testifying to important matters against her, she did not receive that fair treatment which the law contemplates and to which she was entitled.

The demurrer will be overruled, and the writ issued.

THE PRESIDENT.

(District Court, W. D. Washington, S. D. April 3, 1914.)

No. 1540.

COSTS (§ 277*)—RIGHT TO MAINTAIN SUIT—PAYMENT OF COSTS OF PREVIOUS ACTION.

A libelant is not entitled to maintain a suit in rem in admiralty against a vessel without first paying the costs adjudged against him in an action at law previously brought by him on substantially the same cause of action against the claimant.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 1048–1060; Dec. Dig. § 277.*]

In Admiralty. Suit by Frank Morgan against the steamship President; the Pacific Coast Steamship Company and the Pacific Coast Company, claimants. On motions by libelant for leave to prosecute

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

in forma pauperis, and by claimants for stay of suit until payment of costs of prior action. Libelant's motion denied, and claimant's motion granted.

Wedell Foss, of Tacoma, Wash., for libelant.
Farrell, Kane & Stratton, of Seattle, Wash., for respondent.

CUSHMAN, District Judge. Libelant asks leave to prosecute in forma pauperis his libel in rem, to recover general damages in the amount of $7,500, on account of personal injuries received upon the respondent's vessel, while engaged thereon as a stevedore to work under the captain of respondent, and caused by a block of marble being carelessly hoisted under the directions of the officers of the ship.

Claimants, Pacific Coast Company, the owner, and Pacific Coast Steamship Company, the lessee of respondent, oppose the application and, as a ground of opposition, set out that libelant is a resident of Oregon; that, heretofore in a common-law action brought by libelant in this court against the claimant Pacific Coast Steamship Company, on account of the same accident and injury, said cause resulted in a judgment of dismissal with costs to the claimant; that the Pacific Coast Steamship Company is the party in interest in both actions and the party who will have to bear the expenses, both for costs, and on account of any judgment recovered by the plaintiff.

Claimants not only ask that libelant be not allowed to proceed in "forma pauperis," but not at all until the costs of the former action have been paid and a cost bond given herein as security for future costs; the libelant not being a resident of this state.

It is not claimed that there is other, further, or different evidence available, or to be presented upon the present, than in the former trial, except that, whereas in the former suit, plaintiff's injury is alleged to have been caused by the faulty handling of certain winches on the ship—whereby a block of marble being hoisted was swung against libelant—in the present libel, there is the added allegation that the injury was caused, in part, by the swells from a passing vessel. In the former action, a verdict was directed by the court for the defendant, at the close of all the testimony.

Libelant cites the following authorities: 26 Cyc. 755B; Williams & Bruce, Admiralty Practice, 295, note F; Marsden, Collisions, etc., 70, 85, 81g; Workman v. Mayor, 179 U. S. 552, 21 Sup. Ct. 212, 45 L. Ed. 314.

Claimants rely upon the following authorities: Buckles v. Chicago, M. & St. P. Ry. Co. (C. C.) 47 Fed. 424; Kimble v. Western Union Tel. Co. (C. C.) 70 Fed. 888; Whittle v. St. Louis Ry. Co. (C. C.) 104 Fed. 286; Weinstein v. Schnepp, 56 App. Div. 275, 67 N. Y. Supp. 746; Wemyss v. Allan, 88 App. Div 475, 85 N. Y. Supp. 91; Traver v. Jackman, 98 App. Div. 287, 90 N. Y. Supp. 739.

Unless the present suit is essentially different from the former one, the motion herein made must be granted on well-established principles. Kimble v. Western Union Tel. Co. (C. C.) 70 Fed. 888; Id., 99 Fed. 892; Henderson v. Griffin, 5 Pet. 150, at pages 158 and 159,

8 L. Ed. 79; Buckles v. Chicago, M. & St. P. Ry. Co. (C. C.) 47 Fed. 424.

Enough has been stated to show the privity existing between the defendant in the former case and the respondent and claimants here. 23 Cyc. 1164f, 1208c, 1213c.

"The doctrine of estoppel by judgment does not rest upon any superior authority of the court rendering the judgment; and a judgment or decree of one court of competent jurisdiction may be pleaded in bar of an action in another court of coordinate or concurrent jurisdiction." 23 Cyc. 113B.

While the admiralty will, in a suit in rem, afford the libelant ample security for his asserted claim by the seizure of the vessel and the stipulations required for her release—remedies not granted by the common law—yet it is not necessary, on the present motion, to decide whether the court of admiralty and this court, sitting as a court of law, administering common-law remedies, are courts of concurrent jurisdiction in such sense that a judgment recovered in the latter will be res adjudicata in a proceeding like the present, for the rule requiring the payment of costs in a former suit for the same cause is based upon an equitable principle and it is the province of courts of admiralty to administer relief according to equitable principles. Equity requires the payment of the costs to which claimant has been put. Whittle v. St. Louis & S. F. Ry. Co. (C. C.) 104 Fed. 286. The defense of fellow servant, which the court held to be conclusively established upon the motion for an instructed verdict, is a defense in admiralty as at law. This was lately determined in this district by Judge Neterer in the case of The C. S. Holmes, 209 Fed. 970.

The same equitable principles control on the other grounds of the motion.

Claimants' motion is granted.

Ex parte MARSHALL (seven cases).

(District Court, N. D. California, First Division. March 10, 1914.)

Nos. 15,500, 15,502, 15,503, 15,524, 15,528–15,530.

1. ALIENS (§ 54*)—ADMISSION TO PHILIPPINES—APPLICATION TO ENTER UNITED STATES.

Supervision over the admission of aliens to the Philippines being under the control of the Secretary of War, while the admission of aliens to the mainland is intrusted to the Commissioner General of Immigration, the action of the authorities at the Port of Manila in admitting certain aliens to the Philippines was not conclusive as to their right to enter the mainland.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 112; Dec. Dig. § 54.*]

2. ALIENS (§ 46*)—IMMIGRATION FROM PHILIPPINES—RIGHT TO ENTER.

Where aliens immigrated to the Philippines and thence to the United States, their right to enter the mainland must be determined as though they had applied to enter the United States in the first instance.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 105; Dec. Dig. § 46.*]

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

3. ALIENS (§ 54*)—IMMIGRATION—EXCLUSION—MODE.
Where immigration authorities had power to exclude certain aliens applying to enter the United States, it was immaterial that such exclusion was done under warrant of arrest.
[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 112; Dec. Dig. § 54.*]

Applications by Henry F. Marshall for writs of habeas corpus on behalf of Radha Singh and others to procure their release from custody under a deportation warrant. Petition denied.

Henry F. Marshall, of San Francisco, Cal., for petitioners.
John W. Preston, U. S. Atty., and Walter E. Hettman, Asst. U. S. Atty., both of San Francisco, Cal., for respondent.

DOOLING, District Judge. These cases involve the right of the individuals named to land at the Port of San Francisco, having already landed at Manila, and coming thence here.

[1] In the Case of Rhagat Singh et al., 209 Fed. 700, this court decided that the immigration officers on the mainland might exclude therefrom aliens theretofore admitted to the Philippine Islands, upon proof satisfactory to them that the aliens so excluded are persons likely to become a public charge. Counsel for the present petitioners urges very earnestly and very ably that this is not a case of exclusion but of expulsion. Whatever it be called, the real question still remains: "Does admission to the Philippines ipso facto entitle an alien to admission to the mainland?" It was stated in the Case of Rhagat Singh, supra:

"There may be reasons for rejecting an alien at continental ports which would not exist if he were applying to enter the Philippines. Labor and climatic conditions and standards of living are so diverse that one going to the Philippines, who would not there be likely to become a public charge, might well be likely to become such if he proceeded thence to the mainland. A more rigid test may, therefore, well be applied to those seeking admission to the mainland than that applied to those seeking admission to the Philippines."

[2, 3] The supervision over the admission of aliens to the mainland has been intrusted to the Commissioner General of Immigration, while the supervision of the admission of aliens to the Philippines is under the control of the Secretary of War. It is not a fair statement of the situation to say that the proceedings of the Immigration Department here sought to be reviewed is an attempt on the part of the immigration officers to review the action of the Secretary of War in admitting these aliens at the Port of Manila. Had the aliens been content to remain in the Philippines, to which place alone the Secretary of War had power to admit them, no question of their right to do so could have been moved by the immigration authorities. But when they left the Philippines for the mainland they left the only place to which they had been admitted, and the only place to which those admitting them had any authority to admit them, and when they reached the mainland they were naturally confronted by those whose duty it is to see that no alien shall be admitted thereto

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

who is likely to become a public charge. I am satisfied therefore that the action of the authorities at Manila is not conclusive upon the immigration officers on the mainland, and while the law is, in its present form, very uncertain and unsatisfactory, I am of the opinion that, whether we call it exclusion or expulsion, the immigration officers may prevent the entry to the mainland of aliens who have heretofore been permitted to land at Manila for any reason which would lawfully operate to prevent their landing here, in the first instance, if they had never gone near the Philippines. If they so have the power to exclude, as the aliens appear to have had a fair hearing, the fact that this was done under a warrant of arrest is immaterial.

The petition for a writ of habeas corpus must be denied, and it is so ordered.

SPENCER v. BABYLON R. CO.

(District Court, E. D. New York. April 15, 1914.)

RECEIVERS (§ 150*)—CLAIMS AGAINST RECEIVER—EVIDENCE CONSIDERED.

Evidence in support of a claim against an insolvent railroad *held* insufficient to establish such claim, or to entitle the claimant to have the report of the master disallowing the same set aside and a new hearing granted; no further evidence to substantiate the claim being offered.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 267, 268; Dec. Dig. § 150.*]

In Equity. Suit by William B. Spencer against the Babylon Railroad Company. On motion to confirm master's report disallowing claim of J. Edward Gerety. Report confirmed.

Arthur Carter Hume, of New York City, for receiver.
Robert D. Ireland, of New York City, for defendant.
Howard A. Sperry, of New York City, for claimant.

CHATFIELD, District Judge. The master has reported adversely on the claim of one J. Edward Gerety, and motion has been made to confirm the report. Opposition was presented upon the ground that the hearings were held so quickly and the methods of examination were so much in the nature of cross-examination that the witnesses for the claimant were intimidated. In the affidavit presented, confirmation of the report is opposed on the ground that the master is said to have become so prejudiced against the claimant that another master should be appointed or leave given to bring suit upon the claim. The statement is made that it is useless to proceed further before the present master. No affidavit is made showing any testimony which the claimant desires to present and which he was not given an opportunity to present before. No exceptions to the report have been filed and no sufficient reason is shown why another or further reference is necessary.

Whether the report in the present case is an incorrect or improper conclusion from the record might be argued upon exceptions to the

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findings or upon a general objection coupled (if necessary) with evidence to show that the testimony was not fairly considered.

The claimant has, however, interposed an affidavit, which he apparently wishes to have treated as exceptions to the master's report, and is a statement on his part of his charge that the master did not give proper consideration to the evidence. The matter has been submitted upon the record and upon this affidavit, and there seems to be no reason to require the filing of further exceptions under the circumstances.

The claimant is assignee of his brother, who admitted that he owed certain money to the estate of a relative of which the claimant is the "manager." The assignee also admits that he executed the paper offered as an assignment. This does not specify the amount or nature of the property assigned, nor state the actual consideration, but is as follows:

"Babylon, L. I., Aug. 23, 1912.

"John L. Gerety hereby agrees to assign all rights he has in a claim against the Babylon Railroad now on file with the receiver for the sum of one dollar and other valuable considerations. John L. Gerety."

The claim so assigned merely states "for services rendered in the years 1908, 1909, 1910, in securing franchises, rights of way, etc., in the incorporated villages of Amityville and Babylon and the township of Babylon, the sum of $2,750.00," and is dated August 8, 1912.

The claimant has testified that he personally made the advances of money received by his brother, and the report of the master does not seem to be based upon any question as to the existence of consideration for the assignment, but is rather based upon the fact that the assignor gave no testimony of any services answering to the description of those in the claim, and that he finally stated in writing his desire to drop the matter.

The record also shows that certain counterclaims might be proved, involving questions of integrity as well as liability on the part of the assignor.

The court is unable to see how on such a record the assignee of this claim can insist that he is entitled either to have the report set aside or to a new hearing, when he presents no testimony indicating that the assignor of the claim had any such claim as that purported to be assigned; that is, unless the claimant has some evidence to substantiate the claim which he alleges he took in settlement of a debt due him from his brother.

The record shows no error on the part of the master in the receipt of testimony, nor is there anything to indicate that his report or actions were affected by any feeling against the claimant or his assignor.

The motion for further hearing will be denied, and the report confirmed.

REICHERT v. CARFLOAT NEW YORK, N. H. & H. R. CO. NO. 25.

(District Court, E. D. New York. March 13, 1914.)

SALVAGE (§ 10*)—RIGHT TO COMPENSATION—SERVICE RENDERED TO BURNING CAR FLOAT.

A tug, which assisted others in keeping down a fire on a car float and the cars thereon until the arrival of the fireboats of the city, *held* entitled to a salvage award for the service.

[Ed. Note.—For other cases, see Salvage, Cent. Dig. §§ 18–20; Dec. Dig. § 10.*]

In Admiralty. Suit by William Reichert, owner of the steam tug Roy, against Car Float No. 25 of the New York, New Haven & Hartford Railroad Company. Decree for libelant.

Foley & Martin, of New York City (James A. Martin, of New York City, of counsel), for libelant.

Charles M. Sheafe, Jr., of New York City (Madison G. Gonterman, of New York City, of counsel), for claimant.

CHATFIELD, District Judge (orally). The evidence indicates in this case that the Roy arrived at the fire at a time when there was considerable flame and smoke, and that it succeeded in getting a stream of water upon the fire on the lea side and under or through the cars, so as to drive the fire back against the wind, about the same time that the two Pennsylvania tugs became able to get their streams of water in play. Prior to that the Johnstown had pulled the float away from the dock, and thus rendered service in preventing danger to other property. The No. 7 was far enough behind the Johnstown to prevent her sharing in pulling the float out, but as the float was turned in the river she ran up on the windward side, where her lines could best be made fast to take charge of the boat, and the Johnstown then went ahead to get at the fire. The streams from these two boats were from their standpipes, and their crews had evidently, up to this time, been occupied to some extent in attending to the movements of the boats and to their lines. The streams from the standpipes were played directly upon the flames, which were shooting up around and between the cars, but could not reach the seat of the fire, because the nozzles of the standpipes were above the tops of the cars and above the level of the roof, along over the platform between the lines of cars.

The Roy, on the other hand, went as close to the point opposite the fire as she could reach in the face of the flame and smoke, carried to that spot by the northwest wind, and the result of the operations of the three tugs was such that by the time the fireboats arrived the flames had been driven back and beaten down, and the two fireboats, working for ten minutes, extinguished the fire. The other details need not be considered. The tugs had a stream on the fire for at least five minutes and probably a little longer.

The value of the cars and the float, being at least $12,000, made the service worthy of consideration, in so far as the entire saving by

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

putting out the fire is concerned; but the elements of danger and the value of immediate aid before the arrival of the fireboats is considerably diminished by the fact that the cars were all empty wooden freight cars and that no inflammable or dangerous cargo was present. The difference in loss between what occurred and what would have occurred if no aid had been given until the fireboat arrived (leaving out of the question any possible loss, if the boat had remained at the dock) could not have been very large.

This case resembles many cases that arise in the harbor, where the allowance of an award for salvage services is justified, but where the amount of the award should not cause deliberate entry upon litigation which takes as much time in court and requires the attendance and testimony of as many witnesses as if the amount involved were large. Libelants must not be encouraged to force the trial of cases by punitive awards against the claimant, nor should the claimant be allowed to combat every case, whether worthy or unworthy, by seeking to show that no award at all should be given, and by thus making the litigation entirely unproductive, even in a worthy case, if the award is always kept down to such bare compensation as would have been reasonable if no litigation were involved. Such situation rests upon both parties, and the court cannot apply any corrective measures, unless in the individual case the situation is so bad that the particular parties should be punished.

In the present case the situation needs to be stated, but the facts do not justify treatment of the particular case in any other way than from the basis of a trial upon the evidence of what happened. The three tugs did render services before the arrival of the fire department, which should be considered as salvage and worthy of compensation and award. The Pennsylvania tugs did the duty which they were called upon to do first, and did not devote themselves merely to proceeding at once to the seat of the fire to put out the fire alone. This, in fact, was impossible until the boat was out in the stream, and the Roy was on hand and ready at that moment, and seems to have gotten directly at the fire, and to have done exactly what would be expected from that time on.

Assuming that a fair award for the services of the three tugs should be taken into account, and that the Roy sustained an equal share in preventing further loss to the cars by the fire, it would seem that a decree for $200 would be proper, one-third to the crew and two-thirds to the owner.

EVANS v. ERIE R. CO.

(Circuit Court of Appeals, Sixth Circuit. April 14, 1914.)

No. 2430.

1. RAILROADS (§ 351*)—CROSSING ACCIDENTS—ACTIONS—INSTRUCTIONS—CONTRIBUTORY NEGLIGENCE.

In an action for the death of a person struck by a south-bound train at a crossing, instructions that, if he started right back of a north-bound freight train on a track between him and the south-bound train, to cross within a few feet, that would be negligence, and he could not recover, that, if he could have waited and allowed the freight train to pass and escape injury, but did not, and started as soon as the train was a few feet over the crossing, he could not recover, that, if he started to drive upon the tracks when the freight train was only two or three yards from the crossing, to find for defendant, that, if the only obstruction to his view of the approaching train was the freight train, or the smoke therefrom, to find for defendant, if the smoke or steam was of a temporary nature, and it was his duty to await the removal of such obstructions before attempting to cross, placed a greater burden of care upon decedent than was warranted, since the use of the expression "a few feet," because of its indefiniteness, was consistent with a movement of the freight train far enough to permit a clear view of the track for a sufficient distance.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1193–1211, 1213–1215; Dec. Dig. § 351.*]

2. RAILROADS (§ 351*)—CROSSING ACCIDENTS—ACTIONS—INSTRUCTIONS—CONTRIBUTORY NEGLIGENCE.

In an action for the death of a person struck by a south-bound train at a crossing, an instruction that, if the only obstruction to decedent's view of the approaching train was a north-bound freight train, or the smoke therefrom, and if this was of a temporary nature, and it was his duty to await the removal of such obstruction before attempting to cross, to find for defendant, was erroneous, where there was testimony that the smoke settled toward the south-bound track, as it failed to hypothesize decedent's knowledge of the existence of the smoke as a temporary obstruction to the view, and he would not be negligent in failing to observe an approaching train concealed by the smoke, unless he knew of its presence.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1193–1211, 1213–1215; Dec. Dig. § 351.*]

3. RAILROADS (§ 347*)—CROSSING ACCIDENTS—ACTIONS—EVIDENCE.

In an action for the death of a person in a crossing accident, where negligence was alleged in failing to maintain a watchman, gates, or electric warning bell, and in running the train at a speed of 50 miles an hour, evidence as to other accidents at such crossing, as to complaints by the public authorities to defendant subsequent to such accidents, relative to the claimed dangerous character of the crossing, with the request that gates or watchmen be maintained, and as to narrow escapes from accidents, so far as notice to defendant could be shown, by express information or general public notoriety, should have been admitted to show the dangerous character of the place and defendant's knowledge thereof.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1124–1137; Dec. Dig. § 347.*]

4. RAILROADS (§ 350*)—CROSSING ACCIDENTS—ACTIONS—QUESTIONS FOR JURY.

Whether common prudence and a due regard for the safety of travelers requires gates or a flagman at a railroad crossing, as being especially dangerous, is generally a question of fact for the jury, under all the circumstances of the case.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1152–1192; Dec. Dig. § 350.*]

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

5. RAILROADS (§ 307*)—CROSSING ACCIDENTS—LIABILITY—DUTY TO MAINTAIN GATES OR FLAGMEN.

A jury would not be warranted in finding that a railroad company should maintain gates or flagmen at ordinary country crossings.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 972–977, 979, 980; Dec. Dig. § 307.*]

6. RAILROADS (§ 307*)—CROSSING ACCIDENTS—LIABILITY—DUTY TO MAINTAIN GATES OR FLAGMEN.

Gen. Code Ohio, § 588, authorizing the Railroad Commission to require gates, an alarm bell, or a flagman at crossings declared by it to be dangerous, does not, as a matter of law, relieve the railroad company from liability for a failure to adopt such precautions as the particular circumstances require in the absence of an express direction by the commissioner.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 972–977, 979, 980; Dec. Dig. § 307.*

Duty to give warning signals at crossings, see note to Chesapeake & O. Ry. Co. v. Steele, 29 C. C. A. 90.]

7. RAILROADS (§ 347*)—CROSSING ACCIDENTS—ACTIONS—EVIDENCE.

In an action for death in a crossing accident, in which negligence was alleged in failing to maintain a watchman, gates, or an electric warning bell, evidence as to the practice of running passenger trains at a high speed over such crossing on a downgrade was admissible, in connection with evidence as to the number of tracks, the grade, the amount and kinds of highway travel and railroad traffic, and prior accidents and near accidents resulting from the nature of the crossing, on the question of whether the crossing was unusually dangerous.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1124–1137; Dec. Dig. § 347.*]

In Error to the District Court of the United States for the Northern District of Ohio; William R. Day, Judge.

Action by David J. Evans, administrator of Reese Edwards, against the Erie Railroad Company. Judgment on a verdict for defendant, and plaintiff brings error. Reversed, and new trial ordered.

E. H. Moore and Frank Jacobs, both of Youngstown, Ohio, for plaintiff in error.

Hine, Kennedy & Manchester, of Youngstown, Ohio, for defendant in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

KNAPPEN, Circuit Judge. Plaintiff's intestate, while driving with his wife and daughter across the tracks of defendant at Crab Creek Crossing, so-called, adjacent to Youngstown, Ohio, was struck and instantly killed by defendant's passenger train. The wife suffered fatal injuries from the collision. This suit is brought to recover for the death of the husband.

The accident occurred on December 21, 1906, at about 4:30 p. m. It was already dark, and snow was falling. Several hundred feet west of the crossing Hubbard Road connects with Wick avenue (extending northerly from Youngstown), and runs easterly across the creek, and then crosses the railroad tracks practically at right angles. The Lake Shore and the Erie maintain each a double track at this point; the two railroads paralleling each other (the Lake Shore being

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

westerly), the tracks being but a few feet apart, and trains running in each direction on each road. From the east end of the bridge to the center of the first Lake Shore track is about 20 feet. There was a heavy upgrade to the north, and thus from the direction of Youngstown, extending for 5 or 6 miles, and embracing the crossing. Decedent waited on the bridge for the passage of a long freight train going north on the nearest Lake Shore track (upgrade), propelled by one engine ahead and two pusher engines. After the freight train had passed decedent started to cross the tracks and was struck by the Erie south-bound passenger train, which was running in a direction opposite to that of the Lake Shore freight, and on the second track east from that on which the freight was running; the two tracks being about 30 feet apart from center to center. The Erie train was thus going downgrade, and was behind time and coasting. Defendant is charged with negligence in failing to maintain a watchman, gates, or electric warning bell at the crossing, in failing to give warning of the train's approach by bell or whistle, and in running at an alleged negligent speed of 50 miles per hour. No gates, watchman, or other safeguard of that nature had ever been maintained, so far as suggested by the record. There was evidence tending to show negligence in each of the other respects charged. Defendant denied negligence on its part, and alleged contributory negligence on the part of deceased. Trial was had to a jury, which rendered verdict for defendant.

The complaints which we shall discuss are, first, that the court excluded as a ground of actionable negligence the failure to provide a watchman or gates at the crossing; second, the refusal to permit the plaintiff to show that within 2 years previous to the accident there had been three fatal accidents at this same crossing from Erie south-bound passenger trains, as well as "other numerous escapes from like accidents" in that period; third, that the court in its charge upon the subject of contributory negligence placed too severe a burden on decedent.

1. The charge as to contributory negligence. Decedent was 52 years of age. He operated a farm, a country bank, and a coal mine. His habits were good. He was familiar with the crossing in question, being in the habit of driving over it in going to and from Youngstown. The daughter testified that they waited about 10 minutes after the freight train passed before crossing the railroad tracks (apparently an exaggerated estimate of time); that her mother sat in the middle and was driving, her father being upon the mother's right, the daughter being upon the left side of the carriage, the top being up, and side and back curtains on; that after the freight passed the father told the mother to look up the tracks, and he would look down; that both leaned forward and looked, and that the daughter looked; that both the father and mother continued to look while crossing the tracks, the father saying, "Be careful, there is more than one track;" that no bell or whistle was heard, nor any light seen (except that of the freight); and that there was nothing to indicate the approach of the passenger train until they were struck. The speed of the freight train was variously estimated by those operating it at

from 4 to 12 miles per hour. The point at which the last pusher engine of the freight met the engine of the passenger train was variously estimated at from 100 to 500 feet north of the crossing. The estimates of the speed of the passenger train range from 20 miles to 40 to 50 miles per hour. A pedestrian crossing the track at about the same time as decedent testified that the latter's horse was started when the freight train had gone only from 2 to 3 yards beyond the crossing; another pedestrian, who waited near decedent's carriage while the freight train was passing, estimated that she had gotten about 15 feet beyond the Erie track when the collision occurred.

[1, 2] The jury were instructed:

(a) That, if the Lake Shore train "was there as described by the witnesses, and [decedent] started right back of that train to cross within a few feet, that would be plainly negligence on his part, and he cannot recover. That is quite apparent."

And (b) that, if decedent "could have waited and allowed it [the freight] to pass and escape injury, but he did not, and as soon as the train was a few feet over the crossing he started and was struck, then he cannot recover."

(c) That, if decedent and his wife started to drive upon the tracks when the rear end of the freight train "was only 2 or 3 yards over the crossing, your verdict should be for the defendant."

And (d): "I will say to you, as a matter of law, that if the only obstruction to decedent's view of the approaching train was in passing of the Lake Shore freight train, or the smoke from the engine thereof, your verdict must be for the defendant, if, under the other instructions I have given you, you find this smoke or steam was of a temporary nature, and it was his duty to await the removal of such obstruction after the Lake Shore train left before attempting to cross the tracks."

Defendant construes the first three paragraphs of these instructions—which we have indicated as (a), (b), and (c)—as meaning only that, if decedent drove upon the tracks immediately in the rear of the freight train, "without waiting a sufficient time to enable him to have a proper view of the track," no recovery could be had.

If this is all the instruction meant, it would not be subject to criticism. But we think the use of the expression "a few feet" was unfortunate in its indefiniteness, and that the use of that term might be consistent with a movement of the freight train far enough to permit a clear view of the Erie track for a sufficient distance. Moreover, there was testimony that the smoke from the rear pusher engine of the freight train settled in a southeasterly direction, which would be toward the Erie track. If decedent did not know of the presence of this smoke, he would not be negligent in failing to observe an approaching train concealed thereby. While, in one portion of the charge, *decedent's knowledge* of the existence of this smoke as a temporary obstruction to the view was evidently intended to be submitted as an ingredient of contributory negligence,[1] yet, in the later in-

[1] The previous instruction was in these words:

"There is some testimony as to the escape of smoke and steam. It is well-established law that, when a traveler approaches a crossing, and there is a

struction above quoted, the question of such knowledge, if not eliminated, was not clearly made necessary to a finding of contributory negligence. We are constrained to think that the learned trial judge thus imposed upon decedent a greater burden of care than was warranted.

[3] 2. Proof of other accidents. The record is somewhat inartificial; but we think it should be construed as meaning that plaintiff offered to give evidence of other accidents and near accidents as before referred to, and that this offer was excluded and exception reserved. The rule is well settled in the federal courts that testimony of other accidents in the same place is admissible not only to show the dangerous character of the place, but also that knowledge thereof was brought to the attention of those responsible therefor. The alleged dangerous character of the crossing would naturally affect the question whether a given speed was negligent or not, as well as whether gates or flagmen were reasonably necessary. In District of Columbia v. Armes, 107 U. S. 519, 525, 2 Sup. Ct. 840, 845 (27 L. Ed. 618), which was an action for injuries by reason of a defective sidewalk, Mr. Justice Field said:

"The frequency of accidents at a particular place would seem to be good evidence of its dangerous character—at least it is some evidence to that effect. * * * Besides this, as publicity was necessarily given to the accidents, they also tended to show that the dangerous character of the locality was brought to the attention of the city authorities."

In Chicago & N. W. Ry. Co. v. Netolicky (C. C. A. 8th Cir.) 67 Fed. 665, 672, 14 C. C. A. 615, which was an action against a railway company for damages for an accident at a grade crossing, it was held proper to permit witnesses familiar with the locality to testify to narrow escapes they had had at the same crossing, in connection with descriptions of the locality, for the purpose of showing the nature of the crossing and the difficulties of travelers in passing over it. In Patton v. Southern Ry. Co. (C. C. A. 4th Cir.) 82 Fed. 979, 983, 27 C. C. A. 287, the rule of the admissibility of proof of other accidents was applied in the case of the derailment of a train at a sharp curve at the foot of a steep grade. See, also, Smith v. Sherwood Township, 62 Mich. 159, 165, 28 N. W. 806, where, in an action for negligently permitting a hole to remain in a bridge, at which a horse became frightened, evidence that other horses had shied at the same hole was held admissible.

We think testimony of accidents at this crossing from Erie southbound passenger trains should have been received, as well as proof of alleged complaints by the public authorities to the defendant subse-

temporary bank of steam and smoke, he should wait until it clears up, and, if he does not stop, he is guilty of contributory negligence. And if this man Edwards saw the bank of smoke and steam from this train, the Lake Shore engine, and he disregarded it and drove across, he cannot recover in this action.

"As I said before in reference to this Lake Shore train moving across there, if he could have waited and allowed it to pass and escape injury, but he did not, and as soon as the train was a few feet over the crossing he started and was struck, then he cannot recover."

The last paragraph contains the clause we have above indicated as (b).

quent to such accidents relating to the claimed dangerous character of the crossing with the request that gates or watchmen be maintained thereat. We think, also, that testimony of narrow escapes therefrom should have been admitted, so far as testimony should be produced tending to show notice to defendant thereof either by express information or general public notoriety.

[4-6] 3. The duty to maintain gates or watchmen. The Ohio statute does not provide that compliance with crossing signals by way of bell and whistle shall excuse a railroad from taking other precautions, even to the extent of providing gates or a watchman, provided the situation be such that common prudence and due regard for the safety of travelers at the particular place and time require such further precautions; and, as a general rule, whether such care and prudence require gates or flagmen at a given crossing, as being especially dangerous, is a question of fact for the jury, under all the circumstances of the case. Gd. Trunk Ry. Co. v. Ives, 144 U. S. 408, 420, 12 Sup. Ct. 679, 36 L. Ed. 485; Erie R. R. Co. v. Weinstein (C. C. A. 6th Cir.) 166 Fed. 271, 274, 92 C. C. A. 189; Rothe v. Pennsylvania Co. (C. C. A. 6th Cir.) 195 Fed. 21, 25, 114 C. C. A. 627; Railway Co. v. Schneider, 45 Ohio St. 678, 694, 17 N. E. 321; Newport News & M. V. Co. v. Stuart's Adm'r, 99 Ky. 496, 502, 36 S. W. 528; Hubbard v. Boston & Albany R. R. Co., 162 Mass. 132, 135, 38 N. E. 366; Baltimore & Ohio R. R. Co. v. Stanley, 54 Ill. App. 215, 221. A jury, however, would not be warranted in saying that a railroad company should maintain these extra precautions at ordinary country crossings. Gd. Trunk Ry. Co. v. Ives, supra; Erie R. R. Co. v. Weinstein, supra; Railway Co. v. Reynolds, 23 Ohio Cir. Ct. R. 199, 201; Commonwealth v. Boston & W. R. Corporation, 101 Mass. 201, 203; Telfer v. Northern R. R. Co., 30 N. J. Law, 188, 193. As said in the Ives Case (at page 421 of 144 U. S., at page 684 of 12 Sup. Ct. [36 L. Ed. 485]):

"It seems, however, that before a jury will be warranted in saying, in the absence of any statutory direction to that effect, that a railroad company should keep a flagman or gates at a crossing, it must be first shown that such crossing is more than ordinarily hazardous; as, for instance, that it is in a thickly populated portion of a town or city, or that the view of the track is obstructed either by the company itself or by other objects proper in themselves, or that the crossing is a much traveled one, and the noise of approaching trains is rendered indistinct and the ordinary signals difficult to be heard by reason of bustle and confusion incident to railway or other business, or by reason of some such like cause."

We think there is nothing in the Ohio statute—Gen. Code, § 588—(authorizing the Commission to require gates, alarm bell, or a flagman) which, as matter of law, relieves the railroad company from failure to adopt such precautions as the particular circumstances may require, even in the absence of express direction by the Commission. The correctness, therefore, of the court's action in thus relieving defendant, as matter of law, from the duty of maintaining gates or watchmen depends upon whether the undisputed testimony shows that the crossing in question was merely an ordinary country crossing, or whether there was evidence from which the jury might properly find the presence of such unusual features distinguishing from the ordi-

nary country railroad crossing as reasonably to require the additional precautions.

The crossing in question was just outside the city of Youngstown, and since the accident has been brought within the city limits. This Hubbard Road, or Crab Creek Crossing, was a regular thoroughfare from Youngstown to Hubbard and other places. In the short space of time while decedent was waiting for the passage of the freight train, and attempting to make the crossing, at least four pedestrians crossed the tracks, as well as two other buggies; part of this travel being in one direction and part in another. It appeared that at least two of these pedestrians were factory workers in Youngstown, on their way between their homes and their work. Just west of the track, and abutting on the northerly side of the road, was a lumber manufacturing plant, office and yard, and at the connection of Hubbard Road and Wick avenue there was a small store. The photographs introduced in evidence show several houses in the vicinity of the crossing, but do not indicate a "populous district." It seems inferable from the record that no crossing light was maintained. The testimony as to surrounding conditions, as affecting the dangerous nature of the crossing, is very meager; but it appears from experiments by photography from the crossing that from the center of the Erie track in question, and at various points ranging from 10 to 34 feet west thereof, there was a clear view of 3,300 feet up the track, and at 48 feet west of that track a clear view of 2,500 feet, and at 74 feet distance a 700 feet view. We have found no satisfactory evidence as to the actual extent and nature of the railroad traffic over this crossing, or the extent of the highway travel thereover. As to the latter, the testimony is generally to the effect that the crossing was "much used" or "much traveled." One witness (the fireman of the Erie train in question) testified (by an affirmative answer to a leading question) that he knew the crossing was "greatly used, * * * particularly so"; and the same witness, in answer to a question whether the reason for keeping the bell ringing between Hubbard and Youngstown (about 7 miles) was that they "were going down hill and dangerous crossings," said:

"It is dangerous all the way down and you got different things to look out for and besides shutting off the bell all the time."

[7] As there must be a new trial, on which the testimony may be more complete than in the record before us, we do not determine whether there was sufficient evidence of an unusually dangerous crossing to justify submitting the question to the jury, adding, however, that, in our opinion, evidence of what we understand to be alleged by plaintiff as a practice of running Erie passenger trains at high speed over this crossing on a downgrade is proper to be taken into account, in connection with other conditions (including the number of tracks, the grade, the amount and kinds of highway travel and railroad traffic, and prior accidents and near accidents so far as shown to have resulted from the nature of the crossing), in determining the presence or absence of an unusually dangerous crossing.

The judgment of the district court is reversed, and a new trial ordered.

HOUSTON OIL CO. OF TEXAS et al. v. GOODRICH et al.

(Circuit Court of Appeals, Fifth Circuit. Feb. 10, 1914. On Rehearing, April 7, 1914.)

No. 2524.

1. DEEDS (§ 207*)—GENUINENESS OF SIGNATURE—SUFFICIENCY OF EVIDENCE—ANCIENT DEED.

Evidence considered and *held* to establish the genuineness of an ancient deed to a Mexican grant of land in Texas, which deed was executed in 1839, acknowledged before a notary whose signature was proved, duly recorded, and was found in the possession of a descendant of a subsequent grantee in association with the admittedly genuine original duplicate Mexican grant.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 614–624; Dec. Dig. § 207.*]

2. ADVERSE POSSESSION (§ 57*)—DURATION AND CONTINUITY OF POSSESSION—CONFLICTING TITLES.

Evidence *held* insufficient to establish adverse possession of land by successive occupants of such continuity and for such length of time as to sustain a plea of title by limitation by a defendant, where it was also shown that there was an outstanding adverse claim of title during the time and there was evidence tending to show that the possession was taken and held thereunder, and not under defendants' grantors.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 277, 278, 655, 667, 687; Dec. Dig. § 57.*]

3. ADVERSE POSSESSION (§ 115*)—EXTENT AND CHARACTER OF POSSESSION—LEASE OF SAND PITS.

Defendant deraigned title to 2,578 acres of land in Texas through a complete chain of deeds from the original Mexican grantee, but the first deed, while prior in point of execution, was not recorded until after a second deed made by the same grantor, which under the law of Texas made it junior in legal effect. Defendant and its predecessors in title paid the taxes on the land for many years. By written contracts it licensed a third person to remove sand from a pit covering some seven or eight acres, and such removal continued for more than five years before plaintiffs, adverse claimants, brought suit to recover the land, and during that time two houses were built on the land and occupied by employés of the contractor. *Held*, that such acts of possession were sufficient and of a character to require the submission to the jury of a plea of the five-year statute of limitation of Texas by defendant.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 314, 691–701; Dec. Dig. § 115.*]

4. ADVERSE POSSESSION (§ 100*)—EXTENT OF POSSESSION UNDER COLOR OF TITLE—OCCUPANCY OF PART OF LARGER TRACT.

Actual possession of a small part of a tract of land by one who claims, under color of title, evidenced by registered deeds, the entire tract extends his possession to the boundaries described in his color of title in the absence of actual adverse possession of any part of the tract by another.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 547–574; Dec. Dig. § 100.*]

5. ADVERSE POSSESSION (§ 25*)—POSSESSION BY LICENSEE—EXTENT.

Where the claimant of a tract of land under color of title evidenced by registered deeds, by contracts sold to another sand out of a pit on the land, not defined by metes and bounds, with the right to enter and remove it, the sand to be paid for at a stated sum per car load, the possession

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

of the licensee inured to the benefit of the licensor and constructively extended to the boundaries of its color of title.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 116–120; Dec. Dig. § 25.*]

Shelby, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Eastern District of Texas; Gordon Russell, Judge.

Action at law by Cornelia G. Goodrich and others against the Houston Oil Company of Texas and others. Judgment for plaintiffs, and defendants bring error. Reversed.

This was an action instituted by certain of the defendants in error, who were plaintiffs in the court below, to recover the title to and possession of a tract of land consisting of 2,578 acres of the northern portion of the Felder league, situated in Hardin county, Tex. Certain other of the defendants in error were permitted to intervene and assert their title to the land in controversy. The action was filed in the United States Circuit Court, for the Eastern District of Texas, that court having jurisdiction of the case by reason of the diversity of citizenship of the original parties to it; and was transferred to the District Court for the same district upon the taking effect of the Judicial Code. The interveners claimed title under a remote grantor in the plaintiff's chain of title, originally both as against the plaintiffs and defendants, but, before final disposition of the cause, the plaintiffs and interveners combined their interests in the land, so that the only question decided by the District Court was the title to the land as between the plaintiffs and interveners upon the one hand and the defendants upon the other hand. There were amended petitions, interventions, and answer and cross-actions filed by the respective parties, but they are of no importance in considering the questions presented by the writ of error. The court below, after the evidence was completed, directed a verdict for the plaintiffs and interveners against the defendants for the land in controversy, and against the defendant the Texas Builders' Supply Company for the value of sand taken by it from the lands in the amount of $1,286, and in favor of that company against the defendant the Houston Oil Company for like amount. The writ of error was sued out by the defendants the Houston Oil Company,' the Kirby Lumber Company, and the Maryland Trust Company, alone. Their codefendant, the Texas Builders' Supply Company, refused to join in the writ of error, and a severance was had as to it. The only error assigned and insisted upon was the action of the court below in directing a verdict for the plaintiffs and interveners for the land sued for.

T. M. Kennerly, of Houston, Tex., and Charles T. Butler, of Beaumont, Tex. (H. O. Head, of Sherman, Tex., of counsel), for plaintiffs in error.

John L. Little, of Kountze, Tex., and E. E. Easterling, H. M. Whitaker, W. D. Gordon, and Thos. J. Baten, all of Beaumont, Tex., for defendants in error.

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

GRUBB, District Judge (after stating the facts as above). The Felder league, a part of which was the land in dispute, was granted by the government of Mexico to Charles A. Felder, under whom both parties claim prior to 1836. The plaintiffs claimed through a deed, claimed to have been executed by the grantee Felder to one John A. Veatch on June 18, 1839, which was recorded in Liberty county, Tex., on October 21, 1839, and thereafter in Menard or Tyler county, Tex., and still

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

later in Hardin county, Tex. Veatch conveyed the land to James Morgan by deed dated March 15, 1841, and the interveners claimed as heirs of James Morgan. James Morgan conveyed to W. D. Lee by deed dated October 17, 1845, which was witnessed but neither acknowledged, proven, nor legally recorded. By agreement between plaintiffs and interveners, this deed was admitted in evidence. The plaintiffs claim title, through intermediate grantors, from W. D. Lee. In the chain of title, under which the plaintiffs claimed, was a grantor named William Walker, who received a conveyance of the land September 22, 1848, from Richard C. Washington, who had in turn received a conveyance from Benjamin E. Green, who was W. D. Lee's grantee. A descendant of William Walker produced what purported to be the original deed from Charles A. Felder to John A. Veatch, together with the admitted original testimonio, or duplicate original Spanish grant, delivered by the Mexican Commissioner to Charles A. Felder, the original grantee; the protocol, or first original, having been deposited in the public archives and on file, at the time of the trial, in the General Land Office of Texas, and therefrom produced upon the trial.

The defendants traced title back through intermediate grantors to one William Daniels. The original grantee, Charles A. Felder, conveyed to William A. Daniel on the 10th of June, 1839, eight days before his conveyance to plaintiffs' and interveners' predecessor in title, John A. Veatch. However, the conveyance from Felder to Daniels was not recorded until February 23, 1842, and under the then Texas statute the first recorded conveyance took precedence. The record title was therefore in plaintiffs and interveners, if the deed from Felder to Veatch was a genuine deed. The defendants filed an affidavit of forgery as to the signature of the grantor to this deed, under the Texas statute, and this had the effect to put in issue the genuineness of the signature of Charles A. Felder to the deed to John A. Veatch. This is the only issue in the case upon this appeal, so far as the title depends upon the record. Affidavits of forgery were filed by the plaintiffs and interveners as to certain deeds relied upon by defendants, but no evidence of forgery was offered by the plaintiffs and interveners to sustain the issue.

The defendants also claimed title by the statutes of limitation of Texas of three, five, and ten years, under two separate claims of possession. The first was that of Elizabeth Browning and her successors along about the year 1870, and the second was that of the Texas Pine Land Association, the immediate grantor of the Houston Oil Company, one of the defendants, from 1892 until 1901, in connection with the possession of the Texas Builders' Supply Company, also a defendant, which removed sand from the land in controversy under three contracts with the Houston Oil Company, extending over a period from the 16th day of October, 1902, until the beginning of the suit on June 7, 1911.

There are therefore two questions presented by the record for decision:

(1) Was the deed from Charles A. Felder to John A. Veatch shown without conflict in the evidence to be a genuine deed? The court below held that it was, and defendants complain here of this ruling.

(2) Was there evidence which the court below should have submitted to the jury in support of the defendants' pleas of the statutes of limitations, based either upon the possession of Elizabeth Browning and her successors in 1870, or upon the possession of the Texas Pine Land Association, defendants' immediate grantor, and that of the Texas Builders' Supply Company, its contractor from 1902 until the bringing of the suit. The court below held that there was no question of fact to be submitted to the jury upon these pleas, and the defendants also complain of this ruling.

[1] 1. Upon the issue of the genuineness of the signature of Charles A. Felder to the deed purporting to be from him to John A. Veatch, the defendants introduced the original protocol, containing the signed application of Felder for the league granted to him by the Mexican government, and the testimony of two handwriting experts, who had compared the signature to the protocol with what purported to be Felder's signature to the original deed to Veatch, and testified that the signatures did not resemble each other and in their opinion were not written by the same person. The applicant for land grants in Texas was not at the time of the application of Felder required to sign the application in person and in his own handwriting, though presumptively he would do so. This was the evidence relied upon by defendants to sustain the issue of forgery. The original deed from Felder to Veatch was produced by a witness who was the descendant of an intermediate grantee of the land from Veatch, and therefore found in the proper custody. It was an ancient deed, free from marks of suspicion. It was found in association with the admittedly genuine original duplicate Mexican grant to Felder in the custody of the same producing witness. It bore a certificate of acknowledgment under the hand and official seal of an ex officio notary public of Texas, the signature to which was shown to be in the handwriting of the notary. The law of Texas did not require the signature of a deed to be written by the grantor, even by a grantor who was able to write, provided it was properly acknowledged by him. There was also evidence of the good character of the grantee Veatch. Upon this evidence, we are not prepared to say that the court below should have submitted the issue of forgery to the jury.

2. Upon the issue of the statute of limitations (a) as based upon the possession of Elizabeth Browning and those succeeding her in possession, and (b) as based upon the possession of the Texas Pine Land Association, and of the Houston Oil Company, through the Texas Builders' Supply Company, under its contract with that company.

[2] (a) The defendants introduced evidence tending to show that in 1870 or 1871, a widow, Elizabeth Browning, occupied a house on the Felder league and cultivated land upon it, and cut timber from it, until the year 1875; that one Madison Cane succeeded her in possession, moving into the house before she had removed from it, and continuing in possession for three years, making three crops; that a man named Bill Cane, who had been employed by Madison Cane while the latter was in possession, took possession upon his departure, and stayed two years, tending the ferry on the east side of Village creek and cultivating a ten-acre field on it. for two years till his death,

which occurred on the place; that a man named Frank Womack, two months after Bill Cane's death, bought out Cane's widow, buying her claim to the ferry and putting a logging camp on the place; and that there had been a ferry on the land for many years and up until 1891. The defendants also introduced evidence tending to show that one P. S. Watts, who acted as the agent of one Moore, one of the remote grantees in defendants' chain of title, was on the league frequently during the times mentioned, collecting stumpage from the different parties who cut timber from the league, and that Mrs. Browning recognized Watts as agent for Moore, the claimant of the land, and paid him stumpage for timber she took from the league. There is also evidence from which it might be inferred that some of the successors in possession of Mrs. Browning attorned to one or more of the grantees in defendant's chain of title, while in possession. The evidence as to the length and the continuity and the extent in area of the possession of Mrs. Browning and her successors is indefinite and unconvincing. It is even less persuasive in showing that those in this line of possession recognized the chain of title, under which defendants claim, as the paramount one. On the contrary, there is an independent chain of title, shown without dispute, under which this possession was maintained. E. B. Ratliff conveyed 640 acres, known as the James Brown survey, to Sterling Spell in June, 1866; Sterling Spell conveyed the same land to Elizabeth Browning in September, 1870; Elizabeth Browning conveyed the same land to Frank C. Womack in 1883, and Womack instituted an action to recover title and possession of the same land against the Texas Pine Land Association, the immediate grantor of defendant the Houston Oil Company, on February 20, 1884, but afterwards took a nonsuit in the case. In view of the inconclusive character of the evidence as to the length, continuity, extent, and character of the possession of the defendants' predecessors in title through the possession of Elizabeth Browning and her successors, and in view of the undisputed adverse chain of title, contemporaneous with such possession, as shown by the conveyances mentioned, and by the suit instituted by Womack to enforce the adverse claim, we think the court below decided correctly that there was not sufficient proof of tenancy or such continuous possession of the tract, actual or constructive, by the alleged tenants for the prescribed period, as to justify the submission of the issue of the statutes of limitations pleaded by the defendants to the jury, as based on the Browning possession. A verdict for defendants based on the possession of Elizabeth Browning and those in privity with her would be so unsupported by the evidence as to justify the court in setting it aside.

[3] (b) This brings us to the question as to whether the record contains evidence that should have been submitted to the jury of the possession of the Texas Pine Land Association and of the Houston Oil Company, through its contractor, the Texas Builders' Supply Company, for the period prescribed by either of the Texas statutes of limitations of three, five, or ten years.

The defendant the Houston Oil Company traced title from itself back to the sovereignty, through a complete chain of deeds, all of which

were registered. It and its predecessors had paid taxes on the entire tract in controversy for very many years. There was no evidence introduced that any deed in its chain of title was a forged instrument, though affidavits of forgery were filed against two or more of them. It was contended that one of the grantors in the chain of title, William Daniels, was not the William A. Daniel who was the grantee of the original grantee Felder. This, however, was a question of fact for the jury. The defendants claimed through a deed of the original grantee, prior in point of date of execution, but subsequent in date of recordation, and hence under a junior deed in legal effect, and were not entitled to the benefit of the three-year statute. Defendants, claiming under registered deeds, having paid taxes on the land each year during the period, and no deed in their chain of title being shown to be a forgery, were entitled, if shown to have been in peaceable and adverse possession of the land, using, cultivating, and enjoying the same for the prescribed period, to the benefit of the five-year statute of limitation. We think there was evidence of the necessary elements, apart from possession itself, sufficient to make a jury case under the five-year statute.

Was there evidence of peaceable and adverse possession of defendants or their predecessors, accompanied by use, enjoyment, and cultivation, for a period of five years before the bringing of the suit in June, 1911, which should have been submitted to the jury?

In the year 1893 a railroad was built through the tract of land in controversy, which was then owned by the Texas Pine Land Association. The land was conveyed by the association in 1901 to the Houston Oil Company. During the intervening period, the evidence shows that the railroad company took sand from the lands both within and without the right of way; that its right of way was acquired and occupied with the consent and acquiescence of the association; and that timber and ties were cut from the land by persons acting under the license of the association, and used by the railroad company. During all this period, and for many years preceding it, taxes were annually paid by defendants and their predecessors in title on the entire tract. After the conveyance to the Houston Oil Company and in 1902 that company made a contract with the Texas Builders' Supply Company, licensing it to remove sand from a pit, known as "F" pit, on the land, and the contract was twice renewed before the bringing of the suit. Under these contracts 605 cars of sand were removed during the period from 1910 to 1912, the value of which as shown by the judgment was $1,286. In one month 63 cars were removed, and for the period mentioned the daily average exceeded two. The evidence tended to show that two houses were built on the land, and occupied for more than five years by men who worked in excavating and loading the sand on cars; that the pit was excavated over an area of seven or eight acres, and was not a mere encroachment beyond the railroad right of way by the railroad company. The evidence showed that the Texas Builders' Supply Company, in removing the sand, recognized the title and ownership of the Houston Oil Company, paying it for all sand removed. This status, without looking for aid to the acts of the Texas Pine Land Association, continued for a period of more than five years

prior to the institution of this suit. If acts of possession of this kind are of a character to support the plea of the statute of limitations, then that issue should not have been withdrawn from the jury.

It is asserted that they are insufficient and for two reasons: (1) Because their character, if they had been done by the land owner itself, was not such as to give notice of an adverse claim to the entire tract of 12,578 acres. (2) Because they were done by the contractor, and not by the owner, and by the terms of the contract the contractor was restricted in possession to a specific portion of the land (the sand pit, designated "F" in the contract), and the owners' possession was equally as circumscribed as was the contractor's.

[4] The principle is a general one and is well established in Texas that actual possession of a small part of a tract by one who claims, under color of title, evidenced by registered deeds, a large tract, extends his possession to the boundaries described in his color of title, in the absence of actual adverse possession of any part of the tract by another. Ellicott v. Pearl, 10 Pet. 412, 9 L. Ed. 475; Hunnicut v. Peyton, 102 U. S. 333, 26 L. Ed. 113; Smith v. Gale, 144 U. S. 509, 12 Sup. Ct. 674, 36 L. Ed. 521; Scaife v. North Carolina Land Co., 90 Fed. 238, 33 C. C. A. 47; Evitts v. Roth, 61 Tex. 81.

Nor is it necessary to the application of this principle that the part occupied should have borne any considerable proportion to the entire tract, or that it should be inclosed under fence, or dwelt upon by the occupant. It is sufficient if it be used and enjoyed in a way consistent with the character and utility of the land. So it has been held that the continued removal of sand from an otherwise useless vacant lot is an act of possession of the land that may ripen into title, and as well the use of a tract of land for the deposit of stone, the removal of timber from it, cultivation without occupancy or inclosure, and many other like acts, when done with color of title and accompanied by the payment of taxes. Ellicott v. Pearl, 10 Pet. 411, 9 L. Ed. 475; Ewing v. Burnet, 11 Pet. 41, 9 L. Ed. 624; Holtzman v. Douglas, 168 U. S. 278, 18 Sup. Ct. 65, 42 L. Ed. 466; Small v. McMurphy, 11 Tex. Civ. App. 409, 32 S. W. 788; El Paso v. Ft. Dearborn National Bank, 96 Tex. 496, 74 S. W. 21.

[5] So it seems quite clear, if the defendant the Houston Oil Company had removed the sand that the evidence shows was removed by its contractor, the Texas Builders' Supply Company, during the period from 1902 to 1911, this, in connection with the contemporaneous occupancy of the houses by its employés, and the payment by it of annual taxes on the entire tract, would have constituted an adverse possession on its part that would have been extended by its color of title to the entire tract of 2,578 acres, and given it title thereto by the statute of limitations of five years. Does the fact that the sand was removed by a third party under a contract with the owner or claimant change the conclusion? It is contended that it does because, by the terms of the contracts between the Houston Oil Company and the Texas Builders' Supply Company under which the sand was removed, the right of the contractor to remove it was impliedly limited to one specific portion of the tract, and the possession of the owner or claimant, through its contractor, was likewise limited to the same portion.

The contention is based upon the principle that, when an adverse claimant, holding under color of title, leases a portion of the tract adversely claimed by him to a tenant, the lease restricting the possession of the tenant to the lesser tract, described by metes and bounds, the adverse possession of the landlord, by virtue of his tenant's possession, extends only to the tract described in the lease by metes and bounds, and not to his entire tract described in his color of title.

In the case of Ellicott v. Pearl, 10 Pet. 411–443 (9 L. Ed. 475), Justice Story said:

"In Jones v. Chiles, 2 Dana (Ky.) 28, it was held by the court that, if a landlord settles a tenant without bounds upon a tract of land, he is in possession to the limits of the claim. But if the tenant is restricted by metes and bounds, to a part only of the land, the landlord's possession is in like manner limited."

In the cases of Read v. Allen, 63 Tex. 158, and Craig v. Cartwright, 65 Tex. 424, the principle is laid down that:

"Where one holding a deed to land described by metes and bounds leases a part of it to a tenant by specific metes and bounds, the possession of the tenant is only coextensive with the bounds specified in the lease, and not with the whole tract."

In the case of Bowles v. Brice, 66 Tex. 730, 2 S. W. 733, the court said:

"The question is: Must the possession in this case be restricted to the portion of the premises actually occupied by the tenants? It is held in Read v. Allen, 63 Tex. 154, and in Texas Land Co. v. Williams, 51 Tex. 61, that when a party claiming land leases by written contracts specific parts of it, describing them by metes and bounds, his possession through his lessees extends only to the parcels so defined. * * * But we consider that we have a different case before us. Shall a party who lets to tenants, for the purpose of cultivating the improved part of a tract of land, be deemed to have lost his constructive possession of the portion which is unimproved? We think not. He applies the property to the only use of which it is susceptible, and should be deemed as exercising ownership over the whole tract as fully as if he were in possession of the improved portion, cultivating it himself. It is true that the witnesses state that the tenants in this case had no right or authority over the land not in cultivation. This is ordinarily the case in the farming out of agricultural lands. A tenant, who leases of one claiming a house and lot in a city a room in such house, does not usually have any dominion over other parts of the property, though unoccupied. Yet is it to be held that the landlord's possession is restricted to the room so leased? This question must be answered in the negative. No arbitrary rule can be laid down in this class of cases; and we conclude that, in a case like the one present, the possession of the landlord should be construed to be coextensive with the boundaries of his deed."

In the case of Haynes v. T. & N. O. R. R. Co., 51 Tex. Civ. App. 53, 111 S. W. 429, the Court of Civil Appeals of Galveston said:

"It was held by the Supreme Court, in Read v. Allen, 63 Tex. 158, that, 'where one holding a deed to land described by metes and bounds leases a part of it to a tenant by specific metes and bounds, the possession of the tenant is only coextensive with the bounds specified in the lease, and not with the whole tract,' and the same rule is also announced in Craig v. Cartwright, 65 Tex. 424. The later case of Bowles v. Brice, 66 Tex. 730 [2 S. W. 729], while not in terms overruling the former opinions in the cases referred to, seems to us to hold directly to the contrary. We gather from the statement of the facts in the latter case that the only possession of the land held by the owner was through tenants to whom had been rented the improved and

cultivated land, only a part of the whole tract, and that these tenants had no right or authority over the land not in cultivation. We can see no difference between the facts of that case and this. We understand the court to hold in that case that in such case the constructive possession of the owner, by virtue of this actual possession of the tenant, extends to the limits of the entire tract, and was not limited to the boundaries of the portion leased to the tenants."

The cases quoted from show that, where the principle relied upon obtains, its scope is restricted to cases in which the tenant is restricted by the description of the premises leased to a specific part of the tract, described by metes and bounds. The Supreme Court of the United States, in the case of Ellicott v. Pearl, 10 Pet. 411, 9 L. Ed. 475, quote approvingly from the case of Jones v. Chiles, 2 Dana (Ky.) 28, the principle that "if a landlord settles a tenant, without bounds, upon a tract of land, he is in possession to the limits of the claim," and that the landlord's possession is limited to the part occupied by the tenant, only, "if the tenant is restricted by metes and bounds, to a part only of the land."

The earlier Texas cases cited are reconcilable with the case of Bowles v. Brice, 66 Tex. 724, 2 S. W. 729, only upon the distinction that those were cases in which when a party "claiming land, leases by written contract specific parts of it, describing them by metes and bounds, his possession through his lessees extends only to the parcels so defined." In the Bowles v. Brice Case, the lease was of the improved parts of the land, without specific description, for the purpose of cultivation. The court, distinguishing that case from the two earlier ones, says:

"But we consider that we have a different case before us. Shall a party who lets to tenants, for the purpose of cultivation, the improved part of a tract of land, be deemed to have lost his constructive possession of the portion which is unimproved? We think not. He applies the property to the only use of which it is susceptible, and should be deemed as exercising ownership over the whole tract as fully as if he were in possession of the improved portion, cultivating it himself."

The distinction is a narrow one, based possibly upon the idea that a description by metes and bounds in the lease is equivalent to an implied exclusion of the tenant from the part of the tract not so described in the lease; while a lease of the improved portions of a tract is the equivalent of a lease of the tract for the purpose of cultivation, the only parts useful to that end being the improved parts, and that such a lease implies no exclusion of the tenant from the remaining portions, not improved, and so the landlord's possession extends to the whole tract by virtue of his tenant's.

The case of Houston Oil Co. v. Kimball, 103 Tex. 94–105, 122 S. W. 533, 124 S. W. 85, only holds that while the successor in possession of a part of a tract of one, who had recognized the title of a claimant, is estopped to deny his title, because of his privity with his predecessor in possession, yet, in order that the claimant may benefit by the possession of the occupant to the entire tract, it must appear that the occupant for himself or for the claimant claimed or exercised possession over the entire tract.

Whether a tenant occupying a part only does claim and exercise possession to the limits of the tract, is to be determined by the facts of each case; and, as the Texas Supreme Court said in the case of Bowles v. Brice, supra, "no arbitrary rule can be laid down in this class of cases."

The Texas Builders' Supply Company was in possession under contracts that differed from leases in material respects. They were in effect a sale of the sand in place, with the privilege to the purchaser to enter on the premises and remove the sand. The work done by the contractor, under such an agreement, was as much done by the owner as if performed by his agent. If the owner had employed an agent or a contractor to excavate and load the sand on cars for him, paying a reward for the service, and retaining title to the sand, it is clear the acts of the contractor in excavating and loading the sand would be the owner's acts, as much so as if done in person. Such acts, if continued for the requisite length of time and with the necessary continuity, and under color of title and adverse claim of right, would ripen the possessor's claim into legal title and ownership of the land described in his color of title. The fact that the contractor purchases and pays for the sand in place and excavates and loads it at his own expense does not change the character of his possession. In entering upon the premises to remove the sand, he acts as the licensee of the owner, and his possession is as much that of the owner as if the owner had assumed the duty of removing it himself. The contract gives the purchaser no exclusive possession of any part of the premises, as against the owner. The license to enter is confined to the purpose for which it was granted, i. e., to remove the sand. For no other purpose can the contractor enter or claim possession of the premises as against the owner. Under a lease, the tenant can exclude the landlord from possession of the leased premises during the term, unless his right to enter is reserved. So that in such a case, unless the landlord has possession through the possession of his tenant, he cannot have it at all. In this case, however, the owner never surrenders possession of the premises to his contractor, but, at most, permits him to enter upon them for the single purpose of taking away the purchased sand. For all other purposes the possession of the premises is as it was before the contract was entered into. The relation between the owner and the contractor is more nearly that of principal and agent than that of landlord and tenant. The acts done by the contractor are therefore done by the owner through procuration. The contract provides merely that the owner "agrees to sell to second party (the purchaser) sand out of said pit 'F,' * * * and said sand shall be mined and loaded at the expense of the second party." It also provides that the purchaser shall have exclusive right to haul sand from the pit, "with the exception that the Kirby Lumber Company has the concurrent right to haul all the sand from said pit which may be desired by said Kirby Lumber Company for its own use," and also that the purchaser shall load and ship sand for the Kirby Lumber Company at certain prices therein fixed. It is clear that the contract did not effect the surrender of the possession of the premises to the contractor, and was in no sense a lease, but so far as it authorized

the entry by the contractor was a mere license, under which the contractor was no more than the agent of the owner, and his acts of possession consequently were those of the owner himself.

If the contract should be considered a lease of the premises from which the sand was to be removed, there is no specification of the part leased by metes and bounds or other description. The language is:

"First party hereby agrees to sell to second party sand out of said pit F at $2.25 for each coal car and $1.25 for each flat car; and said sand shall be removed and loaded at the expense of second party."

The evidence shows there was never but one sand pit on the tract of land. If the contract be construed to put the contractor in possession, it does not attempt to restrict this possession either by metes and bounds or in any other way than by designation of the pit where alone the sand was to be obtained. It would have been as futile to have leased the contractor land on which there was no sand, as for an agricultural lease to include wild and unimproved land. The purpose was to vest the contractor with such possession as would enable him to get out the sand, and that possession was of the land where the sand was located, which happened to be at pit "F" and not elsewhere. The contractor had the right to follow the sand to wherever upon the land the vein carried him. His possession was restricted only by the purpose for which he was granted it, viz., the removal of the sand. He could only occupy the land for that purpose, but could occupy all of it if shown to be necessary for that purpose. The contract contains no territorial restriction upon the contractor, by metes and bounds, or otherwise, but only the restriction implied from its purpose. This brings this case within the principle of the cases, like that of Bowles v. Brice, where the improved lands of a large tract were leased for cultivation, and the landlord held to be in possession of the entire tract through the partial possession of his tenant; rather than that of the cases of Read v. Allen and Craig v. Cartwright, in which the limitation on the tenant's possession was by specific boundaries, and the landlord held to have no more extensive possession than his tenant.

If the possession of the Texas Builders' Supply Company by occupancy of houses and removal of sand was of a kind that would enure to the defendant the Houston Oil Company, and extend its constructive possession to the boundaries of its color of title, then it was for the jury to say whether the defendants had established their plea of the five years' statute of limitations, and the court below erred in directing a verdict for the plaintiffs and interveners.

The cause is reversed and remanded to the District Court for a new trial in conformity herewith.

On Rehearing.

PER CURIAM. The petition for rehearing has been duly considered, and the same is denied.

SHELBY, Circuit Judge (dissenting). I did not concur in the opinion or judgment in this case, though my dissent was not entered

on the record. I wish now to have it noted on the record that I am of the opinion that the judgment of the District Court should have been affirmed.

BANK OF DILLON v. MURCHISON et al.

In re E. L. MOORE & CO.

(Circuit Court of Appeals, Fourth Circuit. February 27, 1914. Rehearing Denied.)

No. 1222.

1. CHATTEL MORTGAGES (§ 187*)—PROPERTY WHICH MAY BE SUBJECT OF MORTGAGE—STOCK IN TRADE.

The rule that a mortgage, upon a shifting and perishable stock of merchandise left in the mortgagor's possession, is fraudulent and void per se as against creditors is not upheld in South Carolina, and an insolvent debtor by a bona fide mortgage, intended merely as security for a just debt, may prefer one creditor, but if the mortgage is designed, not as security, but as a transfer of the debtor's property, to the favored creditor, it is void under the assignment law.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 372–392; Dec. Dig. § 187.*]

2. CHATTEL MORTGAGES (§ 201*)—FRAUDULENT CONVEYANCE—QUESTION OF FACT.

Whether a chattel mortgage on a stock of merchandise, left in the mortgagor's possession, is intended as security or as a transfer of the property to the favored creditor in preference to other creditors is a question of fact.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 360; Dec. Dig. § 201.*]

3. BANKRUPTCY (§§ 144, 467*)—CONFLICTING JURISDICTION OF COURTS OF BANKRUPTCY AND STATE COURTS.

Where, after the commencement of an action to enforce a chattel mortgage on a stock of merchandise and the appointment of a receiver and an order of sale, a petition in bankruptcy was filed, it was for the United States District Judge to determine primarily whether the administration of the mortgaged property should be left to the state court or brought into the bankruptcy court, and his discretion would not be reviewed unless clearly abused.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 237, 929; Dec. Dig. §§ 144, 467.*

Conflict of jurisdiction of federal courts with state courts, see note to Louisville Trust Co. v. City of Cincinnati, 22 C. C. A. 356.]

4. CORPORATIONS (§ 477*)—MORTGAGES—FORM AND REQUISITES.

A chattel mortgage signed by M. & Co., a corporation, by its president and secretary and treasurer, and which was clearly intended to give the mortgagee a lien upon the corporation's stock of merchandise, was valid, though it did not anywhere disclose in express terms that the mortgagor was a corporation, but, on the contrary, used terms implying that it was a partnership.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1857–1863, 1865–1869; Dec. Dig. § 477.*]

5. CHATTEL MORTGAGES (§ 59*)—EXECUTION—NECESSITY OF SEAL.

At common law, unchanged by any statute of South Carolina, a bill of sale or other conveyance of personal property does not require a seal, and

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

the same rule applies to a "chattel mortgage," which is merely a bill of sale with a defeasance incorporated in it.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 114; Dec. Dig. § 59.*

For other definitions, see Words and Phrases, vol. 2, pp. 1098–1106.]

6. CORPORATIONS (§ 425*)—MORTGAGES—ESTOPPEL TO DENY VALIDITY.

Where a chattel mortgage given by a corporation, though not authorized or ratified at a regular meeting or in writing by the directors, was executed by two of them as its president and secretary and treasurer, and a third, making a majority, knew and approved of its execution, and the corporation received and utilized the proceeds of the loan made on the security thereof, it was estopped to deny the validity of the mortgage; and creditors as to whom no fraud was practiced, and who had acquired no lien rights, could not dispute the mortgage.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1697–1701, 1705; Dec. Dig. § 425.*]

7. CHATTEL MORTGAGES (§ 90*)—RECORDING OF MORTGAGE AS NOTICE.

Under Civ. Code S. C. 1912, § 1352, requiring the execution of writings, before being recorded, to be proved by the affidavit of a subscribing witness, where a chattel mortgage on a stock of merchandise sufficiently described and located, executed by M. & Co., a corporation, by its president and secretary and treasurer, which nowhere disclosed that M. & Co. was a corporation, was recorded upon the affidavit of the subscribing witness that he saw "M. & Co. sign, seal, and * * * deliver" it, but not stating that he saw the officers sign and deliver it, it was sufficiently probated and properly recorded and valid as to subsequent creditors, as the sole reason for the recording act is to give notice, and the sole necessity for an affidavit to show the verity of the instrument, and the record would have put any one upon inquiry, which, if pursued, would have disclosed the facts.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 168–173; Dec. Dig. § 90.*]

8. CHATTEL MORTGAGES (§ 125*)—SALES—RIGHT TO PROCEEDS.

While a chattel mortgage on a stock of merchandise, together with all accounts then and thereafter accruing from the sale of such merchandise, was not sufficient as an assignment of other accounts and choses of action, where there was no notice to the debtors or delivery of any evidence of debt, the mortgagee was entitled to accounts and choses of action receivable from and on account of sales of the mortgaged stock after the execution of the mortgage, as, the mortgage being a bill of sale with a defeasance, the legal title was in the mortgagee, and the mortgagor, in making sales, was in legal effect the mortgagee's agent.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 210–212; Dec. Dig. § 125.*]

On Cross-Appeals from the District Court of the United States for the Eastern District of South Carolina, at Charleston; Henry A. M. Smith, Judge.

In Bankruptcy. In the matter of E. L. Moore & Co., bankrupts. From an order relative to the disposition of property subject to a chattel mortgage, the Bank of Dillon and William Murchison, trustee in bankruptcy, and others bring cross-appeals. Reversed.

Recorded in the office of the clerk of the court of common pleas of Dillon county, S. C., as of June 10, 1912, is a paper in these words:

"State of South Carolina, County of Dillon.

"$10,000.00. Dillon, S. C., May 27th, 1912.

"On the 1st day of October after date we promise to pay to the order of the Bank of Dillon ten thousand dollars at the office of the said bank with inter-

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

est and after maturity at the rate of eight per cent. per annum. And in case the said debt is not paid at maturity we promise to pay all expenses incurred in collecting same, including ten per cent. attorneys' fees in case the same is placed in the hands of attorneys, and all costs of any litigation incurred in the collection of said debt, and to secure the payment of the said debt, interest, attorneys' fees and costs aforesaid, we have bargained, sold and released and mortgaged, and do hereby bargain, sell, release and mortgage to the said the Bank of Dillon, all of our entire stock of general merchandise, and fixtures, together with all accessions that may be made to said stock of goods, wares, merchandise and fixtures from time to time, also accounts which here and hereafter accrue from the sale of said stock of goods, wares and merchandise, and all other accounts not heretofore transferred, said property being located in the store of Mamie P. Moore on the west corner of Main and First avenue. And if the said goods and chattels shall in any way be removed from the usual place of same, or deteriorate in value, be abused or mistreated, or the security becomes insufficient, then the said the Bank of Dillon, their heirs and assigns, shall have the right to deem said debt due and payable and seize all or any portion of said goods and chattels, and the same to sell upon giving five days' notice by posting the same in three public places in said county and apply the proceeds of said sale to the payment of said debt, interests and costs, and in that event we promise to deliver said goods and chattels to the said the Bank of Dillon, their heirs and assigns, for the purpose aforesaid, hereby waiving all claims which we might have thereto.

"In witness whereof, we have hereunto subscribed our name and affixed our seal this the 27th day of May, A. D. 1912.

"E. L. Moore & Co. [L. S.]
"By E. L. Moore, Prest., [L. S.]
"By L. H. Cottingham, Sec. & Treas.

"Executed in the presence of
"C. C. Graham.
"Alice Scott.

"State of South Carolina, County of Dillon.

"Personally appeared before me C. C. Graham, and made oath that he saw the within named E. L. Moore & Co., sign, seal and as their act and deed deliver the within written deed, and that he with Alice Scott witnessed the execution thereof. "C. C. Graham.

"Sworn to before me this 27th day of May, 1912.

"Jno. C. Bethea, [L. S.]
C. C. C. P."

On February 5, 1913, the Bank of Dillon filed its complaint in the court of common pleas for the county of Dillon, S. C., against E. L. Moore & Co., corporation, setting forth the execution of the foregoing paper, charging default in its conditions, praying for the appointment of a receiver and an order of sale. Receiver was appointed and sale ordered by this state court, and such sale was advertised. Before made, however, on February 15, 1913, certain creditors filed a petition in involuntary bankruptcy against the E. L. Moore & Co. corporation, and seven days thereafter filed an additional petition praying an injunction inhibiting such sale under the state court proceeding and assailing the validity of this paper as a mortgage. Such injunction was granted after reference had to ascertain the facts, and upon hearing had July 19, 1913, the court below held in effect that, as against the corporation and all its creditors existing at the date of its execution, this instrument was to be upheld and enforced in equity as a valid mortgage, save and except as to accounts receivable referred to therein, but as to all creditors, whose debts accrued subsequent to the date of the execution thereof, to be invalid, null, and void. Thereupon the Bank of Dillon and the creditors have taken their appeal and cross-appeal, respectively, from this ruling.

W. H. Muller, of Dillon, S. C., and P. A. Willcox, of Florence, S. C. (Gibson & Muller, of Dillon, S. C., and Willcox & Willcox and Henry E. Davis, all of Florence, S. C., on the brief), for appellant and cross-appellee.

Louis M. Swink, of Winston-Salem, N. C., and Robert H. Talley, of Richmond, Va. (Mitchell & Smith, of Charleston, S. C., and Townsend, Rogers & McLaurin, of Bennettsville, S. C., on the brief), for appellees and cross-appellants.

Before PRITCHARD and KNAPP, Circuit Judges, and DAYTON, District Judge.

DAYTON, District Judge (after stating the facts as above). [1, 2] It is to be noted, incidentally, that the rule, maintained in many of the states, that a mortgage or deed of trust upon a shifting and perishable stock of merchandise left in the possession of the mortgagor is fraudulent and void per se as against creditors is not upheld in South Carolina. On the contrary, the rules there are settled by its Supreme Court, in Porter v. Stricker, 44 S. C. 183, 21 S. E. 635, approved in Marshall v. Crawford, 45 S. C. 189, 22 S. E. 792, to be: (1) An insolvent debtor may, by a bona fide mortgage, which is intended merely as a security for a just debt, prefer one of his creditors. (2) If the mortgage is really designed to operate not as a security merely, but as a means of transferring the debtor's property to the favored creditor, in preference of the other creditors, then it is void under the assignment law. (3) The question as to what was the intention is a question of fact.

Therefore this case, being a South Carolina one, must be governed, in its decision, by these rules; and such cases as Ritchie County Bank v. McFarland, 183 Fed. 715, 106 C. C. A. 153, are not applicable. In this connection it is sufficient to say that the lower court has stated that:

"There is no testimony whatsoever that there was any actual fraud about the transaction. The deed was made more than four months before the adjudication in bankruptcy, and, if a good mortgage, is not invalid as a preference. The bank appears to have given value for it as a mortgage and relied upon it as such."

These statements have not been and cannot be controverted.

[3] We are not greatly impressed with the argument made by counsel for the bank that comity required the court below to refrain from taking charge of and administering the res, instead of leaving the same to be administered by the state court.

The bankrupt law is supreme and its practical and plenary administration is more and more demonstrating the fact that it must, to a very great extent, be exclusive. This, among other reasons, because the insolvent laws of so many of the states are in conflict with the bankrupt act as to the method and order of distribution; because distribution by state courts curtail creditors' rights as to hearings, selection of administering trustees, and other details, secured to them by the bankrupt act; and because of costs, delays, and confusion arising from a dual administration.

The bankrupt law being supreme, and the District Judge of the United States being constituted the especial judicial expounder of it, the responsibility is primarily upon him to determine, in each case, whether its administration shall be shared with another. His discre-

tion in the premises will be rarely reviewed unless abuse of it is clearly shown. New River Coal Land Co. v. Ruffner Bros., 165 Fed. 881, 91 C. C. A. 559; Va. Iron, Coal & Coke Co. v. Olcott, 197 Fed. 730, 117 C. C. A. 124.

The determination of this case, therefore, resolves itself into answers to three questions: (1) Is this paper writing in form and fact the chattel mortgage of the bankrupt corporation? (2) If so, was it legally admitted to record? (3) Is its terms sufficient to pass, by way of assignment, to the bank, its accounts receivable? The validity of this paper as a mortgage is assailed upon two grounds: First, because there is nothing on its face to indicate that it was executed by, or on behalf of, a corporation and lacks a corporate seal; and, second, its execution was not legally authorized by its directors.

[4, 5] We are in accord with every statement made by the learned judge sitting upon the hearing below to the effect that this instrument is most slovenly and carelessly drawn. It is a conspicuous illustration of the fact that when one, in order to save expense, secures an untrained hand to draw such papers he finds, ultimately, that he has been "penny wise and pound foolish." Nevertheless, so many are so drawn in the conduct of human affairs that, since the time of Sir Mathew Hale at least, courts have been astute to find means to make them effectual according to the honest intent of the parties. There can be no question as to the honest intent of the parties here. The officers of this corporation clearly intended by this writing to give this bank a lien upon this stock of merchandise. The bank just as clearly intended it should give it and in good faith accepted this paper as a chattel mortgage to secure its money. It is true that no words in the paper discloses, in express terms, that E. L. Moore & Co., was a corporation. It is rightly said that its terms imply that it was a partnership. Nevertheless it is an undisputed fact that it was a corporation, that its name was signed to it by its officers, who were in fact such officers, by whom, under all ordinary circumstances, such papers, on its behalf, would have to be executed. As to whether the seal of the corporation was attached to it is a disputed question. The bank insists that it was affixed to the original paper, and that, in recording it, the clerk so indicated by attaching the letters in brackets [L. S.] instead of the form and reading of the seal itself. We will not undertake the determination of this question of fact, for the reason that we deem it immaterial to do so. At common law no seal to a bill of sale or other conveyance of personal property was required. And nothing contained in the statute law of South Carolina, pertinent to the question (volume 1, Code 1912, §§ 4103–4112), makes a seal necessary, and therefore the common-law rule becomes effective. As said in Gibson v. Warden, 14 Wall. 244, 20 L. Ed. 797:

"The term 'mortgage,' used in the statutes, does not import or imply that a seal is necessary. In regard to chattels, it is a mortgage, and not a deed of mortgage, that is required. The distinction between real and personal property and between the means which are necessary to affect them is well settled. Personal property, according to the common law, could always be transferred or incumbered without the use of a deed for that purpose. A seal has never been held necessary to the validity of a bill of sale. A chattel

mortgage is only a bill of sale with a defeasance incorporated in it. The presence or absence of that formality is wholly immaterial."

[6] We therefore conclude that it is our duty to uphold this instrument as a chattel mortgage, sufficient in form and execution by the corporation. As to whether it was so legally authorized as to be valid as against the corporation and its creditors, it is insisted by the bank that, while no such authority was given by resolution passed by the directors in a regularly called meeting, it was subsequently ratified by the individual directors. It is apparent that this corporation, while one in name, was conducted in effect as a partnership. It had four directors, two of whom were the officers executing this paper. A third testified in effect to his knowledge and approval of its execution. A majority only was required to make such authorization. Because it was not authorized or ratified in regular meeting or in writing by the directors, the learned judge below held that there was no sufficient evidence of any legal ratification, but in that connection rightly reasoned thus:

"It does appear from the testimony that both parties to the transaction acted upon the assumption that the deed was a good mortgage. The mortgagor, E. L. Moore & Co., received and utilized the proceeds of the loan made on the paper as a mortgage. The Bank of Dillon, relying upon the security, made the loan. It would be impossible now to restore the parties to the positions held when the deed was executed. The corporation of E. L. Moore & Co., having enjoyed all the benefits of the transaction, would not be permitted in equity to recede therefrom at this date because of irregularities and insufficiencies in the deed. As equity would now require the E. L. Moore & Co. to cure the defects of the deed, so it will hold that company stopped as against the Bank of Dillon to deny the instrument to be a mortgage.

"Such being the case, no outside creditor existing when the mortgage was given would have any greater rights than the corporation under the circumstances of this particular case. No fraud is shown to have been practiced upon such creditors and none of them are shown to have acquired any lien rights upon the mortgaged property which would entitle them to dispute the mortgage when neither the corporation nor its stockholders can now do so."

In this conclusion we fully concur, but because the learned court below was further of opinion that this instrument "was not sufficiently and definitely phrased and framed, even if properly probated and recorded, to notify subsequent creditors that there was a prior mortgage made by the corporation styled E. L. Moore & Co.," and because the probate of it was not "sufficient to admit it to record so as, when recorded, to constitute constructive notice to such creditors," he held it to be null and void as to such subsequent creditors.

[7] As to whether the instrument was "sufficiently and definitely phrased and framed" to constitute it a chattel mortgage of this corporation, we have already set forth our dissent to his conclusion that it was not. This brings us to the consideration of the question as to the sufficiency of its probate.

The law of South Carolina (volume 1, § 1352, Code 1912), provides that:

"Before any deed or other instrument in writing can be recorded in this state, the execution thereof shall be first proved by the affidavit of a subscribing witness to said instrument, taken before some officer within this state competent to administer an oath."

It is admitted that Graham was a subscribing witness and that his affidavit was taken by the clerk of the court competent to administer an oath. The court below says:

"The usual affidavit to prove the execution by a corporation is an affidavit of a witness that he saw the corporate officers, whoever they were, sign and affix the corporate seal and as the act and deed of the corporation deliver the instrument."

This manifestly, as to a mortgage of real estate, a sealed deed, is true, but, as we have seen, a chattel mortgage need not be a sealed instrument; therefore this probate, it must be conceded, did not require proof of sealing and would have undoubtedly been sufficient if it had set forth that he saw the officers sign the instrument. He does say that "he saw the within E. L. Moore & Co. sign, seal and as their act and deed deliver the within written deed." Inasmuch as he could only see the officers sign, and the corporation could only sign by and through such officers, is not the position taken too technical? We think so. The sole necessity for any affidavit by a witness is to show the verity of the instrument to the recording tribunal, so that it and the public might not be imposed upon by the recordation of a false or fraudulent instrument. The sole reason for the recording acts is to give notice to the public of such instrument. Could any one, turning to the record of this one in controversy, fail to be put upon notice that E. L. Moore & Co. had given a chattel mortgage on its stock of goods fully described and located, signed by its president and secretary and treasurer, and that Graham had sworn to its verity of execution? We think not. Finally, with such knowledge conveyed to him by this record, was it material that he might have taken E. L. Moore & Co. to be a partnership instead of a corporation? We think not, for such inquiry would disclose that E. L. Moore & Co. was the mortgagor, the Bank of Dillon the mortgagee, and the stock of goods described and located was the res mortgaged. In this position we feel ourselves fully sustained by Kelly v. Calhoun, 95 U. S. 710, 24 L. Ed. 544, and the many authorities cited in Cyc. and the text-writers. We conclude, therefore, that this instrument was sufficiently probated and properly recorded, and that the court below erred in holding it null and void as to subsequent creditors.

[8] In conclusion, did the court below err in holding this instrument to be too indefinite to constitute an assignment of the accounts receivable of the bankrupt corporation? His opinion was that:

"As against creditors of any class, choses in action, such as accounts receivable, cannot be transferred by general loose language of the character used in this instrument without any notice to the account debtor or delivery of any evidence of debt."

At least two things are to be borne in mind in this connection: First, that it is admitted that the stock of goods mortgaged is sufficiently described and located in this chattel mortgage; and, second, as said in Gibson v. Warden, 14 Wall. 244, 20 L. Ed. 797:

"A chattel mortgage is only a bill of sale with a defeasance incorporated in it. The presence or absence of that formality is wholly immaterial."

This being true, as to general accounts or choses in action not receivable from and on account of sales made of this stock of goods

after the execution of this mortgage, the ruling of the court below is right, but as to such accounts receivable, by reason of sales made of this mortgaged stock, such ruling is erroneous; this for the reason that, in legal effect the bank having title to the goods, the mortgagor, in like legal effect, became only the agent of the bank in making any sales thereof.

It follows that the decree of the court below must be reversed.

Reversed.

POOLER et al. v. HYNE.

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

No. 1945.

1. JUDGMENT (§ 17*)—VALIDITY—JURISDICTION OVER PARTIES.
   Under the law of Indiana, a decree is a nullity as against a defendant as to whom the summons was returned "not found" and who was not otherwise served, and also as against the interests of other defendants named but who had died before the suit was commenced.
   [Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 25–33, 157, 422; Dec. Dig. § 17.*]

2. PROCESS (§ 103*)—PUBLICATION—DESIGNATION—MAIDEN NAME.
   Under the law of Indiana, a suit to quiet title may be maintained against a nonresident married woman by her maiden name, where she was last known in the state by that name, and where the instrument through which she claims is of record in that name.
   [Ed. Note.—For other cases, see Process, Cent. Dig. §§ 129, 131; Dec. Dig. § 103.*]

3. PERPETUITIES (§ 4*)—CREATION OF REMAINDER—VALIDITY.
   Under Rev. St. Ind. 1843, p. 425, § 68, providing that "no remainder shall be created upon an estate for life of any other person or persons than that of the grantee or devisee of such estate, unless such remainder be an estate in fee," a deed to a trustee creating a remainder in fee after the termination of a life estate reserved in the grantor and a succeeding life estate in his wife is valid.
   [Ed. Note.—For other cases, see Perpetuities, Cent. Dig. §§ 4–44; Dec. Dig. § 4.*]

4. JUDGMENT (§ 686*)—PERSONS CONCLUDED.
   A consent decree against the grantor sustaining the validity of a deed is binding on him and his subsequent devisee of the land conveyed therein.
   [Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1209; Dec. Dig. § 686.*]

5. LIFE ESTATES (§ 8*)—ADVERSE POSSESSION—CLAIM OF FEE—NOTICE TO REMAINDERMEN.
   The repudiation by a life tenant of his tenancy and his claim to an estate in fee does not make his possession or that of his grantee adverse as to the remaindermen until notice of the repudiation is brought home to them.
   [Ed. Note.—For other cases, see Life Estates, Cent. Dig. §§ 24–28; Dec. Dig. § 8.*]

6. EQUITY (§ 87*)—LACHES—FOLLOWING STATUTE OF LIMITATIONS.
   The equitable doctrine of laches does not necessarily follow the statute of limitations, and a complainant may be denied relief in equity although less than the statutory period of limitations has run against his claim.
   [Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 242–244, 39[illegible]; Dec. Dig. § 87.*]

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

7. QUIETING TITLE (§ 29*)—CROSS-BILL—LACHES—PARTIES AGAINST WHOM LACHES MAY BE PLEADED.

The owner of a quarter section of land in 1846 conveyed the same in trust to be held for the sole use and benefit of himself during his life and afterward of his wife during her life, with remainder in fee to her children by a former marriage. He died in 1849 leaving a will by which, after devising other land, he made his wife his sole devisee and legatee. The widow and her children continued to reside on the land for a number of years, and in 1865 she sold the same for its full value, and gave a warranty deed. At that time her children by her first marriage were all of age and some or all lived with her. From that time her grantee and his successors in interest were in possession of the land and made improvements and paid the taxes thereon. The widow died in 1897. In 1909 her surviving children on an ex parte application secured the appointment of a new trustee under the deed of trust and an order for the execution of a deed by him to them which they placed on record. After the death of their mother the land was sold by the claimants in possession to others who bought in good faith and paid full value therefor, and had increased in value from $8,000 to $20,000. The adverse claimants in possession brought a suit to quiet title in which the remaindermen filed a cross-bill. There was evidence tending to show that their mother had always claimed the land in fee under her husband's will and not under the trust deed, but owing to the long lapse of time all persons who were in position to know the facts, and under what arrangement, if any, between her and defendants it was sold, were dead. *Held*, that defendants were in effect the attacking parties, and their cross-bill was subject to the defense of laches, and that under the circumstances their delay of 12 years before asserting their claim barred them of any right to recover the land and the rents and profits thereof.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 63; Dec. Dig. § 29.*]

Appeal from the District Court of the United States for the District of Indiana; Albert B. Anderson, Judge.

Suit in equity by Jennie Hyne against Cecelia Lukens Pooler, William Howard, Jr., Cecelia Howard Hacket, Mary Howard Barbour, Julia E. Howard Osborn, Laura Howard Cox, Birdie Bell Howard Simpson, and Tillman Overton Howard. Decree for complainant, and defendants appeal. Affirmed.

See, also, 202 Fed. 194.

Appellee filed her bill of complaint against Cecelia Lukens Pooler and Isabella Lukens Howard to quiet title to the west half of the northwest quarter of section 12, township 4 south, range 13 west, in Posey county, Ind. At the same time Silas Hyne filed his complaint against the same parties to quiet title to the east half of the same quarter section. After these suits had been instituted, Isabella Lukens Howard died, and her heirs, who are the appellants other than Cecelia Lukens Pooler, were substituted as parties defendant. In each suit appellants filed a cross-bill, asking to have title quieted in themselves. Each cause was referred to the master in chancery, and before him the causes were treated as consolidated for the purpose of taking the evidence and making a report of the facts. Decrees were rendered in favor of the Hynes, and appellants have prosecuted an appeal in each case. By agreement the result of this appeal is to be determinative also of the case of Silas Hyne.

In his report the master found the following facts:

1. In 1845 Joshua Overton lived in Posey county, Ind. He was then over 70 years old, and in that year married Fidelia Lukens, a widow 31 years old and mother of four children by her former marriage, namely, Eliza, Isabella, Cecelia, and William Clark Lukens. On June 16, 1846, Joshua made a deed

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

of bargain and sale of the quarter section of land involved in these controversies and also 80 acres in an adjoining section, to one James T. Walker "to have and to hold the above described premises to the only use, benefit and behoof of the said James T. Walker, his heirs and assigns forever, in trust to and for the uses and purposes hereinafter mentioned, declared and specified, that is to say, that the said Joshua Overton of the first part shall have the right and be permitted without hindrance or molestation to use, possess and enjoy the said tracts of land and every part thereof, together with the appurtenances, either by himself or his tenants, and to receive the rents and profits thereof and appropriate and dispose of the same to and for his own use and benefit so long as the said Joshua Overton of the first part shall live, and that after the death of the said Joshua Overton, the wife of the said Joshua Overton, namely, Fidelia Overton, shall have the right and be permitted without hindrance or molestation to use, possess and enjoy the said tracts of land and every part of them, together with the appurtenances, either by herself or her tenants, and to receive the rents and profits thereof and appropriate and dispose of the same for her own benefit and use during her own lifetime; and after the death of the said Fidelia Overton, the said tracts of land to be conveyed by the said James T. Walker, or his legal representatives, in fee simple to Eliza Lukens, Isabella Lukens, Cecelia Lukens, William Clark Lukens and their heirs and assigns."

2. At the March term, 1848, of the circuit court of Posey county, Ind., Joshua Overton brought suit against James T. Walker, Fidelia Overton, and the four Lukens children, and charged in his bill that he had signed the deed to Walker, trustee, but had never delivered it, and that by fraud the instrument came into possession of Walker and was thereafter lodged for record in the recorder's office of Posey county and therein recorded. Overton's prayer was that Walker be decreed to reconvey the land. All the defendants were duly summoned to appear and answer. Walker and Fidelia Overton appeared by counsel and filed answers. For the minor children the court appointed a guardian ad litem, who filed an answer in their behalf. And after evidence was taken a decree by agreement was entered in which it was "ordered, adjudged, and decreed that Seth M. Leavenworth be, and he is hereby, appointed a commissioner to make to the said Joshua Overton a deed for the east half of the northwest quarter of section 11, township 4 south, range 13 west, and that the deed in complainant's bill mentioned as to said half quarter section be, and the same is hereby, declared null and void, and as to the rest and residue of the land in said deed mentioned, such deed is adjudged good and valid."

3. On August 9, 1849, Joshua Overton duly made his last will, in which he devised to John Benjamin Overton, a son born to him by his wife Fidelia Overton, the east half of the northwest quarter of section 11, township 4 south, range 13 west. And the residue of said will was as follows: "I also give and bequeath to my present wife, Fidelia Overton, all the estate, real, personal and mixed, except the above mentioned parcel of land, which I may own, possess or be entitled to at the time of my death, either in law or in equity, to have and to hold the same to her and her heirs forever." Joshua Overton died on September 1, 1849. His said will was duly probated, and his estate was duly administered and closed at the May term, 1852, of the probate court of Posey county.

4. Fidelia Overton continued to reside on the 160-acre tract in section 12 until about 1856, and thereafter she rented the land to tenants and collected the rents, and her children during the greater part of that time lived with her on that land. Fidelia Overton exercised all the rights of a fee-simple owner of the 160 acres, and was exercising such rights on the 17th day of November, 1865, "and treated the deed of Joshua Overton to Walker, trustee, as ineffective to divest the title of said Joshua Overton, apparently by reason of its being invalid, because the said Walker was a nominal trustee, and the attempt made in said deed to vest the remainder in fee in Cecelia, Isabella, Eliza, and William Clark Lukens was void because in contravention of section 68 of article 3, page 425, of the Revised Statutes of 1843, in that such remainder would have been created upon an estate for the life of said Joshua Overton, a person other than the grantee in said deed, he being grantor in said deed." On said 17th day of November, 1865, Fidelia conveyed the 160 acres

by warranty deed to Lewis A. McDonald for the sum of $5,000, and recited in said deed that she conveyed as the heir of said Joshua Overton, deceased, as would fully appear by reference to his will bearing date August 9, 1849, and on record in the clerk's office of Posey county, on pages 213 and 214 of Book B of Wills. At the time of the conveyance to McDonald the $5,000 paid by him was the fair cash value of the fee-simple title to said 160 acres. Said deed was duly recorded in the recorder's office of Posey county, Ind.

5. Immediately upon delivery of the deed to him McDonald went into possession of said 160 acres of land, and thereafter executed several warranty mortgages of the fee. In 1870 Fidelia Overton obtained a judgment against McDonald, and execution was levied upon said 160-acre tract of land, and said judgment was assigned by Fidelia to Ford, Fitton & Co., who were the holders of a mortgage executed by McDonald. That mortgage was foreclosed in 1874, and through the foreclosure the title of McDonald passed, as a fee-simple title, to Herbert and Florence Fitton.

6. Walker, trustee, died in 1877; Fidelia Overton, on April 2, 1897; William Clark Lukens, on July 25, 1882; Eliza Lukens, on February 10, 1908. On April 15, 1909, John Benjamin Overton, the half-brother, conveyed all his interest in said 160 acres to Isabella Lukens Howard and Cecelia Lukens Pooler. And the shares of William and Eliza passed by inheritance to Isabella and Cecelia.

7. At the May term, 1898, of the circuit court of Posey county, Ind., Herbert and Florence Fitton began suit against Fidelia Overton and her four children by the name of Lukens to quiet title to the 160 acres. Notice by publication was given to Fidelia Overton, Isabella Lukens, Cecelia Lukens, and William Clark Lukens as being nonresident defendants. Summons for Eliza Lukens was placed in the hands of the sheriff of Posey county and returned "not found." On May 30, 1898, the Posey county circuit court adjudged that the Fittons were owners in fee of the 160 acres and decreed that their title be forever set at rest.

8. On January 2, 1898, the Fittons conveyed by warranty deed to Jennie Hyne, the west half of said quarter section for $4,000. On June 8, 1898, the east half was similarly conveyed to Silas Hyne for $4,000.

9. While the Fittons were in possession, they executed warranty mortgages of the fee of said quarter section. And Silas Hyne has done likewise with the 80 acres conveyed to him.

10. When McDonald went into possession on November 17, 1865, the 160 acres were in a run-down condition, about one-half thereof being under cultivation and the remainder being in timber. During McDonald's occupancy he tore down an old building, erected two new buildings, and also built fences and laid a tile ditch in place of a wooden ditch. McDonald paid the taxes on said farm during his occupancy, and the Fittons paid the taxes during theirs, and Silas Hyne and Jennie Hyne paid the taxes on their respective 80-acre tracts during their occupancies. During the occupancy of McDonald he was reputed and commonly believed in the neighborhood to be the owner in fee simple of said 160 acres of land. And the same thing was true with respect to the Fittons and the Hynes during their respective occupancies. From time to time McDonald and the Fittons and the Hynes have cut down and removed and disposed of for their use parts of the timber on said tracts of land.

11. Throughout the period from November 17, 1865, to the time of the trial of this suit McDonald and the Fittons and the Hynes have respectively been in the visible, open, continuous, notorious, and adverse possession of said land.

12. At the April term, 1909, of the circuit court of Posey county, Ind., Cecelia Lukens Pooler and Isabella Lukens Howard filed their ex parte application for the appointment of a trustee as successor to Walker, trustee, and such proceedings were had that the court appointed one Bozeman as such successor in trust; and thereafter, upon ex parte application of Bozeman, the court directed him to execute a deed to Cecelia and Isabella, which he did on September 2, 1909. The complaint in this suit was filed on November 4, 1909.

13. On November 17, 1865, Eliza, Cecelia, Isabella, and William Clark Lukens had each attained majority, and at that time one of them was living at Evansville, Ind., and two or more of them were living with their mother,

Fidelia Overton, at Vincennes, Ind. In 1868 Fidelia Overton and Cecelia Lukens Pooler went to California and lived in Santa Rosa until the time of Fidelia's death in April, 1897. Thereafter Cecelia continued to live in Santa Rosa until 1898, since which date she has resided in San Francisco. None of the other children of Fidelia Overton resided in the vicinity of the land in question at any time after November 17, 1865. None of the children who were living in 1898 had any knowledge of the suit to quiet title prosecuted by the Fittons in the Posey county circuit court, until after the commencement of this suit.

James T. Walker, of Evansville, Ind., and J. T. Hanna, of Chicago, Ill. (Walker & Walker, of Evansville, Ind., of counsel), for appellants.

G. V. Menzies, W. S. Jackson, and R. U. Barker, all of Mt. Vernon, Ind., for appellee.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

BAKER, Circuit Judge (after stating the facts as above). [1, 2] Appellee places some reliance upon the decree of the Posey county circuit court in the suit by the Fittons to quiet title. But the decree was a nullity as against Eliza Lukens who was "not found," and also as against Fidelia Overton and William Clark Lukens who had died prior to the institution of that suit. Thompson v. McCorkle, 136 Ind. 484, 34 N. E. 813, 36 N. E. 211, 43 Am. St. Rep. 334. And appellants claim that the decree is not even good as against Cecelia and Isabella, on the ground that notice by publication given to a married woman by her maiden name is not sufficient. But, under the Indiana decisions, it was sufficient and proper to publish notice to Cecelia and Isabella under the names they had been known by in Posey county up to the time of their departure therefrom, especially as the outstanding interest to be affected by the Fittons' suit was a matter of record in the names used in the publication notice. Jones v. Kohler, 137 Ind. 528, 37 N. E. 399, 45 Am. St. Rep. 215; Baugher v. Woollen, 147 Ind. 308, 45 N. E. 94. The decree was therefore effectual to bar whatever interest Cecelia and Isabella had in 1898; but, inasmuch as they subsequently acquired other interests by inheritance from their sister Eliza and by conveyance from their half-brother John B. Overton, the decree is only a partial defense of appellee's claim of title.

[3] Affirmance of the decree is also asked on the ground that the deed to Walker was void for the reasons stated by the master in the fourth finding. We agree that Walker was only a nominal trustee and that the validity of the deed depends on the answer to the question whether Overton could have made a valid deed directly to the beneficiaries of the trust. Section 68 of article 3, page 425, of Revised Statutes of 1843, so far as applicable, reads as follows:

"No remainder shall be created upon an estate for life of any other person or persons than that of the grantee or devisee of such estate, unless such remainder be an estate in fee."

Although the deed is in substance a conveyance of an estate for life to Fidelia, with remainder over in fee to the four Lukens children, with a reserved estate for the life of the grantor Overton, appellee contends that the remainder was created upon an estate for life of the grantor alone and therefore was violative of the statute.

But, as we read the statute, a remainder could lawfully be created even upon a life estate reserved to the grantor alone, provided that "such remainder be an estate in fee." And since the remainder in the deed in question was an estate in fee, we are of the opinion that the deed was valid.

[4] But if there is any doubt about the validity of the Overton deed to Walker, trustee, the decree of the circuit court of Posey county, rendered in 1848, and described in the second finding, was sufficient to estop Joshua Overton from claiming that the land was his to devise, and Fidelia Overton from claiming that her title and possession came through Joshua's will and not through the deed. Bruce v. Osgood, 154 Ind. 375, 56 N. E. 25.

[5] So, in 1849, after Joshua's death, Fidelia in point of law came into possession as a life tenant under Joshua's deed, no matter what she may have believed or asserted with respect to her having a title in fee as devisee under Joshua's will. Appellants contend that the finding that Fidelia from 1849 to 1865 claimed and exercised all the dominion of an owner in fee and the finding that the possession of Fidelia's grantees was adverse to the remaindermen are not supported by the evidence. We have examined the evidence on these points and confess that it is rather meager and obscure (we shall advert to this condition of the evidence later), but Fidelia's deed to McDonald unmistakably established that on November 17, 1865, she solemnly asserted ownership in fee, deraigning her title through Joshua's will and not through his deed; and from the same evidence and from the further evidence that McDonald paid the full cash value of the land at the time, it is well established that McDonald entered into possession believing that he had lawfully become the owner of the fee. His possession was unquestionably adverse to all the world except the remaindermen named in the Overton deed to Walker, trustee. But, since that deed was properly of record, McDonald was chargeable with notice of the remainder in fee, and therefore his possession as grantee of Fidelia, who in truth was only a life tenant, was not adverse to the remaindermen, and the statute of limitations began to run as against them only in April, 1897, on the death of Fidelia. That is, if a life tenant repudiates his tenancy and asserts a claim to the fee, inasmuch as the possession of the life tenant and those who take under him is on the trust of holding and defending possession in the interest of the remaindermen, no repudiation of the life estate is of any effect against the remaindermen until notice of such repudiation is brought home to them. Haskett v. Maxey, 134 Ind. 182, 33 N. E. 358, 19 L. R. A. 379; Herring v. Keneipp (Ind.) 102 N. E. 834; 1 Cyc. 1032, 1056; 16 Cyc. 616, 637; Zeller v. Eckert, 4 How. 290, 11 L. Ed. 979; and citations in 4 Rose's Notes, 505; Mettler v. Miller, 129 Ill. 630, 22 N. E. 529; Cassem v. Prindle, 258 Ill. 11, 101 N. E. 241. And in the present case the master did not find that the remaindermen had notice of the repudiation of the life tenancy.

[6] Although in Indiana the statutory period for adverse possession is 20 years, and conceding that the statute in this case did not begin to run against appellants until 1897, it does not necessarily follow that the part of their claim which was not barred by the Fit-

tons' decree must be recognized in a court of equity. The equitable doctrine of laches is well stated and explained in Patterson v. Hewitt, 195 U. S. 309, 25 Sup. Ct. 35, 49 L. Ed. 214, a leading case. A full collection of the authorities is given in 16 Cyc. 152 et seq. And the Supreme Court of Indiana, citing and relying on Patterson v. Hewitt, supra, has stated and applied the doctrine of laches in its broadest aspects. Ryason v. Dunten, 164 Ind. 85, 73 N. E. 74.

While courts and text-writers have said that it would not be well to limit and restrain the doctrine by any attempt at precise definition, and that the question is to be determined by the particular facts of each case, yet the general nature of the doctrine may be appreciated in a negative way by recalling what it is not. Though the idea of delay is involved, the doctrine of laches is not an application of any statute of limitations, for, if the statutory time had fully run, no consideration would need to be given to the conduct and position of the parties. And though the conduct of the parties is to be weighed, the doctrine of laches is not coterminous with estoppel by conduct, for if one's conduct at the time of another's entry upon land prevented the pressing of a claim, no consideration would need to be paid to the lapse of time thereafter. That is, although the conduct of the complainant has not created an estoppel in pais, and although less than the statutory period of limitations has run, a court of conscience will compare the conduct and the relative positions of the antagonists, and if on a balancing of the scales of justness and fair dealing the pointer inclines toward the defendant, the chancellor will refuse to be moved by the prayer of the complainant.

[7] Appellants contend that, because they were brought into court as defendants, the doctrine of laches, which is merely a shield and not a weapon of offense, cannot be applied to them. But appellants were really the attacking parties. They came into Posey county and disturbed a repose of nearly 60 years by procuring the appointment of Bozeman as trustee in succession to Walker, and putting the deed from Bozeman to themselves on record. This was an invasion and a drawing up of the line of battle. And when the Hynes people invited appellants into court, they filed their cross-bill in which they affirmatively prayed for title, possession, and an accounting of rents and profits. The decree from which they are now appealing adjudged that there was no equity in their cross-bill and dismissed it for lack of merit. Unless they can get rid of that part of the decree, they are in no position to attack the part which upholds the original bill. Consequently the doctrine of laches is applicable.

Two well-recognized phases of the doctrine apply to this case. One is the change in the position of the occupiers of the land and the increase of value during the interval. 16 Cyc. 161, 162. Fidelia Overton died in April, 1897. Thereupon appellants' right of possession accrued under the deed made 51 years before. No inquiry was made, no move was inaugurated during more than 12 years. Absence from the state and lack of means are given as reasons for the delay. But these are reasons that cannot be accepted. 16 Cyc. 169. A suitor with no money may have relief in equity. And furthermore,

appellants show no change in their circumstances throughout the time from the death of Fidelia down to the bringing of this suit in November, 1909. So, with the right of possession accruing to them in April, 1897, they were charged with the duty of learning what was going on with respect to possession. During those 12 years they knew that some one other than themselves was paying the taxes, keeping up repairs, and improving the estate, if those things were being done at all. And if the taxes were not kept up, 12 years were a double allowance for losing the fee through tax sales and deeds and decrees thereon. The Hynes people did not buy from the Fittons until the year after Fidelia's death. If appellants had moved with sufficient promptness, the Hynes people certainly never would have put their money into paying the full value of the land together with the full value of all of the improvements that had been made by McDonald and the Fittons, at least until after the question of title had been completely settled. But not only were the present occupiers permitted to come into possession during the silence of appellants, but during their continued silence this estate of 160 acres has increased from a value of $8,000 to a value of $20,000, and appellants are not merely demanding the recovery of a $20,000 estate but they also are demanding from the occupiers an accounting for rents and profits of more than $1,000 a year. And inasmuch as it is unquestionable that McDonald and the Fittons and the Hynes have all acted in good faith and have not only paid the full value of the fee at the time of their respective purchases but have greatly increased the value of the estate by improvements and cultivation, while the appellants have never invested a dollar and are not even remotely of the blood of Overton, the appeal of conscience is all on the side of the Hynes.

The other phase is the effect of the delay upon the state of the evidence respecting what occurred between 1849 and 1865. 16 Cyc. 163, 164. Joshua Overton died in 1849. Fidelia was devisee and executrix. Joshua's estate was closed in the probate court in 1852. Fidelia and her children remained in Posey county until 1856. They lived in neighboring counties in southern Indiana until the land was deeded to McDonald in 1865, whereupon Fidelia and her children, who were then all of age, left the state. The master finds that Fidelia, after Joshua's death, claimed and exercised the dominion of owner in fee of the 160-acre estate. As we have hereinabove noted, this finding is not very clearly supported by the testimony. The witnesses were old men, upwards of 70 years at the time of giving their testimony; but that would only make them lads in their teens when Joshua Overton died, and while his widow and stepchildren occupied the land between the time of Joshua's death and their departure from Posey county. This means that all of the people in the neighborhood of the land who were adults and who were conducting the business of the community in those days have long been dead. If in truth the Lukens children had notice of legal advice given to their mother that the deed to Walker, trustee, was void and that their mother had title in fee as devisee under Joshua's will; or, if in 1865 the children received a portion of the consideration paid by McDonald for the land; or if

without receiving any of McDonald's money they had notice of the terms of the sale to McDonald and remained silent—an estoppel in pais would have been created, which would at once have rendered the possession of McDonald and his successors impregnable, and no running of time would be necessary in their behalf. It seems probable that some one or more of the above supposititiously stated circumstances must have existed, for Fidelia and her children were living together in those days and the disposition of what seems to have been substantially all of the family property would have been a matter of too great family concern not to have been known to some or all of the children. Furthermore, the settled and universal belief of all the old people of the neighborhood (who now are mere carriers of a tradition) probably had some basis which is now obscured by time. In such circumstances the delay of 12 years seems to us unconscionable. It is not merely the ordinary 12 years from the time of a lawsuit back to the time of the transactions in question; but it is the 12 years intervening between the time of the lawsuit and a time when witnesses, who possibly were alive and in possession of important facts, were already at the verge of senility or death. When we note that more than half a century has elapsed between the transactions to be investigated and the beginning of the suit, we are impressed with the belief that the conduct of appellants in allowing 12 years to go by, during which their adversaries were resting in peace and taking no steps to investigate occurrences dating back to 1849 and during which much testimony was lost in all probability, was so unconscionable as to justify the chancellor in declining to heed their prayer.

The decree is affirmed.

NORTHERN PAC. RY. CO. v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. March 21, 1914.)

No. 4015.

(Syllabus by the Court.)

1. MASTER AND SERVANT (§ 13*)—HOURS OF SERVICE—REPORT OF EXCESSIVE SERVICE—OMMISSION OR MISTAKE IN.

An omission by a common carrier from a periodical report of the instances of excessive service of its employés, made and filed in good faith within the time prescribed therefor by the Interstate Commerce Commission pursuant to the amendment of section 20 of the act to regulate commerce (Act June 18, 1910, c. 309, § 14, 36 Stat. 555 [U. S. Comp. St. Supp. 1911, p. 1307]), of one or more instances that should have been included therein, or any mistake of law or fact made therein in good faith, does not subject the common carrier to liability for the penalties or forfeitures denounced by that amendment for a failure to file the periodical report.

[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

2. STATUTES (§§ 174, 175*)—CONSTRUCTION—NATURAL MEANING PREFERRED TO HIDDEN SIGNIFICATION.

The apparent and natural meaning of the terms of a statute is to be preferred to any curious recondite signification deduced by study, ingenuity, and strong desire.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 254, 266; Dec. Dig. §§ 174, 175.*]

3. STATUTES (§§ 174, 175*)—REASONABLE INTERPRETATION PREFERRED TO UNJUST AND OPPRESSIVE ONE.

A reasonable sensible interpretation of a statute should be preferred to an irrational signification that renders the law unjust and oppressive.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 254, 266; Dec. Dig. §§ 174, 175.*]

4. STATUTES (§§ 241, 263*)—PENAL STATUTE CREATING NEW OFFENSE—PERSONS AND ACTS DENOUNCED—RETROSPECTIVE CONSTRUCTION.

A penal statute which creates a new offense and prescribes the punishment for it must clearly state the persons and acts denounced.

An act or omission which is not clearly an offense by the expressed will of the legislative body before it is committed may not be made so after its commission by the introduction into the law of declarations, or by the expunging therefrom of words or terms, by the judiciary.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 322, 323, 344, 349; Dec. Dig. §§ 241, 263.*]

In Error to the District Court of the United States for the District of North Dakota; F. A. Youmans, Judge.

Prosecution of the Northern Pacific Railway Company for failing to correct an omission of an instance of excessive service of its employés in its monthly report. From a conviction, the railroad company brings error. Reversed and remanded.

Emerson Hadley, of St. Paul, Minn. (C. W. Bunn, of St. Paul, Minn., and Watson & Young, of Fargo, N. D., on the brief), for plaintiff in error.

Philip J. Doherty, Sp. Asst. U. S. Atty., of Washington, D. C. (Edward Engerud, U. S. Atty., of Fargo, N. D., on the brief), for the United States.

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

SANBORN, Circuit Judge. The railway company complains of a judgment of $500 against it for five fines of $100 each for failing for five successive days to correct an unintentional omission of an instance of excessive service of some of its employés from its monthly report of such instances, filed with the Interstate Commerce Commission on November 29, 1912.

The Interstate Commerce Commission, under the authority of the amendment of section 20 of the act to regulate commerce of February 4, 1887, chapter 104, 24 Stat. 386 (U. S. Comp. St. 1901, p. 3169), made June 18, 1910, and found in chapter 309, § 14, 36 Stat. 555 (U. S. Comp. St. Supp. 1911, p. 1305), made an order on June 28, 1911, that all carriers subject to the provisions of "An act to promote the safety of employés and travelers upon railroads by limiting the hours of service of employés thereon," commonly called the hours of

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

service act (Act March 4, 1907, c. 2939, 34 Stat. 1415 [U. S. Comp. St. Supp. 1911, p. 1321]), should "report within thirty days after the end of each month, under oath, all instances where employés subject to said act have been on duty for a longer period than that provided in such act," and it was for an innocent omission of one instance from one of these monthly reports that this action was brought. Section 20 of the act of 1887, as amended by Act June 29, 1906 (34 Stat. pp. 584, 593, c. 3591, § 7 [U. S. Comp. St. Supp. 1911, p. 1307]), authorized the Commission to require annual reports from each common carrier subject to the act of its capital stock issued, the amounts paid therefor, the manner of payment therefor, its dividends paid, its surplus fund, the number of its stockholders, its funded and floating debt, the cost and value of its property, franchises, and equipment, the number of its employés and the salaries paid each class, its accidents, earnings, receipts, expenditures, etc., and it empowered the Commission to require from each carrier specific answers to all questions upon which the Commission might need information. A subsequent portion of this section 20, as amended in 1910 (36 Stat. 556), read in this way:

"If any carrier, person, or corporation subject to the provisions of this act shall fail to make and file said annual reports within the time above specified, or within the time extended by the Commission for making and filing the same, or shall fail to make specific answer to any question authorized by the provisions of this section within thirty days from the time it is lawfully required so to do, such parties shall forfeit to the United States the sum of one hundred dollars for each and every day it shall continue to be in default with respect thereto. The Commission shall also have authority by general or special orders to require said carriers, or any of them, to file monthly reports of earnings and expenses, and to file periodical or special, or both periodical and special, reports concerning any matters about which the Commission is authorized or required by this or any other law to inquire or to keep itself informed or which it is required to enforce; and such periodical or special reports shall be under oath whenever the Commission so requires; and if any such carrier shall fail to make and file any such periodical or special report, within the time fixed by the Commission, it shall be subject to the forfeitures last above provided."

This quotation contains the only definition of the offense and the only specification of the penalties involved in this case. The offense is the failure "to make and file any such periodical * * * report within the time fixed by the Commission" and the penalties are "the forfeitures last above provided." The forfeitures last above provided are prescribed for the failure of the carrier to file in due time its annual report, which is required to set forth the vast mass of statistics and information required by the first portion of section 20, and for its failure to answer any specific question propounded by the Commission within the time lawfully prescribed for the answer, and these penalties are the forfeiture of $100 for each and every day the carrier shall continue to be in default with respect to the annual report or the answers to the questions. The judgment in this case was rendered upon the pleadings, and the material facts which they disclose are these: On October 29, 1911, an engineer, fireman, conductor, and two brakemen were called at 7:30 p. m. to take out a wrecker train at 8:10 p. m. from Jamestown, N. D., but it subsequently proved unnecessary to send that train out, and at 8:10 p. m. these employés were

released from duty, and notified that they would not be required for service until 10:35 p. m., and they rendered no service prior to that time, except that the engineer and fireman kept the fire in their engine alive. At 10:35 p. m. they took a train east from Jamestown to Mapleton, where they arrived and where their service ceased at 1:15 p. m., October 30, 1911, so that, unless they were in service between 8:10 p. m. and 10:35 p. m., October 29, 1911, their service was only 14 hours and 40 minutes, and they rendered no excess service. If, on the other hand, they were on duty between 8:10 p. m. and 10:35 p. m., October 29th, their continuous service exceeded the 16 hours limited by the hours of service act. It was conceded at the hearing in this court that the United States had sued the company, had recovered, and the company had paid, the penalty prescribed by the hours of service act for this excessive service, and that by that judgment the fact that these employés were on duty from 8:10 p. m., October 29th, until 1:15 p. m., October 30th, was rendered res adjudicata. On November 29, 1911, the railway company filed its monthly report, under oath, of the instances of hours of service of its employés on duty during October for longer periods than those named in the hours of service act, in the form and in accordance with the regulations of the Interstate Commerce Commission, and many such instances were disclosed therein. By reason of the abandonment of the wrecker train, the company did not consider or understand, when it made and filed this report, that it was required to report the instance which has been described, and its report was intended in good faith to be true and complete, and to embrace any and all instances where its employés were kept in service longer during the month of October than the times limited by the act of Congress, but it did not specify the instance of excessive service on which this suit is founded. The result is that the case, in brief, is this:

[1] The Commission lawfully required the company to file within 30 days after the end of each month a monthly or periodical report of all instances of hours of service of its employés on duty for a longer period than that named in the hours of service act. The twentieth section of the act to regulate commerce, as amended, fixed a penalty of $100 for each and every successive day of failure of the company to file such a periodical report. The company filed in good faith such a periodical report, under oath, within the time fixed, but unintentionally and by mistake omitted one instance of excessive service from its report which it should have included. Is such an omission a failure to file the periodical report which renders the company liable to the penalty of $100 for each successive day after the expiration of the 30 days within which the report is required to be filed? The court below answered this question in the affirmative, and in support of that conclusion counsel for the government contend that the mistake of the company here was a mistake of law, and not of fact, and for the purposes of this discussion and decision this contention may be admitted to be sound. They argue that the order of the Commission required a monthly report of all instances of excessive service, that the filing of the report of all instances but one was a failure to file a report of all instances, and therefore a failure to file the periodical

report which created a liability to the penalties prescribed by the act. But it is not true that a carrier that in good faith files an incorrect or incomplete periodical report, under oath, in due time, has failed to file any such periodical report. If it were, such a carrier would be liable to penalties for each of the instances of excessive service specified in such a filed report as much as for those omitted, and such a result is too intolerable and oppressive to be seriously contemplated. Counsel cite and review the cases that treat of the constitutionality of the hours of service act, of its worthy purpose, of the authority of the Commission to require the reports and of the duty of the courts to enforce the law (Baltimore & Ohio R. R. Co. v. Interstate Commerce Comm., 221 U. S. 612, 621, 31 Sup. Ct. 621, 55 L. Ed. 878; United States v. Yazoo & M. V. R. Co. [D. C.] 203 Fed. 159; United States v. Chicago, Milwaukee & Puget Sound Ry. Co. [D. C.] 195 Fed. 783), but they present no direct authority that the filing in good faith of an incomplete or incorrect report, affidavit, complaint, answer, or other such article required by law is a failure to file any such article which subjects the delinquent to a penalty denounced for such a failure. And there are many reasons why that proposition fails to commend itself to our judgment.

[2] A reasonable sensible meaning should be attributed to a statute in preference to one which is irrational and improbable. Madden v. Lancaster Co., 65 Fed. 188, 195, 12 C. C. A. 566, 573; Omaha Water Co. v. City of Omaha, 147 Fed. 1, 13, 77 C. C. A. 267, 279, 12 L. R. A. (N. S.) 736, 8 Ann. Cas. 614; Armour Packing Co. v. United States, 153 Fed. 1, 18, 21, 82 C. C. A. 135, 152, 155, 14 L. R. A. (N. S.) 400; Lafayette Co. v. Wonderly, 92 Fed. 313, 316, 34 C. C. A. 360, 363; Webber v. St. Paul City Ry. Co., 97 Fed. 140, 143, 38 C. C. A. 79, 82. The penalties denounced by section 20 of the act to regulate commerce as amended by the act of June 18, 1910 (36 Stat. 556), for the failure to file this monthly report, are the same as those prescribed by the same section for the failure of a carrier to file its annual report. They are $100 for each and every day the carrier shall continue to be in default with respect thereto. The annual report requires such a vast amount of information, so many statistics and details, that it is improbable, if not impossible, that any carrier could ever make such a report without some unintentional omission of information required and some mistakes in the information given. If the failure to file an annual report without such an omission and without any mistake or misinformation therein is such a failure to file an annual report as makes the carrier liable for the penalties, it must be difficult, if not impossible, for any carrier to escape them, and it is incredible that the Congress intended to subject carriers to the forfeitures prescribed for the failure to file these annual reports on account of such inadvertent omissions or mistakes in them. If the Congress did not so intend in the case of the annual report, it probably did not have that intention in the case of the monthly report, for the same penalties are prescribed in the same section for the failure to file each.

The penalties are $100 for each and every day the default in filing the report continues. If these penalties are incurred for failure to

file the report, as the statute reads, the act of Congress is neither unreasonable nor excessively drastic, for the carrier knows, or may readily ascertain, whether or not it has filed its report in due time, and hence it is easy for it to prevent any continuing default. But, if these penalties are incurred by its innocent omission from or mistake in the specifications of excessive service in the report filed by the carrier, the statute becomes irrational and unduly oppressive, for the carrier is not aware and will not have notice of such unintentional omissions and mistakes when it makes its report, and yet for each omission or mistake it may incur a penalty of $100 every day for at least 360 days, or $36,000, and thus an honest error of law or mistake of fact in making the report may easily entail a penalty of $36,000, while a willful delay to file the report immediately and under oath would be limited to $100 or $200. Indeed, if the construction claimed by counsel for the government is the true interpretation of this act, the United States could recover of the defendant for its omission in this case $100 for each day between November 30, 1911, and September 14, 1912, when the complaint in this case was filed, or $28,900. Such an interpretation of this act of Congress renders it so unjust and oppressive that we cannot think that Congress intended that it should receive such a construction.

Again, this amendment of June 18, 1910 (36 Stat. 556), created and penalized a new offense, the failure of a carrier to file its monthly or periodical report of instances of the excessive service of its employés within the time fixed by the Commission.

[4] A statute which creates a new offense and prescribes its punishment must state clearly the persons and acts denounced. An act which was not an offense by the expressed will of the legislative body before it was done may not be justly or lawfully made so by construction after it is committed, either by the introduction into the statute of declarations, or the expunging therefrom of words or terms, by the judiciary. Congress might have modified this clause which describes and limits the offense, to wit: "If any such carrier shall fail to make and file any such periodical or special report within the time fixed by the Commission, it shall be subject to the forfeitures last above provided," so that it would have read: "And if any such carrier shall fail to make and file any such periodical or special report within the time fixed by the Commission, or shall omit to specify in any such report it files any instance of excessive service required to be reported therein, it shall be subject to the forfeitures last above provided." But it did not do so, the legal presumption is that it did not intend to do so, and it is not the province of the judiciary thus to amend the statute and by such amendment to create and punish another class of offenses. Nothing comes to mind more appropriate to the determination of the question here at issue than the familiar words of Chief Justice Marshall:

"Where there is no ambiguity in the words, there is no room for construction. The case must be a strong one, indeed, which would justify a court in departing from the plain meaning of words, especially, in a penal act, in search of an intention which the words themselves did not suggest. To determine that a case is within the intention of a statute, its language must authorize us to say so. It would be dangerous, indeed, to carry the principle

that a case which is within the reason or mischief of a statute is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated." United States v. Wiltberger, 18 U. S. (5 Wheat.) 76, 95, 5 L. Ed. 37; United States v. Ninety-Nine Diamonds, 139 Fed. 961, 964, 72 C. C. A. 9, 12, 2 L. R. A. (N. S.) 185; First National Bank of Anamoose v. United States, 206 Fed. 374, 376, 124 C. C. A. 256, 46 L. R. A. (N. S.) 1139.

[3] The natural apparent meaning of the terms of a statute should always be preferred to any recondite signification discovered only by study, ingenuity, and strong desire. United States v. Ninety-Nine Diamonds, 139 Fed. 961, 964, 72 C. C. A. 9, 12, 2 L. R. A. (N. S.) 185; First Nat. Bank of Anamoose v. United States, 206 Fed. 374, 376, 124 C. C. A. 256, 46 L. R. A. (N. S.) 1139. The natural apparent meaning of this statute is that Congress relied, and intended to rely, upon the oath to the periodical report and the penalty for perjury in willfully falsely making it, as security for the completeness and truth of the report, and upon the penalty for the failure to file it as security for its filing alone. The terms of the statute are plain, and they fail to declare the innocent omission of an instance of excessive service from or the mistake in a report an offense punishable by the fines it specifies. Reason and authority alike teach that the act of omitting from a periodical report filed in good faith an instance or item which should have been included therein, or a mistake in the information which the report contains, is not the offense of failing to file any such periodical report. United States v. Four Hundred Twenty Dollars (D. C.) 162 Fed. 803, 804; Bonnell v. Griswold, 80 N. Y. 128, 132, 133; Pier v. Hanmore, 86 N. Y. 95, 100; Matthews v. Patterson, 16 Colo. 215, 26 Pac. 812, 813; Whitney Arms Co. v. Barlow, 63 N. Y. 62, 20 Am. Rep. 504.

And the conclusion is that an omission by a carrier from the periodical report of the instances of excessive service of its employés made and filed in good faith within the time prescribed therefor by the Interstate Commerce Commission under the amendment of section 20 of the act to regulate commerce (36 Stat. 556), of one or more instances that should have been included therein, or any mistake of law or fact therein made in good faith, does not subject the carrier to liability for the penalties or forfeitures denounced by that amendment for the failure to file a periodical report.

The judgment below must therefore be reversed, and the case must be remanded to the court below for further proceedings not inconsistent with the views expressed in this opinion; and it is so ordered.

UNITED STATES v. MISSOURI PAC. RY. CO.

(Circuit Court of Appeals, Eighth Circuit. March 21, 1914.)

No. 4013.

(Syllabus by the Court.)

1. MASTER AND SERVANT (§ 13*)—VIOLATION OF HOURS OF SERVICE ACT—DEFENSE.

The proviso of section 3 of the "Act to promote the safety of employés and travelers upon railroads by limiting the hours of service of employés thereon," of March 4, 1907 (Act March 4, 1907, c. 2939, 34 Stat. 1415 [U. S. Comp. St. Supp. 1911, p. 1321]), commonly known as the hours of service act, exempts a common carrier from liability for the penalty specified therein when, in a case of casualty, unavoidable accident, or the act of God, it necessarily requires or permits a telegraph operator, train dispatcher, or other employé of their class to serve longer than the time limited for his service by section 2 of that act.

[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.]

2. MASTER AND SERVANT (§ 13*)—VIOLATION OF HOURS OF SERVICE ACT—DEFENSE.

An operator at a day office was in service at a station where the general limit of his service expired at 10 p. m. December 11th, and the limit of his four hours excess service in case of emergency at 2 a. m. December 12th. An unavoidable accident caused a wreck before 10 p. m. December 11th, and necessitated the continuous service of the operator until the wreck could be cleared. A relief operator could have been procured at the time of the accident, but the company expected to clear the wreck by 11 p. m. December 11th. Every effort to clear it at once was made, but unforeseen and unavoidable difficulties delayed the clearance until 5 a. m., and necessitated the operator's continued service until 6:35 a. m. December 12th. As soon as the delay was known, defendant attempted to procure a relief operator, but none could be found.

Held, these facts fail to deprive the defendant of its defense to an action for the penalty for the violation of the hours of service act that the continued service of the operator was necessarily rendered in a case of casualty or unavoidable accident.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 14; Dec. Dig. § 13.*]

3. PLEADING (§ 214*)—VIOLATION OF HOURS OF SERVICE ACT—DEMURRER TO ANSWER—EFFECT AS ADMISSION.

A demurrer to an answer, in which the defendant alleged "that through no fault or negligence of the defendant company, or its agents or servants, a derailment occurred on the line of the defendant," admits that, however high the degree of foresight and diligence required in relation to the derailment, the defendant exercised that degree, for so only could it be without fault or negligence.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 525–534; Dec. Dig. § 214.*]

4. STATUTES (§§ 174, 175, 190*)—CONSTRUCTION.

The apparent and natural meaning of the terms of a statute is always to be preferred to any curious hidden signification deduced by the reflection and ingenuity of acute and powerful intellects. Where the language of a statute is unambiguous, and its meaning plain, no room is left for construction.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 254, 266, 269; Dec. Dig. §§ 174, 175, 190.*]

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

5. STATUTES (§ 185*)—CONSTRUCTION—AMBIGUITY.
Where the legislative body makes no exception to a general and clear enactment, the conclusive presumption is that it intended to make none, and it is not the province of the courts to do so.
[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 264; Dec. Dig. § 185.*]

6. STATUTES (§ 184*)—CONSTRUCTION—PURPOSE.
A rational practical interpretation of a statute, one which tends to promote the accomplishment of the purpose of the law, should be preferred to one which is unreasonable or impracticable, or that would hinder the accomplishment of that purpose.
[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 262; Dec. Dig. § 184.*]

7. STATUTES (§ 241*)—PENAL STATUTES—ESSENTIALS.
A penal statute which creates a new crime and prescribes a punishment for it must clearly state the persons or acts denounced. A person who, or an act which, is not by the expressed terms or plain meaning of the law clearly within the class of persons or within the class of acts it denounces will not sustain a conviction.
[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 322, 323; Dec. Dig. § 241.*]

Hook, Circuit Judge, dissenting.

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

Action by the United States against the Missouri Pacific Railway Company, for violation of the hours of service act. From a judgment for defendant the United States brings error. Affirmed.

Philip J. Doherty, of Washington, D. C. (Mr. Fred Robertson, of Atwood, Kan., on the brief), for the United States.

W. P. Waggener and James M. Challiss, both of Atchison, Kan., for defendant in error.

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

SANBORN, Circuit Judge. The United States complains that the court below overruled a demurrer to the answer of the defendant and rendered judgment in the defendant's favor in an action against it for an alleged violation of the hours of service act. The plaintiff alleged in its complaint that the defendant required and permitted its telegraph operator at Meneger Junction, Kan., an office and station operated only during the daytime, to remain on duty during the 24 hours, commencing at 7 o'clock a. m. December 11, 1911, more than 13 hours, in violation of "An act to promote the safety of employés and travelers upon railroads by limiting the hours of service of employés thereon," approved March 4, 1907, 34 Stat. 1415. The defendant answered that its operator at that station was on duty on December 11, 1911, from 7 a. m. until 12 noon and from 1 p. m. until 6 p. m. and from 7 p. m. on that day until 6:35 a. m. on December 12, 1911; that his hours of service in excess of 13 hours were due to this casualty and unavoidable accident; that through no fault or negligence of the defendant, its agents or servants, a derailment occurred on the main line of its railroad at

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

Nearman, Kan., which made it necessary to detour its trains from Leavenworth to Kansas City over the defendant's branch line through Meneger Junction; that the defendant used every effort to clear its track, and expected to have it cleared by 11 p. m. on December 11th at the latest, but unavoidable difficulties delayed its clearing until 5 a. m. December 12th; that there was no telegrapher on its branch line, on its main line, or on its Omaha Division that could be sent to relieve the operator at Meneger Junction at that time; that after the unavoidable delay an attempt was made to secure a relief operator, but none could be found; that at the time the wreck occurred it might have been possible to secure such an operator, but that the defendant did not know at that time that it would require so long to clear the main line. The plaintiff demurred to this answer, and counsel for the United States contend that the decision overruling that demurrer was erroneous: (1) Because the proviso of section 3 of the hours of service law is inapplicable to telegraphers, train dispatchers, and others of their class who fall under the terms of section 2 of the act; (2) because the failure of the defendant, under the circumstances pleaded in the answer to secure a relief operator, constituted no excuse for keeping the regular operator on duty after the expiration of the 13 hours of service specified for him in section 2 of the act; and (3) because the derailment pleaded in the answer was not such a casualty or unavoidable accident as justified the defendant in keeping the operator on duty beyond the 13 hours of service specified in the act.

The parts of the act material to the determination of these questions read in this way:

"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 or remain on duty for a longer period than sixteen consecutive hours, * * * 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: 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 in 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. * * *

"Sec. 3. That any such common carrier, or any officer or agent thereof, requiring or permitting any employé to go, be, or remain on duty in violation of the second section hereof, shall be liable to a penalty of not to exceed five hundred dollars for each and every violation. * * * Provided, that the provisions of this act shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employé at the time said employé left a terminal, and which could not have been foreseen. * * *"

[1, 2] Are the provisions of section 2 which relate to telegraph operators, train dispatchers, and other employés of their class excepted from the declaration of the proviso of section 3, "that the provisions of this act shall not apply in any case of casualty or unavoidable accident,

or the act of God?" Counsel for the United States contend that this question should be answered in the affirmative because section 2 provides that telegraph operators and train dispatchers may serve "in case of any emergency" four hours longer than the time generally fixed for their services when there is no emergency, and they argue that this provision for four hours excess service limits all excess service by them, whether demanded by an emergency, a casualty, an unavoidable accident, or an act of God; that casualties, accidents, and grave catastrophies resulting from landslides, floods, and other external incidents bear more heavily upon other employés than upon telegraphers, and that the four-hour limitation in case of an emergency would become ineffective if any casualty, unavoidable accident, or act of God would relieve telegraphers from all limitation, of the hours of service. But there are many emergencies in the operation of railroads which are neither caused by nor are they casualties, unavoidable accidents, or acts of God, and the application of the four-hour limitation of excessive service to such emergencies would give it ample scope and effect. Moreover, even if the meaning of the word "emergencies" were identical with the aggregate meanings of the words "casualties, unavoidable accidents and acts of God," neither of the two provisions under consideration would be ineffective and they would be only cumulative. Each would have force.

The chief object of the Congress in enacting the proviso in section 3 was to promote and insure the safety of travelers and employés on railroads in cases of casualties, unavoidable accidents, and grave catastrophies affecting the operation of railroads. The danger to travelers and employés upon trains running upon the roads from the absence of the service of telegraphers and train dispatchers who control their movements is vastly greater than from the absence of the service of any other class of employés, and that fact is a persuasive reason why the Congress excepted them, as well as all other employés, from the limitation of their hours of service fixed by section 2 of the act in every case of a casualty, an unavoidable accident, or an act of God. That Congress was of the opinion that it was more important to insure their continued service than that of any other class of employés under such circumstances is demonstrated by the fact that it permitted their service in any emergency whatever four hours longer than the time generally limited for their service, while it permitted no such excess of service to other employés in any case except in a case of casualty, unavoidable accident, or act of God. There are other reasons not less convincing why the position of counsel for the government is not tenable. If the parts of this act of Congress that are not relevant to the question under consideration are laid aside, the clear terms of section 2 prohibit the service of telegraph operators and train dispatchers in day offices more than 13 hours, and in cases of emergency more than 4 hours longer in 24 hours, prohibit the service of such operators and dispatchers in night and day offices more than 9 hours and in case of emergency more than 4 hours more in 24 hours, and prohibit the service of other employés more than 16 hours in 24 hours. The expressed terms of section 3 make every common carrier liable for a penalty of $500 for every violation of section 2, and declare that none of the pro-

visions of the act shall apply in any case of casualty, unavoidable accident, or act of God. If none of the provisions of the act apply in any case of casualty, unavoidable accident, or act of God, then the provisions of the act which prohibit the service of telegraph operators and train dispatchers in day offices for a longer period than 13 hours, and in case of emergency 4 hours more in 24 hours, do not apply in such cases, and so it is that the unambiguous terms of the act expressly declare that the limitations of the hours of service of telegraphers and train dispatchers in section 2 have no application in any case of casualty, unavoidable accident, or act of God.

[4] The apparent and natural meaning of the terms of a statute is always to be preferred to any curious hidden signification deduced by the reflection and ingenuity of acute and powerful intellects, and where the language of a statute is unambiguous and its meaning is plain, no room is left for construction. United States v. Ninety-Nine Diamonds, 139 Fed. 961, 964, 72 C. C. A. 9, 12, 2 L. R. A. (N. S.) 185; First National Bank of Anamoose v. United States, 206 Fed. 374, 124 C. C. A. 256, 46 L. R. A. (N. S.) 1139.

Congress had the right and the power to prohibit the application of all or of only a part of the provisions of the act in cases of casualties, unavoidable accidents, and acts of God. It enacted "that the provisions of this act shall not apply in any case of casualty or unavoidable accident or the act of God," and it made no exception. The construction for which counsel for the government contends requires the amendment of this prohibition by the interpolation of an exception therein so that it will read:

"That the provisions of this act, except those in section 2, which relate to the hours of service of the operators and train dispatchers and others of their class, shall not apply in any case of casualty, or unavoidable accident or the act of God."

[5] But where the legislative body makes no exception to a general and clear declaration of its will, the conclusive presumption is that it intended to make none, and it is not the province of the courts to do so. Madden v. Lancaster Co., 65 Fed. 188, 195, 12 C. C. A. 566, 573; Omaha Water Company v. City of Omaha, 147 Fed. 1, 13, 77 C. C. A. 267, 279, 12 L. R. A. (N. S.) 736, 8 Ann. Cas. 614; Armour Packing Co. v. United States, 153 Fed. 1, 18, 21, 82 C. C. A. 135, 152, 155, 14 L. R. A. (N. S.) 400; Lafayette Co. v. Wonderly, 92 Fed. 313, 316, 34 C. C. A. 360, 363; Webber v. St. Paul City Ry. Co., 97 Fed. 140, 143, 38 C. C. A. 79, 82.

[6] Another approved rule of construction is that a rational, sensible and practical interpretation of a statute, one which will permit the accomplishment of the purpose of the act, should be preferred to one which is unreasonable or impracticable, or that would hinder or retard the accomplishment of that purpose. United States v. Ninety-Nine Diamonds, 139 Fed. 961, 965, 72 C. C. A. 9, 13, 2 L. R. A. (N. S.) 185; Stevens v. Nave-McCord Mercantile Co., 150 Fed. 71, 75, 80 C. C. A. 25, 29; American Bonding Co. v. Pueblo Investment Co., 150 Fed. 17, 27, 80 C. C. A. 97, 107, 9 L. R. A. (N. S.) 557, 10 Ann. Cas. 357; McPhee & McGinnity Co. v. Union Pacific R. Co., 158 Fed. 5, 17, 87 C. C. A. 619, 631. The purpose of the provision of section 3,

"that the provisions of this act shall not apply in any case of casualty or unavoidable accident or the act of God," evidently was to relieve the common carriers and their employés in such cases from all the provisions of the act limiting the hours of service of the latter, and the reason for the provision is plain. Congress perceived, and reflection will convince any one, that the protection, safety, and welfare of travelers and employés upon railroads require that in such cases hard and fast rules shall yield to the demands of humanity and the necessities of the cases. The times when such casualties will occur and when such cases will arise cannot be foreseen. An unavoidable accident is as likely to occur within the last as within the first 10 minutes of the limited 16 hours of the service of a trainman. It is as likely to occur within the last five minutes of the limited four hours excessive service of a telegraph operator as in the first minutes of his limited 9 or 13 hours of service. It is conceded that carriers and all their employés, except operators, train dispatchers, and members of their class, are exempt from the limitation of their hours of service in every case of casualty, unavoidable accident, or act of God. But it is more important, more essential to the protection of the safety and welfare of travelers and employés in cases of this character, that carriers and their telegraph operators should be relieved from the restrictions of their hours of service than that carriers and their other employés should be thus relieved. A telegraph operator in a day office is often the only operator within many miles of his station. It is often impossible and generally much more difficult speedily to find and bring a substitute to his place of service than it is to provide a substitute for an employé of any other class. A flood may wash out a bridge, a landslide may cover a railroad track with rocks and earth, a rail may break, and a railroad wreck may occur within a few minutes of the end of the 17 hours which marks the utmost limit of the service permitted an operator under section 2 of the act. Passenger trains and freight trains may rush towards the wreck, the lives, limbs, and suffering of men and women at the wreck, the stoppage of coming trains, and the prevention of greater injuries may be at stake on the continued service of the operator for many hours. It is incredible that the Congress intended to prohibit, or did prohibit, such extended service by operators, train dispatchers, and others in their class in cases of such casualties and unavoidable accidents. The object of the statute, the safety of travelers and employés, the necessities of the cases of railroad casualties and accidents, the demands of humanity, and a rational and practical interpretation of the statute converge with compelling force to convince that the Congress intended what it expressed, that "the provisions of the act," all the provisions of the act, those relating to the hours of service of telegraphers and train dispatchers, as well as those relating to the hours of service of other employés, "shall not apply in any case of casualty or unavoidable accident or the act of God."

[7] There is still another rule of construction that persuades to the same conclusion. This is a suit for the collection of a penalty of $500 for a violation of this act of Congress. The act created and denounced a new offense. A statute which creates a new offense and prescribes its punishment must clearly state the persons and the acts

denounced. An act which is not clearly an offense by the expressed will of the legislative body before it was done may not be lawfully or justly made such by construction after it is committed, either by the interpolation of expressions, or by the expunging of its words by the judiciary. And as this statute not only failed clearly to denounce as an offense requiring or permitting an operator or train dispatcher to serve beyond the hours limited in section 2 in case of a casualty, an unavoidable accident, or the act of God, but positively declared that in such a case the provisions of the act which denounced such excessive service, as an offense did not apply, the defendant may not lawfully be punished for such an act. United States v. Wiltberger, 18 U. S. (5 Wheat.) 76, 96, 5 L. Ed. 37; United States v. Ninety-Nine Diamonds, 139 Fed. 961, 964, 72 C. C. A. 9, 12, 2 L. R. A. (N. S.) 185; First National Bank of Anamoose v. United States, 206 Fed. 374, 376, 124 C. C. A. 256, 46 L. R. A. (N. S.) 1139.

And the result is that the plain terms of the statute, the reason of the case, and the rules and authorities upon the construction of statutes to which reference has been made have convinced that the proviso of section 3 of the "Act to promote the safety of employés and travelers upon railroads by limiting the hours of service of employés thereon," approved March 4, 1907, commonly known as the hours of service act, exempts a common carrier from liability for the penalty specified therein when in a case of casualty, unavoidable accident, or the act of God it necessarily requires or permits a telegraph operator, train dispatcher, or other employé of their class to serve beyond the time limited for his service by section 2 of that act.

The next contention of counsel for the government is that the answer destroys the defense that the derailment therein pleaded presented a case of an unavoidable accident because it pleads no sufficient excuse for the defendant's failure to furnish another operator to relieve the operator in charge at Meneger Junction, in other words, that the answer fails to plead that the defendant was not negligent in this regard. But this is not an action for the negligence of the company in failing to procure a relief operator within a reasonable time. It is an action for requiring the service of the operator in charge more than 13 or 17 hours, in violation of section 2 of the act, and the answer is that this was a case of a casualty or unavoidable accident, and that the prohibition of requiring the operator's service more than 13 hours, or more than 17 hours, is inapplicable.

Again, if the penalty here sought could have been recovered on account of the negligence of the defendant in securing a relief operator, no such negligence was charged or pleaded. All persons are presumed to discharge their duties faithfully until the contrary appears, and there was therefore a legal presumption that the defendant exercised due diligence to procure such a relief operator and this presumption is sustained by these facts, which are alleged in the answer and admitted by the demurrer. The 13 hours limited by section 2 of the act for the service of the operator expired at 10 p. m. December 11th, and the 4 excess hours in case of an emergency expired on December 12th at 2 a. m. During the hours limited for this service, and prior to 10 p. m. December 11th, an unavoidable accident occurred

which exempted carrier and operator alike from these limitations of the operator's hours of service. The accident caused a wreck which made it necessary to detour trains from Leavenworth to Kansas City through the station of the operator and to keep him in service until the wreck was cleared. Every possible effort was made to clear away the wreck at once. When the wreck occurred the defendant expected to clear it by 11 p. m. December 11th, which would have been 3 hours within the 17 hours of service permitted in case of no accident. The company could have procured a relief operator at the time the wreck occurred, but it did not know and could not foresee that one would be necessary. It expected and believed that the wreck would be cleared by 11 o'clock. Subsequent unavoidable difficulties delayed the clearance until 5 a. m. December 12th, and made the continuous services of the operator necessary until 6:35 a. m. of that day. After the unavoidable delay became known, the defendant attempted to procure a relief operator, but none could be found. There was no evidence of culpable negligence in the fact that no effort was made to procure a relief operator before the unavoidable delay was known or could be foreseen, because at that time the evidence and expectation were that the clearance of the wreck would relieve the operator before the 17 hours expired. There was no evidence of negligence, but proof of diligence in the fact that as soon as the delay was known, an attempt was made to obtain a relief operator, though none could be found, and the conclusion is that there was nothing in the answer to deprive of its validity the defense that this was a case of an unavoidable accident which made the continued service of the operator necessary. United States v. Southern Pacific Co., 209 Fed. 562, 126 C. C. A. 384.

[3] Finally, counsel for the United States insist that the unavoidable accident, the derailment pleaded in the answer, was not a casualty or an unavoidable accident because the defendant failed to use due diligence to avoid it, and they quote this sentence from the opinion of this court in United States v. Kansas City Southern Ry. Co., 202 Fed. 828, 833, 121 C. C. A. 136, 141:

"To bring itself within the exceptions stated, the carrier must be held to as high a degree of diligence and foresight as may be consistent with the object aimed at, and the practical operation of its railroad."

But counsel are estopped from making this contention by their demurrer which admits this averment of the answer, "that through no fault or negligence of the defendant company, its agents or servants, a derailment occurred on the line of the defendant," and this is an averment that, however high the degree of diligence and foresight required in regard to this derailment, the defendant exercised that degree, for so only could it have been without fault or negligence.

The court below committed no error in overruling the demurrer to the answer and the judgment below is affirmed.

HOOK, Circuit Judge, dissents.

CROWDER v. ALLEN-WEST COMMISSION CO.

(Circuit Court of Appeals, Eighth Circuit. March 30, 1914.)

No. 4036.

(Syllabus by the Court.)

1. BANKRUPTCY (§ 312*)—DISALLOWANCE OF CLAIM—GROUNDS—FRAUD CONNECTED WITH PRIOR COMPOSITION.

In 1899 H. made a composition agreement with his creditors and an agreement with A., one of them, which was unknown to the others, to pay his claim in full in consideration of his loan to H. of the money required to pay the other creditors the composition percentage of their claims, and in 1910 he was adjudged a bankrupt. *Held*, these facts furnish no ground for the disallowance of A.'s claim against the estate of the bankrupt because the composition creditors never rescinded the voidable composition and had no cause of action against A., and H., the debtor, had voluntarily paid, after the execution of the composition, the moneys loaned him by A. to pay the other creditors.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 496–500; Dec. Dig. § 312.*]

2. COMPOSITIONS WITH CREDITORS (§§ 13, 22, 29*)—ENFORCEMENT—RESCISSION.

Such a composition agreement, while executory, is not enforceable and after execution is voidable, not void, and creditors may rescind it and return, if practicable, to their former position, but they have no other remedy. The debtor may recover the excess above the composition percentage which he pays to the preferred creditor before the execution of the composition or the excess which he is compelled to pay thereafter, but he may not recover the excess which he voluntarily pays it thereafter.

[Ed. Note.—For other cases, see Compositions with Creditors, Cent. Dig. §§ 23–37, 64–67, 87–94; Dec. Dig. §§ 13, 22, 29.*]

3. CHATTEL MORTGAGES (§ 6*)—STIPULATIONS OF AGENCY—OPERATION AND EFFECT.

A mortgage of merchandise in use in trade and other property in Arkansas, which contains stipulations that the mortgagor's property is conveyed and surrendered to the possession of the mortgagee, that the mortgagor is to act as the agent of the mortgagee in the sale of the stock of merchandise on hand and to be purchased, that he is the agent and representative of the mortgagee in everything pertaining to the business, and that he will make statements and reports of the business and property to the mortgagee as requested, is not an absolute conveyance of the property to the mortgagee and the establishment of the relation of principal and agent between the mortgagee and mortgagor, but is, notwithstanding the stipulations regarding agency, a mortgage only.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 23–41; Dec. Dig. § 6.*]

4. BANKRUPTCY (§ 312*)—DISALLOWANCE OF CLAIM—FRAUD.

H., an insolvent debtor, made false statements of his financial condition to creditors and commercial agencies and failed to state his debt to his largest creditor from time to time between August, 1899, and December, 1910, when he was adjudged a bankrupt. A., his largest creditor, knew he was insolvent, but hoped and believed that by loaning him more money it could enable him to make his business so prosperous that he could and would pay his debts. It continued to loan him money to pay his other creditors and to carry on his business until his debt to it had increased from $7,730.00 on September 1, 1901, to $238,835.40 more than the value of the security it had obtained for it, in December, 1910. Meanwhile it had taken three mortgages on his property to secure his debt to

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

it which it had recorded. It had never stated in response to inquiries by mercantile agencies, creditors of H., or others, the amount of his debt to it or its estimate of his financial condition, and had never made any false statements about these matters but had refrained from stating his indebtedness to it or its view of his financial condition. *Held*, A. had not been guilty of any breach of duty to, deceit of, or fraud upon any of the other creditors of Hawks which could or ought to estop it from proving its unsecured debt against the estate of Hawks and sharing in the distribution of its proceeds.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 496–500; Dec. Dig. § 312.*]

5. BANKRUPTCY (§ 312*) — DISALLOWANCE OF CLAIM — FRAUD — BREACH OF DUTY.

A creditor must have been guilty of some moral turpitude or some breach of duty whereby other creditors were deceived to their damage to constitute such a fraud as will estop him from sharing with them in the distribution of the proceeds of the estate of his debtor in bankruptcy. A willful intent to deceive or such negligence as is tantamount thereto is an essential element of such an estoppel.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 496–500; Dec. Dig. § 312.*]

6. BANKRUPTCY (§ 312*)—DISALLOWANCE OF CLAIM—BREACH OF DUTY—FIDUCIARY RELATION.

A creditor of an insolvent debtor is a competitor of his other creditors. He stands in no fiduciary or contractual relation to them, and he owes them no duty to inform them of his debtor's financial condition or of the amount of his indebtedness to him.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 496–500; Dec. Dig. § 312.*]

Appeal from the District Court of the United States for the Eastern District of Arkansas; Jacob Trieber, Judge.

The claim of the Allen-West Commission Company against the estate of J. M. Hawks, bankrupt, was allowed by the District Court of the United States for the Eastern District of Arkansas, in 204 Fed. 309, and T. J. Crowder, trustee in bankruptcy of J. M. Hawks, bankrupt, appeals. Affirmed.

The trustee in bankrupty of the estate of J. M. Hawks appeals from the allowance by the court below of the unsecured claim of the Allen-West Commission Company for $238,835.40. Hawks was adjudged a bankrupt on December 30, 1910, the property of his estate has been sold for some less than $100,000, and the claims of other creditors aggregate about $125,000. The contention of the trustee is that the claim of the commission company should be disallowed because from 1899 until 1910 it conspired with Hawks to conceal his indebtedness to maintain his credit and thereby to defraud his other creditors. The salient facts established in the case are these: The commission company was a cotton factor engaged in the business of loaning money to Hawks and other merchants in the country to enable them to advance money to their customers who were raising cotton so that they could control the shipment of the cotton in their respective communities and send it to the commission company, which sold it on commission and applied the proceeds to the respective debts of these merchants. On August 1, 1899, Hawks was insolvent, and his 27 creditors, one of whom was the commission company, made a composition with him whereby they released him from his debts to them set forth in the composition agreement upon the subsequent payment to them of 40 per cent. of their claims. On August 10, 1899, the commission company and Hawks made a secret contract that the former would loan him the money to pay this 40 per cent. to his other creditors and that he would

pay his debt, which amounted to $3,987.57, to the commission company in full. The commission company loaned Hawks the money, and with it he paid all his other creditors 40 per cent. of his debts to them, and on August 31, 1899, he made a mortgage to that company on a lot he owned in Reyno, Ark., his stock of merchandise valued at $2,500, his store fixtures, 5 horses, 11 mules, his cotton crop on 300 acres, his corn crop on 25 acres, his farm implements, notes and accounts to secure the payment to the commission company of his debt to it of $3,987.57, of a note of $2,500 which he had signed with A. M. Dudgeon and Joseph Dudgeon, of the amounts it should advance to him for all purposes, including its advances to him to pay the 40 per cent. of the claims of the other creditors pursuant to the contract of August 10, 1899, which was specifically referred to in the mortgage and made a part thereof. This mortgage recited that the commission company had agreed to advance money to Hawks to pay these creditors and to purchase goods, and it contained an agreement that Hawks then surrendered and the commission company took possession of the mortgaged property; that Hawks was to act as the agent of the company in gathering and marketing the crops; that in the sale of the merchandise on hand and to be purchased, and in everything pertaining to the business, he was the agent and representative of the commission company; that he was to ship the cotton he picked, or purchased, or received, to the commission company, to be sold by it on account; and that he was to make statements of the business to the commission company as often as requested. The conditions of the mortgage were that if he paid the company the sums it advanced, with 8 per cent. interest, on or before January 1, 1900, and performed the agreement of August 10, 1899, then the mortgage should be void; but that if he failed to perform any of his covenants contained therein, or if he should purchase goods or supplies contrary to the instructions or desire of the company, then it should have the right to take possession of all the property mortgaged and all of the property purchased by Hawks, to sell the same and to apply the proceeds to the payment of Hawks' debt to it, returning the balance to him. The mortgage was speedily recorded, and the commission company continued to loan money to Hawks, to receive and sell his cotton, and to apply the proceeds to the payment of his debt to it until his bankruptcy in December, 1910. The lien of this mortgage of August, 1899, expired, as against other creditors, in 1904. The debt of Hawks to the commission company specified in the composition agreement and the debt for his advance to pay the 40 per cent. to pay the other creditors was paid prior to 1904 by the lawful application of the payments upon the account from the sales of cotton shipped by Hawks to the commission company prior to that time, but by agreement of the parties, and by payment of interest, his debt on account of the Dudgeon note survived and became a part of the claim of the commission company against his estate in bankruptcy.

On May 13, 1908, Hawks mortgaged to the commission company all the real estate he had to secure the payment of the Dudgeon note and his debt to the commission company on open account; on August 6, 1910, he mortgaged to it two other pieces of real estate for the same purpose, and these mortgages were recorded soon after their respective dates.

During the 11 years between the composition in August, 1899, and the bankruptcy in December, 1910, there was a voluminous correspondence between Hawks and the commission company, the burden of which was sharp protests by the commission company against Hawks' large and increasing debt to it and repeated advice and requests that he contract his business and pay his debts. But Hawks increased his business until he was operating several stores. He bought and shipped cotton in large quantities to the commission company and bought and sold other merchandise at his stores. He paid all his other mercantile creditors with the money derived from the sales at his stores and from the money advanced to him by the commission company until in December, 1910, his indebtedness to that company had risen to $250,000, and it discovered by an audit of his books that he was owing large amounts to other creditors, when it ceased to honor his drafts and he was adjudged a bankrupt. From the date of the composition to the bankruptcy he was continuously insolvent, but the commission company hoped and believed that by advancing him more money it could enable him to make his business so profitable that he could and

would pay his debt to it and his debts to other creditors. In this belief it permitted his indebtedness to it to become the following amounts at the dates specified: September 1, 1900, $7,730; September 1, 1901, $53,624.58; September 1, 1902, $61,733.07; September 1, 1903, $63,337.17; September 1, 1904, $83,655.57; September 1, 1905, $98,117.17; September 1, 1906, $105,283.58; September 1, 1907, $134,282.58; September 1, 1908, $148,560; September 1, 1909, $176,714.48; September 1, 1910, $202,242.43; December 1, 1910, $254,490.

On its request Hawks made many reports of his business to the commission company during these 11 years, but he did not truthfully state to it the amount of his indebtedness to other creditors. He made reports to commercial agencies and other creditors, but he never truthfully told them the amount of his indebtedness to the commission company. The commission company knew that he did not state to others his indebtedness to it, and, while it stated on inquiry that he was indebted to it, it always refrained from telling to any one during that time the amount of his indebtedness to it. Nevertheless, it made no false statement about this matter or about the property or financial standing of Hawks. For example, in reply to an inquiry about selling a bill of goods on credit to Hawks in 1901 the company wrote: "We have paid all the bills Mr. J. M. Hawks has drawn on us. We think he has paid his mercantile bills as promptly as anybody. Most of our cotton shippers who do business with us owe us money. We do not think you would run any risk in filling this bill for Mr. Hawks, but you must be your own judge of credits, as we never profess to judge credits for other people and we would rather you would use your own sources of information like we do, instead of referring to us." Being shown a statement of Hawks to R. G. Dun & Co. which placed the value of his assets $40,922.29 and his liabilities $3,000 on October 5, 1903, when he owed the commission company over $63,000, that company said he owed it some money; that it was unable to specify the amount as he had been and was shipping it cotton; that he carried a good stock and in the past two years made money on cotton, but that it was unable to give an estimate of his worth, and that it did not consider his worth over one-half what he claimed. In July, 1902, the company prepared a letter from Hawks to it which he signed and sent to the company, to the effect that the company had loaned him money whenever he asked for it and had promised to help him out of his indebtedness; that he desired, in case of his death owing the company, that it should take possession of his business and either continue it or close it down, and he agreed that he would turn his business over to it at any time it showed no gain, and it seemed useless for the company to continue paying out money in the hope of his balancing the account. And he frequently expressed willingness to surrender his property and his business to the company. There are other facts and circumstances disclosed in the record, but none which modify the conclusion which those recited compel.

Dwight D. Currie and S. L. Swarts, both of St. Louis, Mo. (Lyon & Swarts, of St. Louis, Mo., on the brief), for appellant.

W. B. Smith, of Little Rock, Ark. (John M. Moore and J. Merrick Moore, both of Little Rock, Ark., on the brief), for appellee.

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

SANBORN, Circuit Judge (after stating the facts as above). Counsel for the trustee present three reasons why the decree allowing the claim of the commission company should be reversed or modified: (1) That in August, 1899, it made an agreement with Hawks to loan him the money to pay the 40 per cent. of the claims of his other creditors which was to be paid under the composition agreement, in consideration that Hawks promised to pay his debt for $3,987.57 to it specified in that agreement in full; (2) that after the mortgage of

August, 1899, and pursuant to the terms thereof, the commission company was the principal and Hawks its agent in the purchase and sale of the property and the conduct of the business Hawks handled; and (3) that the commission company conspired with Hawks to defraud his other creditors by concealing his indebtedness to it and sustaining his credit so that they were induced thereby to sell him goods upon credit.

The lucid and exhaustive opinion of the court below has demonstrated its familiarity with the voluminous evidence in this case and its clear comprehension of the law and the facts which conditioned its decision. In re Hawks, 204 Fed. 309. Reference is made to that opinion for a more extended discussion of the case and citation of the authorities than it is necessary to present here, and this opinion will be confined to an expression of the view of this court upon the conclusions of the court below which the appeal challenges.

[2] An agreement between a debtor and one of several creditors, who are parties to a composition agreement with the debtor, to release him from their claims for a certain percentage thereof, whereby the debtor agrees to pay his preferred creditor in full in consideration of its loan of the funds requested to pay the fixed percentage to the other creditors, is a breach of confidence and good faith which renders the composition voidable. It does not, however, render it void. It is still valid until avoided, not void until validated. The other creditors may successfully resist its enforcement while it is executory. They may rescind it after it is executed, restore what they have received under it, and, if practicable, return to their position before its execution, or they may retain what they have received under it and affirm it. They have no other remedy; no right of recovery against the preferred creditor. The debtor may recover back the excess which he has paid to the preferred creditor above the fixed percentage before the composition was made, and the excess he has been compelled to pay thereafter. But he may not recover anything which he has voluntarily paid after the composition was made pursuant to his agreement with the preferred creditor. Batchelder & Lincoln Co. v. Whitmore, 122 Fed. 355, 359, 360, 362, 58 C. C. A. 517.

[1] The trustee in bankruptcy in this case, therefore, may not defeat in whole or in part the claim of this commission company on account of the composition and the agreement of August 10, 1899: First, because he does not represent and cannot act for the creditors who signed that composition, but may act only for the present creditors of the bankrupt, and but a very small percentage of either class is found in the other; second, because the composition creditors had no remedy, but rescission, and they have never rescinded, but by their retention of 40 per cent. of their claims and acquiescence for 11 years they affirmed the composition; third, because the debtor, by permitting the application of the payments made by him on his indebtedness to the commission company according to law in the order of the accrual of the items of that indebtedness, voluntarily paid the debt for the loan to pay the composition percentages and the debt of $3,987.57 specified in the composition agreement many years before his bank-

ruptcy, and by his repeated acknowledgment and giving of security to pay the Dudgeon note, and his inducement of the commission company thereby to loan him the large amounts of money it subsequently advanced to him, he had estopped himself long before the bankruptcy from any relief at law or in equity on account of the composition or on account of his agreement with the company regarding it. There was consequently no equity in the trustee, either as the representative of the debtor or as the representative of the creditors, to defeat or reduce the claim of the commission company against the estate of the bankrupt in this case on account of the composition agreement, or on account of the agreement between Hawks and the commission company in August, 1899.

[3] Was the commission company the principal and Hawks its agent in the purchase and sale of the merchandise and other property and the conduct of the business which Hawks handled between August 31, 1899, and his adjudication in bankruptcy in 1910? The argument for an affirmative answer to this question rests on the stipulations in the mortgage of August 31, 1899, that Hawks' property therein described was then conveyed and surrendered to the commission company; that Hawks was to act as the agent of the company in the gathering and marketing of the crops mortgaged, in the sale of the mortgaged stock of merchandise on hand and to be purchased; that in everything pertaining to the business or connected therewith he was the agent and representative of the company; that he was to ship the cotton picked and received to the company to be sold by it on account; and that he would make statements of the business as requested by the company. The argument is supported by the facts that Hawks did make to the company reports and statements of the business and of the property in his hands frequently and whenever requested by the company; that he shipped the cotton which he collected to it; that the company conducted a voluminous correspondence with him; that it tried to keep intimately acquainted with the business and the property which he was handling; that it advised and requested him frequently and insistently to contract his operations, dictated his letter to it concerning the business and disposition of the property in case of his death or his failure; and that the commission company paid all the drafts which Hawks drew upon it upon any account from August, 1899, to December, 1910. If these were the only facts relevant to this issue, the question under consideration might well be answered as counsel for the trustee contend it should be. But the instrument of August 31, 1899, was not a mere power of attorney to Hawks to act as agent for the company, although it contains the stipulations regarding his agency which have been recited. Nor was it a mere agreement of sale or conveyance of the property it described. On the other hand, it was a complete mortgage which recited that it was made to secure the present and future indebtedness of Hawks to the company, and that was its main purpose to which the stipulations regarding its agency were but auxiliary. It contained the usual condition of a mortgage that, if the debt specified was paid by the 1st day of January, 1900, the instrument should be void, but that, if Hawks failed to fulfill his promises and

covenants in the mortgage, the company should have the right to take possession of the property, sell it, and apply the proceeds to pay the debt of Hawks to the company, and return the remainder to him. This last stipulation is inconsistent with the theory that the property and the business was already the commission company's and in its possession by the possession of its agent. And when it is considered that at the time this mortgage was made it was the law of Arkansas, where the property and business were situated, that a mortgage of a stock of merchandise in use in retail trade left in the possession of the mortgagor without a provision that he should conduct its sale as the agent of the mortgagee and should account to him for and apply to the payment of his claim the net proceeds of such sale was void, while with such a provision it was valid (Adler-Goldman Commission Co. v. Phillips, 63 Ark. 40, 52, 53, 37 S. W. 297), it is probable that the intention of the parties to this instrument was to assure the validity of the mortgage by the stipulations therein regarding agency and not to transform the commission company from creditor to owner and Hawks from owner and debtor to the agent of the owner of the property and business described. The correspondence between the parties, the reports and statements of Hawks to the company, its requests for them, its endeavor to keep familiar with the business and property he was handling and to secure control of it in case of his death or failure, its advice and request that he curtail his operations and pay his debts are as consistent with the relation of creditor and debtor as with that of principal and agent. Moreover, the account books of the parties, their letters, the mortgages of 1899, 1908, and 1910, which were promptly spread upon the proper public records so that all who wished might know the relation of these parties, treated of them as creditor and debtor, not as principal and agent. The testimony of the witnesses is that they were such, and an examination and consideration of all the evidence has forced the conviction upon our minds that there was no mistake in the finding of the court below that the relation of these parties to each other under the mortgage of August, 1899, and throughout the entire 11 years until the adjudication in bankruptcy in December, 1910, was not that of principal and agent but was that of creditor and debtor, and that Hawks, and not the commission company, was the owner of the property and the business he handled.

[4] Did the commission company conspire with Hawks to defraud his other creditors by concealing his indebtedness to it and sustaining his credit so that they were thereby induced to sell him their goods upon credit? Hawks was insolvent from August, 1899, until his adjudication a bankrupt in December, 1910. Counsel for the trustee contend, and for the purpose of this decision it is conceded, that the commission company knew that he was insolvent during all this time. The record, however, persuades that during all this time, up to the first days of December, that company hoped and believed that he was an honest, industrious, and energetic business man operating in a favorable locality, and that by loaning him more money it could make his business so large and prosperous that he could and would pay off his debts. There is no other rational deduction from the controlling

fact that this company increased its loan to him and enabled him to enlarge and carry on his business and pay his other creditors year by year until, after crediting all the security for its indebtedness which it obtained, that indebtedness rose from $7,730 on September 1, 1900, to $238,835.40 in December, 1910. Meanwhile, it is true, it did not tell inquiring creditors of Hawks, commercial agencies, or other parties, how much he owed it or what its estimate of his financial worth or standing was. It never denied, however, but when questioned always admitted that he owed it money, and it never made any false statement about his indebtedness or financial standing, and it kept spread upon the public records from one to three mortgages, each securing all Hawks' indebtedness to it past, present, and future. Is this course of action such a fraud upon other creditors of Hawks who gave him credit on his false statements of his financial condition, his large business operations, and the acts and silence of the commission company which have been detailed as makes it inequitable for the company to share in the distribution of its debtor's property? In the absence of other evidence than the proof of the claims of all these creditors, the commission company, the largest creditor, would be entitled to share pro rata with the others. The equitable principle upon which it is sought to exclude it is that "he who has done iniquity shall not have equity." But in what way has the company done iniquity? Counsel for the trustee answer: By deceiving the other creditors into the belief that Hawks was solvent and thereby inducing them to give him credit to their damage. But an intent to deceive one to his injury, or knowledge of the falsity of the misrepresentation, or a reckless misrepresentation made in ignorance of the fact is indispensable to actionable deceit or fraud. Union Pacific Ry. Co. v. Barnes, 64 Fed. 80, 83, 12 C. C. A. 48, 51; Western Union Telegraph Co. v. Schriver, 141 Fed. 538, 541, 72 C. C. A. 596, 599, 4 L. R. A. (N. S.) 678; Kahl v. Love, 37 N. J. Law, 5, 6, 7; Polhill v. Walter, 3 Barn. & Adolph. 114, 124.

[5] A creditor must have been guilty of some moral turpitude or some breach of duty by which other creditors were deceived, to their damage, to constitute such a fraud as will estop him from sharing with them in the distribution of the proceeds of the estate of his debtor in bankruptcy. A willful intent to deceive or such gross negligence as is tantamount thereto is an essential element of such an estoppel. Henshaw v. Bissell, 18 Wall. 255, 271, 21 L. Ed. 835; New York Life Ins. Co. v. McMaster, 87 Fed. 63, 67, 30 C. C. A. 532, 536; Daniels v. Benedict, 97 Fed. 367, 380, 38 C. C. A. 592, 605; Farmers' & Merchants' Bank v. Farwell, 58 Fed. 633, 639, 7 C. C. A. 391, 397.

[6] A creditor of an insolvent debtor is a competitor of all his other creditors. He stands in no fiduciary or contractual relation to them and owes them no duty to inform them of his debtor's financial condition, his insolvency, or of the amount of his indebtedness to him. Foster v. McAlester, 114 Fed. 145, 151, 52 C. C. A. 107, 113. There was therefore no fraud or breach of duty in the failure of the commission company to inform the other creditors in this regard. It never made any false statement respecting these matters; whatever it stated was the truth, and no duty rested upon it to state even that, much less

to state more of the truth. It did not use its knowledge to induce other creditors during these 11 years to sell goods to the debtor that from the proceeds of them it might secure a payment of a portion of its claim. On the other hand, it constantly increased its loan and enabled its debtor for 10 years to pay its other creditors with its money, and ceased this course only when it learned that Hawks had incurred a large indebtedness to others when it had supposed and believed that he owed little to any one but itself. A careful review of all the evidence in this case and of all the facts and circumstances which it discloses has satisfied this court, as it did the court below, that the commission company was guilty of no breach of duty to, deceit of, or fraud upon any of the other creditors of Hawks which can or ought to estop it from sharing with the other unsecured creditors in the proceeds of his estate.

The decree below must therefore be affirmed.

And it is so ordered.

AMERICAN ICE CO. v. PORRECA.

(Circuit Court of Appeals, Third Circuit. April 2, 1914.)

No. 1816.

1. MASTER AND SERVANT (§ 121*)—DEATH OF SERVANT—GUARDING MACHINERY—STATUTES—FAILURE TO COMPLY—NEGLIGENCE.

Failure of a master to comply with Pa. Act May 2, 1905 (P. L. 355) § 11, requiring that machinery of every description shall be properly guarded, resulting in death of a servant, constitutes actionable negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 228–231; Dec. Dig. § 121.*]

2. MASTER AND SERVANT (§ 121*)—DEATH OF SERVANT—"MACHINERY"—DUTY TO GUARD.

Where an ice cutting mechanism consisted of a saw and carriage in combination, and hardwood wedges were used to hold the ice plates steady and keep the ice from splitting unevenly, and these, in the process of sawing, were liable to be struck by the saw and thrown from under the unguarded rear of the carriage with great force across the place where it was a servant's duty to work, the carriage constituted "machinery of every description" within Pa. Act May 2, 1905 (P. L. 355) § 11, requiring that machinery of every description shall be properly guarded, so that a mere guarding of the saw did not show such a compliance with the statute, as a matter of law, as would preclude the master from liability for actionable negligence resulting in the death of an employé by being struck by one of such wedges, due to a failure to guard the carriage to protect from such flying wedges.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 228–231; Dec. Dig. § 121.*

For other definitions, see Words and Phrases, vol. 5, pp. 4267–4269.]

3. MASTER AND SERVANT (§ 121*)—INJURY TO SERVANT—GUARDING MACHINERY—STATUTES.

Act Pa. May 2, 1905 (P. L. 355) § 11, requiring that machinery of every kind shall be properly guarded, is to be construed broadly, in accord with its purpose to prevent avoidable harm, and not grudgingly.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 228–231; Dec. Dig. § 121.*]

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

4. MASTER AND SERVANT (§ 121*)—INJURY TO SERVANT—MACHINERY GUARDS—"PROPERLY GUARDED."

Act Pa. May 2, 1905 (P. L. 355) § 11, requiring that machinery of every kind shall be "properly guarded," requires that machinery shall be effectively guarded in the light of the dangers to be anticipated.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 228–231; Dec. Dig. § 121.*]

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

Action by Camilla Porreca against the American Ice Company. Judgment for plaintiff, and defendant brings error. Affirmed. Certiorari refused by United States Supreme Court.

Frank R. Savidge, of Philadelphia, Pa., for plaintiff in error.

Thomas F. Gain and Alfred L. Cameron, both of Philadelphia, Pa., for defendant in error.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

BUFFINGTON, Circuit Judge. This action was brought in a state court by Camilla Porreca against the American Ice Company, to recover damages for alleged negligence of such defendant, which caused the death of her husband, Joseph Porreca, its employé. Thereupon the defendant, on the ground of diversity of citizenship, removed the case to the court below. The case was there tried, and resulted in a verdict for plaintiff. On entry of judgment thereon, defendant sued out this writ of error.

At the time of his death, Joseph Porreca was working as a day-laborer attendant upon an ice cutting saw machine in defendant's artificial ice factory. While engaged in sweeping up the slush ice thrown off by the cutting of the saw, he was struck and killed by a part of a hard wood wedge which was hit by the saw and thrown backwards. The man was found lying at some distance to one side of a line running directly back from the travel of the saw. Just where and how he was struck is not known, as the room was so full of fog or steam at the time that no one could see. In view, however, of proof by the sawyer that he felt the saw strike the wedge; that part of it was found where it was struck; that the other part was found lying by Porreca, there can be no doubt, and indeed it is not disputed, that the man was killed by the flying wedge, violently thrown backward by the saw. As pertinent to the question now before us, the negligence charged was that defendant omitted to comply with the requirement of section 11 of the Pennsylvania Factory Act of May 2, 1905, P. L. 355, viz., "all * * * saws, * * * and machinery of every description shall be properly guarded," in that it negligently failed—

"to provide and maintain upon or about the saw, carriage and turntable, above described, any proper, suitable or sufficient guard to prevent the said wedges or pieces thereof from being thrown away from said ice by the action of the saw and to prevent the said wedges or pieces thereof being thrown against and coming in contact with the said Joseph Porreca, or other workmen whose duties required them to work in proximity to the said turntables."

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

The proofs tended to show that the ice was artificially frozen in large plates some 10 to 12 inches thick, 12 by 18 feet in size, and weighing some five tons. These plates were raised by a crane and laid on a platform or turntable. The plates were then machine sawed into suitable cakes; 3 cuts being made the long way and 10 crosswise the plates. This sawing machine consisted of a frame or carriage on which was mounted an electrically propelled circular saw 36 inches in diameter, revolving at from 600 to 800 revolutions per minute. This carriage was mounted on tracks, and was directed by a sawyer who sat thereon. Half the saw was above, and the lower half, which entered the ice, was below the carriage frame. The edges of the ice plates were at times rounded or beveled, and in order to hold such plates steady and keep the ice from splitting unevenly, four wedges were driven under each of the 12-foot sides of the plates. These wedges were of hard wood about 3x4x6 inches. They were placed outside the intended cut of the saw. They were wet and slippery, and owing to the jar of the plate or machinery, they were at times dislodged and struck by the saw and thrown backward. Giordano, one of the three men who worked in this room, testified that the wedges were thrown out three or four times; that he was afraid of them, that the men had themselves stopped using them for two weeks, but were ordered to continue their use because too much ice was broken without them. In that regard the proof was that about one-fifth of the ice was cracked off and lost when wedges were not used. Rossi, the third man in the room, testified the reason they did not use the wedges during these two weeks was "because so many wedges got cut off by the saw; we could not use any more." He also testified to seeing them thrown out by the saw two or three times. Landis, a witness for defendant, testified there was no "screen or device of any character around that table to prevent those wedges, when hit by the saw, from flying away," and English, another witness, said that "if a wedge is encountered in the path of the saw, there is nothing to prevent that wedge from being thrown backward away from the ice." Kirk, another witness for defendant, testified that when the saw is entering the ice—

"there is absolutely nothing under those I-beams to prevent a wedge from going in a straight line from the ice when it is encountered under the I-beams. That is a clear space of 14 or 15 inches."

The proof tended to show that when the accident occurred, the room was full of steam, so that one could not see anything; that one of Porreca's duties was to clear away the slush as the saw cut it and threw it back, and Giordano, in answer to the question as to what Porreca was doing just before the accident, said, "he had a shovel when I started to cut the ice, to start to clean the snow"; that he was from six to nine feet away from the saw.

"I started the power on the saw to cut the ice, and before I cut on the ice I heard the saw strike the wedge. I stopped the saw right away, and took the wedge out of the saw, and Mr. Dominick Rossi, they were back of me, about 10 feet back of me, he says, 'Tony, what happened?' I says, 'The saw caught a wedge.' Then he came right over. I looked around, and he was following me, right after me. When we went near the Washington avenue wall, on the Washington avenue side, we saw Mr. Joe Porreca was lying down on

the floor, and a piece of wedge right near his head, a big heavy piece, and the small piece right under the saw."

At the close of the testimony the court refused defendant's request for binding instructions and affirmed a point of the plaintiff's as follows:

"(3) The Pennsylvania Act of Assembly, dated May 3, 1905, P. L. 355, section 11, provides in part as follows:

" 'All vats, pans, saws, planers, cogs, gearing, belting, shafting, set screws, grindstones, emery wheels, fly-wheels, and machinery of every description shall be properly guarded.'

"Properly guarded means effectively guarded in the light of the danger to be anticipated. If you believe from the evidence that there was danger of contact between the saw and the wedges, and that there was no guard provided either about the saw or around the cutting table to protect the workmen whose duties required them to be in that vicinity, then you would be justified in concluding that the defendant failed to comply with its statutory duty."

Its action in so doing is, inter alia, here assigned for error. In substance, therefore, the case turns on whether, under the proofs, the court erred in submitting to the jury to find the defendant guilty of negligence by reason of noncompliance with the Pennsylvania Factory Act quoted.

[1, 2] That failure on the part of the defendant to comply with the requirements of that statute would constitute negligence is clear. It is alleged, however, that the statute has no application since the proofs show that a proper hood was placed over the saw. This contention, however, loses sight of the fact that the case involves a much broader question. It is true the saw itself was properly guarded so far as danger arose from contact with it. Thus its upper half, where contact with it was alone possible, was properly hooded, and its lower half was necessarily left unhooded because it had to be left free to cut the ice, and moreover no one could come in contact with it by reason of the surrounding carriage frame and its location beneath such frame. But this contention loses sight of the statute, the declaration, and the proofs. The statute, as we have quoted above, makes it the duty of an employer to properly guard, not only the enumerated elements of saws, planers, etc., but uses the broad, inclusive phrase "and machinery of every description shall be properly guarded." This was the view of the pleader, who alleged, as we have seen, that the defendant negligently failed—

"to provide and maintain upon or about the saw carriage and turntable, above described (see clause 3 of amended statement) any proper, suitable, or sufficient guard to prevent the said wedges or pieces thereof from being thrown away from the said ice by the action of the saw, and to prevent the said wedges or pieces thereof being thrown against and coming in contact with the said Joseph Porreca or other workmen whose duties required them to work in proximity to the said turntable."

While the proofs showed that the saw as a saw was properly hooded and guarded, and failed to show anything in reference to the platform or turntable, they did show the carriage was not guarded so as to prevent wedges struck by the saw from flying out from beneath the carriage, as testified to by defendant's witnesses quoted above. Under these pleadings and proofs, we think the court could not take the case

from the jury, for it did not depend on the guarding of the saw alone. The saw, the motor, the actuating mechanism, were all parts of the movable carriage. They united to make the carriage something that properly came within the broad statutory term "machinery of every description," which it was the purpose of the statute to properly guard. The saw was but an incident of the carriage, and properly guarding the saw against contact was not a guarding of the carriage as a whole.

[3] Nor is this humane and danger-eliminating statute to be grudgingly construed. Its obvious purpose was to properly guard machinery of every description so as to prevent preventable harm. The word "guard" in its derivative sense means to be on the watch, and in its common use to protect from danger.

[4] Bearing in mind, then, the avowed purpose of the statute "to provide for the safety of all employés in industrial establishments," it would seem clear that the term "properly guarded" used therein means effectively guarded in the light of the dangers to be anticipated. In Hindle v. Biertwhistle, 1 Queen's Bench Division, 192, the English Factory Act, which provided "all dangerous parts of the machinery" in a factory shall be securely fenced or otherwise rendered safe, was involved. It was, in substance, there held that the obligation to fence was not confined to machinery which was dangerous in itself in the ordinary course of careful working, but that shuttles of a weaving loom, though not in themselves defective, were "dangerous parts of machinery" if, owing to the negligence of the weaver, defect in the yarn, or from some foreign substance getting in the race, such shuttles were likely to fly out of the race with any degree of frequency. It was there said:

"The learned recorder has supplied us with the keynote of his judgment in one sentence, in which he says that 'the manufacturer is only responsible for machinery which is in itself dangerous in the ordinary course of lawful working.' He seems to think that no machinery can be said to be dangerous unless it is dangerous in itself, however carefully worked. I entirely disagree with such an interpretation, and think it would limit most materially a very beneficial act of Parliament. It seems to me that machinery or parts of machinery, is and are dangerous if in the ordinary course of human affairs danger may be reasonably anticipated from the use of them without precaution."

In this case we have the factors of heavy hard wood wedges, occasionally struck by a saw, revolving at a very high rate of speed, and liable to fly across the place where a workman's duty brought him. Under such circumstances, we cannot, as a matter of law, say that the carriage was properly guarded, when there was no guard or barrier save chance to protect the man doing his work from being struck by a wedge flying out from under the unguarded rear of such carriage. Such was the view of the trial judge, who in submitting this phase of the case to the jury said:

"Now, coming to the statutory duty imposed on the defendant; that is, a duty to properly guard the saw. There does not seem to me to be any dispute as to the extent to which the saw was guarded. The top part of the saw, where it was above the ice, was covered with a sheet iron hood, and it seems to have been properly guarded in that respect, so far as any one coming in contact with it is concerned. So that the question here would be as to whether it was properly guarded to prevent anything flying out, whether there was

any ordinary reason for anything such as happened here, a wedge flying out, and whether there was a substantial compliance with the statute with the guard that was there to prevent any such risk as might be reasonably expected. The defendant contends that it has done its duty in supplying the guard that was there. The question is, as I have stated, and it is for you to determine, whether there was a risk there which the master or any one having to do with the machinery could reasonably expect, and whether there was a substantial compliance with the act providing for a guard by the guard that was there. In other words, would the guard there prevent any foreign substance from flying out and striking anybody, and, if it was not, was it an occurrence which was reasonably to be expected in a plant of this sort?"

These questions having been submitted to and determined by the jury adversely to the defendant, we find no error to warrant our reversing the judgment entered on the verdict.

DESPRES et al. v. GALBRAITH.

(Circuit Court of Appeals, Eighth Circuit. March 28, 1914.)

No. 4045.

1. BANKRUPTCY (§ 76*)—INVOLUNTARY PROCEEDINGS—PERSONS ENTITLED TO FILE PETITION—"CREDITOR."

Where a debtor made an assignment for the benefit of creditors, creditors who became voluntary parties to the assignment contract were absolutely disqualified from filing an involuntary petition in bankruptcy based upon the assignment as an act of bankruptcy, since that would permit them to take advantage of their own wrong and, moreover, by assenting to the assignment contract they released their claims against the assignor and in place thereof accepted claims under the assignment, and therefore were not creditors within the provision authorizing creditors to file a petition in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 50, 56, 97, 99, 100; Dec. Dig. § 76.*

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

2. BANKRUPTCY (§ 161*)—PREFERENCES—VOIDABILITY—COMPUTATION OF FOUR MONTHS' PERIOD.

An involuntary petition in bankruptcy based upon an assignment for the benefit of creditors as an act of bankruptcy and filed by creditors who voluntarily became parties to the assignment contract was void for want of proper petitioners, and an intervening petition thereafter filed by creditors not parties to the assignment contract could draw no support therefrom, and hence payments more than four months before the filing of the intervening petition were not preferential, though made within four months prior to the filing of such void petition.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 261–263; Dec. Dig. § 161.*]

Appeal from the District Court of the United States for the District of Minnesota; Charles A. Willard, Judge.

Bankruptcy proceeding against the Ordemann-Wagner Clothing Company. From an order affirming findings of the referee that certain payments were preferential, Samuel Despres and others appeal. Reversed and remanded, with instructions.

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

Carey W. Rhodes, of Chicago, Ill. (Robert E. Olds, of St. Paul, Minn., on the brief), for appellants.

Kay Todd and Harold C. Kerr, both of St. Paul, Minn., for appellee.

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

RINER, District Judge. The referee found that appellants, at various times between the 14th day of October and the 24th day of December, 1911, had received from the bankrupt certain sums of money aggregating $1,000, and that such sums were preferential payments and therefore disallowed the unsecured claim of the appellants, proved in the sum of $2,487.50, unless within ten days from the date of the order appellants should return to the trustee the $1,000 so received by them; and this is an appeal from an order of the district court affirming the findings of the referee.

On the 30th day of December, 1911, the bankrupt made a general assignment for the benefit of its creditors to one John P. Galbraith. The assignment contract contained, among other things, the following provision:

"In consideration of the foregoing covenants the parties of the third part hereby release said party of the first part from all liability on the amounts due them, they covenanting that all claims against first party are by this agreement satisfied in full."

A number of creditors of the bankrupt accepted the provisions of the assignment contract in writing. February 1, 1912, three of the creditors, parties to the assignment contract and who had assented thereto in writing, filed a petition in bankruptcy against the Ordemann-Wagner Clothing Company, the bankrupt herein. The bankrupt answered, and on the 2d of May, 1912, the referee entered an order dismissing the petition. June 1, 1912, exceptions were filed to the order made by the referee, but no action was ever taken thereon by the court. June 3, 1912, an intervening petition was filed by three creditors not parties to the assignment contract; and on July 23, 1912, an order of adjudication was entered by the court reciting that it was based both upon the original petition of February 1, 1912, and the intervening petition filed June 3, 1912.

Two principal contentions are made by the appellants: First, that the original petition was void for the reason that all of the parties thereto were parties to the assignment contract, and, the execution of that contract being the only act of bankruptcy complained of, they could not maintain an involuntary petition in bankruptcy against the debtor with whom they had thus contracted, and, that being true, the intervening petition filed on June 3d did not have the effect of validating the first petition. Second, that the payments made to the appellants by the bankrupt were not preferential for the reason that they were made pursuant to a consignment contract entered into between the bankrupt and appellants on the 16th day of May, 1911, in which it was provided, among other things, that the consigned goods "are to remain the property of Despres-Loewenstein & Co. and are subject

to their call"; and that this consignment contract was in legal effect a conditional sale, and the title to the goods remained in the appellants until payment therefor was made in the manner provided by the contract.

[1, 2] The importance of the first contention rests in this: If "the filing of the petition" within the meaning of the provisions of the bankruptcy act concerning unlawful preferences has relation to the filing of the petition by the three creditors on February 1st only, the preference, if it was a preference, which appellants received, would be defeated, for the reason that less than four months had elapsed since the last payment was made. If, on the contrary, it can have relation only to the filing of the intervening petition, the alleged preference would be protected because more than four months had then elapsed.

This brings us at once to consider what effect, if any, the filing of the petition on February 1, 1912, by the three creditors who were parties to the assignment contract, had upon the rights of the parties in interest here. It has been repeatedly decided by this court that where a petition was defective merely, as, for example where a petition was filed by one creditor only who alleged that the debtor had less than twelve creditors known to him, and it was subsequently discovered that there were more than twelve creditors, and therefore the petition must be filed by more than one creditor, the requisite number of creditors might join with the original petitioner prior to adjudication, and that in such case the "filing of the petition" within the meaning of the bankruptcy act would relate back to the date of the filing of the original petition by the one creditor. First State Bank v. Haswell, 174 Fed. 209, 98 C. C. A. 217, and cases there cited. In such case the petition will not be void but voidable only and subject to amendment. But we have here, as we view it, a very different case. The three creditors filing the first petition were absolutely disqualified from filing an involuntary petition in bankruptcy by reason of becoming voluntary parties to the assignment contract, as much so as if they had been strangers to the entire proceeding, and it would not be contended, we take it, by any one, that strangers—that is, parties having no claims against a bankrupt—could file a petition against him that would have any validity whatever. The reason given in the cases for denying to one who has become a voluntary party to an assignment contract the right to file an involuntary petition in bankruptcy, basing it upon the assignment as an act of bankruptcy, is that to permit him to do so would be to permit him to take advantage of his own wrong and enable the unscrupulous to entrap a person into involuntary bankruptcy; and it is for this reason that a person who has placed himself in that position is uniformly held to be estopped to set up an assignment for the benefit of creditors as a ground for adjudging the assignor a bankrupt. This rule does not in any degree tend to affect or defeat the object of the bankruptcy law, for, as was said by Judge Taft in Simonson v. Sinsheimer, 95 Fed. 948, 37 C. C. A. 337:

"The estoppel we are considering, if recognized and enforced, does not affect or detract from the paramount character of bankruptcy proceedings, when properly begun, but only prevents the institution of such proceedings

by persons who were privy to the act of which they complain, and on which they found their prayer for an adjudication."

The bankruptcy act authorizes the filing of a petition in bankruptcy by creditors of the bankrupt. If the creditors are less than twelve in number, one creditor may file the petition; if more than twelve, then three or more creditors must join; but in both cases they must be creditors at the time the petition is filed. The three parties who signed the petition on February 1, 1912, were not, because of their assent to the assignment contract, creditors within the meaning of that term as used in the bankruptcy act and did not become such until after the order of adjudication. The reason why this is so is clearly pointed out by Judge Lowell in Re Romanow (D. C.) 92 Fed. 510, where it is said:

"By accepting the assignment, the creditors released their claims against the respondents, and, in place thereof, accepted claims under the assignment. Though the assignment is an act of bankruptcy, and is avoided by the adjudication, yet it is not a void instrument, but only a voidable one. Until the adjudication it is valid, and the assignment creditors are bound by their assent thereto. Hence it follows that, until adjudication, the persons who had assented to the assignment had ceased to be creditors of the respondents."

We are of opinion that the petition of February 1, 1912, was void for the want of proper petitioners. That being true, the intervening petition could draw no support from it. The rule is clearly stated by the court in Robinson v. Hanway, Fed. Cas. No. 11,953, as follows:

"But we are of opinion that the original creditors' petition is void for want of proper petitioners, and did not give the court jurisdiction of the case, and that the intervening petitions are also void for want of an original petition to give them force. It is not a case of amendment of a defective petition of which the court has jurisdiction, and when the interveners perfect the petition by additional numbers and amounts. But it is an attempt to give life to a dead petition, to ingraft branches upon a lifeless stock, and infuse vitality into it. The interveners must draw their support, if at all, from the original petition; but in this case the original petition is dead, and neither supports the interveners nor itself."

The intervening petition therefore must be considered as an original petition filed as of date June 3, 1912, and the adjudication treated as an adjudication based upon that petition alone and cannot relate back to the petition filed February 1st.

The views here expressed render it unnecessary to consider the question of preferential payments, as all of these payments were made more than four months prior to the filing of the intervening petition, which we now hold must be considered and treated as an original petition.

It follows that the order of the District Court affirming the findings of the referee, so far as they relate to appellants' claim, must be reversed and the case remanded to the District Court with instructions to direct the referee to accept appellants' claim as a provable claim against the bankrupt estate without requiring them to return the $1,000 paid by the bankrupt between the 18th day of October and the 24th day of December, 1911, both dates inclusive.

WILLIAMS v. DE SOTO OIL CO.

(Circuit Court of Appeals, Eighth Circuit. March 28, 1914.)

No. 3993.

1. PRINCIPAL AND AGENT (§ 149*)—ACTS WITHOUT AUTHORITY—AGENT'S LIABILITY.

An agent is personally liable for fraudulent misrepresentations of authority, or for making a contract in which he assumes authority he knows he does not possess.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 553–555; Dec. Dig. § 149.*]

2. PRINCIPAL AND AGENT (§ 149*)—ACTS OF AGENT—LACK OF AUTHORITY—AGENT'S PERSONAL LIABILITY.

One who assumes to act for another impliedly warrants that he is authorized to do so, so that, if he in fact lacks authority, he becomes personally liable to one who deals with him in good faith in reliance on the warranty, whether the agent knows he lacks authority or honestly believes he had authority when in fact he had none.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 553–555; Dec. Dig. § 149.*]

3. BROKERS (§ 94*)—AUTHORITY TO PURCHASE MERCHANDISE—CANCELLATION OF CONTRACT.

A broker authorized to purchase cotton seed at prices to be fixed from time to time by the principal, varying according to the market, after making a contract of purchase, had no authority to agree to cancellation thereof.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 136; Dec. Dig. § 94.*]

4. FRAUDS, STATUTE OF (§ 115*)—CONTRACT OF SALE—MEMORANDUM—SIGNING.

Under the Arkansas statute of frauds the memorandum of a contract of sale of merchandise need only be signed by the party to be charged, to wit: The seller on his contract to sell, or the buyer on his contract to accept and pay for the property.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 242–250; Dec. Dig. § 115.*]

5. FRAUDS, STATUTE OF (§ 106*)—CONTRACT OF SALE—MEMORANDUM.

Defendant, purporting to act for a corporation, having sold to plaintiff 25 cars of cotton seed through a broker, executed a memorandum reciting that the same confirmed the sale to the plaintiff through the broker of 25 cars of cotton seed to be shipped during the season to plaintiff at Memphis at $11 per ton, the shipments to be made from points specified and signed by defendant, acting for the alleged seller. *Held*, that the writing was not a mere offer to sell, but was a sufficient memorandum of a completed contract under the statute of frauds.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 193, 210, 211; Dec. Dig. § 106.*]

6. SALES (§ 374*)—CONTRACT—BREACH—ACTION FOR DAMAGES.

Where defendant, after making a contract on behalf of a corporation for the sale of cotton seed to plaintiff, without authority, repudiated the contract, as did also the corporation which defendant purported to represent, and declined to proceed under it, plaintiff was entitled to treat such repudiation as a breach of the contract and sue at once for damages.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1091; Dec. Dig. § 374.*]

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

7. SALES (§ 384*)—CONTRACT—BREACH—DAMAGES.

Where defendant finally repudiated a contract for the sale of cotton seed on a specified date, the court did not err in selecting that date in an instruction on the plaintiff's measure of damages, to wit: That plaintiff was entitled to recover the difference between the contract price and the market price on such date.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1098–1107; Dec. Dig. § 384.*]

In Error to the District Court of the United States for the Eastern District of Arkansas; Jacob Trieber, Judge.

Action by the De Soto Oil Company against Eugene Williams. Judgment for plaintiff, and defendant brings error. Affirmed.

H. F. Roleson, of Marianna, Ark., and W. W. Hughes, of Forrest City, Ark., for plaintiff in error.

John I. Moore, J. M. Vineyard, and W. R. Satterfield, all of Helena, Ark., for defendant in error.

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

RINER, District Judge. This was an action brought in the United States Circuit Court for the Eastern Division of Arkansas by the De Soto Oil Company, defendant in error, a corporation organized under the laws of the state of Tennessee, against Eugene Williams, a citizen of the Eastern Division of the Eastern District of Arkansas, to recover damages for the breach of a contract. The complaint, after setting out the citizenship of the parties, alleged in substance:

That on the 14th day of November, 1907, Williams, the plaintiff in error, while pretending to act as the agent of the Planters' Gin & Manufacturing Company, sold to the De Soto Oil Company 25 car loads of cotton seed at the agreed price of $11 per ton, shipments to be made during the season of 1907–1908 from the stations of Bonair, Forrest City, Colt and Round Pound, in the state of Arkansas, to Memphis, Tennessee. That the sale of the 25 car loads of cotton seed was on the same day confirmed by a memorandum in writing as follows:

"Forrest City, Ark., 11–14–07.

"This confirms the sale to the De Soto Oil Company, through R. M. Nimocks, of twenty-five (25) cars of good cotton seed, to be shipped during the season to them at Memphis, at eleven dollars ($11) per ton, shipments to be made from Bonair, this point, and Colt and Round Pound.

"[Signed] Planters' Gin & Mfg. Co.,
"By Eugene Williams."

That the De Soto Oil Company, relying upon the authority of Williams to execute the memorandum confirming the sale for and on behalf of the Planters' Gin & Manufacturing Company, repeatedly demanded the shipment of the 25 cars of seed as provided in the contract. That after the season of 1907–1908 had passed, and after the Planters' Gin & Manufacturing Company had refused to make shipment of any seed under the contract, the De Soto Oil Company brought suit against the Planters' Gin & Manufacturing Company to recover

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

damages for its failure to deliver the seed pursuant to the terms of the contract, and it then, for the first time, ascertained that Williams had no authority, either express or implied, to execute the contract and memorandum for or in behalf of the Planters' Gin & Manufacturing Company. That the De Soto Oil Company agreed to purchase the 25 cars of seed, and obligated itself to receive and pay for the same in accordance with the terms of the contract as confirmed by the memorandum in writing, and was at all times ready and willing to carry out its part of the contract. That, by reason of the failure and refusal of the Planters' Gin & Manufacturing Company to deliver the 25 cars of cotton seed as provided in the contract, the De Soto Oil Company was damaged in the sum of $3,000.

Williams answered, denying the allegations of the complaint, pleading the statute of frauds and the cancellation of the contract. A trial was had resulting in a verdict and judgment in favor of the De Soto Oil Company in the sum of $2,375.

The evidence established the following facts:

That R. M. Nimocks, a broker living at Forrest City, and acting for and on behalf of the De Soto Oil Company, on the 14th day of November, 1907, entered into a contract with Williams to buy 25 car loads of cotton seed at the agreed price of $11 per ton, to be delivered during the season of 1907–1908. That Williams made the contract and executed the memorandum confirming it in the name of the Planters' Gin & Manufacturing Company, and delivered the same to Nimocks, who at once forwarded it to the De Soto Oil Company. That a few days after the memorandum was executed Williams called on Nimocks and advised him that he desired to cancel the contract. That, in reply to Williams' request, Nimocks said it would be all right so far as he was concerned, but he was not authorized to speak for the De Soto Oil Company, and advised Williams to take the matter up with the company direct. That nothing further was done with reference to the cancellation of the contract until December 10th, when, in reply to a second letter from the De Soto Oil Company asking when shipment would begin, Williams, using the name of the Planters' Gin & Manufacturing Company, advised the De Soto Oil Company, by letter, that no shipments would be made under the contract. That Nimocks had authority to purchase oil seed for the De Soto Oil Company at prices fixed by it from time to time, but had no power to cancel such contracts, and that the price of cotton seed advanced from $11 per ton to $17 per ton during the season of 1907–1908.

The testimony further disclosed that Williams had no authority whatever to enter into a contract for the sale of cotton seed for and on behalf of the Planters' Gin & Manufacturing Company. This clearly appeared from his own testimony on cross-examination when he was asked:

"Q. Mr. Williams, you executed this contract that was offered in evidence? A. Yes, sir. Q. At that time you were secretary and treasurer of the Planters' Gin & Manufacturing Company? A. Yes, sir. Q. And executed this contract in their name, without any authority? A. I did."

[1, 2] An agent is undoubtedly personally liable in case of a fraudulent misrepresentation of authority. He is also personally liable if he has no authority and knows it, but nevertheless makes the contract as having such authority, and this for the reason that he induces the other party to enter into the contract by what amounts to a misrepresentation of a fact peculiarly within his own knowledge, and he must be considered as holding himself out as one having authority to contract, and as guaranteeing the consequences arising from any want of such authority. And the courts have also held that, when a party making a contract bona fide believes that such authority is vested in him, but as a matter of fact has no such authority, he is still personally liable upon the contract. In this last case, while it is quite true that the agent is not actuated by any fraudulent motive, nor has he made any statements which he knows to be untrue, yet it is a wrong differing only in degree from a case where he entered into a contract when he had no authority and knew it, for the effect upon a third party with whom he deals is the same. The general rule is clearly stated in 31 Cyc. 1545, as follows:

"A person who assumes to act as agent for another impliedly warrants that he has authority to do so. If, therefore, he in fact lacks authority, he renders himself personally liable to one who deals with him in good faith in reliance on the warranty, whether the agent knows that he lacks authority and nevertheless assumes to act as if he possessed it, or whether he honestly believes he had authority, when in fact he has none. The warrant of authority embraces not only the existence of the authority, but also it is sufficient to cover the contract which the agent attempts to make, and if, therefore, the agent, whether in good faith or otherwise, acts in excess of authority actually possessed, he renders himself personally liable to third persons." Dale & Banks v. Donaldson Lumber Co., 48 Ark. 188, 2 S. W. 703, 3 Am. St. Rep. 224; Lasater v. Crutchfield, 92 Ark. 535, 123 S. W. 394.

[3] The record clearly shows that Nimocks had no authority whatever to cancel this contract, and recognizing that fact he did not attempt to do so, but advised Williams to take the matter up with the De Soto Oil Company. The authority to make contracts does not necessarily carry with it the authority to cancel them. In this case Nimocks was a special agent authorized to purchase cotton seed for the De Soto Oil Company at prices to be fixed from time to time by that company; the prices varying according to the market. The rule is thus stated in 31 Cyc. 1387:

"Presumptively an agent is employed to make contracts, not to rescind or modify them, to acquire interests, not to give them up, and no power to cancel or vary an agreement is to be inferred from a general power to make it, nor has the agent any implied power to waive or give up rights or interests of his principal, nor to increase his obligation and liabilities for the benefit of third persons, unless the principal knew or approved of such modifications by the agent."

[4] The contention that the contract was invalid under the statute of frauds is, we think, without merit. In the case of a contract, such as we have before us, under the statutes of Arkansas the memorandum need be signed only by the party to be charged, which, we take it, means the vendor upon his contract to sell or the vendee, upon his contract to accept and pay for the property purchased.

Thus it is said in 29 Am. & Eng. Enc. of Law, 858:

"The weight of authority is that the statute is satisfied if the memorandum is signed by the party sought to be charged alone, or, in other words, by the party defendant in an action brought to enforce the contract, whether he be vendor or vendee."

"It very frequently happens," said the court in Lewis v. Atlas Ins. Co., 61 Mo. 534, "that contracts on their face and by their express terms appear to be obligatory on one party only; but in such cases, if it be manifest that it was the intention of the parties and the consideration upon which one party assumed an express obligation that there should be a corresponding and correlative obligation on the other party, such corresponding and correlative obligation will be implied. As, if the act to be done by the party binding himself can only be done upon a corresponding act being done or allowed by the other party, an obligation by the latter to do or allow to be done the act or thing necessary for the completion of the contract will necessarily be implied."

[5] The memorandum clearly shows that the terms of the sale had been agreed upon, and that it was executed and signed by Williams to confirm the contract of sale. The language is:

"This confirms the sale to the De Soto Oil Company through Nimocks of 25 cars of good cotton seed."

So that it cannot, we think, be said that it was a mere offer to sell, but on the contrary evidenced in writing a completed contract of sale upon which Williams, in the absence of authority to make it for and on behalf of the Planters' Gin & Manufacturing Company, in whose name he assumed to act, became personally liable for all damages resulting from the failure of that company to carry out the contract.

[6] At the conclusion of all of the evidence the court instructed the jury that Williams had by his letter of December 10, 1907, committed a breach of the contract sued upon, and that the plaintiff was entitled to recover a verdict in some amount. Under the evidence in the case we think the instruction was proper, for by his letter of December 10th Williams repudiated the contract and declined to proceed under it, and the De Soto Oil Company might well treat such repudiation as a breach of the contract and bring its suit for damages. Roehm v. Horst, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953; Foss-Schneider Brewing Co. v. Bullock, 59 Fed. 83, 8 C. C. A. 14; Edward Hines Lumber Co. v. Alley, 73 Fed. 603, 19 C. C. A. 599; McBath v. Jones Cotton Co., 149 Fed. 383, 79 C. C. A. 203; Michigan Yacht & Power Co. v. Busch, 143 Fed. 929, 75 C. C. A. 109.

[7] The court instructed the jury that the measure of damages for the plaintiff would be the difference between the contract price for 25 cars of cotton seed and the fair market value of cotton seed on December 10, 1907, or within a reasonable time thereafter, at Forrest City, Ark., if such market value at that time and place was in excess of $11 per ton. It also instructed the jury that in their discretion they might allow interest at the rate of 6 per cent. from December 10, 1907, upon such amount as they found the plaintiff entitled to recover. These instructions were excepted to. No comment seems to be made upon them in the brief, except that it is said:

"The court erred in arbitrarily selecting December 10th as the date of breach of the alleged contract, and in fixing the liability at the difference in the contract price and the market value at that date."

We think the court was right, for it was upon that date that Williams repudiated the contract and declined to make any shipments of seed at all.

Our examination of the record satisfies us that the question of damages was submitted to the jury under proper instructions, and that there was ample evidence to support the verdict. It follows, therefore, that the judgment must be affirmed.

And it is so ordered.

TITLE GUARANTY & SURETY CO. v. SCHMIDT et al.

(Circuit Court of Appeals, Eighth Circuit. March 28, 1914.)

No. 3799.

1. PRINCIPAL AND SURETY (§ 27*)—DISCHARGE OF SURETY—DELIVERY IN VIOLATION OF CONDITIONS—NOTICE TO OBLIGEE.

A surety on a bond in the hands of the obligee is not discharged by evidence that the bond was delivered by him to the principal obligor upon conditions which were not performed, but of which the obligee had no notice.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 56; Dec. Dig. § 27.*]

2. PRINCIPAL AND SURETY (§ 159*)—ACTION—BURDEN OF PROOF—DEFENSES.

Defendants signed a bond in favor of plaintiff surety company as obligee to indemnify it against loss by reason of its becoming surety on the bond of a firm of contractors. The bond was on a printed form which did not contemplate its signature by the contractors. It was delivered by them to plaintiff, was fair and regular, and did not disclose on its face that it was signed subject to any conditions. *Held*, that to constitute a defense on the ground that it was delivered in violation of the agreement of the contractors that before delivery the firm would sign it as principal, and would also procure the signature of 10 responsible persons as sureties, the burden rested on defendants to prove, not only such facts, but also that plaintiff had notice of the conditions when it accepted the bond, and that the fact that it was not signed by the contracting firm was not constructive notice to plaintiff of any conditions or irregularity, nor was the fact that one of the defendants failed to sign the property statement attached.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 428–435; Dec. Dig. § 159.*]

In Error to the District Court of the United States for the Southern District of Iowa; Smith McPherson, Judge.

Action at law by the Title Guaranty & Surety Company against William F. Schmidt and others. Judgment for defendants, and plaintiff brings error. Reversed.

Alfred G. Ellick, of Omaha, Neb. (H. C. Brome and Clinton Brome, both of Omaha, Neb., and George S. Wright, of Council Bluffs, Iowa, on the brief), for plaintiff in error.

Emmet Tinley, of Council Bluffs, Iowa (W. E. Mitchell, of Avoca, Iowa, and A. L. Preston and H. L. Robertson, both of Council Bluffs, Iowa, on the brief), for defendants in error.

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

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

RINER, District Judge. This was an action brought by the plaintiff in error in the District Court of the United States for the Southern District of Iowa, Western Division, against the defendants in error, to recover upon an indemnity bond. The record discloses the following state of facts:

Marxen & Rokahr, a copartnership, were general contractors having their principal place of business at Avoca, Iowa; that on the 16th of May, 1905, they entered into a contract with Seward county, Neb., to furnish all material and construct a courthouse building for that county. By the terms of their contract the contractors were required to furnish a bond in the sum of $30,000, conditioned, among other things, for the payment of all material used in the construction of the courthouse building. Pursuant to this requirement of the contract, on the 19th of May, 1905, an application was made to the local agent of the plaintiff in error at Omaha, Neb., to furnish a bond. This application was accepted on condition that Marxen & Rokahr deliver to the plaintiff in error an indemnifying bond in the sum of $10,000, with at least two satisfactory sureties, conditioned to save the plaintiff in error and its successors and assigns harmless against all suits, actions, debts, damages, and loss whatsoever by reason of its contract of suretyship upon its bond given to Seward county to secure the performance by Marxen & Rokahr of their contract for the construction of the courthouse. Marxen, for and on behalf of his firm, agreed to procure an indemnifying bond, and returned to his home at Avoca, Iowa, for that purpose. Pursuant to the agreement between Marxen and the local agent of plaintiff in error at Omaha, the local agent executed and delivered a bond in the sum of $30,000 from the plaintiff in error to Seward county, which was filed in the office of the county clerk of that county. Marxen, having procured the signatures of the defendants in error to the indemnity bond, delivered it to the local agent of the plaintiff in error at Omaha.

During the progress of the work of constructing the courthouse the contractors purchased material from the Des Moines Bridge & Iron Works of the value of $17,609.30, of which they paid the sum of $6,610.80, leaving a balance of $10,998.50 due and unpaid upon the purchase price of the material.

On the 7th of January, 1908, the Des Moines Bridge & Iron Works Company brought an action in the District Court of Seward County, Neb., against the contractors and the plaintiff in error upon the bond given to the county to recover this balance due upon the purchase price of the material furnished by it to the contractors and used in the construction of the courthouse. A trial was had, resulting in a judgment in favor of the Des Moines Bridge & Iron Works Company for $12,134.15, with interest and costs. The contractors being at that time insolvent and unable to pay or appeal from the judgment, the plaintiff in error appealed the case to the Supreme Court of the state of Nebraska, where the judgment was affirmed and the plaintiff in error was compelled to pay the amount of the judgment, with interest and costs, in the sum of $13,886.10. The defendants in error were notified of these proceedings, and also that they would be held liable on their indemnity bond for any loss that the plaintiff in error might

sustain, and pursuant to this notice employed counsel to assist in the defense of the suit brought by the Des Moines Bridge & Iron Works Company.

On the 15th of March, 1911, this action was brought by plaintiff in error to recover upon the indemnity bond.

The defendants in error in their answer set up two defenses: First. That the indemnity bond was executed and delivered without consideration. This defense, however, was abandoned at the trial. The second defense alleged that Marxen at the time he procured the defendants in error to execute the indemnity bond represented to each of them that Marxen and Rokahr would sign the bond, and that he would procure 10 responsible sureties; that he would leave the bond with the cashier of the Avoca State Bank and would not deliver it as an executed agreement until it had been signed by 10 persons and his firm. It is further alleged that the plaintiff in error and Dodson, its local agent at Omaha, had notice of the conditions upon which the signatures of the defendants in error were obtained.

At the trial the defendants in error offered evidence tending to show that Marxen obtained their signatures to the indemnity bond upon the representation that his firm would sign the bond and that he would procure 10 responsible persons to sign before it was delivered; but there is no evidence in the record tending to show that the plaintiff in error or its local agent, who received the bond from Marxen, had any notice or knowledge that the defendants in error had executed the bond upon any condition whatever. The indemnity bond, a copy of which is set out in the record, the original having been presented to the court for inspection at the oral argument, upon its face was a perfect instrument, having no blanks or room for additional names, either in the body of the bond or in the spaces provided for signatures, and the local agent of the plaintiff in error testified that he received the bond in its present condition from Marxen on the 27th of May, 1905, pursuant to their agreement that such bond should be furnished. At the close of all of the evidence the plaintiff in error moved for a directed verdict in its favor, which motion was overruled, and the court on its own motion directed a verdict in favor of the defendants in error.

[1] The bond in suit being apparently perfect and complete upon its face, if the sureties have any defense it must be because the writing does not fully express their contract. They say that it does not express the contract they intended to make, but no conditions are attached to the bond. If they wanted to attach conditions to their obligation they should have stated them in writing, or at least given notice of them in some form to the obligee, the other party to the contract. In other words, the obligation, as expressed in writing must, we think, remain in full force in the absence of conditions known to the party for whose benefit the promise was made.

The case of Dair v. United States, 16 Wall. 1, 21 L. Ed. 491, was an action to recover on a distiller's bond. At the request of Jonathan Dair, one of the principals, James Dair and William Davidson signed the bond as sureties on condition that it was not to be delivered to the plaintiff until it should be signed by Joseph Cloud as cosurety. With

this understanding the bond was placed in the hands of the principal, Jonathan Dair, who subsequently, and without procuring the signature of Joseph Cloud as cosurety, delivered the bond to the plaintiff. The bond was in all respects regular upon its face and the plaintiff had no notice of the condition. Upon these facts the Circuit Court entered a judgment in favor of the United States, which was affirmed by the Supreme Court, and in the course of its opinion the court said:

"It must be conceded that courts of justice, if in their power to do so, should not allow a party who, by act or admission, has induced another with whom he was contracting to pursue a line of conduct injurious to his interests to deny the act or retract the admission in case of apprehended loss."

This principle has been applied in a number of cases: Empire State Surety Co. v. Carroll Co., 194 Fed. 593, 114 C. C. A. 435; Moses v. United States, 166 U. S. 571, 17 Sup. Ct. 682, 41 L. Ed. 1119; Joyce v. Auten, 179 U. S. 591, 21 Sup. Ct. 227, 45 L. Ed. 332; Smith v. Kirkland, 81 Ala. 345, 1 South. 276; Williams v. Morris, 99 Ark. 319, 138 S. W. 464; Tidhall v. Halley, 48 Cal. 610; Byers v. Gilmore, 10 Colo. App. 79, 50 Pac. 370; Mathis v. Morgan, 72 Ga. 517, 53 Am. Rep. 847; Comstock v. Gage, 91 Ill. 328; Whitcomb v. Miller, 90 Ind. 384; Taylor Co. v. King, 73 Iowa, 153, 34 N. W. 774, 5 Am. St. Rep. 666; Benton Co. Bank v. Boddicker, 105 Iowa, 548, 75 N. W. 632, 45 L. R. A. 321, 67 Am. St. Rep. 310; Risse v. Hopkins, 55 Kan. 518, 40 Pac. 904; Whitaker v. Crutcher, 5 Bush (Ky.) 621; State v. Modrel, 69 Mo. 152; Ward v. Hackett, 30 Minn. 150, 14 N. W. 578, 44 Am. St. Rep. 187. The rule is thus stated in Joyce v. Cockrill, 92 Fed. 838, 35 C. C. A. 38:

"A surety is not discharged, even against the payee, by evidence that the obligation upon which he is sued was delivered to the principal obligor upon conditions which have not been performed, if the payee accepted the instrument without notice, and would sustain loss if deprived of the security upon which he relied."

It is also said in the same case:

"Neither will a surety upon a promissory note, or a private bond, in the hands of the payee, be discharged upon evidence that he had signed the note or bond upon conditions not performed, but of which the payee had no notice. Jordan v. Jordan, 10 Lea [Tenn.] 124 [43 Am. Rep. 294]; Russell v. Freer, 56 N. Y. 67; McCormick v. Bay City, 23 Mich. 457; Davis v. Gray, 61 Tex. 506; Merriam v. Rockwood, 47 N. H. 81."

[2] The trial court, as we gather from its opinion attached to the record, took the view that the sureties, having alleged knowledge on the part of the plaintiff in error, of the condition upon which the bond was executed, the burden of proof was upon the plaintiff in error to establish the fact that it had no notice or knowledge of the condition. We are unable to concur in this view. The bond, as already suggested, was fair and regular upon its face, and we think the burden was upon the sureties, not only to plead, but to prove by satisfactory evidence, the condition upon which the bond was signed, its delivery in violation of that condition, and that the plaintiff in error had notice of the condition at the time it accepted the bond. Whitcomb v. Miller, 90 Ind. 384; Bonner v. Nelson, 57 Ga. 433; Nash v. Fugate, 32 Grat. (Va.) 595, 34 Am. Rep. 780; University of Illinois v. Hayes,

114 Iowa, 690, 87 N. W. 664; Williams v. Morris, 99 Ark. 319, 138 S. W. 464. While it is quite true that all the sureties testified to the effect that at the time they signed the bond Marxen represented to them that his firm would sign the bond, and that he would procure the signature of 10 sureties and would deposit the bond with the State Bank of Avoca, and would not deliver it until it was so signed, yet only two of them, Nieman and Thies, seem to have attempted to make their signatures and the delivery of the bond expressly conditional upon compliance with the representations made by Marxen; and the fact that the bond was a printed form which did not contemplate the signatures of the principals, and only provided lines and spaces for the signatures of five indemnitors, may well raise a doubt as to whether the sureties, or at least some of them, signed the bond, making their signatures dependent upon the performance by Marxen of the conditions set out in their answer. However that may be, for the purpose of this case, we may assume that the sureties did sign the bond upon the conditions contended for by them, but still they would be liable for the reason that there is no evidence in the record showing or tending to show that the plaintiff in error, or any of its officers or agents, at the time the bond was delivered, or at any time prior to the time when the answer in this case was filed, had any knowledge or notice of any of the conversations between Marxen and the sureties, or that the bond was executed upon any conditions whatever. The only evidence in the record upon this point is found in the testimony of Dodson, the local agent of the plaintiff in error at Omaha, who accepted the bond from Marxen. He testified that he had no notice, knowledge, or information of any kind that the bond was other than it purported to be upon its face, or that it was signed by the sureties with any conditions attached to or connected therewith.

The trial court seemed to be of the opinion that because Marxen & Rokahr did not sign the bond as principals the bond itself was constructive notice to the obligee of the conditions upon which the sureties signed. This we think cannot be true for the reason that the plaintiff in error stood in no fiduciary relation to these sureties and owed them no duty to see that the bond was signed or executed as they intended it should be. They had the power to withhold their signatures until the principals had signed and to express in the bond itself the conditions upon which it was signed, if it was signed with conditions.

In Empire State Surety Co. v. Carroll County, 194 Fed. 593, 114 C. C. A. 435, which was a suit upon a county treasurer's bond, where the county treasurer as principal had failed to sign the bond, although his name appeared therein as principal, this court held that that fact would not relieve the sureties from liability. Judge Sanborn, speaking for the court, said:

"We adhere to the conclusion that, where the principal named in the bond would be liable in the absence of the bond for the acts or omissions which constitute the breach of its conditions in suit, the failure of the principal to sign the bond does not relieve the surety who has executed and caused, or permitted, it to be delivered to the obligee, from its liability for the breach of its condition. United States Fidelity & Guaranty Co. v. Haggart, 91 C. C. A. 289, 297, 163 Fed. 801, 809; St. Louis Brewing Ass'n v. Hayes, 38 C. C. A. 449, 97

Fed. 859; State v. Bowman, 10 Ohio, 445; City of Deering v. Moore, 86 Me. 181, 29 Atl. 988, 41 Am. St. Rep. 534; Pima County v. Snyder, 5 Ariz. 45, 44 Pac. 297; Douglas County v. Bardon, 79 Wis. 641, 48 N. W. 969; Gibbs v. Johnson, 63 Mich. 671, 30 N. W. 343; Trustees of Schools v. Scheik, 119 Ill. 579, 8 N. E. 189, 192 [59 Am. Rep. 830]; Woodman v. Calkings, 13 Mont. 363, 34 Pac. 187, 40 Am. St. Rep. 449; United States Fidelity & Guaranty Co. v. Union Trust & S. Co., 142 Ala. 532, 38 South. 177; Lovejoy v. Isbell, 70 Conn. 557, 40 Atl. 531; Johnson v. Johnson, 31 Ohio St. 131; San Roman v. Watson, 54 Tex. 254."

It was suggested by the court below in its opinion that because one of the sureties failed to sign the property statement attached to the bond that that was such an irregularity on the face of the bond as to constitute constructive notice. In this connection it need only be observed that the statement signed by the four sureties showed that they had property greatly in excess of the penalty of the bond, and in view of that fact we do not think that the failure of one of the sureties to sign the property statement was a sufficient defect to put the plaintiff in error upon inquiry as to the execution and delivery of the bond. Taylor County v. King, 73 Iowa, 153, 34 N. W. 774, 5 Am. St. Rep. 666.

The distinction sought to be drawn between actions on private bonds and actions upon official bonds and promissory notes is, we think, without merit. Joyce v. Cockrill, supra, and cases there cited.

For the foregoing reasons we think the motion of the plaintiff in error for a directed verdict in its favor should have been sustained.

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

SOLISS v. GENERAL ELECTRIC CO.

(Circuit Court of Appeals, Eighth Circuit. March 20, 1914.)

No. 4020.

(Syllabus by the Court.)

1. EXECUTORS AND ADMINISTRATORS (§ 223*)—TIME FOR PRESENTING CLAIMS—REPEAL OF STATUTE.

Section 1309, Statutes of Oklahoma 1893, required every executor or administrator to publish a notice to creditors to present their claims against an estate to him, and prescribed the method of publication. Section 1310 required the time specified in the notice for the presentation of such claims to be six months after the date of the first publication of the notice in cases in which the value of the estate exceeded $5,000, and four months in all other cases, and section 1312 declared that a claim on contract not presented within the time prescribed should be forever barred, except in cases immaterial here. Chapter 65 of the Session Laws of Oklahoma of 1910 amended section 1309, so that thereafter it provided that every executor or administrator should give notice to creditors of the deceased to present their claims to him within four months from the date of the notice, prescribed a different method of publication and a form of notice, and contained a declaration that all acts and parts of acts in conflict with that chapter were repealed. *Held*, chapter 65 of the Session Laws of 1910 did not repeal section 1310 of the Statutes of Oklahoma 1893,

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

and the time for the presentation of claims against estates of a value in excess of $5,000 remained six months from the date of the notice.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 767; Dec. Dig. § 223.*]

2. STATUTES (§ 181*)—CONSTRUCTION—LEGISLATIVE INTENT.

The primary rule for the interpretation of a statute, the rule to which all others are subsidiary, is to ascertain and give effect to the intention of the legislative body expressed in the law. Courts may not assume or presume intents or purposes not fairly expressed in the statute, and then by judicial construction enact provisions to effect them. And the legal presumption is that the legislative body has expressed its intention in the statute; that it intended what it expressed and nothing more.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 259, 263; Dec. Dig. § 181.*]

3. STATUTES (§ 161*)—CONSTRUCTION—REPEAL BY IMPLICATION.

Where two statutes cover in whole or in part the same subject, are not wholly irreconcilable, and the latter neither clearly expresses nor indicates an intent to repeal the earlier, they must stand together, effect must be given to each, and the earlier is not repealed by the later.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 230–234; Dec. Dig. § 161.*]

In Error to the District Court of the United States for the Eastern District of Oklahoma; F. A. Youmans, Judge.

Action by the General Electric Company, a corporation, against John P. Soliss and others. Soliss dying, the action was revived against Mary Soliss, as executrix of his estate. Judgment for plaintiff, and the executrix brings error. Affirmed.

Thompson & Smith and Burke & Harrison, all of Sapulpa, Okl., for plaintiff in error.

L. O. Lytle, of Sapulpa, Okl. (McDougal & Lytle, of Sapulpa, Okl., on the brief), for defendant in error.

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

SANBORN, Circuit Judge. The General Electric Company brought this action against J. P. Soliss and others on two promissory notes which they had signed. During its pendency Soliss died testate and the action was revived against Mary Soliss as executrix of his estate. She answered that the estate was not indebted on the notes because the plaintiff had failed to present its claim against the estate of the deceased to her within four months after the first publication of her notice to creditors of the estate to present their claims. At the trial these facts were established: The value of the estate of Soliss exceeded $5,000. Sections 1309, 1310, and 1312 of the Statutes of Oklahoma 1893 provided:

"Sec. 1309. Every executor or administrator must, immediately after his appointment, cause to be published in some newspaper in the county, if there be one, if not, then such newspaper as may be designated by the court, a notice to the creditors of the decedent, requiring all persons having claims against him to exhibit them, with the necessary vouchers, to the executor or administrator, at the place of his residence or business, to be specified in the

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

notice. Such notice must be published as often as the judge shall direct, but not less than once a week for four weeks. * * *

"Sec. 1310. The time expressed in the notice must be six months after its first publication, when the estate exceeds in value the sum of five thousand dollars, and four months when it does not."

"Sec. 1312. If a claim arising upon a contract heretofore made, be not presented within the time limited in the notice, it is barred forever. * * * "

On March 17, 1910, the Legislature of Oklahoma passed chapter 65 of the Session Laws of Oklahoma 1910, under this title:

"An act to amend sections 1233, 1234, 1311, 1346, 1347, 1353, 1423, 1457, 1536 and 1309, and to repeal sections 1217 and 1230 of the statutes of Oklahoma, 1893, entitled 'Court Probate' and adding a new section, providing procedure for proving heirship."

There were 13 sections in the act, and sections 3 and 13 provided:

"Sec. 3. Section 1309 is hereby amended so as to read as follows: Sec. 1309. Every executor or administrator must, immediately after his appointment, give notice to the creditors of the deceased, requiring all persons having claims against said deceased to present the same, with the necessary vouchers, to such executor or administrator, at the place of his residence or business to be specified in the notice, within four months from the date of said notice; such notice must be posted up in three public places in the county, one of which shall be at the courthouse where the county court is held, and published in some newspaper printed in said county for two consecutive weeks. Such notice shall be substantially in the following form: All persons having claims against A. B., deceased, are required to present the same with the necessary vouchers, to the undersigned administrator at ——— within four months of the date hereof, or the same will be forever barred. Dated ———, 19—. A. B., Administrator."

Sec. 13. "That all acts or parts of acts in conflict with this act are hereby repealed."

The defendant made the first publication of the notice to the creditors of Soliss, deceased, on May 10, 1912, and in that notice required them to present their claims within four months after that date. The plaintiff did not present its claim to the executrix within four months of the date of the first publication of that notice as required by section 3 of chapter 65, but it did present it to her on September 28, 1912, within the six months prescribed for the presentation of claims against estates of the value of more than $5,000 by section 1310 of the statutes of 1893. The executrix contended that section 1310 was repealed by chapter 65, and that the plaintiff's claim was barred, but the court overruled her contention and rendered judgment against the estate, and that ruling is assigned as error.

[1] The argument in support of the repeal of section 1310 of the statutes of 1893 is that section 3 of chapter 65 relates to and embraces the entire subject of section 1310, is inconsistent therewith, and discloses an intention of the Legislature to repeal that section. But if section 3 and section 1310 be read and construed together, as they must be if that interpretation is possible, they merely provide that the notice to creditors of estates of the value of $5,000 or less shall require them to present their claims within four months from the date of the notice, and that the notice to creditors of estates of the value of more than $5,000 shall require them to present their claims within six months of the date of the notice. There is no more inconsistency in making these two provisions for the two classes of creditors in two

sections than there is in making them in one section, as they were originally made by section 1310.

Another contention of counsel for the executrix is that the Legislature of Oklahoma in 1910 indicated that it had intended to repeal section 1310 by section 3, by the fact that it adopted, by chapter 39 of the Session Laws of 1910–11, the Revised Laws of Oklahoma 1910, which omits section 1310 and contains section 3, 2 Revised Laws of Oklahoma 1910, p. 1738. But counsel concede that chapter 39 of the Session Laws of Oklahoma, 1910–11 did not affect the rights or remedies of the plaintiff in this case, and it is improbable that, in the consideration and adoption of the Revised Laws of 1910, the question whether or not section 3, c. 65, of the Session Laws of 1910, repealed section 1310 of the Statutes of Oklahoma 1893 ever entered the mind of any member of the Legislature.

[2] The primary rule for the interpretation of a statute or a contract, a rule to which all other rules are subsidiary, is to ascertain, if possible, and to enforce the intention which the legislative body that enacted the law, or the parties who made the agreement, have expressed therein. It is the intention expressed in the law or contract, and that only to which courts may lawfully give effect. They may not assume or presume intents or purposes not fairly indicated in the statute and then enact by judicial construction provisions to effect those intentions or purposes, and the legal presumption is that the legislative body expressed its intention in the statute, that it intended what it expressed, and that it intended nothing more. Stevens v. Nave-McCord Mercantile Co., 150 Fed. 71, 75, 80 C. C. A. 25, 29; United States v. Ninety-Nine Diamonds, 139 Fed. 961, 964, 72 C. C. A. 9, 12, 2 L. R. A. (N. S.) 185.

Chapter 65 of the Session Laws of 1910 expresses no intention to repeal section 1310. It expressly amends sections 1233, 1234, 1311, 1346, 1347, 1353, 1423, 1457, 1536, and 1309, and it expressly repeals sections 1217 and 1230, and it mentions no amendment, repeal, or modification of section 1310. Moreover, section 57, art. 5, of the Constitution of Oklahoma, provides, with exceptions not applicable to this case, that "every act of the Legislature shall embrace but one subject, which shall be clearly expressed in its title"; and the Legislature, in the title of the act which became chapter 65, expressed in its title the amendment of "sections 1233, 1234, 1311, 1346, 1347, 1353, 1423, 1457, 1536, and 1309," the repeal of "sections 1217 and 1230," and the addition of a "new section providing procedure for proving heirship," but it did not mention or refer to section 1310. The enumeration of certain members of a class is the exclusion of all others of that class not enumerated, and these provisions of chapter 65, and of its title, leave no doubt that the Legislature never intended to modify or repeal section 1310 thereby.

Returning now to section 13 of chapter 65, which provides that all acts or parts of acts in conflict with that act are thereby repealed, and conceding that section 3 of chapter 65, if standing alone and independent of the original statute, would cover the entire subject of section 1310, and admitting the soundness of the rule invoked by counsel that a later statute, which covers the entire subject of an earlier one,

is clearly inconsistent therewith, and discloses an intention to repeal it, has that effect, that rule is nevertheless inapplicable to this case. Chapter 65 does not make section 3 thereof a statute later than and independent of the original statute in which sections 1309 and 1310 are found. It merely inserts section 3 in place of section 1309 of the original statute and makes it a part of the latter, so that, subsequent to the amendment of section 1309 by chapter 65, section 3 of that chapter must be read as section 1309 of the original statute, in pari materia with section 1310 of the same statute. When the sections are thus read, their construction and effect are not doubtful. The amended section 1309 declares the general rule, the rule applicable in the great majority of the cases, the cases of estates of the value of $5,000 or less, while section 1310 discloses the rule in the special cases, in the cases of estates of a value in excess of $5,000. And even if section 3 of chapter 65 were an independent subsequent act, the true construction of that section and section 1310 would not be different because the intention of the Legislature not to repeal or modify section 1310 shines forth so clearly from the title and the provisions of chapter 65.

[3] Where two statutes cover in whole or in part the same subject, are not wholly irreconcilable, and no intent to repeal the earlier is clearly expressed or indicated by the later, they must stand together, effect must be given to each, and the earlier is not repealed by the later. Frost v. Wenie, 157 U. S. 46, 58, 15 Sup. Ct. 532, 39 L. Ed. 614; United States v. Healey, 160 U. S. 136, 147, 16 Sup. Ct. 247, 40 L. Ed. 369; Board of Commissioners v. Ætna Life Ins. Co., 90 Fed. 222, 227, 32 C. C. A. 585, 590; City Realty Co. v. Robinson Contracting Co. (C. C.) 183 Fed. 176, 181.

There was no error in the ruling of the court below that section 1310 of the Statutes of Oklahoma 1910 was not repealed by chapter 65 of the Session Laws of Oklahoma 1910; and, as this conclusion is necessarily decisive of this case, the discussion and decision of the other questions presented will be omitted, and the judgment below will be affirmed.

It is so ordered.

WEDDEL v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. March 30, 1914.)

No. 3995.

1. PROSTITUTION (§ 3*)—INDICTMENT—SUFFICIENCY.

An indictment for the violation of White Slave Traffic Act June 25, 1910, c. 395, § 2, 36 Stat. 825 (U. S. Comp. St. Supp. 1911, p. 1343), which first charged in the language of the statute that the defendant aided in procuring transportation over an interstate railroad for a woman for the purpose of prostitution, and then specified the particular manner in which the aid was rendered, is sufficient.

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

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

2. CRIMINAL LAW (§ 811*)—TRIAL—REQUEST FOR CHARGE—SINGLING OUT EVIDENCE.

A request, which singled out certain facts without considering the other modifying facts and asked the court to charge that if those facts were true the jury could not find the defendant guilty, was properly refused, especially where the charge as a whole fully, correctly, and fairly stated the law applicable to the case.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1787, 1969–1972; Dec. Dig. § 811.*]

3. CRIMINAL LAW (§ 1170*)—HARMLESS ERROR—EXCLUSION OF TESTIMONY—CURE BY OTHER TESTIMONY.

In a prosecution for the violation of the White Slave Traffic Act (Act June 25, 1910, c. 395, 36 Stat. 825 [U. S. Comp. St. Supp. 1911, p. 1343]), error in sustaining an objection to a question asked the defendant as to her purpose in furnishing the transportation was harmless, where the defendant later on was permitted to testify fully as to such purpose.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3145–3153; Dec. Dig. § 1170.*]

4. CRIMINAL LAW (§ 1129*)—ERROR—NECESSITY OF ASSIGNMENT—EXCLUSION OF EVIDENCE.

Error in the exclusion of testimony in a criminal trial cannot avail the defendant on appeal where no assignment of error was predicated thereon.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2954–2964; Dec. Dig. § 1129.*]

In Error to the District Court of the United States for the Western District of Missouri; William H. Pope, Judge.

Cecilia Weddel, alias Rae Sheldon, was convicted of violating the White Slave Traffic Act, and she brings error. Affirmed.

George A. Neal, of Kansas City, Mo. (R. H. Davis, of Joplin, Mo., on the brief), for plaintiff in error.

Thad B. Landon, Sp. Asst. U. S. Atty., of Kansas City, Mo. (Francis M. Wilson, U. S. Atty., of Platte City, Mo., on the brief), for the United States.

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

ADAMS, Circuit Judge. The defendant (plaintiff in error) was indicted, tried, and convicted for violation of the provisions of section 2 of the act of June 25, 1910, c. 395, 36 Stat. 825 (U. S. Comp. St. Supp. 1911, p. 1343), known as the White Slave Traffic Act. That section reads as follows:

"Any person who shall knowingly transport or cause to be transported, or aid or assist in obtaining transportation for, or in transporting, in interstate or foreign commerce, * * * any woman or girl for the purpose of prostitution or debauchery, * * * or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery, * * * or who shall knowingly procure or obtain, or cause to be procured or obtained, or aid or assist in procuring or obtaining, any ticket or tickets, or any form of transportation or evidence of the right thereto, to be used by any woman or girl in interstate or foreign commerce, * * * in going to any place for the purpose of prostitution or debauchery * * * whereby any such woman or girl shall be transported in interstate or foreign commerce, * * * shall be deemed guilty of a felony, and upon conviction thereof shall be punished. * * *"

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

The second count of the indictment on which alone conviction was had charged that the defendant did—

"unlawfully, willfully, knowingly, and feloniously aid and assist in obtaining and procuring transportation for a certain woman, to wit, Catherine Smith, as a passenger over the lines of certain railway common carriers engaged in interstate commerce, * * * from the city of Rogers, in the state of Arkansas, to the city of Joplin, in the state of Missouri, for the purpose of prostitution, by then and there knowingly furnishing to said Catherine Smith the sum of $5 for the purpose of her, the said Catherine Smith, paying for the transportation of her, the said Catherine Smith, as a passenger over the lines of certain railway common carriers from the city of Rogers, in the state of Arkansas, to the city of Joplin, in the state of Missouri, in interstate commerce, * * * to which said last-named city said Catherine Smith was carried and transported as a passenger in interstate commerce as aforesaid, for the purpose of prostitution."

The assignments of error are these:

"The court erred in denying the motion in arrest of judgment; the court erred in denying defendant's motion for an instructed verdict in her favor; the court erred in its charge to the jury" in a particular later referred to.

[1] It is argued in support of the first assignment that the indictment did not state facts sufficient to constitute an offense. We think this criticism is without any merit whatsoever. The defendant is first charged in the language of the statute itself, with its violation, and then to make it more specific the way and manner of its violation was specifically pointed out. The general charge was that the defendant aided and assisted Catherine Smith in obtaining transportation as a passenger over the lines of certain specified railways, engaged in interstate commerce, for the purpose of prostitution, and then, to make the matter as specific as possible, it was charged that the defendant did so aid and assist her by furnishing to her the sum of $5 with which to pay for her transportation. The indictment was unquestionably good.

The second assignment challenges the sufficiency of the proof to warrant conviction. It will serve no useful purpose to analyze the evidence. We have examined it carefully in view of the strictures passed upon it by counsel for the defendant, and are unable to agree with him. The proof was ample to sustain the verdict and the court rightly refused to instruct the jury to find for the defendant.

The plaintiff in error has assigned for error the refusal of the trial court to give a certain requested instruction to the jury.

[2] This request singled out a few statements of fact testified to by the defendant and asked the court to advise the jury that if those facts were true they would not be authorized to find the defendant guilty.

The vice of this request was that the court was asked to single out and declare the effect of certain facts without consideration of other modifying facts. For this reason the instruction was properly refused. Perovich v. United States, 205 U. S. 86, 92, 27 Sup. Ct. 456, 51 L. Ed. 722, and cases cited. Moreover, the charge as a whole fully and accurately advised the jury of the law applicable to the case and was so fair that one exception only was taken to it, and that

on a matter which was so fully covered in other parts of the charge that counsel neither specified it in their brief nor argued it before us.

[3, 4] Defendant's counsel strenuously argued that the court below erred in sustaining an objection to the following question which was put to the defendant when she was on the stand as a witness in her own behalf, namely:

"State whether or not you let her have that money merely to return to what she regarded as her home and whether it was furnished for the purpose of having her come back and engage in prostitution."

The intent with which the defendant furnished the money was an important element of the crime charged against her, and the substance of the question would seem to have been pertinent and proper. There are two reasons, however, why the error, if any, cannot now avail her: First, the witness later on in her examination was permitted to testify fully on the subject of her intent; and, second, there is no assignment of error predicated on this alleged error of the court.

The judgment is affirmed.

THE McCALDIN BROTHERS.
THE J. J. TIMMINS.

(Circuit Court of Appeals, Second Circuit. March 17, 1914.)

No. 167.

TOWAGE (§ 3*)—TUGS ASSISTING STEAMSHIP TO DOCK—LIABILITY FOR STRANDING.

In a suit by the owner of a steamship against three tugs, employed to accompany her in proceeding under her own steam to her dock in New York harbor, and to dock her, to recover damages on account of her stranding because of the action of the flood tide, which caused her to sheer from her course, libelant *held* not to have sustained the burden resting upon it to prove that the navigation of the vessel had been put in charge of the tugs, or that the tugs caused the sheer, without which they could not be charged with responsibility therefor.

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

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

Suit in admiralty by the Texas Company against the steam tugs McCaldin Brothers and William J. McCaldin, the McCaldin Bros. Company, claimant, and the J. J. Timmins, Edward M. Timmins, claimant. Decree for respondents, and libelant appeals. Affirmed.

Harrington, Bigham & Englar, of New York City (D. Roger Englar, of New York City, of counsel), for appellant.

Peter S. Carter, of New York City, for The McCaldin Brothers.

Burlingham, Montgomery & Beecher, of New York City, for The J. J. Timmins.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. December 3, 1911, the steamer Texas, belonging to the libelant, the Texas Company, lay at anchor off Staple-

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

ton, Staten Island, awaiting the rise of the tide and the arrival of tugs before proceeding to her berth at Bayonne, N. J. The company notified McCaldin Bros. over the telephone the day before the steamer's arrival that she would want three tugs. They were in the habit of furnishing tugs for the company's steamers, but there is no testimony as to what the contract between the parties was further than that, for assistance to Bayonne of steamers proceeding under their own steam, McCaldin Bros. charged $15 for each tug, whereas, if the tugs towed, the charge would be $10 an hour for each tug. The contract in this case was clearly not one of towage. McCaldin Bros. sent two of their own tugs, viz., the William J. McCaldin and the McCaldin Brothers, and employed a third tug, belonging to other parties, named the J. J. Timmins.

The steamer started from her anchorage at 3 p. m. on the flood tide; time of high water at Shooters Island near the company's dock being 5:42. She proceeded under her own steam, with the tug William J. McCaldin on the port and the McCaldin Brothers on the starboard side forward; each holding on by a bow line only and using her own steam to keep up with the steamer. The J. J. Timmins was fast on the port quarter, with bow and stern and breast lines. None of the tugs was towing.

At some point not satisfactorily fixed, after the steamer had rounded Bergen Point, she took a sudden sheer to starboard and fetched up on submerged rocks, which cut through her bottom on the starboard side. The sudden stoppage and list to port parted the lines of the tugs, so that they were not able to render any service at all, even if there had been time to do so. The Texas Company filed this libel in rem against the tugs to recover the damages so sustained.

All the witnesses agreed, and the District Judge found, that the sheer was caused by the effect of the flood tide on the starboard quarter of the steamer. The place of stranding is in dispute, but we think it was at the southern end of the Middle Ground, between Bergen Point and Shooters Island. The proofs give but a meager account of the set and force of the tide, and none at all as to the place where the flood tide from the Arthur Kill meets the flood tide from the Kill Van Kull, or of the effect of the meeting. However, we will adopt the finding that the sheer was caused by the flood tide throwing the steamer's stern to port and her bow to starboard, without clearly understanding why the tide had more effect on the quarter than on the bow.

The District Judge dismissed the libel, on the ground that the tugs had nothing to do with the time of starting, which he found to have been the proximate cause of the accident. In other words, if the start had been an hour or so later, so strong a tide at Shooters Island would not have been encountered. For this reason he found it unnecessary to consider whether the navigation of the adventure was in charge of the master of the steamer or of Capt. Howe, the master of the tug William J. McCaldin, who was also on the bridge and was certainly in charge of the tugs. We cannot concur in this reasoning. It would be satisfactory upon proof made that the steamer could not safely pass Shooters Island at the stage of the tide in question. There

is, however, no such proof, and the supposition is not to be entertained. Persons competent to navigate the waters in question were bound to know the set and force of the tide at that time at that place. If there were the tendency to swing the steamer around, which is alleged, the navigator ought to have taken steps to overcome it. Instead of this, the natural operation of the tide appears to have been a total surprise, and so sudden that nothing whatever was done to counteract it. Therefore it is essential to determine who was in charge of the navigation and at fault for this.

There is no evidence as to the contract between the Texas Company and the McCaldin Bros. All we know is that McCaldin Bros. were to send three tugs to accompany the steamer, proceeding under her own steam, to her berth, and to dock her there; also that Capt. Howe of the tug William J. McCaldin was on the bridge with the master of the steamer. Howe and his witnesses say he merely made suggestions to the master, who was in sole charge; while the master and his witnesses say that Howe was put in charge of the steamer. Of course, there may be an arrangement whereby the control of the master shall be yielded to some one else; but the burden of proving it lies strongly on him who alleges it. We are not disposed to find that the master's authority in this case was displaced, and that the owners of the tugboats assumed responsibility for pilotage and navigation of this valuable steamer and cargo for the sum of $15 a tug. Much clearer proof would be necessary to bring us to such a conclusion. No doubt, as the tugs naturally accompanied the steamer to her berth, if she got into trouble on the way, they would have assisted her. If any tug did so negligently, either at the order of Capt. Howe or on her own motion, that tug would be responsible in rem, although acting gratuitously. What is charged here, however, against the tugs, is not acts of commission, but acts of omission, viz., that they did not take timely measures to counteract the effect of the flood tide. Such cases as The W. B. Mason, 142 Fed. 913, 74 C. C. A. 83, The Anthracite, 168 Fed. 693, 94 C. C. A. 179, and The Harry M. Wall (D. C.) 187 Fed. 278, in which the tug was under an engagement to tow, was actually towing, and her master in full charge of the operation, have no application.

Finding, as we do, that Capt. Howe was not in charge of the navigation and that the tugs were not under any duty to tow, the decree is affirmed.

THE DELAWARE.

THE AMBROSE SNOW.

(Circuit Court of Appeals, Second Circuit. March 10, 1914.)

Nos. 198, 199.

COLLISION (§ 102*)—FOG—STEAM AND SAILING VESSELS MEETING—COMBINED FAULTS.

A collision in the main channel, entering New York Bay in a dense fog between a schooner-rigged pilot boat coming in and a steamship passing out, *held* due to the faults of both vessels in changing their courses after hearing each other's fog signals ahead; the steamship also being in fault for increasing her speed instead of stopping and navigating with caution, as required by article 16 of the Inland Rules, Act June 7, 1897, c. 4, 30 Stat. 96 (U. S. Comp. St. 1901, p. 2880).

[Ed. Note.—For other cases, see Collision, Dec. Dig. § 102.*
Signals of meeting vessels, see note to The New York, 30 C. C. A. 630.]

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

Suit in admiralty for collision by the New York Sandy Hook Pilots' Association and others, as owners of the pilot boat Ambrose Snow, against the steamship Delaware, the Clyde Steamship Company, claimant, with cross-libel. Decree for cross-libelant, and libelant appeals. Reversed.

For opinion below, see 204 Fed. 996.

Lindsay, Kalish & Palmer, of New York City (J. Culbert Palmer, of New York City, of counsel), for appellant.

Burlingham, Montgomery & Beecher, of New York City (Charles C. Burlingham and Chauncey I. Clark, both of New York City, of counsel), for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. May 23, 1912, at a little before 7 p. m. the schooner-rigged pilot boat Ambrose Snow, having transferred her last pilot to the pilot boat Trenton near Scotland Lightship, proceeded on her way to her berth at Stapleton, Staten Island. There was a thick fog, the wind light from S to E to E SE and the tide ebb. The schooner went through the Swash into the Main Channel and proceeded slowly against the ebb tide on a course N by E along the westerly edge with her booms on her port side, sounding three blasts on her mechanical fog horn, indicating that the wind was abaft her beam, as required by article 15 (c) of the Inland Regulations. At the same time the steamer Delaware was coming down the westerly side of the channel on a course S ½ W on her way from New York to Philadelphia, blowing her fog whistle as required by law.

When the schooner heard the steamer's whistle she starboarded a little to go more to the westerly side of the channel. On hearing it a second time she starboarded further, and when she discovered the steamer, she put her helm hard up and threw her bow so far to the

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

westward that her booms jibbed to the starboard side. The steamer struck her amidships and sent her to the bottom.

The lookout of the steamer reported three blasts of a fog horn a little on the port bow, and thereupon the master immediately ordered the helm hard aport and the engines full speed ahead. The answer states:

"Shortly after entering the fog the lookout reported three blasts of a fog horn a little on the port bow, which indicated a sailing vessel running free and bound up the channel. The helm of the Delaware was immediately put hard aport, and her engines rung full speed ahead in order to swing the ship's head more rapidly to starboard. Shortly afterwards, the sails and masts of a schooner running free, with her sails boomed out to port, were made at a distance of about one-fourth mile and about two points on the Delaware's port bow, on a course which would clear the steamship. Suddenly those on the Delaware observed that the schooner, which proved to be the pilot boat Ambrose Snow, was swinging to port under a starboard helm and changing her course so as to cross the Delaware's bow. The engines of the Delaware were immediately stopped and reversed, but the schooner kept going to port and swung directly across the Delaware's bow, rendering a collision unavoidable. Just before the Ambrose Snow crossed the steamship's bow, the schooner jibbed over, and shortly afterwards the vessels came together at about right angles, the stem of the Delaware striking the schooner at her starboard main chain plates. As a result of the collision the Delaware's stem was damaged and the schooner filled and sank."

At the trial the master testified that he hard aported and hooked up at the moment he saw the schooner; she then being 1 to 1½ points on his port bow, heading up the channel. We think the account given in the pleadings much more probable than that given by the master.

The District Judge held the schooner solely at fault because of her change of course. Generally speaking, a vessel hearing the fog signal of another vessel approaching ahead should not change her course until the position and course of the other vessel is ascertained. Any attempt to locate her by the sound of her fog signals a few points on either bow is most dangerous. All the information the schooner had was that a steamer was approaching, probably on the usual channel course, while the steamer only knew that a sailing vessel was approaching with the wind free, but nothing of her precise course. Both vessels changed their courses, whereas apparently if either had held her course the collision would have been avoided.

The steamer was guilty of other faults. Upon hearing the fog horn of an approaching sailing vessel she should have stopped her engines in accordance with the provisions of article 16 of the Inland Rules. The St. Louis, 98 Fed. 750, 39 C. C. A. 201. Instead of this she did just the contrary, put them full speed ahead, although she was then going altogether too fast, some 6¼ knots through the water and with the tide between 8 and 9 knots over the land.

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

THE BAYONNE.

(Circuit Court of Appeals, Second Circuit. March 10, 1914.)

No. 139.

1. COLLISION (§ 22*)—INEVITABLE ACCIDENT.
   The conclusion that a collision was due to inevitable accident should only be adopted if either the cause of the collision is shown and that it was unavoidable or else that all possible causes were unavoidable.
   [Ed. Note.—For other cases, see Collision, Cent. Dig. § 19; Dec. Dig. § 22.*]

2. COLLISION (§ 82*)—FOG—MODERATE SPEED.
   No precise rate of speed in a fog can be held moderate in all cases, but each case must be determined on its own circumstances.
   [Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 170–174; Dec. Dig. § 82.*
   Collision rules, speed of steamers in fog, see note to The Niagara, 28 C. C. A. 532.]

3. COLLISION (§ 100*)—STEAM VESSELS CROSSING—FAILURE TO HEAR FOG SIGNALS—BOTH VESSELS IN FAULT.
   A collision on the Hudson in a dense fog between one of two tugs passing up with a number of boats in tow and a crossing steam lighter *held* due to the faults of both vessels in failing to listen for and hear each others' fog signals, and then to stop and navigate with caution, as required by article 16 of the Inland Rules, 30 Stat. 99 (U. S. Comp. St. 1901, p. 2880).
   [Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 213–215; Dec. Dig. § 100.*]

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

Suit in admiralty for collision by the Cornell Steamboat Company, as owner of the steam tug Edwin Terry, against the steam lighter Bayonne; the Central Railroad of New Jersey, claimant. Decree for respondent, and libelant appeals. Reversed.

Amos Van Etten, of Kingston, N. Y., for appellant.

Jas. J. Macklin, of New York City (De Lagnel Berier, of New York City, of counsel), for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. April 5, 1911, the steam tug Edwin Terry, and the steam tug J. H. Williams on her port side as helper, were towing a flotilla of 12 light boats on hawsers up the North river in a thick fog against an ebb tide of two knots. At the same time the steam lighter Bayonne was crossing the river on her way from Communipaw to Pier 10 on the New York side. At a point about opposite Pier A the Bayonne came into collision with the Terry. As soon as they discovered each other all the vessels went full speed astern. The Williams being shorter than the Terry, and having a single engine which could be reversed sooner than a compound, got out of the way, but the Bayonne struck the port bow of the Terry and rolled her over so that her smokestack carried away and the cook was thrown out of the kitchen into the water.

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

[1] The district judge found that fog signals were blown, but thought it quite common that such signals are not heard. As to speed he found that the Bayonne was proceeding at the rate of 3½ miles and the tugs at 3 miles an hour. He thought this speed necessary to maintain steerageway and therefore that it should be considered moderate. As a result he found the collision to have been due to inevitable accident. This is a conclusion not to be lightly arrived at. It should only be adopted if either the cause of the collision is shown and that it was unavoidable or else all possible causes must be shown to have been unavoidable. The Edmund Moran, 180 Fed. 700, 104 C. C. A. 552. The cause of the collision was the fog and the means of avoiding its effect were to go slowly and to give and listen for fog signals.

[2] We are not at all convinced that on an ebb tide such speed was necessary for steerageway nor that under the rule laid down by the Supreme Court in the case of The Umbria, 166 U. S. 404, 412, 17 Sup. Ct. 610, 614, 41 L. Ed. 1053, such speed, even if necessary for steerageway, is moderate if the vessel cannot avoid another vessel which is herself complying with the law, after discovering her. Counsel relies upon the case of the No. 4, 161 Fed. 847, 88 C. C. A. 665, in which we held that the speed of the lighter of 3½ knots was moderate. The Supreme Court also said in the case of the Umbria that the Iberia's speed of 4 knots was moderate. Every case, however, depends upon its own circumstances. There is no precise rate that can be held moderate in all cases. For instance, the lighter in the case of The No. 4 was being overtaken by the steamer Morse, which was going at an immoderate speed. The faster the lighter went the longer would be the interval within which the vessels might avoid collision. In the case of The Umbria that steamer's speed of 19 knots was so reckless that the Iberia's speed of 4 knots was negligible.

[3] This case, however, can be disposed of upon the other ground which counsel were apparently a little chary of touching. The libel charged the Bayonne with fault for not blowing signals and the answer made the same charge against the tow. The witnesses for the libelant testified that the Terry, which was in charge of the tow and whose duty it was to give the fog signal, did so regularly. Likewise the witnesses from the Bayonne said her fog whistle was blown regularly. We believe this testimony because it is quite unlikely that in such a fog signals were not being blown. The vessels were quite near each other, and there was nothing to interfere with the sound. It follows that those on each vessel were at fault for not hearing the signal of the other. The signal must have sounded from a point forward of abeam, and, if heard, each vessel should have stopped her engines and navigated with caution, as required by article 16 of the Inland Rules. There can be little doubt that by so doing the collision would have been avoided.

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

WEST LEECHBURG STEEL CO. v. BLACKAS.

(Circuit Court of Appeals, Third Circuit. April 27, 1914.)

No. 1833.

1. MASTER AND SERVANT (§ 296*) — ACTIONS FOR INJURIES — INSTRUCTIONS — CONTRIBUTORY NEGLIGENCE.

In an employé's action for injuries, where there was evidence that for some unexplained reason he walked some distance from his usual place of work, leaned his arm on the top of a lever, and was injured by the slipping of his arm therefrom, an instruction, that though he did this he would still be free from negligence unless such acts were negligently done, was erroneous, as it did not submit the question whether his conduct taken as a whole amounted to negligence contributing to the injury, but charged that it was not negligence unless negligently done, thereby begging the question and leaving the jury's minds in a state of confusion.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1180–1194; Dec. Dig. § 296.*]

2. MASTER AND SERVANT (§ 229*)—LIABILITY FOR INJURIES—CONTRIBUTORY NEGLIGENCE.

In an employé's action for injuries, the defense of contributory negligence was made out if his conduct was negligent, judged as a whole and according to the standard of ordinary care.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 674, 683; Dec. Dig. § 229.*]

3. TRIAL (§ 267*)—INSTRUCTIONS—REQUESTS.

It was not necessary that the charge should specifically answer defendant's points; but, where they showed clearly what counsel had in mind and were adequate to bring the subject to the court's notice, they should have received correct treatment in the general charge.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 668–672, 674; Dec. Dig. § 267.*]

In Error to the District Court of the United States for the Western District of Pennsylvania; James S. Young, Judge.

Action by Alexander Blackas against the West Leechburg Steel Company. Judgment for plaintiff, and defendant brings error. Reversed, and new venire awarded.

William A. Stone, of Pittsburgh, Pa., for plaintiff in error.

H. Fred Mercer, of Pittsburgh, Pa., for defendant in error.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

J. B. McPHERSON, Circuit Judge. [1-3] It is unnecessary either to detail the facts, disputed and undisputed, of the accident by which the plaintiff was injured, or to consider all the assignments of error. It is sufficient to say that we think the instructions were erroneous upon one matter that was vital to the defense—the subject of contributory negligence. Unless the plaintiff was free from negligence, he could not recover, and the defendant was therefore entitled to ask that the jury should receive correct and adequate instructions on this matter. Unfortunately the charge submitted the question in such a way that a confused and inaccurate impression was inevitable. The

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

point is this: The plaintiff was injured, not at his usual place of work, but five or six feet distant therefrom. His presence at that spot could be accounted for in one of two ways; either some unforeseen happening connected with his work might have taken him to the place for the moment, or he might have gone there casually without being required to go by his duty. His theory of the injury was that while engaged in his proper work his right arm was caught between two unguarded spindles, the defense being that in an interval of work while nothing was being done he walked to the place of injury for some unexplained reason, leaned his arm on the top of a lever near the spindles, and was injured because the arm slipped off the lever, his own fault being the proximate cause of the accident. The testimony supporting the plaintiff's theory was vague and indefinite, while the defense was testified to clearly and directly. The question for decision was: Did his conduct, taken as a whole, amount to negligence that contributed to his injury? But this question was not submitted to the jury. On the contrary, they were told, in effect, that he might have done all that the defense asserted and would still be free from negligence, unless each of the acts was negligently done. The instruction specially complained of shows plainly, we think, that the language of the learned judge inadvertently begged the question at issue, and must have left the jury's minds in a state of confusion. The defense was made out if the conduct testified to was negligent, judged as a whole and judged according to the standard of ordinary care. That is the point the jury should have been asked to determine; but instead of this they were instructed that the acts complained of would only be negligent if they were negligently done—thus, as we have said, begging the precise question at issue. The instruction referred to was evidently intended as the answer to the defendant's third and fourth points which called the attention of the court distinctly to the defendant's theory. These points were not answered specifically; this was not error, for of course a specific answer was not required, but they show clearly what counsel had in mind, and were adequate to bring the subject to the court's notice, in order that they might receive correct treatment in the general charge.

We express no opinion about the Pennsylvania Factory Act.

The judgment is reversed, and a new venire is awarded.

FOURTH NAT. BANK OF MACON, GA., v. WILLINGHAM.

(Circuit Court of Appeals, Fifth Circuit. April 7, 1914.)

No. 2604.

1. APPEAL AND ERROR (§ 854*)—REVIEW—CORRECT DECISION ON INCORRECT REASONING.

An order correct in itself will not be disturbed, although the reasons for it, or the grounds on which it is based, are incorrect.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3403, 3404, 3408–3424, 3427–3430; Dec. Dig. § 854.*]

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

2. BANKRUPTCY (§ 345*)—CHATTEL MORTGAGES (§ 196*)—VALIDITY—WITHHOLDING FROM RECORD.

Where a chattel mortgage was withheld from record to bolster the credit of the mortgagor and for the purpose of defrauding his creditors, the mortgage was void, and did not constitute a preferred secured claim in favor of the mortgagee after the bankruptcy of the mortgagor.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 531, 532, 534, 539, 540; Dec. Dig. § 345;* Chattel Mortgages, Cent. Dig. §§ 429, 438–441; Dec. Dig. § 196.*]

Appeal from the District Court of the United States for the Southern District of Georgia; Wm. B. Sheppard, Judge.

Intervention by the Fourth National Bank of Macon, Ga., against E. Pringle Willingham, trustee in bankruptcy of the estate of the Lester-Clark Shoe Company. From a decree denying the petition of intervention, the intervener appeals. Affirmed.

Geo. S. Jones and Orville A. Park, both of Macon, Ga. (Hardeman, Jones, Park & Johnston, of Macon, Ga., on the brief), for appellant.

Arthur L. Dasher, Jr., and A. H. Heyward, both of Macon, Ga. (Max Isaac, of Macon, Ga., on the brief), for appellee.

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

SHELBY, Circuit Judge. The appellant filed in the court below an intervention, claiming that it held a mortgage for $5,300 on the stock of merchandise in the store of the bankrupt company. The purpose of the appellant was to establish its mortgage as a secured or preferred claim against the estate of the bankrupt. The trustee filed his answer, resisting the proof of the mortgage as a preferred claim on various grounds, only one of which it is necessary to notice. It was claimed by the trustee that the mortgage was fraudulent and void because of an agreement between the parties to it that it should be withheld from record for the purpose of bolstering the credit of the mortgagor. The mortgage in question was a renewal of a prior mortgage (the latter was never recorded); and, although the renewal mortgage was executed October 11, 1912, it was not recorded until January 22, 1913, at 11:45 o'clock in the forenoon of the same day that the petition in bankruptcy was filed. The evidence—which we need not quote—was sufficient to sustain the contention of the trustee that the mortgage was withheld from the record to bolster the credit of the mortgagor, and to sustain the finding of Hon. Alexander Proudfit, referee in bankruptcy, that the original mortgage "was withheld from record for the purpose of hindering, delaying, and defrauding the creditors of the said Lester-Clark Shoe Company." On this and other grounds, the referee ordered that "the claim be disallowed as a preferred lien, but that the trustee be directed to enter the same upon his record as an unsecured claim."

[1, 2] On petition for review, the petition was denied by the District Court, and the intervention of the appellant "was denied." The effect of the court's decree is the affirmance of the order of the referee. The question before us involves the correctness of the decree.

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

We are not concerned with the reasons given for making it, referred to at the bar, for if the order is itself correct, it is not to be disturbed, although the reasons for it or the grounds on which it is based are not such as meet approval. It is sufficient to say that we hold that on the facts found by the referee—that the mortgage was withheld from record to bolster the credit of the mortgagor and for the purpose of defrauding the creditors of the mortgagor, the bankrupt company—the mortgage is void and was properly rejected as a preferred claim.

We have had occasion to decide the same question on similar facts, and we then considered the relevant parts of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]) and the Georgia statutes.

The decree of the District Court is affirmed on the authority of Clayton v. Exchange Bank, 121 Fed. 630, 57 C. C. A. 656, and In re Duggan, 183 Fed. 405, 106 C. C. A. 51.

Affirmed.

THE ELMIRA.

(Circuit Court of Appeals, Second Circuit. March 10, 1914.)

No. 230.

COLLISION (§ 90*)—FERRYBOATS IN NORTH RIVER—DISOBEDIENCE OF RULES.

A collision at night between two ferryboats proceeding down North river nearly side by side *held* due solely to the fault of a third boat which had run out of her slip at Hoboken to reverse ends and was returning, and which, although the burdened vessel insisted on crossing ahead after her signal therefor had been refused, thus forcing the outer of the down-bound boats to crowd against the other.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 181–186, 196; Dec. Dig. § 90.*]

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

Suit in admiralty for collision by the Central Railroad of New Jersey, as owner of the steam ferryboat Wilkes Barre, against the ferryboat Elmira; the Delaware Lackawanna & Western Railroad Company, claimant. Decree for libelant for half damages, and both parties appeal. Reversed on libelant's appeal.

De Lagnel Berier and James J. Macklin, both of New York City, for libelant.

J. L. Seager, of New York City (A. J. McMahon, of New York City, of counsel), for claimant.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

WARD, Circuit Judge. January 20, 1908, at 8:14 p. m., the ferryboat Syracuse left her slip at Weehawken, bound for Desbrosses street, New York. At 8:20 p. m. the ferryboat Wilkes Barre left her slip at Twenty-Second street, New York, bound for Communipaw, N. J. At or about 8:23 the ferryboat Elmira left her slip at

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

Hoboken, ran out into the river, reversed ends, and started back to lay up at the cattle dock just south of her slip, for the night. The tide was flood. The Wilkes Barre crossed over to the Jersey side and opposite the North German Lloyd piers was overtaken by the Syracuse, the faster boat. They proceeded down on parallel courses; the Syracuse being inshore. When the Elmira reversed ends, the Wilkes Barre and Syracuse were off the Hamburg-American piers, the Wilkes Barre a little in the lead. Notwithstanding that they were the privileged vessels, the Elmira blew a signal of two blasts, indicating her wish to cross their bows, which proposition the Wilkes Barre refused, answering with a signal of one. The Wilkes Barre and Elmira continued their courses and speeds until the Elmira blew a second signal of two blasts, when the Wilkes Barre replied with one, and both reversed full speed astern. The Wilkes Barre also ported, with the effect of bringing the guards on her starboard side a little aft of amidships under the guards on the port bow of the Syracuse. The Wilkes Barre crossed the Elmira's bow within 50 to 75 feet. The Syracuse sustained no damage, and the libelant, as owner of the Wilkes Barre, filed this libel to recover her damages against the Elmira. The district judge found the Elmira primarily at fault, but, holding that the Wilkes Barre was also at fault for porting, he directed a decree for half damages. We do not concur in this finding as to the Wilkes Barre. It is unnecessary to determine whether, in view of this porting, her owners could have recovered her damages of the Syracuse. It was the obstinacy of the Elmira that caused the porting. She put the Wilkes Barre in a pocket, requiring her to choose between a more dangerous collision with the Elmira or a less dangerous one with the Syracuse, and it is but fair that she should indemnify the owners of the Wilkes Barre for the damages resulting.

The decree is modified by directing the court below to enter a decree in favor of the libelant for full damages and full costs of both courts.

BUFFO v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. March 30, 1914.)

No. 4024.

INDIANS (§ 38*) — INTRODUCING LIQUOR INTO INDIAN COUNTRY — CRIMINAL PROSECUTION—SUFFICIENCY OF EVIDENCE.

A verdict finding a defendant guilty of the violation of Act July 23, 1892, c. 234, 27 Stat. 260, by introducing liquor into the Indian country, *held* sustained by the evidence.

[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 22, 64, 66; Dec Dig. § 38.*]

In Error to the District Court of the United States for the Eastern District of Oklahoma; Ralph E. Campbell, Judge.

Criminal prosecution by the United States against Domenico Buffo. Judgment of conviction, and defendant brings error. Affirmed.

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

Horton & Smith, of McAlester, Okl., for plaintiff in error.

D. H. Linebaugh, U. S. Atty., of Atoka, Okl., and Frank Lee, Asst. U. S. Atty., of Prague, Okl.

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

ADAMS, Circuit Judge. Buffo, the plaintiff in error, was convicted in the District Court of the offense of introducing liquor into the Indian country in violation of the provisions of the act of Congress approved July 23, 1892 (27 Stat. 260, ch. 234). That act provides that:

"Every person who * * * introduces or attempts to introduce any ardent spirits, ale, wine, beer, or intoxicating liquor of any kind into the Indian country shall be punished."

The indictment charged that Buffo introduced and carried into the county of Pittsburg and state of Oklahoma, a part of Indian country, from without the state, a certain specified quantity of whisky. No question is made as to the sufficiency of the indictment. Buffo was duly arraigned, put upon his trial, convicted, and sentenced, and now prosecutes this writ of error.

The only assignment of error relied on in brief or argument for reversal of the judgment is that the evidence was not sufficient to sustain the verdict. In our opinion there is no merit whatsoever in this assignment. We have carefully read and considered all the evidence produced, and the conclusion is inevitable that, not only was there substantial evidence to sustain the verdict, but that it preponderates strongly against the defendant.

The judgment is affirmed.

CLIP BAR MFG. CO. v. STEEL PROTECTED CONCRETE CO.

(Circuit Court of Appeals, Third Circuit. April 18, 1914.)

No. 1829.

TRADE-MARKS AND TRADE-NAMES (§ 79*)—UNFAIR COMPETITION—INTERFERENCE WITH BUSINESS OF ANOTHER.

An order denying a motion for preliminary injunction to restrain defendant from notifying complainant's customers of its claim that an article made and sold by complainant infringed a patent owned by defendant, *held* within the discretion of the court, and affirmed.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 89, 90; Dec. Dig. § 79.*

Unfair competition in use of trade-mark or trade-name, see notes to Scheuer v. Muller, 20 C. C. A. 165; Lare v. Harper & Bros., 30 C. C. A. 376.]

Appeal from the District Court of the United States for the Eastern District of Pennsylvania; J. Whitaker Thompson, Judge.

Suit in equity by the Clip Bar Manufacturing Company against the Steel Protected Concrete Company. From an order denying a preliminary injunction, complainant appeals. Affirmed.

For opinion below, see 209 Fed. 874.

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

E. H. Fairbanks, of Philadelphia, Pa., for appellant.
Joseph C. Fraley, of Philadelphia, Pa., for appellee.
Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

J. B. McPHERSON, Circuit Judge. A motion was made to dismiss this appeal, but (as we think the decree should be affirmed) we need not consider the ground on which the motion is based.

The facts of the dispute appear with sufficient fullness in the satisfactory opinion of the District Court. Clip, etc., Co. v. Steel, etc., Co., 209 Fed. 874. The Concrete Company seems to have been acting strictly within its legal rights, so that the only question for consideration now is whether the court below exercised its discretion properly in refusing a preliminary injunction. An examination of the record discloses no good reason for criticism, and leads us to conclude that the decree complained of should be sustained. As appears from Judge Thompson's opinion, the injunction was refused upon the following grounds:

"It nowhere appears on the record that the notices given to the plaintiff's customers were not in good faith, or that they were false or malicious, or for the purpose of destroying the business of the plaintiff. To the contrary, the defendant, so far as appears, believing its claims to be valid, has proceeded to bring suit in this district to establish infringement. Under these circumstances, it must be held for the purposes of the present motion that the defendant is acting within its rights."

The motion to dismiss is refused, and the decree is affirmed.

STAYTON v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. April 7, 1914. Rehearing Denied May 18, 1914.)

No. 2571.

POST OFFICE (§ 48*) — OFFENSES — INDICTMENT FOR DEPOSITING UNMAILABLE LETTER—KNOWLEDGE.

An indictment which charged that defendant knowingly deposited in the post office a letter, giving information as to where an abortion could be performed sufficiently charged that defendant knew of the contents of the letter.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 67–80; Dec. Dig. § 48.*

Nonmailable matter, see note to Timmons v. United States, 30 C. C. A. 79; McCarthy v. United States, 110 C. C. A. 548.]

In Error to the District Court of the United States for the Northern District of Texas; Edward R. Meek, Judge.

Nahona Stayton was convicted of unlawfully using the mails, and she brings error. Affirmed.

Mike E. Smith and Theodore Mack, both of Ft. Worth, Tex., for plaintiff in error.
James C. Wilson and William H. Atwell, U. S. Attys., of Dallas, Tex.

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

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

PER CURIAM. The plaintiff in error was convicted under article 211 of the Penal Code (Act March 4, 1909, c. 321, 35 Stat. 1129 [U. S. Comp. St. Supp. 1911, p. 1651]) under an indictment charging that she did—

"unlawfully, feloniously, and knowingly deposit and cause to be deposited in the United States post office at Ft. Worth, Texas, for mailing and delivery, a certain letter giving information as to where an act producing abortion could be had, done, and performed."

The only error assigned in this court is that the court overruled a preliminary motion to quash the indictment:

"Because the said indictment nowhere directly or indirectly charges that this defendant had any knowledge of the contents of the letter complained of at the time she is alleged to have deposited the said letter in the post office at Ft. Worth, Tex., for the purpose of mailing. A knowledge of the contents of the letter at the time of the mailing is a necessary ingredient of the offense, and must be alleged and proven by the government before a conviction can be had under article 211 of the Penal Code of the United States."

Our examination shows no error in the ruling. United States v. Purvis (D. C.) 195 Fed. 618, and authorities there cited; Price v. United States, 165 U. S. 311, 312, 17 Sup. Ct. 366, 41 L. Ed. 727.

The judgment of the District Court is affirmed.

INTERNATIONAL MAUSOLEUM CO. v. SIEVERT et al.

(Circuit Court of Appeals, Sixth Circuit. March 3, 1914.)

No. 2432.

1. PATENTS (§ 13*)—VALIDITY—SUBJECT-MATTER—IMPROVEMENT OF MAUSOLEUM—"MANUFACTURE."

An improvement in mausoleum construction aimed at securing convenience, preservation of the body, and sanitary conditions brought about by bringing together various parts so as to form an improved, complete whole, is patentable as a "manufacture" under Rev. St. § 4886 (U. S. Comp. St. 1901, p. 3382), providing that any person who has invented or discovered any new and useful art, machine, manufacture, or composition of matter, etc., may obtain a patent therefor; the word "manufacture" being used to mean whatever is made by the hand of man that is neither an art, machine, composition of matter, or design.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 11, 12; Dec. Dig. § 13.*

For other definitions, see Words and Phrases, vol. 5, pp. 4344–4346; vol. 8, p. 7716.]

2. PATENTS (§ 310*)—BILL FOR INFRINGEMENT—DEMURRER—JUDICIAL NOTICE.

In considering questions of novelty and invention, on demurrer to a bill for patent infringement, the court may take judicial notice of facts of common and general knowledge tending to show want of those elements, but it must keep strictly within the field of common knowledge; and, if there is any doubt whatever on the questions of novelty and invention, the demurrer must be overruled.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 507–540; Dec. Dig. § 310.*]

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

3. PATENTS (§ 26*)—"PATENTABLE INVENTION"—COMBINATION OF OLD ELEMENTS.

In order to constitute a patentable invention formed by a combination of old elements, it is not necessary that all the constituents so enter into the combination that it changes the mode of action of every other, and not only performs its own part, but is in some way directly and immediately concerned in the performance of their respective parts by all the other elements, but it is sufficient that the combination produces as a consequence of their union a new and useful result, and not a mere aggregation of several results.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 27–30; Dec. Dig. § 26.*

For other definitions, see Words and Phrases, vol. 6, p. 5234.

Patentability of combination of old elements as dependent on results attained, see note to National Tube Co. v. Aiken, 91 C. C. A. 123.]

4. PATENTS (§ 328*)—VALIDITY—SUBJECT-MATTER—IMPROVEMENT IN MAUSOLEUM CONSTRUCTION.

The Hood patent, No. 858,070, for an improvement in mausoleum construction, comprising a structure with a reception hallway, seamless catacombs erected therein and spaced from the walls whereby an air passage is formed, with valve-controlled ports at their rear ends communicating with the air passage, which is provided with an outlet at or near the top of the structure, and also valve-controlled ports at the front ends of the catacombs through which air may be exhausted therefrom after the same are sealed, was not void on its face, on the theory that the elements did not co-operate to produce a new, final, and unitary result by way of a convenient, sanitary, and body-preserving community mausoleum.

5. PATENTS (§ 328*)—DESCRIPTION.

The Hood patent, No. 858,070, for "a burial crypt" comprising a structure with "a reception hallway, seamless catacombs erected therein, and spaced from the walls thereof," etc., was not invalid as vague and ambiguous, because the nomenclature was inartificial and inaccurate in the use of the word "crypt" as applied to the mausoleum, and "catacomb" as defining the individual burial compartment.

Appeal from the District Court of the United States for the Northern District of Ohio; John M. Killits, Judge.

Suit in equity by the International Mausoleum Company against H. S. Sievert and others for infringement of patent. From a decree dismissing the bill on demurrer (197 Fed. 936), complainant appeals. Reversed and remanded.

Wallace R. Lane and George Mankle, both of Chicago, Ill., for appellant.

A. E. Lynch and Victor C. Lynch, both of Cleveland, Ohio (Lynch & Dorer, of Cleveland, Ohio, and Niles & Peters, of Tiffin, Ohio, of counsel), for appellees.

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

KNAPPEN, Circuit Judge. Suit for infringement of United States patent No. 858,070 to Hood, for burial crypt. On demurrer to the bill, the suit was dismissed, and this appeal is from that action. The object of the invention, as stated in the specifications, is "to provide a community crypt having a hallway or lobby of sufficient size to accommodate the funeral attendants and which will protect them during the services, from extreme temperatures in the weather and also from

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

storms." The inventor provides a series of so-called "catacombs" or berth-like compartments (each for the reception of an individual body) arranged in vertical rows, tier upon tier, with homogeneous tops, floors and partitions, the lower surface of the floor of one set of chambers forming the top of the next set below, and the sides of the chambers being obviously the partition walls as respects the adjoining chambers; the floors and partitions being preferably of "concrete cement." The front end of each individual compartment is provided with a valve-port for the exhausting of air in the chamber after the body is placed therein; also with a valve-port at the rear end of the chamber for the passage therethrough of such gases as may form in the chamber—these valves communicating with, and thus allowing the escape of gases through, air chambers in the exterior walls leading to a common point of escape at or near the highest point in the outer wall. A shelf slightly projecting into the lobby is formed at the base of each row of chambers through an extension of the wall between the horizontal tiers for the purpose of supporting floral designs and appropriate emblems and serving as guides in directing the casket into the compartment. The second claim is as follows:

"A burial crypt comprising a structure with a reception hallway, seamless catacombs erected therein and spaced from the walls thereof whereby an air passage is formed, said catacombs being provided with valve-controlled ports at their rear ends which communicate with said air passage, said passage being provided with an outlet at or near the top of the structure, also valve-controlled ports at the front ends of the catacombs through which the air may be exhausted therefrom after the same are sealed."

The first claim differs from the second in omitting the element of valve-ports at the front ends. The third claim differs from the second in including the shelf.

The two grounds of demurrer which were sustained are directed to the defenses of: (a) Nonpatentable subject-matter; and (b) invalidity of the patent on its face. The prominent considerations on which the presiding judge seems to have based his conclusion are: (a) That the construction in question is not within either of the classes covered by section 4886 of the Revised Statutes (U. S. Comp. St. 1901, p. 3382); (b) that the claims are for mere aggregation of nonco-operating elements; (c) that the use of burial places under roof, with provision for accommodation of funeral attendants and their protection from the weather during services, seamless burial niches and shelves (the latter being but enlargements of the base of the portal) are old, as is also the idea generally of a gas-pressure valve in the rear of the niche, applied to analogous purposes; (d) that there appears no advantage in exhausting the air from the burial niche; (e) that it is matter of common knowledge that a niche constructed of concrete cement would not, by reason of its porosity, permit a vacuum to continue for any appreciable time; and (f) that the dissemination of the gases and their escape into the outer air is not useful, is hardly desirable, and is unsanitary. International Mausoleum Co. v. Sievert (D. C.) 197 Fed. 936.

[1] In support of his conclusion that the subject-matter of the alleged invention is not within the patent statute (Rev. St. § 4886), the

learned district judge cited Jacobs v. Baker, 7 Wall, 295, 19 L. Ed. 200; Fond du Lac County v. May, 137 U. S. 395, 11 Sup. Ct. 98, 34 L. Ed. 714; and American Disappearing Bed Co. v. Arnaelsteen (C. C. A. 9th Cir.) 182 Fed. 324, 105 C. C. A. 40. We think these cases not decisive. In Jacobs v. Baker, Justice Grier, who wrote the opinion, was inclined to the view that an improvement in the plan of constructing a jail was not within the patent statute. The point, however, was not expressly decided; the bill being dismissed on the ground that the patentee was not the first inventor. In the May Case, Jacobs v. Baker was said to have held that:

"An improvement in the construction of a jail did not come under the denomination of a machine, or a manufacture, or a composition of matter; and that it was doubtful whether it could be classed as an art."

But this proposition was passed without reaffirming it, and the case apparently decided upon another ground. The Arnaelsteen Case involved a patent for an apartment house with a disappearing bed, which was declared void, apparently upon the ground that "no particular form or construction of a room in a house, or of a recess in a room, is patentable." We think it not inconsistent with anything actually decided in either of the two cases first cited (and perhaps not with the Arnaelsteen Case) to hold that the improvement of a mausoleum may be within the patent statute. In Traction Co. v. Pope, 212 Fed. 719, — C. C. A. — (decided October 17, 1913), we quoted with approval the language of Judge Acheson in Johnson v. Johnston (C. C.) 60 Fed. 618, 620, that:

"The term 'manufacture,' as used in the patent law, has a very comprehensive sense, embracing whatever is made by the art or industry of man, not being a machine, a composition of matter, or a design."

Mr. Walker, in his work on Patents (4th Ed. § 17), states the rule as follows:

"Whatever is made by the hand of man and is neither of these [i. e., an art, a machine, a composition of matter, or a design], is a 'manufacture,' in the sense in which that word is used in the American patent laws."

In Crier v. Innes (C. C. A. 2d Cir.) 170 Fed. 324, 95 C. C. A. 508, a sarcophagus monument was held to be a manufacture and not a species of architecture, as defendant contends is the character of the device here. Riter-Conley Mfg. Co. v. Aiken (C. C. A. 3d Cir.) 203 Fed. 699, at page 702, 121 C. C. A. 655, at page 658, is a persuasive decision. It was there held that a building or a part of a building, if it involves novelty or invention, is patentable as a manufacture; Judge Buffington saying:

"To say that a roof falls within the domain of architecture is not to decide the question; for the question is not whether a roof construction is included in architecture, which, of course, it is, but whether the roof section here in question is, in view of its several constituent and co-operating elements, a manufacture. We must not be misled by the factors of size or immobility. The pyramids, by reason of their bulk and solidity, are none the less a manufacture, as distinguished from a natural object."

That case (as does also the opinion of Judge Orr in the District Court [205 Fed. 531]) contains an interesting discussion of the ques-

tion under consideration. It seems clear that the making of the various parts of the mausoleum would be manufacture. The subject, in our opinion, does not lose its nature from the mere fact of the bringing of the parts together in a complete whole. See, also, Columbia Iron Works v. National Lead Co., 127 Fed. 99, 62 C. C. A. 99, 64 L. R. A. 645, in which this court held that a corporation engaged principally in the business of building and repairing steel ships for sale and upon order, and which prepared and gave shape to much of their material, was engaged in manufacturing under the bankruptcy act. See, also, Friday v. Hall, etc., Co., 216 U. S. 449, 30 Sup. Ct. 261, 54 L. Ed. 562, 26 L. R. A. (N. S.) 475, where a corporation organized to construct railroads, buildings, and other structures, whose principal business is making and constructing arches, walls, and other buildings out of concrete, which buys and combines together their materials in making concrete and supplies labor, machinery, and materials at the place that the contracts call for, is a corporation engaged principally in manufacturing within the meaning of the bankruptcy act.

We think an improvement in mausoleum construction, aimed at securing convenience, preservation of the body, and sanitary conditions, should be classed as a manufacture under the patent statute.

[2] The rule is well settled that in considering questions of novelty and invention, upon demurrer to a bill, the court may take judicial notice of facts of common and general knowledge tending to show want of those elements; but the court must keep strictly within the field of common knowledge; and, if it have any doubt whatever on the questions of novelty and invention, it must overrule the demurrer, and leave the questions to proof. This rule has been declared and applied by this court in Amer. Fibre-Chamois Co. v. Buckskin-Fibre Co., 72 Fed. 508, 18 C. C. A. 662; Ferro Concrete Constr. Co. v. Concrete Steel Co., 206 Fed. 666, 668, 124 C. C. A. 466; and Chas. Boldt Co. v. Nivision-Weiskopf Co., 194 Fed. 871, 873, 114 C. C. A. 617—in which latter case want of novelty and invention was held to appear palpably from common and general knowledge of the art. The District Court recognized the rule stated and its limitations. We are unable, however, to agree with its conclusion that the patent is void on its face, taking into consideration only such common and general knowledge.

[3] Upon the question of aggregation, for example: While it may ultimately appear not only that each element of the combination is old, but also that there is a lack of necessary co-operation between them; yet, in order that a combination of old elements may be patentable, it is not necessary that all the constituents so enter into the combination that each changes the mode of action of every other; and that each not only performs its own part but is also in some way directly and immediately concerned in the performance of their respective parts by all the other elements. It is sufficient that the combination produces, as a consequence of their union, a new and useful result, and not a mere aggregation of several results. Natl. Cash Register Co. v. Amer. Cash Register Co. (C. C. A. 3d Cir.) 53 Fed. 367, 3 C. C. A. 559; Toledo Comp. Scale Co. v. Moneyweight Scale Co. (C. C.) 178 Fed. 557, 563.

[4] It is not necessary, for instance, that there be direct and continuing coaction between the hallway and the rear port-valve of the individual compartment. Assuming, for the purposes of this opinion (but not deciding), that a hallway may not be a proper element in a community mausoleum, it does not necessarily follow that its presence in the claim vitiates it; its mention may not improperly be regarded as a statement of environment, as, for instance, as if the claim read, "in a burial crypt (having a hallway or lobby), seamless catacombs," etc. And in the absence of testimony, we cannot say with confidence that the elements of the several claims do not co-operate to produce a new, final, and unitary result by way of a convenient, sanitary, and body-preserving community mausoleum. Leaving the subject of aggregation: The fact that burial places under roof, with provisions for the accommodation and protection of attendants, may have been old, does not necessarily exclude the presence of invention in the use of that feature in combination with others here; and the same is true as to the prior use of seamless burial niches and shelves, as well as the alleged use of gas-pressure valves applied to analogous purposes; for, even if it shall turn out that each element of the combination was old, yet, if the combination produces a new and useful result, the inventor is entitled to the protection of the patent. Expanded Metal Co. v. Bradford, 214 U. S. 366, 381, 29 Sup. Ct. 652, 53 L. Ed. 1034. It is, of course, possible that no advantage results from exhausting the air from the burial compartments, and that inadequate means are provided for accomplishing such result; but we should hesitate to so declare in the absence of proof to that effect. The same consideration applies to the suggestion that concrete cement will not permit the continuance of a vacuum. Again, we would not, we think, be justified in assuming either that, in the actual construction of the mausoleum in question, no provision would be made for the sanitary disposition of such noxious gases as might escape, or that health authorities would permit an unsanitary construction. In other words, although it is by no means impossible that complainant may find obstacles in the way of sustaining its patent, the evidence afforded by the patent itself and by common and general knowledge is not such as, in our judgment, enables us to decide adversely to complainant the controlling questions of novelty and invention, which are always questions of fact.

[5] It is true that the nomenclature of the patent is in some respects inartificial and inaccurate, for instance: In the use of the word "crypt" as applied to the mausoleum, and "catacomb" as defining the individual burial compartment. But these inaccuracies are not misleading; and, upon the present record, the specifications do not impress us as fatally vague and ambiguous. We need not consider appellee's suggestion that the second ground of demurrer should have been sustained; for not only was it not passed upon by the District Court, but, should it be held good, complainant would be given opportunity to amend.

For the reasons stated, we are constrained to reverse the decree dismissing the bill, with costs, and to remand the case to the District Court for further proceedings not inconsistent with this opinion.

GOODWIN FILM & CAMERA CO. v. EASTMAN KODAK CO.

(Circuit Court of Appeals, Second Circuit. March 10, 1914.)

No. 194.

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—PHOTOGRAPHIC FILM.

The Goodwin patent, No. 610,861, for a photographic film pellicle, being the rollable film used in amateur cameras, was not anticipated and discloses patentable invention. The application was filed in 1887, and in view of the state of the art at that time the invention was one of more than ordinary merit and the patent is entitled to a liberal construction. Also, *held* infringed as to claims 1, 6, 8, 10, and 12, which cover the process and product.

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

Suit in equity by the Goodwin Film & Camera Company against the Eastman Kodak Company. Decree for complainant, and defendant appeals. Affirmed.

For opinion below, see 207 Fed. 351. See, also, 213 Fed. 239.

On appeal from an interlocutory decree dated September 9, 1913, holding valid and infringed claims 1, 6, 8, 10 and 12 of letters patent No. 610,861, granted to Hannibal Goodwin of Newark, N. J., September 13, 1898, for improvements in photographic pellicles and processes of producing the same. The application was filed May 2, 1887, and the patent was granted eleven years and four months thereafter. The bill was filed December 15, 1902, four years after the patent issued and ten years and eight months before the decision of the District Court sustaining the five claims as stated. Over a quarter of a century has thus elapsed between the filing of the application and the decree sustaining the patent.

The opinion of Judge Hazel is reported in 207 Fed. 351. The record contains 3800 printed pages and the briefs aggregate 575 pages.

Livingston Gifford and J. J. Kennedy, both of New York City (M. B. Philipp, of New York City, of counsel), for appellant.

Edmund Wetmore, Edward C. Davidson and Robert D. Eggleston, all of New York City, for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

COXE, Circuit Judge. Hannibal Goodwin was a clergyman residing at Newark, New Jersey, for thirty years prior to his death, which occurred December 31, 1900. His salary was small and for ten years prior to his death he had no regular charge. He was interested in chemistry and spent much of his spare time in chemical experimentation and research. The necessity for a transparent, sensitive pellicle for use in roller cameras had long been felt and Goodwin, though hampered by his inadequate surroundings, undertook the task of supplying it. The specification points out the manifest objections to supports of glass and of paper in combination with gelatin and other substances, and proceeds to state how they may be avoided. The patentee says:

"I have provided a pellicle the principal ingredient of which is nitrocellulose, or any equivalent * * * which is transparent, and insoluble in the usual developing, fixing and intensifying solutions or liquids used in photog-

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

raphy. * * * In carrying out the invention I provide a suitable surface, such as that of glass, and flow over the same a solution of nitrocellulose dissolved in nitrobenzole or other non-hydrous and non-hygroscopic solvents * * * and diluted in alcohol or other hydrous and hygroscopic diluent."

When dry this solution forms a flexible transparent sheet or pellicle which is insoluble in any of the fluids employed in dry plate photography. The foil when stripped from the glass constitutes a supporting pellicle for the sensitive film. The specification states further that previous efforts to provide a transparent and flexible pellicle have been failures because they did not possess the properties of glass and were incapable of resisting the usual developing, fixing and intensifying solutions used in photography.

The patentee asserts that he has produced a film which is capable of resisting such fluids and of sufficient smoothness, hardness and toughness of surface for service in a roller camera. He says that in carrying out the invention he provides a suitable surface such as glass and flows over it the solution of nitrocellulose (as distinguished from "commercial celluloid") dissolved in nitrobenzole or other solvent not containing or capable of absorbing water. The equivalents for nitrobenzole are acetate of amyl and those non-hydrous non-hygroscopic fluid solvents of nitrocellulose which do not mix with water, are not greasy and are of slow volatility. Nitrocellulose when so dissolved and flowed over a smooth plate produces a smooth, transparent, imporous, impermeable film capable of being subjected to the photographic fluids without being affected thereby. It is further stated that the solution thus obtained by dissolving the nitrocellulose is diluted with alcohol or other similar diluent which serves to dilute or expand the volume of the dissolved nitrocellulose or increase its fluidity. The diluted solution is then applied to a smooth and hard surface, from which it may be stripped when dry.

Page two of the specification is largely devoted to a discussion of matters which seem to us to have little bearing on the questions here involved and especially so as it is stated that the entire page was inserted after the patentee learned of the defendant's process. The patentee on page 3 of the patent describes how he may reduce the cost by enveloping or imposing on the nitrocellulose supporting film a film of gelatin or coat a layer of gelatin with outer films of the non-hygroscopic nitrocellulose film, so that water or other solvents cannot gain access to the gelatin. The remainder of the specification is devoted to a description of the various ways in which the pellicle may be constructed and to an explanation of the drawings of the patent.

The claims in controversy are as follows:

"1. An improvement in the art of making transparent flexible, photographic-film pellicles, the same consisting in dissolving nitrocellulose in a menstruum containing a hygroscopic element and an element which is non-hygroscopic, the non-hygroscopic element being of itself a solvent of nitrocellulose, and of slower volatility than the hygroscopic element, depositing and spreading such solution upon a supporting-surface, and allowing it to set and dry and harden by evaporation, and spreading a photographically-sensitive solution on the hardened film, and drying the film, substantially as set forth."

"6. An improvement in the art of making transparent flexible, and elastic photographic pellicles, the same consisting in dissolving nitrocellulose in an

eventual celluloidal menstruum which is anhydrous and non-hygroscopic, spreading such solution upon a supporting-surface, allowing it to dry and harden, spreading photographically-sensitive matter thereon, and again drying and stripping the pellicle from said support, substantially as set forth."

"8. The process of making photographic pellicles which consists in subjecting nitrocellulose to the action of a menstruum combining fast and slow evaporating solvents, the slow evaporating solvent being non-hygroscopic and non-greasy in nature and quality and acting as an eventual solvent as described, spreading the solution upon a support and setting the same by evaporation, then applying photographically-sensitive matter and stripping, all substantially as set forth."

"10. As a new article of manufacture, a transparent film-support for photographic purposes, the same consisting of a thin, non-greasy, film, foil or pellicle of a dried and hardened celluloidal solution of nitrocellulose, combining in addition to the following essential properties of glass-plate supports, viz., insolubility in developing fluids, insensibility to heat and moisture, imporosity of structure, and hardness, smoothness, and brilliancy of surface the further desirable properties of exceeding thinness, lightness in weight, toughness in texture and elasticity in flexure; as and for the purposes specified."

"12. The process of manufacturing photographically-sensitive pellicles, consisting of flowing a non-photographically sensitive solution of nitrocellulose dissolved in a non-hygroscopic liquid, or a liquid which is eventually non-hygroscopic, and drying and hardening such compound into a support for the photographically-sensitive emulsion and imposing on such support the said sensitive emulsion, substantially as set forth."

Claim 10 covers the film support as a new article of manufacture and the other claims cover the process by which the pellicle is produced.

An examination of the first claim will demonstrate sufficiently the various steps of the Goodwin process for making a transparent, flexible photographic-film pellicle. These are:

First: Dissolving nitrocellulose in a mestruum containing a hygroscopic and a non-hygroscopic element, the latter being of itself a solvent of nitrocellulose and of slower volatility than the former.

Second: Spreading such solution upon a supporting surface.

Third: Allowing it to set, dry and harden by evaporation.

Fourth: Spreading a photographically sensitive solution on the hardened film.

Fifth: Drying the film.

At the time of Goodwin's invention the art was vehemently demanding, as a substitute for the glass plates then in use, a transparent photographic film capable of supporting the sensitive emulsion necessary in photography and also capable of being rolled up. Goodwin entered the field as an inventor for the sole purpose of overcoming the difficulties then existing and we think he did so when, speaking broadly, he discovered the process of dissolving nitrocellulose in a menstruum containing nitrobenzole and alcohol or their equivalents and then spreading the sensitive emulsion on the hardened film. He was subjected to almost unprecedented delays and disappointments in the Patent Office, which it is unnecessary to consider in detail, but he held tenaciously to his original conception of the invention.

Throughout the proceedings in the Patent Office and the courts Goodwin and his representatives have consistently asserted the proposition that he was the first to produce a pellicle by the above-named process. Others may improve the process and may, perhaps hold their

improvements, if patented, against the owners of the Goodwin patent, but this does not give them the right to appropriate the basic invention. We are unable to find any proof in the record to support the contention that his process was known by others prior to the date of his application. On the contrary the necessity for the patented pellicle became more and more apparent and the demand for it more and more insistent and many efforts were made to meet the demand, but with partial success only.

In 1887 an article appeared in the Photographic Times Almanac in which a well known authority on photographic subjects, Andrew Pringle, points out the pressing needs of the art in language which is prophetic of the Goodwin invention. He says:

"When we get a support such as I have indicated, transparent, flexible, and in lengths, tourist photography will make a stride that will throw into obscurity all previous advances."

And yet at the time this article was published, there was in the Patent Office an application showing that this stride had actually been taken.

In an affidavit made by Mr. Eastman in 1890, after describing his efforts to produce a satisfactory film, he says:

"From 1884 until the year 1888 I was constantly on the lookout for a fluid pyroxyline compound which would be suitable for the purpose of making such films."

It is unnecessary to advert to the other evidence in the record showing priority of invention in Goodwin. In addition to the presumption arising from the patent itself, we have his clear description of the process which any intelligent chemist would understand and which, if followed, must produce the desired film. Stripped of the unnecessary technical verbiage, which was largely produced by the proceedings in the Patent Office, Goodwin's statement is so plain that it would seem that a neophyte might follow the instructions successfully.

We cannot resist the conclusion that Goodwin's application, as filed in 1887, disclosed for the first time the fundamental and essential features of a successful, rollable film and that, unless constrained by some controlling consideration to do otherwise, the effort of the court should be to uphold the patent. The burden is on the defendants to prove its invalidity. The presumptions are all in its favor. Nothing in the prior art shows Goodwin's process and the proposition that any skilled chemist, familiar with the art as it existed prior to May 2, 1887, could construct the Goodwin pellicle cannot be maintained. We do not understand that the defendant now asserts that any one prior to Goodwin had produced a successful film roll system. The defendant's brief says:

"The Eastman Company, in 1888, devised and introduced its first 'Kodak' camera. * * * This 1888 Kodak * * * marked the beginning of amateur photography."

But it is not pretended that a film other than one having a paper support coated with sensitized gelatin, was used prior to Goodwin's invention or, indeed, prior to May 2, 1887. The proposition that these

paper films were used because they were inexpensive and thus available for trying out the film roll system is not persuasive.

The Eastman Company did not commence its experiments looking to the substitution of pyroxyline for paper as a film support until the latter part of 1888. These experiments were continued by Henry M. Reichenbach, the company's chemist, until February, 1889, and on April 9, 1889, he filed his application for a patent as assignor to the Eastman Dry Plate and Film Company and promptly received a patent dated December 10, 1889. During all this period, beginning with the experiments and ending with the patent, Goodwin's application was lying in the Patent Office. We are unable to see how the Reichenbach patent anticipates or limits the claims of the Goodwin patent. It may be that his process was an improvement on Goodwin and that during the life of his patent he was entitled to the exclusive use of such improvement, but it can have no retroactive effect, it cannot destroy or limit an invention which was in esse before his invention was conceived. The defendant's brief, after alluding to the extensive manufacture of the Reichenbach film since 1889, continues as follows:

"This is the industry which is enjoined by the decree of the court below—7 years after the expiration of the Reichenbach patent 417,202,—24 years after the Eastman Company began the manufacture of nitrocellulose film—and 26 years after the filing of the application on which the Goodwin patent issued. And this industry is enjoined on a patent the application for which was uniformly rejected by the five different Examiners who successively had it in charge during its eleven years' pendency in the Patent Office."

Truly an extraordinary and deplorable condition of affairs! But who was to blame for it—Goodwin or the five examiners who improperly deprived him of his rights during these eleven years? We are unable to see what he could have done to enforce his rights during this period or how any blame can attach to him for his inaction.

We have examined the printed articles published respectively, as follows: David, in 1881, 1882 and 1883; Les Mondas, 1883; Moniteur, 1885; British Journal of Photography, 1885; Year Book, 1869; Photographic News, 1881, and the prior patents to Journond, 1885-6; Parkes, 1855-6-65; Berard, 1857; Ollion, 1859-60; and do not find anticipation, even if these publications are considered in the aggregate. No pellicle possessing the Goodwin characteristics, made prior to the patent, is produced and yet we are asked to conclude that one could be produced by following the directions contained in these articles. The defendant must prove anticipation beyond a reasonable doubt and it has not done so. The best references are undoubtedly the Parkes patents and the disclosures of David to the French Photographic Society. Parkes, in his 1855 patent, was not concerned with photographic pellicles or the process of producing the same, but with making a substitute for india rubber and gutta percha consisting of a waterproof coating for fabrics which may also be used for book bindings, button making and similar purposes and may be pressed or rolled into different forms or thin sheets. In 1856 he was dealing with the substitution of collodion for glass as a support for the prepared film in taking photographs. He says, "or a thick layer of collodion may be first formed on the glass, and on this layer the film of prepared col-

lodion may be produced, and the picture taken thereon and suitably varnished or protected, afterwards the whole may be stripped from the glass together."

The 1865 patent has to do with the manufacture of "Parkesine," a product undoubtedly named in honor of the inventor, and his claim is "the employment of nitrobenzole, aniline and glacial acetic acid or either of them for dissolving pyroxyline in the manufacture of Parkesine and similar compounds of pyroxyline." He also claims the above ingredients in the manufacture of collodion.

David's contribution to the art is found in photographic journals which purport to give his remarks in explaining experiments made by him. These were tentative efforts on his part which he hoped might culminate in something practical, but they never did. The various articles contain expressions like the following:

"He believes that this substance is sufficiently transparent and flexible to form good material for photographic plates, provided it can be cut sufficiently thin. His various attempts to cut it have not been successful. I think they will have to render them less inflammable, for if only a spark falls on one of these leaves it is sufficient to produce rapid combustion. Mr. David presents films produced with celluloid which probably might serve as a support for the sensitized preparations. He says probably, because he has not yet been able to make the experiment. But we believe that the difficulty of manipulation and the high price of liquid celluloid would prevent this process from entering practical realms. One of our members has tried this process, but has not obtained good results in proceeding by successive coatings."

All this uncertainty and doubt is far from the clear and explicit statement required to anticipate a patent. There is no evidence that anyone ever did make the Goodwin pellicle prior to his invention and we are convinced that no one could have made it by following the directions of Parkes or David.

It is unnecessary to consider the question of invention, in all the details pointed out in the defendant's briefs, for the reason that we are convinced that Goodwin was the first to dissolve nitrocellulose in nitrobenzole or its equivalents diluted in alcohol or its equivalents. This being so, his patent is entitled to a construction broad enough to enable its owner to reap the profits which naturally and fairly belong to the invention. The invention is one of more than ordinary merit and the claims should not be so construed that any one may safely infringe who has wit enough to substitute equivalents for the elements named in the patent and to add or subtract therefrom, so long as the menstruum contains a hygroscopic and a non-hygroscopic element, the latter being a solvent of nitrocellulose and of slower volatility than the former. If the defendant uses a process having these elements, it matters not what else it uses or that its method is an improvement on the patented method.

Reverting to the first claim heretofore considered, there can be no doubt that the defendant's process employs all the elements there enumerated. The defendant contends that it does not employ the first element, as there stated, for the reason that in its process "the nitrocellulose is dissolved in a low boiling-point, rapidly-evaporating, hygroscopic and miscible-with water-solvent, wood alcohol and acetone * * * and in the use of this solution with the other ingredients

heretofore referred to (fusel oil and camphor) the defendant cannot operate 'under ordinary atmospheric conditions,' i. e., heat, during the spreading and drying of the nitrocellulose solution in order to secure the 'desired film.' "

Goodwin being the first to make the patented pellicle, is entitled to a fair range of equivalents, whether he claims them or not. His specification was addressed to chemists, not lawyers, and he was justified in assuming that a chemist would understand when he said in his original application that he used nitrobenzole or other solvent, that he meant other similar or equivalent solvent, one which would accomplish the same result in the same manner. A chemist knowing the object to be attained, would hardly have selected a solvent which could not accomplish that object. Knowing the properties of nitrobenzole, he naturally would seek an equivalent having similar properties and not one having properties which would defeat the object in view. Later on, in response to a demand from the Patent Office, Goodwin removed all doubt by actually stating, what we think the law implied, that he used "Nitrobenzole or other non-hydrous and non-hygroscopic solvents such as may be employed in producing celluloid, as distinguished from collodion." This amendment was within his rights. Hobbs v. Beach, 180 U. S. 383, 21 Sup. Ct. 409, 45 L. Ed. 586; Cleveland Foundry Co. v. Detroit Stove Works, 131 Fed. 853, 68 C. C. A. 233.

But without the amendment we can hardly imagine a chemist stupid enough to select the "other solvent" from those solvents which he must know would not do the work.

Goodwin says in the specification:

"In carrying out the invention I provide a suitable surface, such as that of glass, and flow over the same a solution of nitrocellulose (by which I do not mean a solution of the compound known as 'commercial celluloid' dissolved in alcohol or ether) dissolved in nitrobenzole," etc.

The defendant now argues that as commercial celluloid contains camphor, this language amounts to a disclaimer of camphor and that one who uses camphor in any amount, however small, avoids infringement. We think this contention is hypercritical and one which must be rejected by any fair and reasonable construction of the patent. Manifestly the patentee had in mind the amount of camphor used in commercial celluloid, which is said to be from 40 to 60 per cent. If he intended by the language to disclaim anything, it was such excessive use which, the proof shows, could not be successfully used to produce the result he had in view. He was endeavoring to distinguish his solution of nitrocellulose from the solution used in celluloid. In other words, he told the art that a solution containing from 40 to 60 per cent. of camphor would not do, but he never said that 13 or 14 per cent. of camphor would not do. Surely he did not intend to say that one who used his formula could avoid infringement by using other ingredients which did not effect the ultimate result.

We do not deem it necessary to enter upon a discussion of the Reichenbach interference further than to say that this, as well as most of the complications in the case, would have been avoided had the

Goodwin patent gone to issue in due course, as it should have done. The long delay and the contradictory rulings of the Patent Office would have discouraged an inventor who had not supreme faith in the justice of his cause. If we are right in thinking that Goodwin made a generic invention it follows that he is entitled to hold as infringers those who use the equivalents of nitrobenzole and alcohol. In the process of the patent, and of the defendant, nitrocellulose is used. In both it is dissolved in a menstruum containing a high-boiling, non-hydrous, non-hydroscopic solvent like nitrobenzole or its equivalents and a diluent like alcohol, or its equivalents. In both the processes of the defendant nitrocellulose is dissolved in a menstruum consisting of a high-boiling, non-hydrous, non-hygroscopic solvent and a diluent of wood alcohol. In the process of 1898 the solvent was amyl-acetate 5 parts, fusel oil about 16 parts and camphor 3 to 5 parts. The diluent was wood alcohol 104 parts. In the 1902 process the solvent was fusel oil 16 parts and camphor 3 parts. The diluent was wood alcohol 40 parts and acetone 40 parts. There can be no doubt that the defendant uses nitrocellulose and the diluent of the patent, viz., alcohol —wood alcohol being expressly referred to in the patent as an example of a diluent having a low boiling point and a relatively quick evaporating quality. The only debatable question relates to the equivalency of the defendant's solvent and we cannot doubt that the combination of fusel oil, camphor and amyl-acetate of the 1898 process and the fusel oil and camphor of the 1902 process are equivalents of the high boiling, non-hydrous, non-hygroscopic solvent of the patent. It matters not that the defendant's process produces better results than that of the patent. Assuming this to be true, it does not give the defendant the right to use Goodwin's discovery because it has introduced improvements. It would be strange, indeed, if during the fifteen years which elapsed from the date of the Goodwin application to the adoption of the 1902 process there had been no progress in the art. Undoubtedly there was progress, but as we have had occasion to point out before, one cannot use a patented invention because he has improved it.

Our decision may be briefly stated—believing, as we do, that Goodwin was the first to produce a transparent sensitive pellicle for use in roller cameras, the conclusion naturally follows that his patent is entitled to a liberal construction. Doubts should be resolved in its favor and care taken not to confuse the art at the date of issue with the art as it existed at the date of the application, eleven years before. So considered and construed, we think the claims in controversy valid and infringed.

We fully realize the incongruity of submitting a complicated question of chemistry to a tribunal composed of lawyers, even though assisted by such eminent chemists as Dr. Chanler and Professor Main, who have made comprehensible the salient features of an unusually complex and difficult controversy.

It is said that a motion is pending in the District Court for an order extending the time during which the complainant may recover profits and damages to the date of the Goodwin patent. This motion was postponed by stipulation until after the decision of this court and

we are asked to make this affirmance "subject to the motion and stipulation referred to." We do not see that any action by this court is necessary as the District Court will have full jurisdiction in the premises.

The questions arising on the other assignments of error are carefully considered and sufficiently discussed in Judge Hazel's opinion and we see no necessity for adding to what is there so clearly stated.

The decree is affirmed.

GOODWIN FILM & CAMERA CO. v. EASTMAN KODAK CO.

(Circuit Court of Appeals, Second Circuit. March 18, 1914.)

No. 194.

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

On motion for injunction.

See, also, 213 Fed. 231.

Before LACOMBE, COXE, and WARD, Circuit Judges.

COXE, Circuit Judge. After the almost unprecedented delays of this controversy, we think the time has come when the complainant is entitled to prompt and adequate relief. It is evident that nothing short of an injunction, or the equivalent thereof, will give the complainant anything more than the chance of recovering some time in the distant future the amount which may be awarded by an accounting for sales made during the time the injunction is suspended. Unquestionably it is for the interests of all, the public included, that the defendant should be permitted to complete the sales, contracts and obligations now outstanding and adjust its own business to the changed situation, if this can be done without jeopardizing the interests of the complainant. We think this can be accomplished by providing that an injunction issue after eight days from the date of this decision unless in the meantime the defendant furnishes to the complainant a verified statement of its total list prices of the infringing films sold between September 9, 1913, and March 10, 1914, and pays to the complainant 20 per centum of the total amount or gives a bond, to be approved by the District Court, to secure the payment of the said amount within 60 days.

For the period from March 10th until July 10th the defendant should render to the complainant on the 15th day of each month, viz., April, May, June and July, a statement of the defendant's total list prices of the sales of the infringing films during the preceding month or part of a month, accompanying each of said statements with a payment in cash of 20 per centum of said total list prices of sales so reported, the same to be computed upon defendant's list prices current on March 10, 1914.

The form of this order should be left to the District Court to prescribe and regulate the necessary details.

It is, of course, understood that in fixing the payment at 20 per centum we have chosen that amount as a fair payment for the ad in-

terim suspension of the injunction. It may be more or less, as determined by the accounting, and the amount required to be paid by the final decree will be regulated accordingly.

UNITED STATES v. DELAWARE, L. & W. R. CO. et al.

(District Court, D. New Jersey. April 7, 1914.)

No. 297.

1. CARRIERS (§ 25*) — REGULATION OF INTERSTATE RAILROADS — COMMODITIES CLAUSE OF INTERSTATE COMMERCE ACT—SEPARATE CORPORATION.

Under the decisions of the Supreme Court construing the commodities clause of Hepburn Act June 29, 1906, c. 3591, § 1, 34 Stat. 584 (U. S. Comp. St. Supp. 1911, p. 1287), and holding that it does not prohibit a railroad company from transporting in interstate commerce commodities manufactured, mined, produced, or owned at the time of shipment by a distinct bona fide corporation, merely because of the company's ownership of stock in such corporation, irrespective of the extent of such stock ownership, a railroad company, owning and holding as lessee, at the time of the passage of the act, a large quantity of coal lands and extensive mines and storage and sales equipment throughout the country, which after such decisions, in good faith, organized a separate coal company to lease its outside equipment and buy the product of its mines at the breakers, in which corporation it owns no stock, but sold the greater part to its own stockholders, by whom much of it was afterwards sold to third persons, is not prohibited from carrying the coal from its mines after it has passed into the ownership of the coal company.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 25.*]

2. CARRIERS (§ 25*)—REGULATION OF INTERSTATE RAILROADS—COMMODITIES CLAUSE OF INTERSTATE COMMERCE ACT—CARRIAGE OF PROPERTY OWNED BY SEPARATE CORPORATION.

It is insufficient to render such transportation unlawful that a comparatively small number of persons own a controlling interest in both the railroad company and the coal company, and that some of the officers and directors of the two are the same, where the business of each is separately conducted, and no discrimination is shown to have been made by the railroad company in favor of the coal company as a shipper.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 25.*]

3. CARRIERS (§ 25*)—REGULATION OF INTERSTATE RAILROADS—COMMODITIES CLAUSE OF INTERSTATE COMMERCE ACT—INTEREST IN COMMODITY CARRIED.

A contract between the two companies, by which the coal company agreed to buy f. o. b. at the mines all of the coal mined or purchased by the railroad company which it desired to sell, and to pay for certain grades thereof a stated per cent. of the general average f. o. b. prices of such coal at tidewater points, does not leave the railroad company with "any interest, direct or indirect," in the coal, after its delivery to the coal company, which renders its transportation unlawful under the statute, where all shipments are made pursuant to orders of the coal company, and the latter also has full control over the prices at which it sells.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 25.*]

In Equity. Suit by the United States against the Delaware, Lackawanna & Western Railroad Company and the Delaware, Lackawanna & Western Coal Company. On final hearing. Decree for defendants.

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

F. R. Coudert and H. T. Kingsbury, both of New York City, for plaintiff.

W. S. Jenney, of New York City, and J. G. Johnson, of Oneonta, N. Y., for defendants.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

J. B. McPHERSON, Circuit Judge. This proceeding is based chiefly upon the commodities clause (Act June 29, 1906, c. 3591, § 1, 34 Stat. 584 [U. S. Comp. St. Supp. 1911, p. 1287]), which forbids any railroad company to carry in interstate commerce after May 1, 1908—

"* * * any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier."

The government's contention is that the Delaware, Lackawanna & Western Railroad Company is violating this statute because it is carrying in such commerce anthracite coal originally produced by its own mines in Pennsylvania or bought from other mineowners in that state, the government alleging that during such carriage the railroad continuously retains some kind or degree of interest or ownership in the coal. The railroad denies that any such interest or ownership exists, averring that the coal is sold in good faith before the carriage begins; the other defendant, the Delaware, Lackawanna & Western Coal Company, being the buyer under a contract that will be referred to hereafter. The government attacks this contract, declaring it to be merely a subterfuge, and to have no effect in divesting or modifying the railroad's title. The questions raised by the record are of very great importance, and it is therefore a matter for much satisfaction that the Supreme Court has already considered the general subject, and has laid down the rules by which the controversy must be decided. We think it desirable to preface the discussion by stating in sufficient outline (even at the risk of seeming diffuse) what has been said and done in two previous suits where the meaning and effect of the clause under consideration were directly involved.

In June, 1908, the defendant railroad and five other coal-carrying roads were brought into the Circuit Court for the Eastern District of Pennsylvania, charged with violating the statute. The companies appeared and defended, and the cases were argued upon the several bills or petitions and the answers thereto, no testimony having been taken. In September of that year the Circuit Court dismissed the proceedings, one of the judges dissenting. The majority opinion (164 Fed. 215 et seq.) was put upon the ground—we state it briefly and in general terms—that under the proper construction of the statute a railroad was forbidden to carry its own coal to market, and was thus deprived of its property in violation of the fifth amendment to the federal Constitution. The dissenting opinion rests upon the propositions that the power to regulate commerce includes the power to reg-

ulate the carrier, and that commerce might be lawfully regulated by ordaining that a public carrier should not also be a private shipper. The cases were then appealed to the Supreme Court, and were decided by that tribunal early in May, 1909. United States v. Delaware & Hudson Co., 213 U. S. 367, 29 Sup. Ct. 527, 53 L. Ed. 836 et seq. The opinion shows that the court did not pass upon the differing views of the Circuit Judges, and did not find it necessary to discuss the fifth amendment. But the government's contention concerning the scope and meaning of the clause was stated, and the far-reaching consequences of such contention were recognized. The present Chief Justice (who wrote the opinion of the court) declared (213 U. S. 406, 29 Sup. Ct. 535 [53 L. Ed. 836]) that:

"* * * If the contention of the government as to the meaning of the commodities clause be well founded, at least a majority of the court are of the opinion that we may not avoid determining the following grave constitutional questions: (1) Whether the power of Congress to regulate commerce embraces the authority to control or prohibit the mining, manufacturing, production, or ownership of an article or commodity, not because of some inherent quality of the commodity, but simply because it may become the subject of interstate commerce. (2) If the right to regulate commerce does not thus extend, can it be impliedly made to embrace subjects which it does not control, by forbidding a railroad company engaged in interstate commerce from carrying lawful articles or commodities, because, at some time prior to the transportation, it had manufactured, mined, produced, or owned them, etc.? And involved in the determination of the foregoing questions we shall necessarily be called upon to decide: (a) Did the adoption of the Constitution and the grant of power to Congress to regulate commerce have the effect of depriving the states of the authority to endow a carrier with the attribute of producing as well as transporting particular commodities, a power which the states from the beginning have freely exercised, and by the exertion of which governmental power the resources of the several states have been developed, their enterprises fostered, and vast investments of capital have been made possible? (b) Although the government of the United States, both within its spheres of national and local legislative power, has in the past for public purposes, either expressly or impliedly, authorized the manufacture, mining, production, and carriage of commodities by one and the same railway corporation, was the exertion of such power beyond the scope of the authority of Congress, or, what is equivalent thereto, was its exercise but a mere license, subject at any time to be revoked and completely destroyed by means of a regulation of commerce?"

Upon these serious questions, however, the court intimated no opinion, because an analysis of the clause and the ascertainment of its true meaning thereby rendered such an opinion unnecessary. Without following the analysis, it is enough to say that the court did not approve either of the constructions maintained in the opinions of the Circuit Court, but reached its own conclusions on this subject, stating the true meaning of the statute to be as follows (213 U. S. 415, 29 Sup. Ct. 538 [53 L. Ed. 836]):

"We then construe the statute as prohibiting a railroad company engaged in interstate commerce from transporting in such commerce articles or commodities under the following circumstances and conditions:

"(a) When the article or commodity has been manufactured, mined, or produced by a carrier or under its authority, and at the time of transportation the carrier has not in good faith before the act of transportation dissociated itself from such article or commodity; (b) when the carrier owns the article or commodity to be transported in whole or in part; (c) when the carrier at the time of transportation has an interest, direct or indirect, in a legal or

equitable sense, in the article or commodity, not including, therefore, articles or commodities manufactured, mined, produced, or owned, etc., by a bona fide corporation in which the railroad company is a stockholder."

In the Circuit Court no testimony had been taken, but the controversy had been heard upon the pleadings, and mainly for this reason the Supreme Court did not give particular directions concerning each defendant, but remanded with general instructions that such further proceedings be taken as should be necessary to apply and enforce the statute interpreted as just set forth.

After the cases had been sent back for further proceedings, the government in March, 1910, asked leave to amend its charge against the Lehigh Valley Railroad Company, one of the six roads originally attacked. This amendment was afterwards summarized by the Supreme Court in 220 U. S. at page 268, 31 Sup. Ct. at page 389 (55 L. Ed. 458), as follows:

"In substance it was averred that as to this particular coal company the railroad company was not only the owner of all the stock issued by the coal company, but that the railroad company so used the power thus resulting from its stock ownership as to deprive the coal company of all real independent existence, and to make it virtually but an agency or dependency or department of the railroad company. In other words, in great detail facts were averred which tended to establish that there was no distinction in practice between the coal company and the railroad company, the latter using the coal company as a mere device to enable the railroad company to violate the provisions of the commodities clause. It was expressly charged that in consequence of these facts:

" 'The coal company is not a bona fide mining company, but is merely an adjunct or instrumentality of the defendant. The defendant is in legal effect the owner of and has a pecuniary interest in the coal mined by the coal company, and which is transported by the defendant.'

"Not only was it thus charged that the railroad company used its stock ownership to so commingle the operations of the affairs of the mining company with its own as to render it impossible to distinguish as a matter of fact between them, but it was moreover expressly in substance charged that, exerting its influence as the owner of all the stock of the coal company, the railroad company caused the coal company to buy up all the coal produced by other mining companies in the area tributary to the railroad, and fixed the price at which such coal was bought, so as to control the same and the transportation thereof, and establish the price at which the coal thus ostensibly acquired by the coal company by purchase should be sold when it reached the seaboard.

"It was charged that by these abuses the production, shipment, and sale of all the coal within the territory served by the railroad company was brought within the dominion of that company practically to the same extent as if it was the absolute owner of the same. Finally it was alleged as follows:

" 'That by virtue of the facts hereinbefore set out and otherwise, and more particularly by virtue of the control, direction, domination, and supervision exercised by the persons who are the officers of the defendant railroad and by the defendant over all the operations of the said coal company, embracing the mining and production of said coal, the shipment and transportation of the same over the defendant railroad, and the sale thereof at the seaboard, it follows:

" 'First. That the coal company, not being in substance and in good faith a bona fide corporation, separate from the defendant, but a mere adjunct or instrumentality of the defendant, the defendant, at the time of transportation, has an interest, direct or indirect, in a legal or equitable sense, in said coal.

" 'Second. That said coal of said coal company is mined and produced under the authority of defendant, and the defendant at the time of transportation and before the act of transportation has not in good faith dissociated

itself from all exercise of authority over said coal, but continues to exercise authority over said coal at the time of transportation and over the subsequent sale thereof.' "

The Circuit Court refused permission to make this amendment—the refusal apparently resting upon the ground that the amendment added nothing essentially new to the original cause of action—and again entered a final decree against the government. Thereupon another appeal was taken to the Supreme Court, and the court held (United States v. Lehigh Valley Co., 220 U. S. 257, 31 Sup. Ct. 387, 55 L. Ed. 458 et seq.) that the amendment should have been allowed, declaring that the additions thereby proposed to the original bill were not foreclosed by the decision in the Delaware & Hudson Company's Case. After summarizing the amendment in the words quoted above, the Chief Justice went on to say (220 U. S. 271, 31 Sup. Ct. 390 [55 L. Ed. 458]):

"While that decision expressly held that stock ownership by a railroad company in a bona fide corporation, irrespective of the extent of such ownership, did not preclude a railroad company from transporting the commodities manufactured, mined, produced, or owned by such corporation, nothing in that conclusion foreclosed the right of the government to question the power of a railroad company to transport in interstate commerce a commodity manufactured, mined, owned, or produced by a corporation in which the railroad held stock and where the power of the railroad company as a stockholder was used to obliterate all distinctions between the two corporations; that is to say, where the power was exerted in such a manner as to so commingle the affairs of both as by necessary effect to make such affairs practically indistinguishable and therefore to cause both corporations to be one for all purposes. To what extent the amendment charged this to be the case will become manifest by again particularly considering its averments concerning the use by the railroad company of the coal company as a purchaser of coal, as also the direct charge made in the proposed amendment that by such acts the railroad company was enabled to control all or a greater portion of the coal produced in the region tributary to its road, and thus to dominate the situation and fix the price, not only at which all the coal could be bought, but at which it could be sold at the seaboard for consumption.

"That the facts thus averred and the other allegations contained in the proposed amended bill tended to show an actual control by the railroad company over the property of the coal company, and an actual interest in such property beyond the mere interest which the railroad company would have had as a holder of stock in the coal comany, is we think clear. The alleged facts, therefore, brought the railroad company, so far as its right to carry the product of the coal company is concerned, within the general prohibitions of the commodities clause, unless for some reason the right of the railroad company to carry such product was not within the operation of that clause. The argument is that the railroad company was so excepted, because any control which it exerted or interest which it had in the product of the coal company resulted from its ownership of stock in that company, and would not have existed without such ownership. The error, however, lies in disregarding the fact that the allegations of the amended bill asserted the existence of a control by the railroad company over the coal corporation and its product, rendered possible, it is true, by the ownership of stock, but which was not the necessary result of a bona fide exercise of such ownership, and which could only have arisen through the use by the railroad of its stock ownership for the purpose of giving it, the railroad company, as a corporation for its own corporate purposes, complete power over the affairs of the coal company, just as if the coal company were a mere department of the railroad. Indeed, such a situation could not have existed, had the fact that the two corporations were separate and distinct legal entities been regarded in the administration of the affairs of the coal company. Granting this to be the case, however, it is in

effect urged, as the railroad company held all the stock in the coal company, and therefore any gain made or loss suffered by that company would be sustained by the railroad company, no harm resulted from commingling the affairs of the two corporations and disregarding the fact that they were separate juridical beings, because ultimately considered they were but one and the same. This, however, in substance but amounts to asserting that the direct prohibitions of the commodities clause ought to have been applied to a case of stock ownership particularly to a case where the ownership embraced all the stock of a producing company, and therefore that a mistake was committed by Congress in not including such stock ownership within the prohibitions of the commodities clause. We fail, however, to appreciate the relevancy of the contention. Our duty is to enforce the statute, and not to exclude from its prohibitions things which are properly embraced within them. Coming to discharge this duty, it follows, in view of the express prohibitions of the commodities clause, it must be held that, while the right of a railroad company as a stockholder to use its stock ownership for the purpose of a bona fide separate administration of the affairs of a corporation in which it has a stock interest may not be denied, the use of such stock ownership in substance for the purpose of destroying the entity of a producing, etc., corporation, and of commingling its affairs in administration with the affairs of the railroad company, so as to make the two corporations virtually one, brings the railroad company so voluntarily acting as to such producing, etc., corporation within the prohibitions of the commodities clause. In other words, that by operation and effect of the commodities clause there is a duty cast upon a railroad company proposing to carry in interstate commerce the product of a producing, etc., corporation in which it has a stock interest not to abuse such power so as virtually to do by indirection that which the commodities clause prohibits, a duty which plainly would be violated by the unnecessary commingling of the affairs of the producing company with its own, so as to cause them to be one and inseparable."

It will be observed that (for the purpose of deciding whether the government's motion should have been allowed) the Supreme Court necessarily assumed that the averments of the proposed amendment were true, and while a summary of these averments has already been given it may therefore be useful to give the full text in the margin.[1]

[1] "The defendant [the Lehigh Valley Railroad Company] continuously for several years last past has been and now is the owner of the entire capital stock of the Lehigh Valley Coal Company, hereinafter called the 'Coal Company,' a corporation of the state of Pennsylvania, which holds by conveyances and leases anthracite coal lands and coal mines situated in the counties of Carbon, Lehigh, Luzerne and Wyoming, in the state of Pennsylvania, which mines have been and are being operated in the mining of coal, and are tributary to the lines of transportation operated by the defendant, and the coal so mined has been and is being carried by the defendant over its said lines of transportation. There have been and are a large number of other companies and individuals situated in the same localities and engaged in the mining of such anthracite coal and in shipping the same over the lines of transportation owned by the defendant to markets in other states in competition with each other and the Coal Company.

"The Coal Company is so organized and controlled by the defendant and its affairs are so conducted as to make it merely an instrumentality or adjunct of the defendant. That the Coal Company is a mere adjunct, instrumentality or department of the defendant appears from the following facts, among others:

"For a long time past the defendant has owned and now owns the entire capital stock of the Coal Company.

"For a long time past the officers of the defendant have been and are now the principal officers of the Coal Company. They are appointed officers of the Coal Company through the influence of the defendant, and for the reason that they are, respectively, officers of the defendant; as officers of the Coal

We repeat that the language just quoted from the opinion in the Lehigh Valley Case was used upon the assumption that the averments of the proposed amendment were true, and it is these therefore that were held to describe a relation, and particularly to describe a course of conduct or a series of acts, that "obliterated all distinction between the two corporations," and that so commingled their affairs "as by necessary effect to make these affairs practically indistinguishable, and thus to cause both corporations to be one for all purposes." It was held that, although a railroad company may carry in interstate com-

Company they are acting merely on behalf of and for the defendant, and under the direction and instructions of the latter.

"Specifying the officers more particularly:

"The president of the defendant, E. B. Thomas, is president of the Coal Company; the first vice president of the defendant, J. A. Middleton, is second vice president of the Coal Company; the assistant to the president of the defendant, L. D. Smith, is assistant to the president of the Coal Company; the secretary of the defendant, D. J. Baird, is secretary of the Coal Company; the treasurer of the defendant, W. C. Alderson, is treasurer of the Coal Company; the assistant treasurer of the defendant, J. M. Baxter, is assistant treasurer of the Coal Company; the assistant secretary of the defendant, E. A. Albright, is assistant secretary of the Coal Company; the assistant treasurer of the defendant, J. William Robbins, is assistant secretary of the Coal Company.

"Of the six directors of the Coal Company, the following, to wit, George F. Baker and E. T. Stotesbury, are directors of the defendant, and J. A. Middleton and L. D. Smith are, respectively, first vice president and assistant to the president of defendant.

"E. B. Thomas, E. T. Stotesbury, and George F. Baker, who are on the executive committee of the Coal Company, are also on the executive committee of the defendant.

"The defendant, by reason of the fact that it owns the entire capital stock of the Coal Company, is enabled to and does dictate who shall be elected directors of the Coal Company, who shall be its officers and employés and who shall be on the various committees.

"Each of the above-named officers, directors, and committee men, and others not specified, is appointed to his position in the Coal Company by reason of his holding a position with the defendant, thereby enabling him in all matters to act in the interests and on behalf of the defendant, and in the position in the Coal Company to which he has been appointed he acts in reality for and on behalf of the defendant and under the directions of the latter.

"The Coal Company uses the offices of the defendant, and the work of the Coal Company is carried on over the desks belonging to the defendant. The Coal Company in fact is nothing more than a department of the defendant, being operated by officers who in their principal capacity are officers of the defendant, and by virtue of their position in the defendant control and dominate the actions of the Coal Company.

"The defendant, through its officers and directors, exercises a supervision over the coal mined by the Coal Company from the time of the mining of said coal to the sale of the same at New York and other markets. The defendant, through its officers and directors, determines how much coal the Coal Company shall mine, it dictates the shipment and transportation of said coal over its own lines, and it fixes, regulates, and determines the price at which the Coal Company shall sell the coal at the Atlantic seaboard and other places to which it has been transported over the lines of the defendant or at the dictation of the defendant.

"Acting under the direction and instructions of the defendant, and of its officers and directors, the Coal Company has entered and is entering into contracts with other companies and individuals, producers and miners of coal, and tributary to the lines of transportation owned by defendant and to other railroads, for the purchase of the coal mined by said companies and in-

merce the product of a manufacturing, mining, producing, or owning corporation in which the railroad has a stock interest, the power given by such interest must not be abused; for the duty that rests upon the railroad not to abuse such power, "so as virtually to do by indirection that which the commodities clause prohibits, * * * plainly would be violated by the unnecessary commingling of the affairs of the producing company with its own so as to cause them to be one and inseparable."

dividuals. The defendant causes this coal to be shipped and transported over its own lines, and, acting through the Coal Company, it fixes and determines the prices at which such coal shall be sold after transportation to the Atlantic seaboard and other markets. The Coal Company as a rule loses money on these transactions, as the amounts received by it for the coal which it has bought from such companies and individuals generally do not equal the price paid by it for the coal plus the cost of transportation to market. The purpose of the defendant in compelling the Coal Company to enter into such contracts with other coal companies and individuals is thereby to remove the competition which would otherwise exist between the coal mined and sold by such companies and the coal controlled by the defendant through the Coal Company, and furthermore to enable the defendant by means of these contracts to dictate the transportation of such coal over its own lines, and to obtain the freight charged therefor.

"The Coal Company has not paid any dividends upon its stock during the time such stock has been owned by the defendant. It has been furnished millions of dollars by the defendant, which it has never refunded, and upon which during many years it paid no interest. The defendant has guaranteed bonds of the Coal Company, and paid interest on such bonds. The earnings of the defendant received for the transportation over its lines of the coal produced by the Coal Company and of the coal controlled by means of the contracts above described compensates the defendant for the failure of the Coal Company to pay dividends on its stock.

"The operation of the Coal Company by the defendant in effect merely is a device for evading the law, and more particularly the provisions of the said commodities clause. The Coal Company is not a bona fide mining company, but is merely an adjunct or instrumentality of the defendant. The defendant is in legal effect the owner of and has a pecuniary interest in the coal mined by the Coal Company, and which is transported by the defendant.

"That by virtue of the facts hereinbefore set out and otherwise, and more particularly by virtue of the control, direction, domination, and supervision exercised by the persons who are the officers of the defendant railroad and by the defendant over all the operations of said Coal Company, embracing the mining and production of said coal, the shipment and transportation of the same over the defendant railroad, and the sale thereof at the seaboard, it follows:

"First. That the Coal Company, not being in substance and in good faith a bona fide corporation, separate from the defendant, but a mere adjunct or instrumentality of the defendant, the defendant, at the time of transportation, has an interest, direct or indirect, in a legal or equitable sense, in said coal.

"Second. That said coal of said Coal Company is mined and produced under the authority of defendant, and the defendant at the time of transportation and before the act of transportation has not in good faith dissociated itself from all exercise of authority over said coal, but continues to exercise authority over said coal at the time of transportation and over the subsequent sale thereof.

"Therefore the transportation of said coal by the defendant in the manner and under the circumstances hereinabove described constitutes a violation of the fifth paragraph of the first section of said 'act to regulate commerce,' as amended by an act of Congress approved June 29, 1906."

The opinion in the Lehigh Valley Case was delivered in April, 1911, and the Reports of the Attorney General for 1911 and 1912 contain references to the subject. In the Report for 1911 the two decisions of the Supreme Court are thus referred to:

"As stated in my last annual report, after the decision in the original commodities clause case (U. S. v. Delaware & Hudson Company, 213 U. S. 366 [29 Sup. Ct. 527, 53 L. Ed. 836])—in which the Supreme Court, while sustaining the validity of that provision in the Hepburn Act of 1906 (34 Stat. 584) which prohibits the transportation in interstate commerce by a carrier of a commodity produced or owned by it, etc., except such as may be necessary in the conduct of its business, held, however, that a carrier was not the owner of an interest in articles manufactured, mined, produced, or owned by a corporation whose stock was owned by it, within the meaning of the statute—the government applied to the Circuit Court for leave to file an amended bill, which was denied, whereupon an appeal was taken to the Supreme Court from that decision. In substance, the government by its proposed amendment averred that, in the particular case at bar, the railroad company was not only the owner of all the stock issued by a coal company, but that it so used the power resulting from this stock ownership as to deprive the coal company of all real independent existence, and to make it virtually but an agency, or dependency, or department, of the railroad company. In other words, to employ the language of the court:

" 'In great detail facts were averred which tended to establish that there was no distinction in practice between the coal company and the railroad company, the latter using the coal company as a mere device to enable the railroad company to violate the provisions of the commodities clause.'

"The Supreme Court, on this showing, reversed the order of the Circuit Court and remanded the case, with instructions to permit the amendment to be filed, because the facts, if proven, would bring the railroad company, so far as its right to carry the product of the coal company was concerned, within the general prohibitions of the commodities clause. Accordingly, the government is proceeding in the Circuit Court, endeavoring to apply the prohibitions of the commodities clause to the carriage by a railroad company over its line of coal mined and owned by a coal company every share of the stock of which is owned by the railroad company, and which is operated as a department of the railroad company."

And in the Report for 1912 the following statement will be found on pages 23 and 24:

"Following the decision in the case of United States v. Lehigh Valley Railroad Company, referred to in my last annual report (220 U. S. 257 [31 Sup. Ct. 387, 55 L. Ed. 458]), remanding the case to the Circuit Court with instructions to allow the government to amend its complaint in order to show that the Lehigh Valley Coal Company was in fact a mere adjunct, instrumentality or department of the railroad company, and, therefore, that ownership of the coal by the coal company at the time of transportation amounted in reality to ownership by the railroad company, and was transported in violation of the commodities clause of the commerce act (34 Stat. 584), the railroad company filed an answer to the amended complaint putting its allegation in issue. Subsequently, however, the railroad company caused to be incorporated under the laws of New Jersey a separate company known as the Lehigh Valley Coal Sales Company, with an authorized capital stock of $10,000,000, of which $6,060.800 was issued forthwith. The Lehigh Valley Railroad Company declared a dividend in January, 1912, of 10 per cent. on its outstanding capital stock. This dividend amounted in the aggregate to $6,060,800. The preferred and common stockholders of the railroad company were given the privilege of subscribing to shares of the sales company to an amount equivalent to 10 per cent. of their holdings. By this method, in effect, the shares of the sales company were distributed to and among the shareholders of the railroad company. Thereupon, on March 1, 1912, the Lehigh Valley Coal Company entered into a contract with the Lehigh Coal Sales Company whereby the for-

mer agreed to sell to the latter all coal thereafter mined by it from all coal lands owned or leased by it, together with all coal it may purchase, the sales company agreeing to purchase and take all such coal at a price delivered f. o. b. railroad cars, at the breakers where the same is prepared, at, for all sizes above pea coal, a sum equal to 65 per cent. of the general average f. o. b. price of said sizes received at the water points at or near New York, between Perth Amboy and Edgewater.

"The situation is, therefore, that coal which is shipped over the Lehigh Valley Railroad is mined by the Lehigh Valley Coal Company, all of whose stock is owned by the railroad company, and is sold at the breakers to the Lehigh Valley Coal Sales Company, all of whose stock has been originally issued to and distributed among the stockholders of the railroad company pro rata, but which company has separate officers from the railroad company, and separate directors, and whose stock may be sold by the stockholders without regard to their continued holding of stock in the railroad company. By this arrangement both the railroad company and the coal companies seem to have parted in good faith with title to the coal before transportation begins, and it is claimed, therefore, that transportation is free from the prohibition of the commodities clause as construed by the Supreme Court in 213 U. S. 412 [29 Sup. Ct. 527, 53 L. Ed. 836]. The question will be submitted to the court at an early day."

[1] In the following month, on January 27, 1913, the amended bill in the Eastern district of Pennsylvania was dismissed with the government's consent, but without prejudice to the right to bring a new suit. We understand that such a suit has recently been brought in the Second circuit. The foregoing résumé states in sufficient detail the course of the previous litigation against the coal-carrying roads, and brings us to the present dispute. The rules to which we have referred are now to be applied to the relation existing, and to the course of conduct actually pursued, between the Delaware, Lackawanna & Western Railroad Company and the Delaware, Lackawanna & Western Coal Company, and we are to determine whether the facts establish that the power of the Railroad Company has been "used to obliterate all distinctions between the two corporations"; or (to employ other language of the court) whether the power of the Railroad Company has been "exerted in such a manner as to commingle the affairs of both as by necessary effect to make such affairs practically indistinguishable, and therefore to cause both corporations to be one for all purposes." If the railroad has the power to attain the objects thus condemned, and if these objects have been attained by the actual use and exertion of the power, the commodities clause has been violated; otherwise, it has not been infringed.

It will be a help in appreciating the evidence now under consideration if we first take some account of the general situation in the anthracite region of Pennsylvania. This is well described in a paragraph from page 224 of 164 Fed., afterwards quoted by the Supreme Court in the Delaware & Hudson Case, at page 402 of 213 U. S., at page 530 of 29 Sup. Ct. (53 L. Ed. 836):

"The general situation is that for a half century, or more, it has been the policy of the state of Pennsylvania, as evidenced by her legislative acts, to promote the development of her natural resources, especially as regards coal, by encouraging railroad companies and canal companies to invest their funds in coal lands, so that the product of her mines might be conveniently and profitably conveyed to markets in Pennsylvania and in other states. Two of the defendant corporations, as appears from their answers, were created by the Legislature of Pennsylvania, one of them three-quarters of a century ago and

the other half a century ago, for the express purpose that its coal lands might be developed and that coal might be transported to the people of Pennsylvania and other states. It is not questioned that, pursuant to this general policy, investments were made by all the defendant companies in coal lands and mines, and in the stock of coal-producing companies, and that coal production was enormously increased and its economies promoted, by the facilities of transportation thus brought about. As appears from the answers filed, the entire distribution of anthracite coal in and into the different states of the Union and Canada, for the year of 1905 (the last year for which there is authoritative statistics) was 61,410,201 tons; that approximately four-fifths of this entire production of anthracite coal was transported in interstate commerce over the defendant railroads, from Pennsylvania to markets in other states and Canada; and of this four-fifths, from 70 per cent. to 75 per cent. was produced either directly by the defendant companies or through the agency of their subsidiary coal companies. It also appears from the answers filed that enormous sums of money have been expended by these defendants, to enable them to mine and prepare their coal and to transport it to any point where there may be a market for it. It is not denied that the situation thus generally described is not a new one, created since the passage of the act in question, but has existed for a long period of years prior thereto, and that the rights and property interests acquired by the said defendants in the premises have been acquired in conformity to the Constitution and laws of the state of Pennsylvania, and that their right to the enjoyment of the same has never been doubted or questioned by the courts or people of that commonwealth, but has been fully recognized and protected by both."

In addition to these considerations, the following facts—also taken from the Delaware & Hudson Case, in 164 Fed. on page 221—were especially applicable then to the railroad company now defendant, and may be referred to again as relevant to a large extent in the present controversy:

"The Delaware, Lackawanna & Western Railroad Company, like the Delaware & Hudson Company, admits that it is the owner of coal lands, and mines coal which it sells; that it was organized under an act of the Legislature of Pennsylvania in 1849 (Act Feb. 19, 1849 [P. L. 79]); that all the lines of railroad owned by it are wholly within the state of Pennsylvania, extending from the Delaware river, at the boundary line of the state of New Jersey, in a northwesterly direction across the state of Pennsylvania, to the boundary line between the state of Pennsylvania and the state of New York, with a branch line extending from Scranton, in the state of Pennsylvania, to Northumberland, in said state. Said defendant also admits and alleges that, under express authority of acts of the Legislature of the states of Pennsylvania, New Jersey, and New York, it, as lessee, now operates, and long prior to May 1, 1908, had operated, various lines of railroad in the two last-mentioned states, by which it has direct traffic connection with the city of Buffalo and other cities in the said states. Defendant also admits that for many years it has owned, in fee, extensive tracts of coal land in the state of Pennsylvania; that it has also leased large tracts of coal lands in the said state, and is now engaged, and for many years last past has been engaged, in mining coal from the lands so owned and leased by it; that the holding of said lands, whether in fee or by lease, and the mining, manufacture, and interstate transportation of the coal therefrom, has been and continues to be under and by virtue of the authority of the laws of the state of Pennsylvania; that in addition to the foregoing, certain coal companies, organized from time to time under acts of assembly of the said state of Pennsylvania, have been merged into said defendant corporation; that by an act of the General Assembly of the state of Pennsylvania, approved April 15, 1869, entitled 'An act to authorize railroad and canal companies to aid in the development of the coal, iron, lumber, and other material interests of this commonwealth,' the defendant was authorized to aid corporations authorized by law to develop coal, iron, lumber, and other material interests of Pennsylvania, by purchase of their capital stock or bonds, or either of them. The answer of said defend-

ant also alleges that, by reason of its ownership of said coal lands and coal and the revenues derived from the transportation of the same to market, it has been enabled to expend millions in the betterment of its general transportation facilities for both goods and passengers, and give to the public the benefits of a well constructed and equipped modern railroad; that by virtue of leases of railroads, to enable it to transport coal in interstate commerce, it has become bound to pay yearly, in interest charges, the sum of $5,155,697, and for taxes $1,163,916; that out of a total of about 8,700,000 tons of coal produced by it in the year 1907 from its land owned in fee and leased, upwards of 6,700,000 tons were transported over its lines of railroad in interstate commerce; that from 40 per cent. to 60 per cent. of its annual transportation earnings, from the operation of leased lines, has been derived from the carriage of its own coal thereover; that it uses, in the conduct of its business as a common carrier, approximately 1,700,000 tons of anthracite coal of pea size or smaller, annually, and will require more for such use in the future; that to obtain this coal in these economic sizes, it is necessary to break up coal, leaving the larger sizes which must be disposed of otherwise; that great waste would result if it were forbidden to transport to market in interstate commerce these large sizes thus resulting. That defendant's rights to acquire its holdings of coal land, its rights to own and mine coal and to transport the same to market in other states, as well as in Pennsylvania, and its leases of other railroads, were acquired many years prior to the enactment of the so-called 'interstate commerce act,' and of the said amendment thereto known as the 'commodities clause.'"

Turning to the record now under consideration, we find no facts of importance in dispute; the controversy is over the inferences that should properly be drawn therefrom. The relation existing between the two defendants is a direct result of the railroad's effort to obey the decision of the Supreme Court in the first of the cases referred to —United States v. Delaware & Hudson Co. When that decision was announced on May 3, 1909, the Railroad Company was presented with a serious problem. It owned or leased 15,000 acres of coal lands in the Wyoming region, and these were of great value, both present and prospective. Its mines were producing several million tons of coal each year, and the sale and carriage of this coal were highly important sources of revenue, and its uninterrupted distribution through the established channels of trade was of great importance to the public. It had more than 600,000 tons of mined coal on hand, not yet disposed of, either on storage or in course of transit. A demand for the coal that the railroad had been selling for many years existed throughout a wide territory, stretching from New England into Canada and the Middle West; and an extended and elaborate organization had grown up in the course of a long and continuous effort to bring the coal to the consumer seasonably and economically. Facilities for storage and handling had gradually been acquired and expanded; numerous contracts had been made with agents and dealers; other contracts existed with independent operators for the purchase of additional coal for carriage and sale—all this, and much more, resting upon the undisturbed practice of many years under direct state authority, whereby the Railroad Company mined its own coal, bought coal from others, and carried and sold in many and in widely separated markets the property thus mined and bought.

This long-established business was now to be changed, and changed almost immediately. In our opinion the evidence shows that the railroad intended to obey the law as the Supreme Court had authorita-

tively announced it, and we may say at once that an examination of the record affords no ground to doubt the good faith of all concerned in the transactions now complained of. No trick or sham or evasion was contemplated or attempted, but a genuine effort was apparently made to comply with the statute and to carry out openly and publicly what the court had declared to be necessary. The situation was not welcome, but the railroad clearly understood it and accepted it frankly. No doubt existed that the railroad must dissociate itself in good faith from the ownership of the coal before the act of transportation should begin, and must divest itself of every interest therein, either direct or indirect. Counsel were therefore consulted and a plan was adopted. As a business proposition it was evidently indispensable to find a single purchaser who should be able, financially and in other respects, to handle several million tons a year; it was obviously impracticable to dispose of such a quantity by sales in small lots to small dealers, or for small dealers to distribute afterwards to numerous consumers scattered over so wide an area. So large a quantity, needed in so many places at about the same time, could only be handled by some one with large capital and with a well-organized and capable force of agents. It was therefore decided that a New Jersey corporation should be organized, with a capital sufficiently large, and that this corporation should take over the trained and experienced clerks and agents connected with the coal sales department of the railroad's business.

It was recognized as desirable that the relations between the railroad as the seller, and the proposed coal company as the buyer, should be friendly, and in the first instance the stock in the Coal Company was offered only to the shareholders of the Railroad Company. They were expected to accept the offer, and this expectation was realized. As is well known, the defendant railroad has had a prosperous career, and in June, 1909, it had a large cash surplus. Out of this fund it declared a dividend of 50 per cent., and offered to its shareholders the right to use one-half the dividend to buy the shares of the proposed Coal Sales Company at par. The offer was accepted by nearly all the shareholders; the only exceptions were 36 separate interests, representing 2,249 shares. Since that time, however, many changes have taken place among the stockholders of either company. Both stocks are dealt in by the public, one on the Exchange and the other on the curb; the result being that in October, 1913, the shares of the railroad not interested in the Coal Company had increased from 2,249 to 88,716, and the shares in the Coal Company not interested in the railroad had increased to 6,907. The number of shareholders in the Coal Company had become 1,588, and of these 801 were women, either in their own right or as cestuis que trustent.

The capital subscribed and paid in before August 2, 1909, was nearly $6,600,000, but the Railroad Company did not subscribe or pay for a single share, and had no interest therein, direct or indirect. The capital was all subscribed and paid for by individuals; but, as these individuals were also stockholders of the Railroad Company, the government contends (almost solely for this reason) that the two corporations are in effect identical and cannot be regarded as dis-

tinct. If this ground be not well taken, scarcely anything is left of the government's case—certainly nothing that would support a decree. But, if the contention be sound, the case is made out, and accordingly this point is much insisted upon in the brief, where numerous cases are cited and discussed. We do not think it necessary to take them up in detail. Some of them differ essentially from the case at bar in the fact that they disclose fraud or bad faith as an element, whereas here nothing of the kind exists. But we need not discuss these or any other authorities, because the Supreme Court has already declared distinctly the rule for these particular cases, and has determined that a railroad itself might lawfully hold stock in a manufacturing, mining, producing, or owning corporation, upon the single condition that the latter be a bona fide organization. In the Delaware & Hudson Case—on page 415 of 213 U. S., on page 539 of 29 Sup. Ct. (53 L. Ed. 836)—the court said that while the carrier was forbidden to have any interest, direct or indirect, in a legal or equitable sense, in the article or commodity carried, nevertheless this prohibition of the statute did "not include * * * articles or commodities manufactured, mined, produced, or owned, etc., by a bona fide corporation in which the railroad company is a stockholder." This would seem to be plain enough, without more; but, as the subject was important, the court returned to it in the Lehigh Valley Case and left no room for doubt. On page 266 of 220 U. S., on page 388 of 31 Sup. Ct. (55 L. Ed. 458), the Chief Justice declared that:

"The prohibitions of the statute were addressed only to a legal or equitable interest in the commodities to which the prohibitions referred; that they therefore did not prohibit a railroad company from transporting commodities mined, manufactured, produced, or owned by a distinct corporation, merely because the railroad company was the owner of some or all of the stock in such corporation."

And on page 271 of 220 U. S., on page 390 of 31 Sup. Ct. (55 L. Ed. 458), the Delaware & Hudson Case is again referred to as holding expressly that:

"Stock ownership by a railroad company in a bona fide corporation, irrespective of the extent of such ownership, did not preclude a railroad company from transporting the commodities manufactured, mined, produced, or owned by such corporation."

We may therefore assert with confidence that, since a railroad itself may own stock in the producing or owning corporation without offending against the statute, no offense is committed although individual subscribers to such stock may also be stockholders in the railroad. No act of Congress or judicial decision has declared it to be illegal for an individual citizen to invest his money in two enterprises, merely because the enterprises may be closely connected. But what the Supreme Court did lay down was this: Although a railroad company may lawfully own stock in a producing or owning corporation, it must not use the power given by such ownership to obliterate the distinction between the two organizations; it must not exert such power so as to commingle indistinguishably the affairs of both, and thus cause both corporations to be one for all purposes; it must not

destroy the entity of the producing or owning corporation, and thus make the two virtually one. If it actually do these forbidden things, then the commodities clause applies and condemns as unlawful such an abuse of a lawful right. But it is the abuse that is unlawful, not the mere existence of the relation or of the right growing out of the lawful ownership of stock.

[2] Let us see, therefore, what has been actually done by the two defendants. The railroad owns no stock, and has no legal or equitable interest, in the Coal Company. As far as the evidence discloses, it has taken little, if any, corporate action, except to authorize the contract hereafter quoted. But we may fairly infer, although there is not much positive evidence on the subject, that the plan carried out was initiated and finally agreed upon by some at least—probably by all, or by a majority—of a comparatively small group of 35 persons who own a controlling interest in the railroad's stock. They (or nearly all of them, 28 or 29 being the number) also own a majority of the Coal Company's stock, and we take it for granted that they actually control both companies. Being majority stockholders, they have a lawful right to exercise the power of control, provided they exercise it for lawful objects. We assume, also, that several other facts upon which the government lays especial stress are due to the will of this controlling group, namely: The facts that the vice president of the Railroad Company, who was the former head of its coal department, became the president of the Coal Company; that a former sales agent of the Railroad Company transferred his services to the Coal Company and has been (and is now) its vice president and general sales agent; that the president of the Railroad Company is a member of the Coal Company's board of directors; and that three other members are sons of directors on the board of the railroad. As far as these facts go, they are pertinent to the government's contention, and are legitimately used in the effort to prove that the two corporations are identical. But of themselves they are not sufficient; no effort has been made to show, and we do not understand the government to suggest, that the sons (who own no stock in the Railroad Company) have been unfaithful to their trust and have betrayed the interests of the Coal Company which they help to direct; there was no serious effort to show that any of the present or former officials of the Railroad Company that are now, or have been, in the Coal Company's service, have used their power or influence improperly. And—what is more to the point in the present inquiry—nothing was offered in denial of what the evidence shows to be a fact, namely, that the Coal Company has never been favored over other shippers of coal by discrimination in rates or in practices, or in facilities or quality of service. As the Supreme Court has recently pointed out in Railroad Company v. United States, 231 U. S. 363, 34 Sup. Ct. 65, 58 L. Ed. ——, where the object of the commodities clause was considered, the evil at which the clause was aimed was the danger that a carrier, if he were also the owner of the goods transported, would favor himself unduly:

"If such carrier hauls for the public and also for its own private purposes, there is an opportunity to discriminate in favor of itself against other shippers in the rate charged, the facility furnished or the quality of the service

rendered. The commodities clause was not an unreasonable and arbitrary prohibition against a railroad company transporting its own useful property, but a constitutional exercise of a governmental power intended to cure or prevent the evils that might result if, in hauling goods in or out, the company occupied the dual and inconsistent position of public carrier and private shipper."

[3] The following facts are also pertinent upon the question how far the corporate activities and the actual operations of the two companies have been distinct and separate. In August, 1909, they entered into the contract of which the government complains. A summary of that agreement is given in the bill of complaint:

"That the Railroad Company would sell to the Coal Company all mined, marketable coal then owned, except such as it should elect to retain for use in its business as a common carrier, to be paid for within thirty days at prices designated.

"That the Railroad Company would lease to the Coal Company certain described storage and stocking plants, trestles and docks, and accept in payment 5 per cent. per annum on a valuation to be agreed upon.

"That the Coal Company would take over certain leases of trestles and sale agencies contracts theretofore made by the Railroad Company.

"That the Railroad Company would sell and deliver to the Coal Company, f. o. b. cars at the breakers, all coal thereafter mined by the former from all lands owned or leased by it, together with all coal purchased by it, the amount to be so sold and delivered to be at the absolute option of the seller and without liability upon its part for failure to supply any. The Coal Company agrees to purchase all coal offered by the Railroad Company, and no other, unless necessary to comply with contracts then outstanding.

"That the railroad might retain sufficient coal for its use as a common carrier.

"That the Coal Company would accept from the Railroad Company all coal delivered on cars at the breakers, and pay for all sizes above pea 65 per cent. of the general average f. o. b. prices at tide points at or near New York between Perth Amboy and Edgewater, and for the smaller sizes specified portions of such general average prices.

"That the Coal Company would conduct the business of selling so as to best conserve the interest of and preserve the good will and markets of the coal mined by the Railroad Company; that any disputes which might arise between the parties should be settled through a board of arbitration, made up as specified; and that the terms of the agreement itself might also be modified by arbitration if conditions justified.

"That the contract should continue to be operative until six months after either party shall notify the other in writing of its intention to cancel the same, and that upon its expiration the Coal Company would sell to the Railroad Company and the latter would buy all coal then stored or in transit theretofore purchased by the former at prices to be agreed upon or fixed by arbitration."

The full text of the contract will be found in the margin.[2]

Since August 2, 1909, when this contract was made, the general course of events may be condensed from the testimony of the prin-

"[2] This contract, entered into this second day of August, 1909, between the Delaware, Lackawanna & Western Railroad Company, hereinafter called the 'seller,' of the first part, and the Delaware, Lackawanna & Western Coal Company, hereinafter called the 'buyer,' of the second part, witnesseth:

"Whereas, the seller is the owner of coal lands situated at various points in the counties of Luzerne and Lackawanna, and the state of Pennsylvania, and has been engaged both in mining the coal therefrom and in transporting to market and selling the same, and in like manner has so transported and sold large amounts of coal purchased by it in said state; and whereas, the

cipal witness in the case: Since that date, the Coal Company has conducted the whole business of marketing the coal referred to in the contract, and the railroad has taken no part therein, except to move the coal in obedience to orders received from the Coal Company. Notice of the change of business was promptly given to agents and customers and the trade in general. The railroad sells all its coal to the Coal Company on board cars at the breakers, except such quantity as it uses for its own purposes, or permits to be used by its employés. But the Coal Company buys coal from other persons also, the quantity

seller, to so sell its coal, has constructed storage plants and trestles at various points in different states, and has entered into various sales agency contracts; and whereas, to so market said coal most of the same must be transported in interstate commerce, so that it has become necessary for the seller, in compliance with law, to sell all of its coal within the state of Pennsylvania; and whereas, the buyer is desirous of contracting to so purchase all of the seller's coal at its mines, to contract for the transportation of the same to market, and to sell the same and for such purpose to lease of the seller various of its storage plants, trestles, offices, and other facilities, and assume its selling agency contracts:

"Now, therefore, in consideration of the premises, and of the mutual covenants herein contained, it is agreed as follows:

"First. The seller agrees to sell to the buyer, and the buyer agrees to buy of the seller, all mined, marketable coal wherever situated now owned by the seller, and either stored, held at various points, or in the course of transportation, except such coal as the seller elects to retain for its use in the conduct of its business as a common carrier. The buyer shall pay the seller therefor, in cash within thirty days from the date hereof, as follows, viz.: For all of the coal in transit, at prices to include the full tariff charges of the seller and of all other carriers whose charges have been paid by the seller for the transportation of such coal from the mines, together with the market value thereof at the mines as fixed herein, at prices prevailing for the month of July, 1909; for all coal stored, of all sizes, at points west and north of Buffalo, N. Y., the sum of five dollars and fifty cents ($5.50) per gross ton; for prepared sizes of coal stored at Buffalo and at other points along the lines of the owned, leased and controlled lines of the seller, the sum of four dollars ($4.00) per gross ton; for sizes smaller than prepared sizes so stored at Buffalo and points east, along the lines of the seller, not including that stored at or about the mines of the seller, the sum of one dollar ($1.00) per gross ton. The buyer shall also pay an equitable proportion of taxes for the year 1909 assessed or to be assessed against such stored coal.

"The buyer hereby assumes and agrees to pay all unpaid charges of every nature incurred in connection with the tranportation or storage of said coal, and hereby assumes all risks and obligations in connection therewith from the beginning of the day of the date hereof.

"Second. The seller shall lease to the buyer contemporaneously herewith, the following properties: The Checktowage stocking plant, at Buffalo, N. Y.; the Port Morris storage plant, at Port Morris, N. J.; the Dover stocking plant, at Dover, N. J.; the Erie Street lake trestle, at Buffalo, N. Y.; the transfer trestle, at East Buffalo, N. Y.; the lake shipping trestle, at Oswego, N. Y.; the canal trestle, Clinton Street trestle, and Geddes yard trestle, at Syracuse, N. Y.; the canal trestle, at Utica, N. Y.; the retail trestles located, respectively, at Newark, Harrison, Bloomfield, Summit, and Paterson, N. J.; the Division Street dock trestle at Chicago, Ill.; the Wabash dock trestle, at Toledo, Ohio. The rental to be paid the seller by the buyer for the use of said properties shall be five per cent. (5%) of their agreed value, including good will, and the leases shall provide that the buyer shall keep the said properties insured and in repair, and shall contain such other covenants as may be proper to protect the interests of the seller.

"The seller has leased certain of its trestles to different persons, as follows: The Main Street, Erie Street, Chicago Street, Seneca Street, Walden Avenue,

being 3,847 tons in 1909, 2,267 tons in 1910, 6,600 tons in 1911, 9,204 tons in 1912, and 310,645 tons in the first 10 months of 1913. The Coal Company directs the movement of the coal from the breakers (where the title passes from the Railroad Company) until it reaches the numerous markets and customers in Pennsylvania and elsewhere; and the railroad obeys these orders. With the exceptions already noted, the Coal Company has always had a separate board of directors and separate officers. The actual management has also been separate and distinct. The Coal Company has its own officers, and keeps its

and Black Rock trestle at Buffalo, N. Y., to E. L. Hedstrom; the McKinney trestle at Binghamton, N. Y., the Chemung Coal Company trestle at Elmira, N. Y., the Oswego Coal Company trestle at Oswego, N. Y., the Gilmore trestle at Utica, N. Y., the Horre trestle and elevator on pier 5, Hoboken, N. J., Burns Brothers' trestle on property of the seller at South Brooklyn, N. Y., the Klink trestle at Syracuse, N. Y., a coal trestle at Bath, N. Y., and various other trestles located on the lines of its owned, leased, and controlled lines.

"The seller has also entered into sales agency contracts, as follows: With E. L. Hedstrom & Co., Chicago, Ill., S. C. Schenck, Toledo, Ohio, Northwestern Fuel Co., St. Paul, Minn., Milwaukee Western Fuel Co., Milwaukee, Wis., E. L. Hedstrom, Buffalo, N. Y., and Ogdensburgh Coal & Towing Company, of Ogdensburgh, N. Y.

"All of such leases and sales agency contracts shall be taken over by the buyer as of the date hereof, on terms to be agreed upon, and it shall assume all obligations of the seller with respect thereto, and be entitled to the benefits thereof. The buyer also agrees to lease of the seller the coal sales office building at Buffalo and Syracuse, N. Y., rooms in the station of the seller at Scranton, Pa., and suitable quarters at 90 West street, New York City.

"The seller will provide that any of the foregoing properties so to be leased to the buyer which are owned by the Syracuse, Binghamton & New York Railroad Company shall be so leased to it by such corporation.

"The seller has also entered into contracts for the sale of coal for the current year with various customers. A schedule of such contracts shall be prepared and furnished to the buyer by the seller. All of such sales contracts shall be assumed by the buyer as of the date hereof, and it agrees to comply with the terms and conditions of such contracts. The buyer also agrees to assume the obligations of a certain contract entered into October 8, 1905, between Lucy A. Turner and the seller in connection with the business of Henry B. Turner Coal Company at foot of East 23d street, New York, and shall be entitled to the benefits thereof without other consideration than that named herein.

"The seller has entered into a contract, dated June 17, 1905, expiring August 1, 1910, with the Solvay Process Company, of Syracuse, N. Y., providing for the sale of washery coal at prices named therein. It is understood that the buyer shall assume such contract and supply said company with coal at prices named therein. The seller, however, agrees that as the buyer cannot conform to the conditions of such contract without a material loss, it will adjust such loss with the buyer upon an equitable basis on terms to be agreed upon.

"Third. Subject to the conditions of this paragraph, and at the prices herein stated, the seller agrees, during the terms of this contract, to sell to the buyer all coal hereinafter mined by it from all coal lands owned or leased by it, together with all coal it may purchase. The buyer agrees to purchase all such coal at such prices and to pay the seller therefor in cash on the 20th of each month for all coal delivered to it by the seller f. o. b. cars at the mines during the preceding month. The buyer also agrees on the 15th of each month to pay the seller in cash all tariff charges of its owned, leased, and controlled lines, and all moneys advanced by it to other carriers for the transportation of said coal during the preceding month.

"The amount of coal to be so delivered and sold to the buyer by the seller shall be at the absolute option of the seller as its interests may determine, and the seller shall be subject to no liability whatsoever for failure to supply the

own books according to its own method of bookkeeping, and its books relate to its own business. Its funds are deposited in its own name in banks of its own choosing, and are subject to its own disposal. Its earnings are computed from its own books, and the profits go solely to its own stockholders. The sales department of the Coal Company is mainly controlled by its vice president and general sales agent, although its president takes some part in the supervision. The sales agents throughout the territory served with the coal are and always have been in the exclusive employ of the Coal Company, and are paid solely by that company. And this is true, also, of the bookkeeping force in the

buyer with such amount of coal as it may desire. The buyer agrees that, except to enable it to comply with the terms of the existing hereinbefore cited sales agency and other sales contracts of the seller, in the event of the failure of the seller to sell it coal, it will purchase all coal to be sold by it from the seller, and will purchase no coal from any other person or corporation, except with the written consent of the seller.

"The seller reserves the right to retain all coal required by it for the use of its owned, leased and controlled lines in the conduct of their business as common carriers; also such coal as it may desire to sell its employés at the breakers, the same not to be hauled in railroad cars.

"The buyer agrees to pay the seller, and the seller agrees to accept from the buyer, the following prices for said coal, to be delivered f. o. b. railroad cars at the various breakers now located and hereinafter constructed by the seller at its mines aforesaid:

"For all sizes above pea coal, sixty-five (65) per cent. of the general average free on board prices of said sizes received at tide points at or near New York, between Perth Amboy and Edgewater.

"For pea coal, fifty (50) per cent. of the general average f. o. b. price for pea coal at said tide points at or near New York, when the said price is two dollars and fifty cents ($2.50) per ton or less, and for each advance of ten (10) cents per ton in the said f. o. b. price above two dollars and fifty cents ($2.50) the proportion paid the seller shall be increased one (1) per cent. until the percentage paid for pea coal reaches sixty-five (65) per cent.

"For buckwheat coal No. 1, forty (40) per cent. of the general average f. o. b. price at said tide points at or near New York when the said price is two dollars ($2.00) per ton or less, and for each advance of ten (10) cents per ton in the said f. o. b. price the proportionate price paid the seller shall be increased two (2) per cent. until the said f. o. b. price reaches two dollars and fifty cents ($2.50), after which the proportionate price paid the seller shall advance one (1) per cent. for each ten (10) cents advance in the f. o. b. price above two dollars and fifty cents ($2.50), as in the case of pea coal above mentioned: Provided, that nothing herein contained shall oblige the buyer to pay for buckwheat No. 1 coal a rate higher than for pea coal.

"For all sizes smaller than buckwheat No. 1, the seller shall receive twenty-five (25) cents per ton f. o. b. railroad cars at breakers, and for each ten (10) cents increase in the general average f. o. b. price above one dollar and thirty cents ($1.30) a ton at tide the price shall be increased five cents per ton.

"The general average f. o. b. prices herein referred to shall be determined by the general average free on board prices received for the various sizes on general market sales thereof at tide points at or near New York between Perth Amboy and Edgewater during each calendar month, and a statement of such prices shall be furnished the buyer by the seller prior to the 8th day of each month subsequent to that in which such monthly sales shall have been made—the intent of this provision being to ascertain and to fix the market price of the coal at the mines as nearly as may be as of the several and respective days of delivery of the coal at the mines.

"Payment on the 20th day of each month for coal purchased during the preceding month shall be made at such prices.

"Fourth. The seller agrees that all its coal sold to the buyer shall be prop-

Coal Company's offices. The government has had access to the books and accounts of the Coal Company, and has offered some extracts therefrom in evidence. The Coal Company has been charged, and has paid, the same rates of freight and demurrage as any other shipper, and has received no discriminating favors from the railroad. The transactions of the Coal Company for each of the years 1910, 1911, and 1912, embrace 8,000,000 tons or more, and about $40,000,000.

The Coal Company pays large sums in cash each year to the railroad for coal purchased and for freight. In 1912 the amount paid for coal was nearly $20,000,000, and for freight more than $13,000,000; in 1910, the total of these items was about $34,500,000; and in 1911, $35,000,000. In addition to these sums, the Coal Company paid to other carriers, and to agents for salaries and other charges, from $2,-

erly prepared for market in accordance with the past practice and standards of the seller.

"Fifth. The buyer agrees that at any transfer trestles leased to it by the seller it will transfer from car to car any coal which the seller desires to have transferred, at a price to be agreed upon. It is also understood that the parties hereto shall adjust the charges to be paid by the buyer to the seller for coal forwarded to and unloaded from storage or stocking plants and with respect to other transportation charges to be subsequently covered by tariffs to be filed by the seller.

"Sixth. The buyer agrees that it will conduct the business of selling the coal of the seller in such manner as best to conserve the interests of and preserve the good will and markets of the coal mined by the seller, and to continue to fill the orders of all responsible present customers of the seller even though as to some of such customers the sales may be unprofitable; it being understood and agreed that at the prices above quoted the entire business of the buyer will be conducted at a profit.

"Seventh. In the event of dispute as to tidewater prices or as to the proper interpretation of any provision of this agreement, or if by reason of changes in market conditions, tariff rates or otherwise, modifications or changes in this contract should fairly be made, and the parties hereto cannot agree with respect to such modifications or changes, or if the parties cannot agree as to any matter, it is agreed that all such differences shall be determined by arbitration by a board of arbitrators to consist of one person selected by the general sales agent of the buyer, and one person selected by the president of the seller, and a third person to be selected by the then president of the Farmers' Loan & Trust Company of the City of New York, and that the decision of a majority of such board of arbitration shall be final and binding upon the parties hereto.

"Eighth. Any changes or modifications in the terms, conditions, or covenants of this contract which may hereafter be agreed to may be made by written agreement, duly executed, provided the same be approved by a vote of both the parties hereto acting by a majority of their several boards of directors or managers.

"Ninth. This contract shall become in effect on the beginning of the day of the date hereof upon written notice by either party to the other prior to August 1, 1910, of its intention to cancel this contract, it shall expire at midnight on the 28th day of February, 1911. Should no such notice be served, the contract shall continue to be operative until the expiration of six months after either party shall notify the other in writing of its intention to cancel the contract, in which event it shall expire at midnight of the last day of the six months named in the notice of cancellation.

"Upon the expiration of this contract, the buyer agrees to sell to the seller or to whomever the seller shall nominate, and it agrees to buy or cause to be bought, all coal then stored or in transit purchased of the seller by the buyer, at prices to be agreed upon; or in case the parties cannot agree, to be fixed by arbitration as herein provided."

500,000 to $3,000,000 in each of the years named. For all purposes, the Coal Company has paid, to others than the railroad, more than $7,000,000 in 1910, and also in 1911, and more than $5,000,000 in 1912.

A rental of 5 per cent. on the estimated cost of the railroad's former storage and trestle facilities is paid by the Coal Company, together with the cost of operation and maintenance. Since August, 1909, the Coal Company has been buying other property at various places—mainly land, buildings, and trestles—at a cost of several hundred thousand dollars, and has been making contracts on its own account to supply certain agents with coal for a definite number of years. It obtains some of its coal from other sources of supply than the Railroad Company, although the railroad is by far the most important source. And, finally, it may be noted that several unadjusted differences exist between the two companies, one being the railroad's claim to receive a higher price for its coal.

We are asked to hold that the facts thus set forth do not establish the good faith of the railroad, and therefore to decree that the company's interest in the coal transported continues to exist, in spite of the contract of August 2, 1909, and of the whole course of conduct hereinbefore detailed. The government prays that we enjoin the defendant from "shipping, transporting, or causing to be transported, any anthracite coal, the product of mines owned by defendant railroad company, or purchased by it from others, and sold, transferred, or delivered to defendant coal company, in pursuance of the above-described agreement or arrangement existing between them, or any similar one." Manifestly, a decree that goes so far and would destroy so much should rest upon well-established facts, and these in our opinion have not been proved; the evidence is too slender to justify us in drawing the inferences urged by the government. On the contrary, believing that we have fairly stated the uncontroverted facts, we shall only add that they appear to lead to these conclusions: That the transactions between the two companies began and have been carried on in good faith, in obedience to the decisions of the Supreme Court and in reliance thereon; that the distinction between the two corporations has not been obliterated; that their affairs have not been so commingled as by necessary effect to make their affairs indistinguishable; and that the two are not one for all purposes, but are two distinct and separate legal beings, actually engaged in separate and distinct operations. It follows that the railroad does not own the coal in question, either in whole or in part, during its carriage, but has in good faith dissociated itself therefrom before the beginning of the act of transportation.

2. But the government contends, further, that the Railroad Company retains a direct or indirect interest in the larger sizes of the coal while it is being transported, because the contract contained a provision relating to the price to be paid for these sizes. Coal larger than pea is called "prepared" coal, and for this size the third paragraph of the contract provides that the Coal Company shall pay "sixty-five (65) per cent. of the general average free on board prices of said sizes received at tide points at or near New York between Perth Amboy and Edgewater."

The same paragraph makes somewhat similar provisions for ascertaining the prices to be paid for the smaller sizes; these are also to be paid for on the basis of certain percentages of the general average free on board prices at tide. It is not contended, however, that the railroad retains any interest in these smaller sizes; the argument is restricted to "prepared" coal, or sizes larger than pea. It is urged that the railroad will be the gainer by a high price at tide, since this will necessarily increase the price at the mines, and, therefore, that this interest in the price is such an interest in the coal itself as is condemned by the statute. Undoubtedly it is correct to say that the railroad has an interest in the price; but it should be understood that "interest" merely means that the railroad will gain by a higher price at tide, and does not mean that the railroad has power to control the coal or the price for which it sells. It might also be argued—and, indeed, the suggestion is glanced at in the government's brief—that the price at tide is also affected by the rate of freight, and therefore that the railroad retains an interest in the coal because it can increase the tidewater price by increasing the rate of freight. In theory this argument may be sound, but as a practical consideration it is not entitled to weight, because the railroad cannot increase the rate of freight at pleasure, but must accept whatever rate is established by the Interstate Commerce Commission. And the other argument, while equally good in theory, is equally ineffective as a practical consideration, because the Railroad Company does not control the price at tide, and cannot increase that price, however much it may desire to do so. The Railroad Company does not fix prices; it does not decide how much coal is to go to New York harbor; and it does not determine the sum for which the coal is to be sold at that point. The average price at tide had its origin a good many years ago, when the coal-carrying roads had contracted with numerous mine owners to buy their coal at certain percentages of the average selling price at the harbor. In order to determine what that price was, records were kept by a bureau organized for that purpose, showing the quantities sold and the prices. This was the situation in 1902, when the notable strike in the anthracite region took place, and one of the terms of the award that settled that struggle was a sliding scale of wages to be determined by reference to the selling prices reported by the bureau. These prices have been so reported ever since, in accordance with the order of the Strike Commission, and wages have been computed by reference thereto.

This price at tide afforded the present defendants a convenient basis for calculation. It has certain obvious advantages; the market in New York harbor is very large, probably the largest single market available; it is served by all the principal coal companies; and the general average of prices obtained there may fairly be regarded as an accurate measure of value at that point. But the purpose of the third paragraph of the contract was to value the coal at the breakers, and the New York price merely afforded a starting point for the computation. The contract declares this purpose distinctly:

"The general average f. o. b. prices herein referred to shall be determined by the general average free on board prices received for the various sizes on general market sales thereof at tide points at or near New York between

Perth Amboy and Edgewater during each calendar month, and a statement of such prices shall be furnished the buyer by the seller prior to the 8th day of each month subsequent to that in which such monthly sales shall have been made—the intent of this provision being to ascertain and to fix the market price of the coal at the mines as nearly as may be as of the several and respective days of delivery of the coal at the mines."

We think it clear that after the title passes to the Coal Company at the mines the railroad retains nothing more than an interest in the price, and that this is not the same thing as an interest in the coal. But the commodities clause is dealing with an "interest, direct or indirect," in the commodities themselves, and this must mean some kind or degree of ownership or interest in the thing transported, or some power to deal with it or to control it. We think we have already shown that the Railroad Company neither owns nor controls the coal after it has been loaded on cars at the breakers. Thereafter the Coal Company is the owner and the master, and fixes prices, routes, and destinations, at its own will. The Railroad Company has parted with its title so completely that it would suffer no loss if thousands of tons should be burnt or otherwise lost in transit. No doubt the railroad will be advantaged whenever the price at tide is high, but the railroad does not increase that price or compel the Coal Company to increase it.

But it seems superfluous to consider the government's argument further, in view of what was said by the Supreme Court in the Delaware & Hudson Case about the meaning of this very phrase—"in which [the railroad] may have any interest, direct or indirect." On page 413 of 213 U. S., on page 538 of 29 Sup. Ct. (53 L. Ed. 836), the court said:

"It remains to determine the nature and character of the interest embraced in the words 'in which it is interested directly or indirectly.' The contention of the government that the clause forbids a railroad company to transport any commodity manufactured, mined or produced, or owned in whole or in part, etc., by a bona fide corporation in which the transporting carrier holds a stock interest, however small, is based upon the assumption that such prohibition is embraced in the words we are considering. The opposing contention, however, is that interest, direct or indirect, includes only commodities in which a carrier has a legal interest, and therefore does not exclude the right to carry commodities which have been manufactured, mined, produced or owned by a separate and distinct corporation, simply because the transporting carrier may be interested in the producing, etc., corporation as an owner of stock therein. If the words in question are to be taken as embracing only a legal or equitable interest in the commodities to which they refer, they cannot be held to include commodities manufactured, mined, produced or owned, etc., by a distinct corporation merely because of a stock ownership of the carrier. Pullman Palace Car Co. v. Missouri Pac. R. R., 115 U. S. 587 [6 Sup. Ct. 194, 29 L. Ed. 499]; Conley v. Mathieson Alkali Works, 190 U. S. 406 [23 Sup. Ct. 728, 47 L. Ed. 1113]. And that this is well settled also in the law of Pennsylvania is not questioned. It is unnecessary to pursue the subject in more detail, since it is conceded in the argument for the government that, if the clause embraces only a legal interest in an article or commodity, it cannot be held to include a prohibition against carrying a commodity, simply because it had been manufactured, mined or produced, or is owned, by a corporation in which the carrier is a stockholder."

If we remember that this language was used about a situation arising where a railroad itself owned stock (even in a controlling amount) in the producing or owning corporation, and where the railroad would

therefore profit directly by the price received for the commodity transported, it hardly seems worth while to argue at any length that, where the railroad does not own a single share of such stock, it does not have an "interest, direct or indirect," in the particular commodity thus produced or owned. In such a state of affairs—if we understand correctly what the Supreme Court has said—the interest of the carrier ceases when the commodity is sold and delivered bona fide to a distinct and separate corporation, and no interest remains, either direct or indirect, merely because the price has not yet been precisely ascertained.

3. The bill of complaint also makes a formal charge against both defendants under the Anti-Trust Act (Act July 2, 1890, c. 674, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]); but the oral argument left us under the impression that this charge was not much insisted on. We believed then, and have believed since, that, while the government earnestly desired to obtain a decision concerning the application of the commodities clause to the facts of this case, the anti-trust branch of the complaint was regarded as comparatively unimportant. For this reason, therefore, we shall not undertake for the present what we think would be the needless task of discussing the evidence bearing upon the charge of restraining or monopolizing commerce. If we are mistaken in this supposition, however, the error can easily be corrected.

A decree may be entered dismissing the bill; but as the situation may change in the future, and the change may afford the government ground to assert that the affairs of the two corporations have become unlawfully identified, so as to violate the commodities clause, the dismissal will be without prejudice to the government's right to begin a second proceeding whenever it may be so advised.

THE RUPERT CITY.

(District Court, W. D. Washington, N. D. April 14, 1914.)

No. 2487.

1. MARITIME LIENS (§ 56*) — SUITS TO ESTABLISH — STATUS AND RIGHTS OF MORTGAGEE.

A mortgage on a vessel is not a maritime lien, but is always subordinate to such liens. It is not even a maritime contract, and cannot be foreclosed in a suit in rem, but the mortgagee may intervene in such a suit and defend against the establishment of maritime liens against the vessel.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. § 95; Dec. Dig. § 56.*]

2. MARITIME LIENS (§ 69*) — SUITS TO ENFORCE — DISTRIBUTION OF SURPLUS FUND.

When a vessel has been sold in a suit to establish maritime liens, after the payment of such liens the court will direct the payment from the fund of such nonmaritime liens as have been proved, but cannot pay claims not supported by liens.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. § 107; Dec. Dig. § 69.*]

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

3. MARITIME LIENS (§ 39*)—ASSIGNMENT—ENFORCEMENT BY ASSIGNEE.
A claim entitled to a maritime lien may be assigned, and the lien enforced by the assignee in his own name.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. § 57; Dec. Dig. § 39.*]

4. ASSIGNMENTS (§ 121*)—ASSIGNMENT FOR COLLECTION—RIGHT OF ASSIGNEE TO SUE IN HIS OWN NAME.
An assignment of a claim for collection is an assignment for value, and vests such an interest in the assignee as entitles him to sue thereon in his own name.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 200–205; Dec. Dig. § 121.*]

5. MARITIME LIENS (§ 1*)—DEFINITION.
A "maritime lien" may be defined as a right of property in a ship adhering to it wherever it may go, vesting a right in the person whose claim is thereby secured to cause a sale of the ship in a proceeding directly against it in order to obtain satisfaction of his debt.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. § 1; Dec. Dig. § 1.*

For other definitions, see Words and Phrases, vol. 5, pp. 4377, 4378.]

6. MARITIME LIENS (§ 26*)—CONTRACTS GIVING LIENS.
A contract to give rise to a maritime lien must be a maritime contract, and there must be a pledge of the ship for the performance of such contract either express, by implication from the circumstances, or arising therefrom by operation of law.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. § 39; Dec. Dig. § 26.*]

7. MARITIME LIENS (§ 9*) — MARITIME SERVICES — LOADING OR DISCHARGING SHIP.
The loading or discharging of a cargo is a maritime service which will support a maritime lien.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. § 13; Dec. Dig. § 9.*]

8. MARITIME LIENS (§ 25*) — FURNISHING "NECESSARIES" — CONTRACT FOR STEVEDORING.
A stevedore contracting with the managing owner for the discharge of a ship furnishes "necessaries" within the meaning of Act June 23, 1910, c. 373, §§ 1, 2, 36 Stat. 604 (U. S. Comp. St. Supp. 1911, p. 1192), and is entitled to a maritime lien thereunder.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. §§ 20, 31–36; Dec. Dig. § 25.*

For other definitions, see Words and Phrases, vol. 5, pp. 4693–4703.]

9. MARITIME LIENS (§ 12*)—EXTENT OF LIEN—INCIDENTAL EXPENSES.
A maritime lien for furnishing supplies or other necessaries to a ship includes expenses incidental thereto, such as the cost of delivering the supplies to the vessel.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. § 16; Dec. Dig. § 12.*]

10. SEAMEN (§ 27*)—WAGES OF MASTER—LIEN—BRITISH AND CANADIAN STATUTES.
While by the general maritime law a master is not entitled to a lien for wages, under the Canadian Shipping Act, § 194, and the British Merchants' Shipping Act of 1894, § 167, both of which give a master the same right as a seaman to a lien for wages, the master of a British ship, registered in a Canadian port, who contracted with the owner, a resident of

Canada, is entitled to a lien for his wages although an American, and employed in a port of the United States.

[Ed. Note.—For other cases, see Seamen, Cent. Dig. §§ 4, 141, 157-169; Dec. Dig. § 27.*]

11. SHIPPING (§ 69*)—MASTER—TERMINATION OF EMPLOYMENT—SEIZURE OF VESSEL.

The wages of the master of a ship terminated when she was taken into custody in proceedings to enforce liens against her.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 201, 293-307, 312, 313, 315, 317, 318; Dec. Dig. § 69.*]

12. MARITIME LIENS (§ 14*)—ADVANCES BY MASTER.

The power of the master to hypothecate his vessel depends upon necessity, and he can claim a lien for advances only where they were made to discharge or prevent the incurring of a lien.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. § 18; Dec. Dig. § 14.*]

13. MARITIME LIENS (§ 14*)—DISBURSEMENTS BY MASTER—SHORE EXPENSES.

A master is not entitled to a maritime lien on the ship for his personal expenses on shore, although incurred in connection with the owner's business.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. § 18; Dec. Dig. § 14.*]

14. MARITIME LIENS (§ 9*)—SUBJECT-MATTER OF CLAIM—BROKERAGE CHARGES.

Claims against a ship for brokerage charges for aiding in the entry of the ship in customhouse, etc., are not secured by a maritime lien.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. § 13; Dec. Dig. § 9.*]

15. MARITIME LIENS (§ 12*)—SUPPLIES FURNISHED CREW AFTER SEIZURE OF VESSEL.

One furnishing provisions and lodging to the crew of a ship on shore after she has been seized in legal proceedings is not entitled to a maritime lien therefor.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. § 16; Dec. Dig. § 12.*]

In Admiralty. Suit by Fischer Bros. against the steamship Rupert City; Watts, Watts & Co., mortgagee, claimant. On exceptions to report of commissioner as to liens. Sustained in part, and overruled in part.

George R. Biddle, of Seattle, Wash., for libelants.

Huffer & Hayden, of Tacoma, Wash., for claimant.

Herr, Bayley & Wilson, of Seattle, Wash., for intervener Williams et al.

Albert Moodie, of Seattle, Wash., for intervener Wireless Telegraph Co.

Daniel Landon, of Seattle, Wash., for the crew.

NETERER, District Judge. On the 23d day of January, 1913, the Rupert City, owned and operated by a corporation of British Columbia, flying the British flag, sailed from Seattle bound for Australia. On May 28, 1913, she arrived on her return voyage and anchored at Port Townsend. On the same day a libel was filed by Fischer Bros., monition issued, and the vessel taken into the custody of the United States marshal. Thereafter various intervening libels were filed by the members of the crew for wages, by the master for wages and ad-

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

vances, and by various parties claiming to have furnished supplies, repairs, or other necessaries. On the 19th day of June, 1913, Watts, Watts & Co. filed a petition in intervention alleging that it was the owner and holder of a certain mortgage executed to secure the payment of $19,000 advanced and other sums to become due, and prayed that it might appear and claim the vessel and defend against the various libels filed therein. Leave was accordingly granted by order of court on June 19, 1913. The cause was referred to the United States commissioner, who took the testimony and reported findings of fact and conclusions of law, and the cause is now before the court on exceptions to the report of the commissioner.

[1] Interveners Watts, Watts & Co. claim priority of their mortgage over the various lien claimants. It is, however, well settled that a mortgage is not and cannot be made a maritime lien and that it is always subordinate to such liens. The J. E. Rumbell, 148 U. S. 1, 13 Sup. Ct. 498, 37 L. Ed. 345; Schuchardt v. Babbage, 19 How. 239, 15 L. Ed. 625; The Lyndhurst (D. C.) 48 Fed. 839. It is not even a maritime contract and may not be foreclosed in an action at rem. Bogart v. The John Jay, 17 How. 399, 15 L. Ed. 95; Rea v. The Eclipse, 135 U. S. 599, 608, 10 Sup. Ct. 873, 34 L. Ed. 269.

It does not follow, as contended, however, that the mortgagee may not intervene and defend against the establishment of maritime liens against the vessel. These would deplete the fund upon which he must rely, as the vessel when sold is discharged of his lien, and the mortgagee has a claim only upon the proceeds of the sale. Schuchardt v. Babbage, 19 How. 239, 15 L. Ed. 625; The H. N. Emilie (D. C.) 70 Fed. 511; The Advance (D. C.) 63 Fed. 704; The Old Concord, Fed. Cas. No. 10,482; The Mary Anne, Fed. Cas. No. 9,195.

[2] When the vessel is sold and the fund is in the registry of the court, after the payment of all maritime claims, the court will order the payment of such nonmaritime liens as have been established, in the order of their priority. Claims not supported by liens cannot be paid out of the fund, since they are against the owners personally, and not against the fund. The Advance (D. C.) 63 Fed. 704, 706.

[3] Libelants Fischer Bros. seek to establish not only a lien for supplies furnished by them, but also liens for supplies, repairs, and other necessaries furnished by various parties whose claims were assigned to the libelants by instruments in writing. It is stipulated that such claims were assigned for the purpose of "collection" and that Fischer Bros. "did not pay cash for them." Intervening mortgagee contends that a maritime lien is personal and that a maritime claim cannot be assigned so as to vest the lien in the assignee and entitle him to enforce it in his own name. But the great weight of authority is against such contention. 26 Cyc. 801, and cases there cited; The Sarah J. Weed, Fed. Cas. No. 12,350; The Emma L. Coyne, Fed. Cas. No. 4,466.

[4] Exception is taken to the finding of the commissioner that the assignments were for value, and the contention is made that nothing having been paid, the assignor is the real party in interest and the assignee cannot maintain the action. But an assignment for collection in writing should be held to vest such an interest in the assignee

as to entitle him to sue. The Court of Appeals of New York, in Hays v. Hathorn, 74 N. Y. 486, holds that an assignment for collection is an assignment for value, and that the assignee may sue, although the Code of that state provides that actions shall be brought in the name of the "real party in interest." To the same effect is the holding of the Supreme Court of Washington. McDaniel v. Pressler, 3 Wash. 636, 29 Pac. 209.

[5, 6] As the right of the various creditors to be paid out of the fund depends upon whether they have maritime liens, it may be well to call attention to the nature and character of maritime liens on ships and the circumstances which give rise to them. A maritime lien may be defined as a right of property in a ship adhering to it wherever it may go, vesting a right in the person whose claim is thereby secured to cause a sale of the ship in a proceeding directly against it in order to obtain satisfaction of his debt. It may arise from tort or contract. A contract to give rise to such a lien must be a maritime contract; that is, one which relates to the use of the ship as an instrument of commerce and navigation and one which tends to aid it in the accomplishment of its adventures as such. It is also necessary that the ship be pledged for the performance of such a contract before a lien will arise. Such pledging may be expressed in the agreement of the parties, or it may be implied from the circumstances under which they contracted that such was their intention, or the law may say from the nature of the contract and the circumstances under which it was made that a lien shall arise to secure its performance. The first question, therefore, to be determined, is whether the particular contract relied upon as creating the claim was a maritime contract, and, if so, did the parties expressly or impliedly contract that the credit of the ship might be relied upon for its enforcement, or was such an incident attached to the contract by the law?

The Fischer Claims.

[7] The commissioner allowed Fischer Bros., as assignee, $627.25 for services performed in discharging the cargo at San Francisco. It is stipulated with respect to this claim that O. J. Humphrey, the managing owner of the Rupert City, was at San Francisco when the work was done, and that it was performed at his special instance and request. It is now settled that the labor of loading or discharging a cargo is a maritime service for which the credit of the ship may be so pledged as to give rise to an action in rem, since it is necessary to enable the ship to fulfill her maritime obligations. The Seguranca (D. C.) 58 Fed. 908; The Mattie May (D. C.) 45 Fed. 899; Florez v. The Scotia (D. C.) 35 Fed. 916; The George T. Kemp, Fed. Cas. No. 5,341, 2 Low. 477. It is stated that, where the stevedore is directly employed, his labor being similar to that which was formerly performed by seamen, he has a lien by the general maritime law, irrespective of whether or not the work was done in the home port of the vessel. But where the work of loading or discharging a cargo is done by a contractor who furnishes the labor of others, it is then stated that his claim is similar to that of one who furnishes workmen for repairs, and that, when done in the home port of the vessel,

the presumption is that he intended to rely upon the credit of the owners. The Seguranca, supra.

[8] The basic principle of a lien for necessaries is that the vessel must go on, and where its needs cannot be supplied from funds furnished by the owners or upon their personal credit the master is vested with power to pledge the credit of the ship. Where such necessaries are furnished in the home port of the vessel, there is no presumption of necessity to pledge the credit of the ship, and this is also true where the contract is made with the owners or in their presence, even though the vessel may not be in the home port. 19 Am. & Eng. Encyc. of Law, 1102; The General Smith, 4 Wheat. 438, 4 L. Ed. 609; 19 Am. & Eng. Enc. of Law, 1098; 26 Cyc. 778; The Havana, 92 Fed. 1107, 35 C. C. A. 148. Quite generally the states enacted laws which provided for liens when the necessaries were furnished at the home port of the vessel, and the effect of these statutes is not to create a lien against the intention of the parties, but to create a presumption that such was their intention where nothing appears to the contrary. 26 Cyc. 777; The Westover (D. C.) 76 Fed. 381; The Golden Rod, 151 Fed. 8, 80 C. C. A. 248.

The Act of June 23, 1910, c. 373, 36 Stat. 604 (U. S. Comp. St. Supp. 1911, p. 1192), provides:

"Section 1. That any person furnishing repairs, supplies, or other necessaries, including the use of dry dock or marine railway, 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."

In Ely v. Murray, 200 Fed. 369, 118 C. C. A. 520, it was held that this statute met the presumption that necessaries furnished on the order of the owner were upon his personal credit, and thus that it is analogous to the state statutes, the effect of which is to give rise to a presumption that the parties intended to contract in reference to the credit of the ship. In the recent case of The Sinaloa (D. C.) 209 Fed. 287, Judge Dooling held that this statute did not give a lien for the services of a watchman employed by the owner of a launch. This holding, however, is based expressly upon the fact that the services of the watchman were not maritime in character. The court says:

"This act does not by any fair construction of its terms include the services here in suit, nor is it clear that its terms should be so extended by construction as to include them. The apparent intent of the act was to relieve those persons who formerly would have had a lien if credit had been given to the vessel from the necessity of alleging and proving that credit had been so given. The purpose does not seem to have been to create a new class of liens, or liens for services which had been theretofore determined not to be maritime, but only to deal with certain matters that had always been recognized as cognizable."

In The J. Doherty (D. C.) 207 Fed. 997, Judge Veeder held that the statute in question was not intended to apply to towage. The learned judge concluded that the act was intended to raise the pre-

sumption of a lien only where there was no lien given by the maritime law. A lien for towage, even on the owner's order, being presumed by the maritime law where the services were performed in an exigency or under circumstances of necessity, he said the act had no application. The court also applied the rule of ejusdem generis, and held that "other necessaries," when used in connection with "repairs" and "supplies," must be construed to mean necessaries of like nature, and not whatever was necessary to facilitate the use of the ship.

If the stevedores in this case had themselves contracted with the managing owner, treating their services as analogous to those of seamen, by the general maritime law they would have a lien on the vessel.

"There are maritime services which are usually rendered under circumstances which make them so essential to the movement of a vessel, and to the performance of her primary function as an instrument of commerce, that the admiralty law presumes they are rendered on the credit of the vessel, in the absence of proof to the contrary, and creates a maritime lien in their favor, independently of the question whether it be a domestic vessel, or not. Notable examples are the lien for pilotage services, the lien for seamen's wages, for towage services, and for salvage services." The Alligator, 161 Fed. 37, 88 C. C. A. 201.

But where the contract is made with the owner by one who furnishes stevedores, as in this case, he cannot claim wages, for he has rendered no personal service, and he cannot claim to be subrogated to the liens of the stevedores, for they have agreed to look to him and not to the vessel for pay. He therefore is in the same position as one who furnishes supplies or repairs. Speaking of such contractors, Judge Brown, in The Seguranca (D. C.) 58 Fed. 908, 910, says:

"They simply supplied the labor of other persons, whom they employed and paid. This differs in no degree, so far as I can perceive, from a contractor's supply of workmen to do repairs; and thus the present case falls strictly within the analogy of repairs and supplies in the home port."

It is evident, therefore, if we construe the statute as intending to raise the presumption of a lien only where the maritime law does not create one, that the act does apply to the furnishing of stevedores by a contractor in the home port or on the order of the owner, for by the general maritime law no lien arises from such a contract. Still further, if we apply the rule of ejusdem generis, the furnishing of stevedores under such a contract is similar to that of a contractor's furnishing of workmen to do repairs, so that it would come strictly within the phrase "other necessaries," even though such term be limited to necessaries of a nature similar to those mentioned. I must therefore conclude that, when the contract was made by the California Stevedore & Ballast Company with the managing owner of the vessel, a presumption arose according to the provisions of the Act of June 23, 1910, that the credit of the ship was pledged thereby, and this presumption is not rebutted by any facts or circumstances appearing in the testimony.

The same principles govern the assigned claim of the Washington Stevedore Company. It was named as the stevedore in the charter party, so it was not employed by the master, but by the terms of the Act of June 23, 1910, a lien arose upon which it may now rely.

[9] Objection is made to the $8 charge in the California Stevedore & Ballast Company's claim for hauling tarpaulins between wharves in San Francisco on the ground that this was not a maritime service. But it appears to have been incidental to the stevedore work, and its character is determined by the nature of the services in connection with which it was rendered. The same may be said of the five items of $1.50 each, "boat charges," in the bill for supplies of the Waterfront Market and to the items of the Chesley Tug Company for shifting scow alongside the Rupert City and handling lines on the scow. If one is allowed a lien for supplies or other necessaries furnished a ship, this must be held to include the reasonable cost of transportation to the ship, since it is just as essential that this be paid as it is that the original value shall be paid. It appears that the scow was engaged in carrying ballast necessary for the use of the vessel in navigation.

H. H. Williams' Claims.

[10] The commissioner refused to allow the claim of the master for wages as a lien on the vessel. In the absence of statute, it is well settled in this country that there is no lien on the ship for the wages of the master, as he is presumed to look solely to the credit of the owners. The Orleans v. Phœbus, 11 Pet. 175, 9 L. Ed. 677; The Imogene M. Terry (D. C.) 19 Fed. 463; 26 Cyc. 758.

The commissioner's reason for denying the lien is thus given by him:

"The contract of hire of Herbert H. Williams being made in this port, under the decision of the Supreme Court of the United States in The Roanoke, 189 U. S. 185 [23 Sup. Ct. 491, 47 L. Ed. 770], construing the statutes of this state applicable to foreign vessels, I conclude that said intervener is not entitled to a lien for his services as master."

The case cited held merely that a state statute could not create a lien upon a foreign vessel for materials furnished upon the order of a contractor, enforceable by a subcontractor regardless of whether such contractor had been paid, as this would be contrary to the general maritime law. But the master's right to a lien does not depend upon a statute of this state. He claims a lien under the statutes of Canada and England; the vessel being registered in British Columbia, and the owners being resident therein. The Canadian Shipping Act provides:

"Sec. 194. Every master of a ship registered in any of the provinces shall, so far as the case permits, have the same rights, liens and remedies for the recovery of his wages, and for the recovery of disbursements properly made by him on account of the ship, which, by this part, or by any law or custom, any seaman, not being a master, has for the recovery of his wages."

The British Merchants' Shipping Act of 1894, § 167, provides:

"The master of a ship shall, so far as the case permits, have the same rights, liens and remedies for the recovery of his wages as a seaman has under this act, or by any law or custom."

The contract for the service of a master being a maritime contract, it is proper for a statute to provide that a lien shall arise therefrom, and such lien will be enforced in any other forum whenever it has

attached by virtue of such statute. By the general maritime law, the master is presumed to contract on the credit of the owners alone. By the British law, the parties are presumed to intend that the credit of the ship shall be pledged. The true inquiry is: What did the parties in this case intend? Did they contract in reference to the general maritime law, or in reference to the laws of Great Britain?

The fact that the contract was made in the United States and not in Great Britain does not prevent the law of Great Britain from being incorporated therein as one of its implied provisions. In The Magna Charta, Fed. Cas. No. 8,953, a seaman was employed by a British vessel at New York, yet the law of England was held to determine his rights under the contract of employment. Nor does the fact that the master was an American and not a British citizen prevent the law of Great Britain from applying. When he assumed the responsibilities of master of a British vessel, his duties were prescribed by the laws of Great Britain, regardless of his own nationality. It would be unjust and illogical to measure his rights by different laws. The contract was with British owners to act as master of a British ship. The master knew that the ship was British and that he was dealing with British owners, and he testified that he relied upon the credit of the ship for his pay. In The J. L. Pendergast (D. C.) 29 Fed. 127, Judge Brown held that where a citizen of this country contracted to serve as master of a British vessel, believing the owners to be British, he was entitled to a lien under the British Merchants' Shipping Act. This case was reversed by Wallace, J., in (C. C.) 32 Fed. 415, who found the fact to be that the master believed at the time that the owner of the vessel was an American with whom he had contracted, and that as to such master the ship was an American and not a British vessel. The law of the previous case, however, is in no way criticised, and from the discussion of the learned judge it is evident that his holding would have been the same as that of Judge Brown had he found the facts as Judge Brown viewed them. The latter case is in harmony with the test of intention here laid down, since it could not there be presumed that the parties intended to contract in reference to the British law if the master believed it was an American vessel. The Alice Tainter, Fed. Cas. No. 195.

The contract of the master being made in reference to the British statutes, the lien on the vessel was part of the consideration for his services of which it would be unjust to deprive him. Covert v. British Brig Wexford (D. C.) 3 Fed. 577; The Havana, Fed. Cas. No. 6,226. The master's lien is established, and he will be paid out of the proceeds of the vessel.

[11] The master takes exception to the finding of the commissioner that his wages terminated on May 28, 1913. It appears on that day that the vessel was taken in custody by the United States marshal pursuant to a monition issued at the inception of this proceeding. The control of her owners over her was then ended, and their power and the power of their agents to incumber her with liens necessarily ceased. The William Hoag (D. C.) 69 Fed. 742; The Augustine Kobbe (D. C.) 37 Fed. 702; The Young America (D. C.) 30 Fed. 790; 19 Am.

& Eng. Encyc. Law, 1094. The commissioner did not err in his finding as to the amount due the master for wages.

[12] The commissioner allowed the master $780 for advances made by him on account of the ship. Objection is made to various items allowed. As to the four items—"A. H. Wardall, expenses, to Vancouver, $45.00;" "Fred N. Beal, acct. Laundry, $16.30;" "Herr, Bailey & Wilson, libel on steamer, $165.00;" "British vice consul, $35.65" —the objection must be sustained. The master admitted that these sums were advanced by the owners. In fact, the $165 was sent to Herr, Bailey & Wilson by the managing owner direct. When asked why these items appeared in his account, the master stated that the whole was charged to him, that it was simply a "matter of bookkeeping," and that he considered he was liable to Capt. Humphrey personally. But no system of bookkeeping, however new, startling, or original can be permitted to alter the well-founded principles of the maritime law. The power of the master to hypothecate his vessel depends upon necessity. This necessity must be apparent as to each particular transaction out of which a lien is claimed to arise. There is no such necessity where the master is furnished with funds for the particular purpose at hand. It is only where there is or would be such a lien if the master did not make the advance that the master can claim a lien on the ship. 26 Cyc. 764; Gardner v. New Jersey, Fed. Cas. No. 5,233; The Orleans v. Phœbus, 11 Pet. 175, 9 L. Ed. 677.

The Canadian Shipping Act provides that a master shall have a lien for "disbursements properly made by him on account of the ship." It is obvious that a disbursement is not made on account of the ship where it is not to discharge or prevent the incurring of a lien, and that the general rule with respect to maritime advances must apply to the master's disbursements. The commissioner erred in allowing these items to the master; there being no necessity to pledge the credit of the ship where the managing owner had advanced the funds.

The same principles must ultimately determine the right of the master to a lien for other items advanced by him. The item of $12 charged as paid to the New Sailors' Home cannot be supported by a lien. The master stated that a portion of this was advanced by the home to the sailors and the other portion was charged by the home for supplying the men. It does not appear that the advance was made for the ship. There is no lien for services in procuring seamen. The Humboldt (D. C.) 86 Fed. 351.

[13] The items charged by the master for his expenses on shore are not secured by liens. They are: "Fares to Eagle Harbor, $5.00;" "Expenses at Seattle, $10.00;" "Expenses, Port Townsend to Seattle and return, $10.00." The transactions out of which these claims arose are not maritime in any sense. It would be a rather strained construction to hold them similar to the furnishing of supplies to the master on shipboard. Even though the owners may be liable for the expenses of the master incurred in connection with their business, the ship cannot be made liable where the transactions have no such connection with the ship as to enable the parties to claim that the credit of the ship was relied on. 26 Cyc. 751.

It is contended that the commissioner should have charged the master for money furnished to buy clothing for the men on the ground that this was for the "slop account" which was for the personal profit of the master. These items are: "E. & F. Kodiak, $5.75;" "Robert Ingall & Son, $55.38;" and "J. J. Baggeson, Melbourne, $40.09." No claim is presented by the master for these amounts. In his account with the owners he is charged with these amounts. The master's system of bookkeeping in connection with these items is thus explained by him. He credited the ship and debited himself with the money furnished and debited the sailors for the supplies they received. He said, "My book shows all these charges to them and will go into their accounts when these men are paid." Evidently, then, when the ship deducted the amount of these supplies from the men's pay, it would get back what it advanced, and if it were allowed to deduct it also from the amount due the master the ship would receive double pay. The commissioner committed no error with respect to these items.

Exception is taken to the failure of the commissioner to charge the master $50 for excess which it is alleged he induced the People's Market to charge wrongfully to the ship for his private benefit after the seizure. But it is obvious that the ship would not be liable for the $50 under the circumstances, and there is no reason for paying it this amount.

It is contended that the master should not have been allowed certain disbursements made by him at Melbourne because he had been furnished £190 for that purpose. The testimony shows that various amounts were paid by the master which do not appear on the account rendered. The evidence in this respect is not as clear as it might be, owing perhaps to the unsystematic method of keeping accounts, but in the face of the testimony of the master that he paid these various items with his own money and that the £190 was paid out for other expenses of the ship, I would not be justified in overruling the commissioner with respect to these items.

The other exceptions to the report of the commissioner with respect to the Williams' account do not call for discussion.

H. H. Morrison & Co. Claims.

[14] The commissioner erred in allowing $25 for "brokerage charge." The testimony shows that these services consisted in aiding in the entry of the ship in the customhouse, and in attending to the "business" of the ship after the seizure. No lien exists for such charges. The Retriever (D. C.) 93 Fed. 480; The Crystal Stream (D. C.) 25 Fed. 575; The Thames (D. C.) 10 Fed. 848; The Joseph Cunard, Fed. Cas. No. 7,535; The Humboldt, 86 Fed. 351.

Nor can the items, "Head tax, 2 alien seamen, $8.00," and "Ship's laundry, $5.74," be recovered. Morrison stated that he had not paid but had merely assumed these amounts, and it does not appear that the ship was released from liability therefor. In other respects, the report of the commissioner as to the Morrison claims is correct.

Frye and Swartz Claims.

These claims were for meats and lodging furnished for the crew on shore after the seizure of the vessel. They were properly denied. The Augustine Kobbe (D. C.) 37 Fed. 702; The Young America (D. C.) 30 Fed. 790; 19 Am. & Eng. Enc. of Law, 1094; Dalzell's Sons v. The Daniel Kaine (D. C.) 31 Fed. 746.

People's Market.

[15] The People's Market excepts to the report of the commissioner in allowing no more than $100.06 for supplies. The supplies a lien for which was refused were furnished a sufficient time after the seizure as to imply that this creditor had notice thereof, and no error was committed in this respect.

Marconi Wireless Telegraph Company.

The amount of this bill depended upon conflicting testimony as to whether the managing owner had notified the creditor that the ship would be laid up and to take the apparatus off the ship, in accordance with the contract. The managing owner testified that he had notified the company that the ship would be laid up and to take the apparatus off the ship, in accordance with the contract. The managing owner testified that he had notified the company that the ship would be laid up "for the present," and that they should take the apparatus off the ship. The testimony of the wireless company tended to show that after this notice it was informed that the ship would later come to Seattle and that notification would then be given that the apparatus be taken off the ship. In view of this testimony, I do not feel warranted in disturbing the findings of the commissioner.

It is hardly necessary to notice the exception that equipment and expenses in operating a wireless apparatus on a ship gives rise to a maritime lien, since it is obviously useful to the ship as an instrument of commerce and navigation. The fact that the contract was made with the owners is immaterial under the act of June 23, 1910, considered above.

Max Kuner Claim.

It is claimed that the commissioner erred in allowing $85.30 for charts, etc., on the ground that the intervening claimant and Max Kuner stipulated that the value thereof was $55.15. I do not find this stipulation in the record.

A decree may be entered establishing the liens of libelants and intervening libelants as found by the commissioner and as herein indicated, and directing the payment thereof out of the proceeds of the vessel.

SULLIVAN v. LLOYD et al.

(District Court, D. Massachusetts. April 25, 1914.)

No. 504.

1. COURTS (§ 307*)—UNITED STATES COURTS—JURISDICTION—CITIZENSHIP OF DEFENDANTS.

Though a former resident of Massachusetts had actually lived in Illinois when suit was brought against him in a Massachusetts court only from June 21st to the end of that month, and then only as a visitor at his brother's house, without residence or place of business in Illinois, if he went there actually intending in good faith to abandon his Massachusetts residence and live in Illinois instead, permanently or for an indefinite time, the proposed change of citizenship and residence was immediately effected.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 850–854; Dec. Dig. § 307.*]

2. REMOVAL OF CAUSES (§ 26*)—UNITED STATES COURTS—JURISDICTION—CITIZENSHIP OF DEFENDANTS.

That a person removed from Massachusetts to Illinois to enable himself to invoke federal jurisdiction by means of a change of citizenship in case a Massachusetts citizen sued him did not affect his right to remove the cause to a federal court, unless he intended only an ostensible change to be made without really intending to stay in Illinois longer than might be desirable for the purposes of the apprehended litigation, and with the view of coming back to Massachusetts when those purposes would no longer be served by residence elsewhere.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 60–63; Dec. Dig. § 26.*]

3. REMOVAL OF CAUSES (§ 107*)—MOTIONS TO REMAND—SUFFICIENCY OF EVIDENCE.

On a motion to remand to a Massachusetts state court an action against a former resident of Massachusetts, evidence *held* insufficient to show that his alleged change of residence to Illinois was in good faith, and with no intent of again changing his residence to Massachusetts when circumstances would permit.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 178, 225–232, 234; Dec. Dig. § 107.*]

4. REMOVAL OF CAUSES (§ 102*)—DIVERSE CITIZENSHIP—DOUBTFUL JURISDICTION.

An action removed from a state court on the ground of diverse citizenship would be remanded where defendant's alleged citizenship in another state was not established as a fact free from doubt.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 218–220, 223, 224; Dec. Dig. § 102.*]

5. REMOVAL OF CAUSES (§ 102*)—DIVERSE CITIZENSHIP—NECESSITY OF OTHER PARTIES.

An action removed from a state court on the ground of diverse citizenship will be remanded if the presence of other parties over whom the court is without jurisdiction is necessary to a complete determination of the controversy.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 218–220, 223, 224; Dec. Dig. § 102.*]

6. REMOVAL OF CAUSES (§ 102*)—DIVERSE CITIZENSHIP—DOUBTFUL JURISDICTION.

Where, in an action removed from a state court on the ground of diverse citizenship, there had been no service or appearance which would

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

enable the court to render a judgment against defendant, and it had jurisdiction, if at all, only to the extent of the property for which citizens of the state, summoned as trustees, might be held chargeable, as against an adverse claim interposed by another citizen of the state, the case would be remanded, as the controversy between the adverse claimant and the trustees was not within the court's jurisdiction, and whether it was separable or not was doubtful, and, if determined in the adverse claimant's favor, the court would be without jurisdiction over the main controversy.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 218–220, 223, 224; Dec. Dig. § 102.*]

7. REMOVAL OF CAUSES (§ 79*)—TIME FOR PROCEEDING TO REMOVE.

Under Rev. Laws Mass. c. 167, § 34, providing, relative to the service of process, that if defendant is out of the commonwealth and no personal service is made on him he shall, in addition to the service therein prescribed, be entitled to further notice of the action as provided in the chapter relative to proceedings against absent defendants, and upon insufficient service, where no valid service or writ had been made upon defendant, a citizen of Illinois, when a petition for removal was filed, the time had not expired within which he was required to answer, or plead, within Judicial Code, § 29 (Act March 3, 1911, c. 231, 36 Stat. 1095 [U. S. Comp. St. Supp. 1911, p. 142]), authorizing the removal of causes at any time before defendant is required by the laws of the state, or the rule of the state court to answer or plead.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 135, 136, 139–160; Dec. Dig. § 79.*]

At Law. Action by Mary I. Sullivan against John B. Lloyd and others. On motion to remand to the state court. Motion allowed.

See, also, 207 Fed. 815.

Hudson & Nichols, of Boston, Mass., for plaintiff.

Brandeis, Dunbar & Nutter, of Boston, Mass., for defendants.

DODGE, Circuit Judge. 1. The plaintiff describes the defendant in her writ as a citizen of Massachusetts. In his petition to remove he alleges that he is a citizen of Illinois. Upon this issue the burden is upon him. By consent of parties the evidence bearing upon it has been heard, and it is to be decided, by the court.

There is no dispute that the defendant was a citizen and resident of Massachusetts from 1908 until June 19, 1913; his residence being in Malden until April 22, 1913, after that in Boston. He left Boston on June 19, 1913, left Massachusetts on June 20th, and went to Winnetka, Ill., arriving there June 21st. He was born in Winnetka in 1886 and had lived there from the time of his birth up to 1899. He stayed in Winnetka in the house where he was born, then occupied as a residence by his brother William, until the end of June, when he started with his brother for Seattle. He ultimately continued this journey around the world, arriving again in the United States in March, 1914. From New York he went back to Winnetka, where he has since lived. He never returned to Boston after leaving it on June 19th, and has been in Massachusetts only on one day since that time, viz., March 23, 1914, for the purpose of testifying in a suit brought against him by a different plaintiff. He returned to Winnetka as soon as this testimony had been given.

[1] The date of the plaintiff's writ is January 14, 1914, and the

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

question is as to the defendant's citizenship on that day. It is true that after he left Boston, and before the date of the writ, he had actually lived in Illinois only from June 21st to the end of that month, and only as a visitor at his brother's house, without residence or place of business in Illinois which he could call his own. But, particularly in view of the fact that his domicile of origin was in Illinois, I see no reason to doubt that if when he went there in June he actually intended in good faith to abandon his Massachusetts residence and live in Illinois instead, either permanently or for an indefinite time, and if this was the whole of his intent, it would be enough to effect the proposed change of citizenship and residence immediately. Cooper v. Galbraith, 3 Wash. C. C. 546, Fed. Cas. No. 3,193; Marks v. Marks (C. C.) 75 Fed. 321.

[2] Nor would this be any the less true if it was his purpose at the time to enable himself to invoke federal jurisdiction, by means of a change of citizenship effected as above, in case the plaintiff should sue him. Such a purpose would make no difference unless what he intended was only an ostensible change, to be made without real intent to stay in Illinois longer than might be desirable for the purposes of the apprehended litigation, but with the view of coming back to Massachusetts when those purposes would no longer be served by residence elsewhere. Morris v. Gilmer, 129 U. S. 315, 328, 329, 9 Sup. Ct. 289, 32 L. Ed. 690.

[3] There is every reason to believe that the defendant's departure from Massachusetts was induced by apprehension of a suit to be brought against him by the plaintiff, and for the cause of action she has declared on. He admits having promised to marry her on April 28, 1913, and having told her on June 16, 1913, that he would not do so, after preparations for the wedding had been made and one date fixed for it had gone by. It may well be supposed that he left to avoid service of process, and not improbably also in order to bring about a diversity of citizenship as between her and himself. Has he made it clear that his intent to change his citizenship covered no ulterior purpose of changing it back again if circumstances should permit?

Independently of this litigation there is not much reason to believe that Massachusetts would be more desirable to him as a residence than Illinois. He is unmarried, without a family, and had been occupying hired apartments. He had been receiving the income from a considerable estate held in trust for him by two Massachusetts residents, summoned as trustees in this case, but the trust property is situated chiefly in Chicago, and the trust expired by its terms on January 13, 1913, the day preceding the date of this writ. In anticipation of its expiration, his interest in the trust property, with other property belonging to him, was made over by him to new trustees upon another trust for his benefit, at or immediately after his departure from Boston in June, 1913, and it is on their behalf that an adverse claim is made in these proceedings. He had been carrying on a printing business in Everett, Mass.; but this plant was conveyed by him to the new trustees and was sold out in December, 1913. He has no other business interests in Massachusetts, so far as appears. His parents are

not living, and of his three brothers, who are all his nearest relatives, two live in Massachusetts and one in Illinois.

He has testified in a deposition taken April 4, 1914, in Illinois, under a commission from this court, that when he left Massachusetts it was his purpose not to return there to live; that when he arrived in Winnetka he had no present intention of leaving there to go elsewhere; that his purpose to go on the journey which took him around the world was not acquired until the latter part of June, 1913; that he intended then and during his journey to return to Winnetka to live; and that he went back there after his arrival in New York to continue to reside there as his home.

It appears by the deposition of Robert H. Howe, taken February 1, 1914, in Illinois, under a commission from the state court, as well as by the defendant's own deposition, that the defendant told Howe on June 21 and on June 26, 1913, in Chicago, that he had come back to Illinois for good, was going to live in Winnetka, and had removed his place of residence from Boston to Winnetka for that purpose, and had left Boston with the purpose and intention of so removing his residence. The statements on June 26th were made in connection with his acknowledgment before Howe, as notary public, of a deed dated June 19, 1913, executed by him before he left Massachusetts, in which he was described as living in Boston. They are recited in Howe's certificate of acknowledgment on the deed.

It further appears that, before he left Boston, the defendant told Dr. Lloyd to give up the apartments he had been occupying, remove his furniture, and store it in Rhode Island; also, that these directions were carried into effect after his departure, the apartments being sublet and never again occupied by him.

[4] Although all the above acts and declarations by the defendant appear without contradiction, and although they might, under some circumstances, be sufficient for a finding that he became an Illinois citizen as soon as he arrived at Winnetka on June 21, 1913, they were all so evidently prompted by the exigencies of the litigation with the plaintiff, apprehended at the time and actually begun in the following month, that only the absolute necessary inferences from them are admissible. The defendant had not done anything before January 14, 1914, so far as appears, which would render another change of residence back to Massachusetts less easy of accomplishment than the change from Massachusetts to Illinois claimed by him to have been made. There was nothing which the accomplishment of such a further change would require him to give up or undo in Illinois—another journey and a further intent would suffice. The entire scope of his actual intent in going to Winnetka, and whether or not it included any purpose of removal back to Massachusetts when there should no longer be reasons for staying in Illinois, can, of course, be known only to himself. His declaration that he had come back there "for good," and what he has stated about his own intent in his rather meager deposition does not seem to me enough to free the question from doubt, and entitle him to a finding by this court that it was in every respect such an intent as was necessary to accomplish the alleged change in citizenship. Except from the deposition referred to, no

means have been afforded for judgment regarding his candor or credibility. The interrogatories upon which the commission to take this deposition issued were filed, not on the defendant's behalf, but on behalf of Dr. Lloyd, appearing as adverse claimant of the fund sought to be attached. The defendant has appeared here only specially and to deny that valid service had been made upon him, and the deposition was admitted in evidence against the plaintiff's objection. The admissibility of Howe's deposition is also in dispute. It also was taken upon interrogatories filed on Dr. Lloyd's behalf as adverse claimant, and there filed before the defendant had appeared even to remove the case. Though opened in the state court, the deposition has not been filed either there or here. In view of everything that is before me, I am unable to believe the defendant's alleged Illinois citizenship established as a fact free from doubt, and this requires the case to be remanded.

[5, 6] 2. But, supposing the defendant a citizen of Illinois, the case is not to be retained here if the presence of other parties over whom the court is without jurisdiction is necessary to complete determination of the controversy presented. Upon that supposition, there has been no service or appearance which will enable the court to render a personal judgment against him, and it has jurisdiction, if at all, only to the extent of the property, if any, for which the Massachusetts citizens summoned in the state court as trustees, and who have there appeared and filed their answer, may be held chargeable, as against the adverse claim interposed by Henry D. Lloyd, also a Massachusetts citizen, on behalf of the new trustees. Clark v. Wells, 203 U. S. 164, 27 Sup. Ct. 43, 51 L. Ed. 138. A garnishee is not, as a general rule, an indispensable party for the purpose of removal proceedings. Macurda v. Globe, etc. Co. (C. C.) 165 Fed. 104. But here the controversy between the adverse claimant and the alleged trustees is not within the jurisdiction of this court; whether it is separable or not is doubtful, as in Concord, etc. Co. v. Haley (C. C.) 76 Fed. 882; and, if it is determined in the adverse claimant's favor, this court is left without jurisdiction over the main controversy. As in the case last referred to, this leaves it doubtful whether the case ought to be retained in this court.

[7] 3. On the assumption that the defendant was a citizen of Illinois, no valid service or writ upon him appears to have been made, and it cannot therefore be said that when his removal petition was filed the time had expired within which he was required by the laws of the state or the rules of the state court to answer or plead. Judicial Code, § 29. He was entitled to further notice before this period could begin to run. Mass. Rev. Laws, c. 167, § 34.

Upon the grounds above stated, however, the motion to remand must be allowed.

TULLAR & TULLAR v. ILLINOIS CENT. R. CO.

(District Court, N. D. Iowa, W. D. April 28, 1914.)

No. 66.

1. ACTION (§ 47*)—CAUSES OF ACTION—JOINDER.
Plaintiff was authorized, by Code Iowa 1897, §§ 3545, 3559 (5), to join in the same action in different counts a cause of action against a carrier for an overcharge in freight and for switching and a cause of action for damages for shrinkage in value and expense of extra feed for animals transported, due to defendant's alleged neglect in failing to transport them to destination in due time.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 469, 470, 472–489; Dec. Dig. § 47.*]

2. REMOVAL OF CAUSES (§ 2*)—SEPARABLE CONTROVERSY CLAUSE—EFFECT.
The separable controversy clause of the removal act (Judicial Code [Act March 3, 1911, c. 231, 36 Stat. 1094 (U. S. Comp. St. Supp. 1911, p. 141)] § 28) does not enlarge the previous clauses of the section which particularly specify the suits which may be removed, but provides only that, if "in any suits" mentioned in the section there should be a controversy wholly between citizens of different states, the entire suit might be removed by a defendant or defendants actually interested in such controversy to the federal court.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 2, 3; Dec. Dig. § 2.*]

3. COURTS (§ 263*)—FEDERAL COURTS—JURISDICTION.
Where a suit is brought originally in a federal District Court on both federal and nonfederal grounds, the court may not rightfully retain that part of the suit based on the nonfederal ground, unless that ground is merely incidental to the federal ground.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 799, 800; Dec. Dig. § 263.*]

4. REMOVAL OF CAUSES (§ 49*)—JURISDICTION—DIFFERENT CAUSES OF ACTION.
Plaintiffs brought suit against defendant railroad company in the state court, alleging two causes of action, one for an excess freight charge on a shipment of live poultry from Storm Lake, Iowa, to Chicago, Ill., for $9 overcharge for switching the car, and another for $47 as damages for shrinkage in value and for expense of extra feed for the poultry in transit, due to defendant's alleged neglect in failing to carry the car to destination in due time. *Held* that, since federal jurisdiction did not obtain in any event as to the second cause of action, the suit was not removable, though the first cause of action alone might have been removable, as arising under the act to regulate commerce as amended.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 95–99; Dec. Dig. § 49.*]

At Law. Action by Tullar & Tullar against the Illinois Central Railroad Company. On motion to remand. Granted.

Faville & Whitney, of Storm Lake, Iowa, for plaintiffs.
Helsell & Helsell, of Fort Dodge, Iowa, for defendant.

REED, District Judge. This action was commenced in the state court in July, 1913, by the plaintiffs to recover from the defendant railroad company less than $100. The petition is in two counts. The first claims $39 for the rental of a car, or freight exacted by the defendant from plaintiffs upon the shipment of a car load of live poultry from

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

Storm Lake, Iowa, to Chicago, Ill., over defendant's road, in excess of the regular rate for such shipment, and $9 overcharge for switching the car in Chicago. The second claims $47 as damages for the shrinkage in value and for expense of extra feed for, and care of, the poultry in transit, because of the alleged neglect of the defendant in failing to carry the car to its destination in due time. Judgment is asked for $90.75, with interest and costs.

The defendant removed the action to this court in November, 1913, upon the sole ground that the cause of action alleged in each count of the petition arises under the interstate commerce act of Congress as amended by that part of the act of June 29, 1906, commonly called the Carmack amendment.

The record has been filed in this court, and plaintiffs move to remand upon the ground that the cause of action alleged in each count of the petition is not one that arises under the act to regulate commerce or any amendment thereof, and that this court has no jurisdiction of the action.

Conceding, without deciding, that the first count of the petition sufficiently shows upon its face that it is to recover for freight charged by defendant upon an interstate shipment of property in excess of the schedule of rates filed by it with the Interstate Commerce Commission, an action to recover alone for such claim might be upon a cause of action, directly traceable to a violation of the act to regulate commerce under section 24 (8) of the Judicial Code, and one that might be removed from the state court to this court under section 28 of that Code. But the second count, being for the recovery of damages arising from the alleged negligent delay of the defendant in carrying the shipment to its destination, is not upon a cause of action traceable to any violation of the act to regulate commerce, and the action to recover therefor, being for less than $3,000, is not one that may be removed from the state court to the federal court. Storm Lake Tub & Tank Factory v. M. & St. L. Ry. Co. (D. C.) 209 Fed. 895. And see Smeltzer v. St. Louis & S. F. R. R. Co. (C. C.) 168 Fed. 420–424.

[1] Under the Iowa practice act, the plaintiffs may rightly sue the defendant upon both causes of action in one petition, alleging each cause of action in a separate count thereof as they have done. Code of Iowa (1897) §§ 3545, 3559 (5).

May this action, as so brought, be removed from the state court to this court? It is not removable either under the first or second clause of the removal act Section 28, Judicial Code. If removable at all, it must be under the third clause of that section, which reads in this way:

"And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states, and which can 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 District Court of the United States for the proper district."

[2] This is the separable controversy clause of the removal act of March 3, 1875, c. 137, 18 Stat. 470, as amended by Act March 3, 1887, c. 373, 24 Stat. 552, and Act Aug. 13, 1888, c. 866, 25 Stat. 433 (U. S. Comp. St. 1901, p. 509). It does not enlarge the previous clauses of

the section which particularly specify the suits that may be removed from the state court, but provides only that, when, "in any suits mentioned in this section," there shall be a controversy which is wholly between citizens of different states, the suit may be removed by a defendant or defendants actually interested in such controversy to the proper federal court. Barney v. Latham, 103 U. S. 205, 26 L. Ed. 514; Coal Company v. Blatchford, 11 Wall. 172, 20 L. Ed. 179; Case of the Sewing Machine Cos., 18 Wall. 553, 574, 575, 21 L. Ed. 914; Blake v. McKim, 103 U. S. 336, 338, 26 L. Ed. 563; In re Pennsylvania Co., 137 U. S. 451, 11 Sup. Ct. 141, 34 L. Ed. 738; Mississippi Mills Co. v. Cohn, 150 U. S. 202, 209, 14 Sup. Ct. 75, 37 L. Ed. 1052; Mexican National R. R. Co. v. Davidson, 157 U. S. 201, 15 Sup. Ct. 563, 39 L. Ed. 672.

In Barney v. Latham, above, the suit was brought by the plaintiffs, citizens of Minnesota and Indiana, respectively, in the state court of Minnesota against a number of individuals, citizens of other states, and the Winona & St. Peter Land Company, a Minnesota corporation. The individual defendants removed the suit to the federal court upon the ground that there was a separable controversy therein between them and the plaintiffs, which could be fully determined as between them without the presence of the land company. The removal was upheld by the Supreme Court, upon the ground, alone, that the land company was not a necessary party to the suit, as between the plaintiffs and the individual defendants; though some of its stockholders might be interested in the result, the land company, as a corporation, was not. Upon the contention of the plaintiffs that the land company was a proper, though not an indispensable, party to the full determination of the controversy, Mr. Justice Harlan, speaking for the court, said:

"Those are matters more properly for the determination of the trial court —that is, the federal court—after the cause is there docketed. If that court should be of opinion that the suit is obnoxious to the objection of multifariousness or misjoinder, and for that reason should require the pleadings to be reformed both as to subject-matter and parties, according to the rules and practice which obtain in the courts of the United States, and if, when that is done, the cause does not really and substantially involve a dispute or controversy within the jurisdiction of that court, it can * * * dismiss the suit, or remand it to the state court as justice requires."

See, also, Blake v. McKim, 103 U. S. 336, 338, 26 L. Ed. 563.

The clause has no reference to suits upon different causes of action between a plaintiff and a single defendant, some of which causes are not cognizable in the courts of the United States; for these courts have no authority to determine any controversy not rightly within their jurisdiction.

Counsel for defendant cite McGoon v. Northern Pacific Ry. Co. (D. C.) 204 Fed. 998, and a number of other cases, including Smith v. A., T. & S. F. Ry. Co. (D. C.) 210 Fed. 988 (decided October 29, 1913 but not reported until April 9, 1914, in 210 Fed. 988, and subsequent to the decision in Storm Lake Tub & Tank Factory v. M. & St. L. Ry. Co., above), and insist that the federal courts have exclusive jurisdiction of both causes of action alleged in the plaintiff's petition. But the jurisdiction of the federal court (if any) of either of said causes of action is concurrent only with that of the state courts of competent

jurisdiction. Mondou v. Ry. Co., 223 U. S. 1, 32 Sup. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 144; Galveston, etc., Ry. Co. v. Wallace, 223 U. S. 481, 490, 32 Sup. Ct. 205, 56 L. Ed. 516; Darnell v. Ill. Cent R. R. Co., 225 U. S. 243, 245, 32 Sup. Ct. 760, 56 L. Ed. 1072; Smeltzer v. St. Louis & S. F. Ry. Co. (C. C.) 168 Fed. 420, 424; section 16 of the act to regulate commerce (Act Feb. 4, 1887, c. 104, 24 Stat. 384 [U. S. Comp. St. 1901, p. 3165]), as amended by Act June 18, 1910, c. 309, 36 Stat. 554 (U. S. Comp. St. Supp. 1911, p. 1303).

In Smith v. A., T. & S. F. Ry. Co., it appears that the suit was brought in the state court to recover: (1) $11,900, damages for the alleged negligence of the defendant railway company in carrying 33 car loads of cattle from some point in Texas to Guthrie, Okl.; (2) $500 as a penalty provided by law for said alleged negligence in carrying the cattle, and an attorney's fee of $500 for prosecuting such cause of action; (3) $200 overcharge of freight upon the shipment; and an attorney's fee for prosecuting such cause of action. It does not appear under what law it is sought to recover the $500 as an alleged penalty for defendant's neglect in carrying the cattle; but the alleged overcharge of freight upon the shipment is one that may arise from a violation of the act to regulate commerce, and within the jurisdiction of the federal court, and if that is established there might be a recovery of an attorney's fee as a part of the costs in such proceeding. But the claim for $11,900 as damages to the cattle would not be one arising from any violation of the act to regulate commerce. Atlantic Coast Line R. R. Co. v. Riverside Mill, 219 U. S. 186, 208, 31 Sup. Ct. 164, 55 L. Ed. 167, 31 L. R. A. (N. S.) 7. It does not appear from the opinion that recovery is sought for an injury occurring upon the line of a connecting carrier to whom the cattle may have been delivered by the defendant as the initial carrier to be carried to their destination, but the fair inference from the opinion is that the loss occurred upon the line of the defendant as the primary carrier. Assuming, without admitting or deciding, that the injury to the cattle occurred upon the line of a connecting carrier, and that the liability of the defendant for such loss arises under the Carmack amendment, as a law of the United States, the amount sought to be recovered viz., $11,900, would be sufficient to confer jurisdiction upon the federal court of such a cause of action, as well as upon the cause of action for the overcharge of freight on the shipment. In any event, the case, upon its facts, furnishes no support for the removal of this cause from the state court. The removal act (Judicial Code, § 28) only permits the removal of a suit that might have been brought originally in the District Court of the United States.

[3] If a suit is brought originally in a District Court of the United States upon both federal and nonfederal grounds that court may not rightly retain that part of the suit based upon the nonfederal ground unless that ground is merely incidental to the federal ground. Mississippi Mills Co. v. Cohn, 150 U. S. 202, 209, 14 Sup. Ct. 75, 37 L. Ed. 1052; Independent School District v. Rew, 111 Fed. 1, 5, 49 C. C. A. 198, 55 L. R. A. 364 (Court of Appeals, this circuit); McNulty v. Connecticut Mutual Life Ins. Co. et al. (C. C.) 46 Fed. 305, 306. Upon what theory, then, can it be successfully maintained that a federal

court may acquire or retain jurisdiction of a nonfederal cause of action by removal of a suit in which recovery is sought thereon from the state court to the federal court?

[4] It is the right of a plaintiff (as many times held by the Supreme Court) to prosecute his action at law, to recover upon the ground of negligence, in his own way in any court having jurisdiction of the causes of action upon which he seeks a recovery; and it is not the right of the sole defendant, at least in such action, to compel him, by removal of the suit or otherwise, to split his suit into parts and prosecute one part in one court and another part in some other court.

It may be that, if the main or principal purpose of a suit in the state court is to recover upon a federal cause of action, the joinder therewith by the plaintiff of a nonfederal cause of a trifling character or amount will not prevent the removal of the suit, if it would otherwise be removable; for that might indicate a bad-faith purpose to defeat the federal jurisdiction. On the other hand, if the main, or a principal, purpose of a suit in the state court is in good faith to recover upon a nonfederal cause of action, the uniting therewith of a federal cause of action of a small or trifling amount will not confer federal jurisdiction. Such questions, however, may be left for determination until they shall properly arise.

The right to remove a suit from a state court to a federal court exists in certain enumerated classes of cases only, even though the federal courts may have jurisdiction of the causes of action therein alleged, or some of them (Chesapeake & O. R. Co. v. Cockrell, 232 U. S. 146, 34 Sup. Ct. 278, 279, 58 L. Ed. ——); and, unless the suit falls within some of the enumerated classes, it is not one that may be removed from the state court. The state court has undoubted jurisdiction of the entire suit in question; this court has not, and the suit does not fall within any of the enumerated classes of suits that may be removed, and was not therefore rightly removed from the state court.

The motion to remand is sustained, and the cause is remanded to the state court from which it was removed.

It is accordingly so ordered.

THE FORTUNA.

(District Court, W. D. Washington, N. D. April 4, 1914.)

No. 2514.

MARITIME LIENS (§ 25*)—"SUPPLIES OR OTHER NECESSARIES"—ARTICLES FOR SLOP CHEST OF FISHING VESSEL.

Articles furnished on the order of the master and representative of the owner to supply the slop chest of a vessel, about to sail on a season's fishing trip of four or five months' duration, are "supplies or other necessaries," within the meaning of Act June 23, 1910, c. 373, § 1, 36 Stat. 604 (U. S. Comp. St. Supp. 1911, p. 1192), for which such section gives a lien on the vessel.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. §§ 20, 31–36; Dec. Dig. § 25.*]

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

In Admiralty. Suit by the Dickson Bros. Company against the schooner Fortuna. Decree for libelant.

See, also, 206 Fed. 573.

Harry H. Johnston, of Tacoma, Wash., for libelant.

Willett & Oleson, of Seattle, Wash., for claimant.

NETERER, District Judge. Libelant seeks to establish a lien upon the schooner Fortuna, a fishing boat, for supplies sold to the master and secretary and manager of the owner for the "slop chest," which consist of oil hats, boots, pants, coats, aprons, gloves, and wool blankets, etc., amounting to $264, and tobacco, etc., amounting to $55.40; said supplies being furnished preparatory to going to the fishing grounds for the season's fishing in Alaska, to be absent about four or five months. All but $200 of the account has been paid.

It is contended by the respondent that the articles furnished were not necessary for the proper operation of the ship, and therefore not lienable. The only issue to be determined is whether the supplies furnished by libelant are a lien against the vessel. Act Cong. June 23, 1910, c. 373, 36 Stat. 604 (U. S. Comp. St. Supp. 1911, p. 1192), provides:

"Any person furnishing repairs, supplies, or other necessaries, including the use of dry docks or marine railway, 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."

The question then is: Were the goods furnished "supplies or other necessaries" under this act? The fostering care of the government for its seamen has ever been manifested on the part of the national Legislatures as well as the Legislatures of the various states, which have given expression upon the subject. The statutes of various states, in the absence of an act of Congress, have endeavored to extend and enlarge the right of lien, so as to include those whom the protecting arm of admiralty did not secure in furnishing supplies for the comfort and protection of seamen. Congress, by Act June 26, 1884, c. 121, § 11, 23 Stat. 56 (U. S. Comp. St. 1901, p. 3101) provides:

"That every vessel * * * shall also be provided with a slopchest, which shall contain a complement of clothing for the intended voyage for each seaman employed, including boots * * * hats * * * oiled clothing, and everything necessary for the wear of a seaman; also a full supply of tobacco and blankets * * * and if any such vessel is not provided, before sailing, as herein required, the owner shall be liable to a penalty of not more than $500."

While it is true that this burden was removed from vessels engaged in the fishing or whaling business by Act June 19, 1886, c. 421, § 13, 24 Stat. 82 (U. S. Comp. St. 1901, p. 3102), in which it is provided:

"That section 11 of 'An act to remove certain burdens on the American merchant marine and encourage the American foreign carrying trade, and for other purposes,' approved June 26, 1884, shall not be construed to apply to vessels engaged in the whaling or fishing business"

—this construction simply removed the compulsory requirement of the act, and instead of compelling the master to have at least $500

worth of clothing, tobacco, etc., in the slop chest, leaves the matter, so far as fishing and whaling schooners are concerned, to the master's discretion and the necessities of the case. The act of Congress referred to provides that such articles as are included in this libel are "necessaries" to be supplied to seamen; and when a fishing trip of four or five months' duration, which the Fortuna was about to undertake, is considered, it becomes apparent that the seamen needed to be provided with such care and protection as the circumstances demanded, and this court, as a court of admiralty, cannot say that the judgment of the master, who was also the secretary and manager of the owner, should not be conclusive upon the fact that the articles purchased by him for the trip were supplies that were necessary. He knew the extent of the voyage that was to take place, and the character of the work which the men would be called upon to do, and realized that without an extra supply the men would be inefficient for any service, and he would be without a complement of able seamen.

Judge Rose in The City of Milford (D. C.) 199 Fed. at page 958, says:

"The battle as to the liability of a ship for materials and services furnished it has been going on for centuries. Judge Lowell, in that wonderfully learned and exhaustive opinion of his in The Underwriter (D. C.) 119 Fed. 713, tells the story of the long struggle. He shows how the questions of substantive law and of policy involved had in the course of hundreds of years become confused and complicated, by being mixed up with differences as to rules of procedure and with disputes as to jurisdiction between the courts of admiralty and those of common law. * * * The general purpose of this enactment [law of 1910] is plain. Hereafter, when supplies are furnished for a ship to one lawfully having the management of the ship, the presumption is that the ship is liable for them. If the materialman knows nothing about the authority of the person in possession of the ship, except that he visibly has the management of it, he may furnish the supplies, and the ship will be bound for them."

I think the articles furnished were supplies that were necessary, and are a lien against the vessel under the act of June 23, 1910. This conclusion is amply supported by the following authorities: The Plymouth Rock, Fed. Cas. No. 11,237; Weaver v. The S. G. Owens, Fed. Cas. No. 17,310; The Ellen Holgate (D. C.) 30 Fed. 125; The Gustavia, Fed. Cas. No. 5,876; Bovard v. The Mayflower (D. C.) 39 Fed. 41.

CLAUSS v. PALMER UNION OIL CO. et al.

(District Court, N. D. California, Second Division. April 3, 1914.)

No. 45.

COURTS (§ 313*)—FEDERAL COURTS—JURISDICTION—DIVERSITY OF CITIZENSHIP.

Where, after the filing, but before the dismissal, of a stockholder's bill by a citizen of Ohio against a California corporation to set aside a transfer of the corporation's property for alleged fraud, complainant's attorneys applied on behalf of 15 other stockholders, all but 4 of whom were residents of California, for leave to intervene, and, this being granted, filed a bill of intervention for them identical with the original bill, a mo-

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

tion, after dismissal, to file an amended bill will not be granted, where it would result in a suit in which there would be 4 nonresident plaintiffs and 12 plaintiffs citizens of the state.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 359; Dec. Dig. § 313.*]

In Equity. Bill by Andrew Clauss against the Palmer Union Oil Company and others. On motion to file amendments to the bill of complaint. Denied.

John E. Bennett and Jesse Olney, both of San Francisco, Cal., for complainant.

Gavin McNab, B. M. Aikins, R. P. Henshall, R. R. Moody, N. Schmulowitz, and Luther Elkins, all of San Francisco, Cal., for defendants.

DOOLING, District Judge. This is a motion for leave to file an amended bill of complaint, or rather to file amendments to a bill of complaint heretofore dismissed by the court. It was held in dismissing the bill that the court had jurisdiction of the subject-matter, but in so holding the court was only passing upon the question as to the amount involved in the controversy. The action is one brought by a single stockholder of the Palmer Oil Company, a California Corporation, such stockholder being a citizen of the state of Ohio and owning 1,000 shares of stock, which, as may be gathered from other averments of the bill, are worth not to exceed $1,500. The relief sought is the setting aside, on the ground of fraud, of a transfer made by the corporation of property stated to be worth $2,500,000; the plaintiff averring that the action is brought on behalf of himself and all others similarly situated.

After the filing of said bill, a petition was presented by the attorneys for plaintiff on behalf of 15 other stockholders of said Palmer Oil Company asking leave to intervene, and such leave having been granted by the court, said attorneys filed a bill of intervention by said 15 stockholders identical in all essential particulars with the original complaint. In this bill of intervention 12 of the plaintiffs, owning 125,567 shares, are citizens of California, and 3, owning 3,500 shares, are citizens of other states. So that, if the present motion were granted, we would have a situation with 4 plaintiffs, citizens of other states, owning in all 4,500 shares, and 12 plaintiffs, citizens of California, owning 125,567 shares, all in this court clinging to the complaint of a single stockholder, resident of Ohio, owning but 1,000 shares, and all represented by the attorneys of the original plaintiff.

Under these circumstances, aside from the fact that the proposed amendments are for the most part amendments to the prayer of the original bill, and not amendments to the bill itself, the motion to amend will be denied; and it is so ordered.

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

Ex parte CHIN FONG.

(District Court, N. D. California, First Division. April 17, 1914.)

No. 15614.

ALIENS (§ 32*)—CHINESE PERSONS—DEPORTATION—RIGHT TO RE-ENTER.

Where a Chinese person residing in the United States, contemplating a trip to China, applied for preinvestigation as to his status as a merchant, and, though a certificate was denied on the theory that his original entry was surreptitious, he left the country in November, 1912, the question of his right to re-enter was for the determination of the Immigration Department, and not by justice, judge, or commissioner, under the exclusion laws.

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

Application by Chin Fong for a writ of habeas corpus to obtain his discharge from a warrant for his deportation to China. On demurrer to writ. Denied.

McGowan & Worley, of San Francisco, Cal., for petitioner.

J. W. Preston, U. S. Atty., and Walter E. Hettman, Asst. U. S. Atty., both of San Francisco, Cal., for respondent.

DOOLING, District Judge. The petition shows that petitioner, Chin Fong, who had been a resident of the United States for a number of years, departed for China in November, 1912; that before he left he applied for a preinvestigation as to his status as a merchant, and a certificate was denied him, on the ground that his original entry into this country was surreptitious; that, notwithstanding this denial, the petitioner left the country, and is now endeavoring to re-enter as a returning Chinese merchant; that he presents the affidavits of a member of the New York firm to which he claims to belong and of two reputable Americans supporting his claim; that, notwithstanding these facts, he has been denied admission and ordered deported on the same ground that his preinvestigation certificate was denied, that is to say, because his original entry was surreptitious; that in so deciding the immigration department has exceeded its authority, as that question can only be determined under the exclusion laws by a justice, judge, or commissioner.

This, briefly stated, is the body of the present petition for a writ of habeas corpus. To this petition a demurrer has been interposed. I am of the opinion that the demurrer must be sustained. Had the petitioner been content to remain in this country, he could have been deported only after a hearing before a justice, judge, or commissioner. But as he left the country voluntarily, and even after a preinvestigation certificate was denied him, the question of his right to re-entry lies peculiarly with the immigration department, and as they have found that he is not entitled to re-enter, such finding cannot be disturbed. A different rule prevails, and a different tribunal determines, in the case of a Chinese applying to enter from that of one already in this country, whom it is sought to deport, under the exclusion laws.

The demurrer will therefore be sustained, and the application for a writ denied.

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

PATTERSON et al. v. JACKSONVILLE TRACTION CO.

(Circuit Court of Appeals, Fifth Circuit. April 8, 1914. Rehearing Denied May 18, 1914.)

No. 2593.

1. CARRIERS (§ 315*)—INJURIES TO PASSENGER—ACTIONS—ISSUES—PLEA OF NOT GUILTY.

Under rule 71 of the Rules of the Florida Circuit Court in Common-Law Actions, providing that in actions for torts a plea of not guilty denies only the breach of duty or the wrongful act, and not facts stated in the inducement, a plea of not guilty to a declaration for injuries received in a collision between two street cars, alleged to be owned and operated by defendant, does not deny that defendant owned and operated the cars, and plaintiffs need not prove that fact.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1270, 1281, 1282; Dec. Dig. § 315.*]

2. CARRIERS (§ 320*)—INJURIES TO PASSENGER—NEGLIGENCE OF CARRIER—RES IPSA LOQUITUR.

Where plaintiff established the fact that she was injured while a passenger on defendant's car and while exercising due care for her own safety, it devolved on defendant to show that the injury was unavoidable by human foresight, and a verdict should not be directed for the failure of plaintiff to show that defendant owned and operated the car which collided with the one on which plaintiff was riding.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1118, 1126, 1149, 1153. 1160, 1167, 1179, 1190, 1217, 1233, 1244, 1248, 1315–1325; Dec. Dig. § 320.*]

3. TRIAL (§ 143*)—TAKING CASE FROM JURY—CONFLICTING EVIDENCE.

Where there is evidence tending to show that plaintiff suffered injuries in a collision between two of defendant's cars, even though defendant's evidence, to the effect that she sustained no injury, may be of greater weight, it is improper to direct a verdict for defendant for plaintiff's failure to show injuries, since the jury should be permitted to decide controverted issues of fact.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 342, 343; Dec. Dig. § 143.*]

In Error to the District Court of the United States for the Southern District of Florida; Rhydon M. Call, Judge.

Action by Nina F. Patterson and another against the Jacksonville Traction Company. Judgment for defendant upon a directed verdict, and plaintiffs bring error. Reversed and remanded for new trial.

Suit was brought by the plaintiff in error, Nina F. Patterson, joined by her husband, hereinafter referred to as plaintiffs, to recover damages of the defendant in error, hereinafter referred to as defendant, for injuries by her received while a passenger on one of its cars.

For the purpose of disposing of the question arising under the pleadings, it is deemed proper to insert the following allegations of the declaration filed by the plaintiffs: "Comes now Nina F. Patterson and C. O. Patterson, her husband, plaintiffs in the above cause, by their attorneys, A. H. King and Roswell King, and sues the defendant, Jacksonville Traction Company, a corporation doing business in the county of Duval and state of Florida, and with its principal place of business in the city of Jacksonville, Duval county, Fla., for this, to wit: That during the month of May, 1911, and during each day thereof, the defendant was in possession of and was operating and managing, and was during said period, and still is responsible for the proper operation and management of a system of street railway in the city of Jackson-

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

ville, Duval county, Fla., operated and managed by it; that plaintiff Nina F. Patterson, on the 14th day of May, 1911, at about noon, boarded and took passage as a passenger on one of the street cars operated by defendant for transportation as a passenger in due course; and as such passenger she was transported by defendant on its said car to the intersection of Main and Phelps streets in said city of Jacksonville, where said car was stopped by defendant, and while said car was so stopped and standing, and while the plaintiff Nina F. Patterson was in such car as such passenger, another street car of defendant, by and through the negligence and carelessness of defendant, was run into the rear of said car upon which plaintiff Nina F. Patterson was riding, as aforesaid, with great force and violence. * * *"

To the declaration the defendant interposed a plea of not guilty, upon which issue was duly joined, and the cause proceeded to a hearing. At the conclusion of the evidence on the part of the plaintiffs, the defendant moved for a peremptory instruction to the jury to find a verdict in its favor on the ground that there was no evidence that would warrant a finding for the plaintiffs. The motion was overruled by the court. Thereupon the defendant placed physicians and surgeons on the stand, who testified touching the condition of the plaintiff Mrs. Patterson, and of the injuries from the effects of which she claimed to be suffering. After both parties closed their testimony, the defendant again moved the court for a peremptory instruction in its favor "on the ground that there was no testimony that would warrant a finding for the plaintiffs, and that all the testimony shows that the plaintiff is not entitled to recover, and on the ground that the testimony shows that the plaintiff was not injured by the defendant, on the ground that the plaintiff has not proved that the acts of negligence set up in the declaration were committed by the defendant, and on the ground that the testimony in the case preponderates in favor of the defendant."

The motion was granted by the court, and in obedience to the instruction a verdict of not guilty was returned and judgment duly entered in accordance therewith. The plaintiffs duly excepted to the peremptory instruction and prosecute error to reverse the judgment.

A. H. King, Roswell King, H. Bisbee, and George C. Bedell, all of Jacksonville, Fla., for plaintiffs in error.

John L. Doggett and Henry C. Clark, both of Jacksonville, Fla., for defendant in error.

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

MAXEY, District Judge (after stating the facts as above). It is insisted by the defendant that the action of the trial court in giving the peremptory instruction was right, because the plaintiffs failed to prove: (1) That the defendant did the wrongful act alleged in the declaration, and (2) that the plaintiff Mrs. Patterson actually sustained the injury alleged in the declaration.

[1] As to the reason first assigned, it may be said that the record fails to disclose that proof was offered by the plaintiffs to show that the car, which ran into the one in which Mrs. Patterson was sitting at the time of the accident, was owned and operated by the defendant. But the declaration does allege in plain language that, while the car was stopped and standing, and while Mrs. Patterson was in the car as a passenger—

"another street car of the defendant, by and through the negligence and carelessness of the defendant, was run into the rear of the car upon which Mrs. Patterson was riding, with great force and violence."

To the declaration the only plea interposed by the defendant was one of not guilty, which, since the adoption by the Supreme Court of Florida of rule 71 of Rules of Circuit Court in Common-Law Actions, operates as a denial only of the breach of duty or wrongful act. And in the present case the plea admits, in view of the allegations of the declaration, that the defendant owned and operated both cars at the time of the accident which resulted in Mrs. Patterson's injuries, and the record contains evidence tending strongly to prove negligence as alleged.

Pretermitting the illustrative examples of rule 71, the rule itself is in the following words:

"In actions for torts, the plea of not guilty shall operate as a denial only of the breach of duty or wrongful act alleged to have been committed by defendant, and not of the facts stated in the inducement, and no other defense than such denial shall be admissible under that plea; all other pleas in denial shall take issue on some particular matter of fact alleged in the declaration."

Rule 71 is a copy of the English rule on the same subject; and, in view of the Florida authorities and the following English cases, it seems clear to us that proof of the facts complained of was not essential under the plea of not guilty. If the defendant desired to traverse them, it might have done so by special plea containing the proper averments. See A. C. L. R. R. Co. v. Crosby, 53 Fla. 400, 43 South. 318; Jacksonville Electric Company v. Sloan, 52 Fla. 288, 42 South. 516; Taverner v. Little, 5 Bing. N. C. 678; Dunford v. Trattles, 12 M. & W. (Exchequer) 529; Hart v. Crowley, 40 Eng. Com. Law, 77.

[2] Pursuing the subject further, we are not disposed to rest our conclusion solely upon the question of the quantum of proof necessary to be introduced under the plea of not guilty. The record discloses that the plaintiff was a passenger on one of the defendant's cars, and that, at the time she claims to have been injured, she was in the exercise of due care in looking out for her own safety. What was then the duty of the defendant? It devolved upon it to show by proof that the injury was unavoidable by human foresight. But the defendant introduced no testimony on that point. In Gleeson v. Virginia Midland Railroad Co., 140 U. S. at page 443, 11 Sup. Ct. 862, 35 L. Ed. 458, it was said by the court:

"Since the decisions in Stokes v. Saltonstall, 13 Pet. 181 [10 L. Ed. 115], and Railroad Company v. Pollard, 22 Wall. 341 [22 L. Ed. 877], it has been settled law in this court that the happening of an injurious accident is, in passenger cases, prima facie evidence of negligence on the part of the carrier, and that (the passenger being himself in the exercise of due care) the burden then rests upon the carrier to show that its whole duty was performed, and that the injury was unavoidable by human foresight. The rule announced in those cases has received general acceptance, and was followed at the present term in Inland & Seaboard Coasting Company v. Tolson, 139 U. S. 551 [11 Sup. Ct. 653, 35 L. Ed. 270]."

See, also, Southern Pacific Co. v. Cavin, 144 Fed. 348, 75 C. C. A. 350, and authorities cited.

[3] It thus appears that the case could not properly be withdrawn from the jury on the ground that the plaintiffs had failed to establish negligence on the part of the defendant; and it becomes our duty to

consider the second ground urged by the defendant to sustain the action of the trial court, to wit, that the plaintiffs failed to prove that Mrs. Patterson actually sustained the injuries alleged in the declaration. Touching this objection it is only necessary to observe that there was testimony tending clearly to show that Mrs. Patterson suffered injuries as a result of the accident. The nature and extent of her injuries was testified to by several witnesses, one of them stating that:

"Before she was hurt she was very energetic and could go about her housework or any duties she had to perform, and that is different now, and I should say she has aged 10 or 15 years."

Let it be admitted, but we would not be understood as so finding, that it was shown by the physicians testifying, on the part of the defendant, that Mrs. Patterson was not hurt as claimed; that her injuries were purely imaginary and without any real basis in fact; that the evidence preponderated in favor of the defendant—still these and kindred questions should have been submitted, under proper instructions, to the consideration of the jury, whose duty it is to determine controverted questions of fact. The rule is thus stated by the Supreme Court in Texas & Pacific Railway Co. v. Cox, 145 U. S. at page 606, 12 Sup. Ct. 909, 36 L. Ed. 829:

"The case should not have been withdrawn from the jury unless the conclusion followed, as matter of law, that no recovery could be had upon any view which could be properly taken of the facts the evidence tended to establish. Dunlap v. Northeastern Railroad, 130 U. S. 649, 652 [9 Sup. Ct. 647, 32 L. Ed. 1058]; Kane v. Northern Central Railway, 128 U. S. 91 [9 Sup. Ct. 16, 32 L. Ed. 339]; Jones v. East Tennessee, Virginia & Georgia Railroad, 128 U. S. 443 [9 Sup. Ct. 118, 32 L. Ed. 478]."

In Big Brushy Coal & Coke Co. v. Williams, 176 Fed. 532, 99 C. C. A. 105, it was said by the Circuit Court of Appeals for the Sixth Circuit:

"It was not the province of the court below to weigh the evidence, when considering the motion to direct at the close of all the testimony. The motion must be overruled, where the testimony presented by the plaintiff, if believed by the jury, will support the petition. Mt. Adams & E. P. Inclined Ry. Co. v. Lowery, 74 Fed. 463, 477, 20 C. C. A. 596; Central Union Depot & Ry. Co. v. Mansfield, 169 Fed. 614, 95 C. C. A. 142; Norfolk & W. Ry. Co. v. Hazelrigg, 170 Fed. 551, 95 C. C. A. 637; L. S. & M. S. Ry. Co. v. J. Eder, Jr. (decided December 7, 1909) 174 Fed. 944 [98 C. C. A. 556]; Noble v. C. Crane & Co., 169 Fed. 55, 94 C. C. A. 423; Van Stone v. Stilwell & Bierce Mfg. Co., 142 U. S. 128, 135, 12 Sup. Ct. 181, 35 L. Ed. 961. In our opinion there was such testimony. The weight of the evidence and the extent and effect of contradiction present questions for the jury. Crumpton v. United States, 138 U. S. 361, 363, 11 Sup. Ct. 355, 34 L. Ed. 958."

See, also, McIntyre v. Modern Woodmen of America, 200 Fed. 1, 121 C. C. A. 1; Haynie v. T. C. I. & R. Co., 175 Fed. 55, 99 C. C. A. 71.

For the reasons stated we are of the opinion that the trial court erred in instructing the jury to return a verdict for the defendant. The judgment should therefore be reversed, and the cause remanded for a new trial; and it is so ordered.

MATSON NAVIGATION CO. v. UNITED ENGINEERING WORKS.

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

No. 2251.

1. CONTRACTS (§ 232*)—CONTRACT FOR REPAIRING VESSEL—METHOD OF DETERMINING COMPENSATION.

Libelant made a bid for the making of repairs on respondent's steamship in accordance with specifications furnished by respondent. Respondent thought the bid too high, and it was then agreed that it should put a timekeeper on the work which should be done on a time and material basis at its reasonable value, but that if done according to the specifications it should not cost respondent more than the sum named in the bid. In doing the work the specifications were by mutual consent departed from in so many respects and to such an extent that it was impossible to apportion the work between what was done within the bid and that which was without and beyond it. *Held*, that under the agreement libelant was entitled to recover for the entire work on a quantum meruit on a time and material basis.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1071–1094; Dec. Dig. § 232.*]

2. EVIDENCE (§ 354*)—COST OF REPAIRING SHIP—WORKMEN'S TIME CARDS.

Under the system followed in a shipbuilding and repair works, in order to keep track of the work and material expended on each particular job, each job was numbered and each workman turned in daily to his foreman a time card showing the length of time he had worked on a particular numbered job and the kind of work he had done. This card was checked by the foreman. Material cards or orders issued by the foremen on which material was issued from the storeroom also showed the number of the job for which it was required. From these cards and orders daily sheets relating to each job were prepared and the items charged therefrom on the books. *Held*, that in a suit to recover for repairs made on a ship, on a time and material basis, such time and material cards, properly identified by the workmen who made them or the foreman who checked them, none of whom had any present recollection of the items thereon, were admissible in evidence, as were also the daily sheets which had been submitted to and approved by the timekeeper employed on the work by the shipowner.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1432–1483; Dec. Dig. § 354.*]

Appeal from the District Court of the United States for the First Division of the Northern District of California; John J. De Haven, Judge.

Suit in admiralty by the United Engineering Works against the Matson Navigation Company. Decree for libelant, and respondent appeals. Affirmed.

E. B. McClanahan and S. H. Derby, both of San Francisco, Cal., for appellant.

Nathan H. Frank and Irving H. Frank, both of San Francisco, Cal., for appellee.

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

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

WOLVERTON, District Judge. This is a libel in admiralty. The United Engineering Works is the libelant and the Matson Navigation Company the respondent. For convenience, the parties will be referred to hereinafter as the United or libelant, and the Matson Company or respondent.

The Matson Company is the owner of the American steamer Hilonian, and the libel charges that, between the months of July and December, 1909, the libelant, at the special instance and request of respondent, furnished certain materials and performed certain labor upon the Hilonian, as set forth in Schedules 1, 2, and 3 annexed to the libel, and that the charges extended in said schedules are just and reasonable. These amount to

Schedule	1	$30,018 83
"	2	170 06
"	3	766 96
Total		$30,955 85
Against which is a credit		520 01
Leaving a balance due of		$30,435 84

For a second cause it is alleged that further materials were furnished and labor done and performed upon said steamer as particularized and set forth in Schedules 4, 5, 6, 7, 8, 9, and 10 annexed to the libel. The demands under these several schedules are as follows:

Schedule	4	$ 616 88
"	5	190 00
"	6	140 00
"	7	140 00
"	8	1,350 00
"	9	1,140 00
"	10	725 00
Total		$4,301 88

The answer to the first cause of libel admits that the libelant furnished certain materials and performed certain work upon the Hilonian; but, as it pertains to the matters and things set forth in Schedule 1, it is alleged that the materials and labor were furnished and performed under an express contract for a consideration of $11,749, but:

"That during the progress of said work it was mutually agreed that certain omissions, modifications, and changes in said specifications and the work to be performed under said contract should be made, and the same were made and omitted without an agreement between the parties as to the value of said omissions, changes and modifications."

And:

"That certain work and materials were also furnished to said steamer by said libelant during said period of time * * * in addition to the work and materials called for by said contract, and for which no price was agreed upon other than that the same would be compensated for at its just and reasonable value."

It is then further alleged that certain work and materials were omitted of the value of $1,398.25, and additional work and materials

were furnished of the value of $8,280.50, leaving due the libelant upon the contract and for work and materials furnished the sum of $18,631.25.

As it relates to Schedules 2 and 3 it is stated that the United did furnish certain materials and supplies and perform certain work "without any agreement as to the price," but that the same was of no greater value than $937.07, which is the aggregate of the two Schedules 2 and 3. The right, however, is reserved to respondent of proving at the trial that such materials and services were worth less than that sum.

The answer to the second cause of libel admits liability as to each of Schedules 4, 5, 6, 7, 8, 9, and 10, except two items contained in Schedule 4, namely, to "Remetal horse shoes," etc., $146.88, and to "Grind off I. P. piston rod," etc., one-half of same $25, and two items of Schedule 9, being "Enlarged casing $60," and "Made new top for breeching," etc., $180.

As a separate answer to both causes of action a credit of $535.76 is claimed.

An analysis of the pleadings reduces the issues practically to a controversy touching Schedule 1 and two items each in Schedules 4 and 9. The respondent reserved the right to show that the work and materials performed and furnished as stated in Schedules 2 and 3 were worth less than the amount charged, but no proof was offered to the purpose, so that these schedules may be eliminated from further inquiry.

The libelant, both in the pleadings and at the trial, has proceeded upon the theory that the work done and materials furnished for the repairs upon the Hilonian were done and furnished under a time and material contract; the respondent tacitly agreeing to pay what the same was reasonably worth. The respondent has contended and is contending that the parties dealt with each other under an express contract, but that in its observance certain changes were made, by mutual agreement, by way of omissions, modifications, and additional services to be rendered, and that, in so far as other work was done and materials furnished instead of such as were stipulated for in the specifications, it was agreed that one should be in compensation for the other, and the additional services were rendered without any agreement as to the value thereof. Its theory, therefore, of the situation is that the integrity of the contract has not been overthrown by the omissions, modifications, and changes made, and that libelant was bound to its performance for the consideration therein named; otherwise it is conceded that the libelant is entitled to pay for the extra services rendered and materials furnished upon a quantum meruit basis.

The libelant, of course, has the burden of proof of establishing in the first instance that it is entitled to recover under the theory it has adopted, which involves proof of the work done and materials furnished the Hilonian, together with their reasonable value, for it is upon this basis it must recover, if at all. The respondent, on the other hand, has the burden of proving that the contract was duly en-

tered into between the parties, and not only this, but that it has so continued in its integrity, notwithstanding the changes and modifications imposed upon it in its treatment by the parties, as to be susceptible of enforcement. Under this theory, there necessarily must be an identification of the work done and materials supplied that are properly referable to the contract and a segregation therefrom of the time and material obligations. In this way only can we hope to arrive at a true understanding of the correlative engagements and ultimate liabilities of the parties.

[1] It will be convenient to inquire, first, whether any contract was entered into between the parties touching the repairs on the Hilonian, and, if so, what its nature was. In this connection, we will also ascertain what Putzar's true relations were to the parties concerned.

Carl E. Klitgaard was chief engineer upon the Hilonian, and as such he prepared, at the instance of the Matson Company, certain specifications for repairs designed to be made upon the vessel. The specifications contained 15 different items, with a statement at the bottom that time would be an important factor in awarding the contract, and fixing a limit of 26 days from August 23, 1909, for doing the work. With these in hand, the Matson Company advertised for bids. The United, among others, submitted a bid of $11,999. This was rejected, and bids were again called for. On August 2d the United submitted another bid, in language following:

"We hereby respectfully submit a figure of eleven thousand seven hundred forty-nine ($11,749.00) dollars on the repairs to the above steamer, all to be in strict accordance with the specifications and further we guarantee to finish the work therein specified in twenty-five (25) calendar days from the date of delivery of vessel at our yard."

After the bid had been received, Gray, who was the secretary of the United, was called into Matson Company's office by telephone, when the parties came to whatever understanding was had respecting the contract. Matson testifies:

"I felt that the bids were still higher than they should be, and he (Gray) suggested to me that we put a timekeeper on and he would guarantee that he would do the job within that figure, and if the crank-shaft did not have to come out there would be a reduction of a couple of thousand dollars. * * * I told him I would give him the job and accept his bid."

There had previously been some talk and discussion respecting the crank-shaft, as to whether it would be necessary to take it out of the vessel and to the shop for making the needed repairs, which could not be determined until there was a proper inspection while yet in the vessel. According to Matson the bid was accepted about the 17th or 18th of August. Mr. E. L. Putzar was put on the job as timekeeper. Putzar's name was probably first suggested for this position by Gray. Matson relates that Putzar was engaged for that purpose, and that his duty was "only to keep time on the repairs of that ship," and that no other authority was given him by witness. Matson was absent in the East a good part of the time while the repairs were being made, and Klitgaard, the chief engineer, and Capt. Saunders were left in charge of the work for the Matson Company. Matson further relates that Capt. Saunders gave Putzar the job. Further,

with relation to the contract, Matson says that Gray guaranteed the work "would be done within that limit of twelve hundred dollars, or whatever it is, I have forgotten now, and if it was any less we would get the credit for it," and that under these circumstances the Matson Company was to keep time on the job, and provide a timekeeper for the purpose. On cross-examination Matson testified as follows:

"Q. What did you say to him (Gray) upon this subject, and what did he say to you upon this subject? A. He said he would take that job and guarantee the Matson Navigation Company that he would do the job within those figures, $11,749. Q. And what did you say? A. I told him I would accept it. Q. Is that all the conversation? Why should he guarantee that he would do it within those figures when his written bid was those figures? A. I told him I still felt that he was high, and I would put a timekeeper on over there and see how that would come out, and there was a crank-shaft— Q. (Intg.) Just one moment. You say you put a timekeeper on there; why did you put a timekeeper on? What was the conversation between you and him respecting that? A. You do not seem to give me a chance, or you did not catch my answer. I say I told him I would put that timekeeper on and to see that we would get a reduction on that crank-shaft which we expected would come out on that day. * * * Q. Then am I to understand your present contention to be that you simply put on a timekeeper to ascertain what the difference would be in the cost in case the crank-shaft did not have to come out for repairs in the manner that you have testified to? A. I think so. Q. That is the only thing you put a timekeeper on for? A. That is the only thing he was there for. Q. The only thing, that is, to keep time on the crank-shaft job? A. To keep tab on everything around there with regard to time."

Further on the witness says:

"I told him (Gray) I would accept his bid with the understanding that if it could be done for less money I was to get credit for it. * * * What was said when I gave the contract was that I was to put on a timekeeper there, and we were to get the benefit of a couple of thousand dollars if the crank-shaft did not come out."

The instructions given Putzar were "to keep time on everything."

Charles W. Saunders, the superintendent of the Matson Company, testifies to a conversation between Capt. Matson and Gray relating to the alleged agreement as follows:

"When Mr. Gray came in, the Captain said: 'Well, Gray, I have decided to give you the job, although I still think the bid is too high, but I want an understanding with you that if the crank-shaft does not have to come out of the ship we will get an allowance from the bid. I am going to put on a timekeeper, as you suggested, for the purpose of getting that reduction.' That is about all of the conversation, except that Mr. Gray said, 'Thank you.' I think that is about all."

Carl E. Klitgaard, chief engineer on the Hilonian, and who had charge of the work attending the repairs, says that Putzar was timekeeper on the work.

Mr. Gray, the secretary of the United, denies emphatically that he ever made any suggestion to Capt. Matson that he would make a reduction of a couple of thousand dollars in his bid if the crank-shaft did not have to come out. Gray further testifies, on cross-examination, touching the subject of the contract, as follows:

"Q. And it was known at the time of the submission to you of the specifications that that would make some difference in the course of the work? A. Providing the specifications were complied with, yes; certainly it would make

a difference whether the shaft would come out or be left in position. Q. I say that was known to you at the time the specifications were submitted to you? A. Exactly. Q. Now, your bid of $11,749, as embodied in 'Christy Exhibit B,' included the removal of the crank-shaft in accordance with the original specifications, did it not? A. Yes; oh, yes. Q. What was the understanding about this undetermined matter of the taking of the crank-shaft out? A. Well, there was a timekeeper sent to the yards to look out for the job as a whole, and he was supposed to determine what the loss or what the saving would be. Q. And if there was a saving the Matson people would get the credit for it? A. Most assuredly they would have got the credit for it; that is what they put the timekeeper on the job for. Q. Now, is that your writing, Mr. Gray, upon here (pointing)? A. No, that is not my writing. Q. I refer to the following: 'This bid submitted on account of its being worth $250 to have vessel and (at) U. E. Works to complete work already contracted for in the shape of retubing donkey boiler and retubing Howden system, etc., per Capt. Saunders.' (This memorandum was noted on the bid in pencil.) A. No, that is not my writing. Q. But it was in accordance with your idea at the time, was it not? A. I told Saunders that—yes, that was the reason that we cut our figure. Q. Cut your figure from the former bid? A. Because I had quite a bit of work on there. I had that pump to install and all these jobs that were mentioned here. Q. And it was your desire to have the ship over there, and it was worth $250 in your judgment? A. It was worth $250 to get it over there. It would have cost me that, or probably more to have done it in some competitor's yard. Q. Was that your reason for coming down in your bid? A. That is the reason I cut the figure. Q. You remember the meeting in Capt. Matson's office when the bid submitted by you and the Risdon and the Union was rejected, do you not? A. It was rejected. Q. You were there, were you not? A. Whether he rejected that positively at that time, or not, I could not tell you. Q. Don't you remember that you waited and had a private talk with Capt. Matson after the other two men from the Risdon and Union had left? A. Well, I remember he took exception to the price at that time, and said he thought it was too high. Q. And don't you remember— A. (Intg.) That is where it rested. Q. And don't you remember at that time this timekeeper was suggested to keep track of the work so that you could find out what the reduction would be? A. It was generally understood there was going to be a timekeeper on the job, after he had come to the conclusion that they were not going to let it out on a contract; that was understood. Q. It was understood? A. After it was understood that they were not going to put it out on a contract we all understood at that time, we knew there was going to be a timekeeper on the job. Q. After who understood it was not going to be let out on a contract? A. After I and Matson and all of them; they came to that decision; they were not going to let it out on a contract. Q. Do you mean to say that this bid of August 2d, being 'Christy Exhibit B,' was not accepted by the Matson Navigation Company? A. He did not accept it. That is the reason he sent the timekeeper over there. Q. Answer the question directly—that bid was not accepted? A. No, he did not accept it. Q. He did not accept it? A. He did not accept it. Q. You are not confusing your statement with your first bid which is embodied in Christy Exhibit A of July 27th? A. He didn't accept that either. Q. He didn't accept either of them? A. No. Q. Will you please, now, Mr. Gray, tell me the circumstances under which that bid was rejected, the last bid, Christy Exhibit B? A. Matson made the statement that he was dissatisfied with the price and thought it should be done for less money. Q. That is what Capt. Matson said? A. That is what he told me, and he said he was going to send a timekeeper to the yards to get the benefit of whatever saving he could get on the job. Q. Saving on what job? A. Below this price; he claimed that that price was too high. Q. Did you say that you would do it for that money? A. Did I say I would do it for that money? If they stuck to the specifications, certainly. Q. And he said that he would not pay you that price? A. His idea was that it was too much. Q. I want to know what he said. A. He did not say he would not pay it. Q. What did he say? A. He said he was dissatisfied with it, he felt it was too high, and he was going to send a timekeeper to the yard to keep track of the time on the job. Q. And it was to be

a time and material job? A. Time and material job under those conditions. I told him, I said, 'If those specifications are adhered to, I will see that it don't cost any more than $11,749.' Q. In other words, that was an outside price? A. A limiting price. Q. It should not cost more than that? A. Not any more than that. Q. So, then, you and he did have a contract by which this work was to be done in strict accordance with the specifications not to exceed $11,749? A. Well, I told you what I said. I don't know as I have anything more to say regarding it."

Questioned further on the subject, the witness answered:

"It seems to me that I proposed to do a certain amount of work for a given sum, and Matson would not accept it, and he said he would put a timekeeper on and see if he could not save himself some money; it seems to me that answers it."

Still later he says:

"There was a timekeeper sent to the yards to look out for the job as a whole, and he was supposed to determine what the loss or what the saving would be."

That Putzar kept time on the work in making the repairs while in progress, there is no question, but he kept the time on the ship only, and not in the shop.

That there was an understanding between the parties respecting the repairs on the Hilonian prior to entering upon the work, there can be no doubt, and that the bid of August 2d was not accepted as made is equally certain. The minds of the parties did not come to rest on that basis. Capt. Matson thought the bid was too high, and on that account would not agree to it. It was uncertain whether the crank-shaft would have to come out and go to the shop. If not, it would make a difference in the amount of work to be done, and thereby reduce the consideration for doing the same. This may have had some bearing in inducing Matson not to accept the bid as made, but it was not, to our minds, the dominant cause that prompted his action in the premises. He was dissatisfied with the consideration as a whole, and was determined not to pay it, as he deemed it too high. The matter of the crank-shaft was discussed, and Capt. Matson insists that his company was to have a reduction in the price named in the bid, which it was estimated at the time would amount to about $2,000, if the crank-shaft did not have to come out, and that Putzar was put in as timekeeper for the purpose only of ascertaining the difference in cost in doing the work on that basis. Gray denies flatly that such was the purpose of having the timekeeper, but asserts that such timekeeper was employed exclusively by the Matson Company for the purpose of determining the cost of the work on a time and material basis, and that, if the work on such basis did not amount to as much as the bid, the Matson Company should have the benefit, but that in any event the amount of the bid should be the outside price for doing the work. Putzar did not confine his work in keeping time to the work on the crank-shaft only, but kept the time on the ship for the whole of the work done, in making the entire repairs.

We are satisfied from a review of the testimony, without going into details respecting the subject, that Putzar was in the sole employ of the Matson Company, that what he did as timekeeper was done

under the direction of that company, and that he was in no way or manner the employé or agent of the United. The fact that Putzar kept time on so large a proportion of the work, notwithstanding he did not keep time in the shop, is itself significant as an interpretation of the ultimate agreement of the parties with respect to the repairs. If the bid had been accepted as made, there would scarcely have been any necessity for the Matson Company to put a timekeeper on to check up the time consumed in doing the work. And so, if there was to be a reduction as respects the crank-shaft only, in case it did not have to go to the shop, there would have been no necessity of keeping the entire time on the ship. But the keeping of such time under the explicit direction of the Matson Company is consistent with Gray's understanding of what the contract was as finally understood between the parties. A further circumstance which seems to confirm Gray's understanding is that, according to the estimates made by Heynemann and Gardner, two expert witnesses called by the respondent to show the value of the entire services rendered, the value of the work omitted on account of not having to remove the crank-shaft to the shop was only $1,398.25, a sum greatly below the $2,000 which Matson claims was the sum that Gray agreed would be the probable difference.

Upon the whole, we conclude that the true understanding of the parties was that the United should do the work contemplated by the bid for a price not exceeding the consideration named therein, but that the Matson Company should put its own timekeeper on the work for the purpose of checking up the United as the work progressed, and that, if it was done for less than the sum named in the bid, the Matson Company was to have the benefit. In effect, the contract when concluded was that the work was to be performed on a time and material basis at its reasonable value, but that it should not cost the Matson Company more than the consideration named in the United's bid. This we firmly believe was the understanding of the parties when the work was entered upon by the United, and in the end we must determine how well the agreement thus concluded was adhered to by the parties, and, if departed from, the extent of such departure and the effect thereof.

As premised at the outset, the libelant has the burden of proof to establish its theory of the case, namely, that the work was done by mutual understanding, for what it was reasonably worth, with the consideration named in the bid as an upset price. We will now ascertain whether libelant has made a case under the evidence upon this basis, leaving for further consideration the question whether the parties have adhered to or departed from their agreement, and the effect of their action in this regard.

[2] To establish libelant's case upon this theory, it has introduced a vast number of time and material cards, as they are called, designed to show what was done as the work progressed, and certain time sheets kept by Putzar, as well as the accounts kept and made up and rendered by the United. The time cards are made up as follows: Every workman is given a shop number, and every job that comes

into the shop is given a job number. This number is painted on the work as it is sent out to the workmen, so that each workman may know upon what job he is called to do work. When the workmen enter upon their day's labor, each one is given a card, and each is required to make a record of his time at work upon the card given him. This he does by entering his shop number and his name in appropriate blanks, the job number upon which he may work during the day in a column headed, "Job Number," the hours worked on each job in another column headed, "Hours Worked," and the pieces worked upon in another column headed, "Article Worked on." Another column contains the heading "Piece Number." What use is made of this column does not appear. Thus, when the day's work is done and the card made out by the workman, it may show that the workman has employed his time on one, two, or more jobs, and always the time given to each job and the piece or article worked upon pertaining thereto. A card entitled, "Time Card," printed in brief of counsel for respondent, shows, "Shop No. 316," date illegible, "Name J. L. Chandler," "Occupation 23." In the column headed, "Job Number," appear the figures 5378, 5325, and 5295; opposite the first number in column headed "Hours Worked" the figure 1, opposite the second number the figure 4, and opposite the third the figure 4; opposite the first number in column headed, "Article Worked on," are found the words, "Circulator Eng.," opposite the second number, "Spring Bearings," and the third, "Main Bearings."

Thus is made up a complete record of what the workman has done during the day, and the job or jobs upon which he has employed his time. These cards are kept by the United, not only for keeping track of the work and the expense attending it done upon each particular job taken from others, but upon work done for itself, in order that it may be informed as to the cost attending the work. These cards, when made out, are handed at the end of the day's work to the timekeeper. In conjunction with this method of keeping the time of the workmen, each of them is required on entering the yard for his day's work to punch a time clock, which records the time of entry, and again when he leaves the yard, and thus is recorded the length of time that he has been engaged at work during the day. These clock cards are required to be signed by the men as they draw their pay. This operates as a check against the time reported by the men upon their time cards, and it is apparent that, in the total number of hours worked during the day, the time reported by the workmen upon their time cards and the clock records must agree.

Following a little further the manner of denoting the job numbers and checking up the time of the men, Robert Adamson explains it quite clearly. Adamson was a foreman in one of the departments, and his duty, among other things, was to keep track of the time of the men, check up their cards, and turn them in to the timekeeper. He relates that he is handed a printed order from the office with a list of work accompanying it, and when the work is brought into the shop from the ship he takes note of it to see that it is on the list. Finding it there, he puts the number of the job on it, and sees that it is taken

to the bench or lathe where the work is to be done upon it. The job numbers are contained in the printed order. Every separate boat under repairs is given a job number, one or more it may be, and it is by the job number that the officers and workmen are enabled to keep trace of the work that is being done on the particular boat or vessel. We quote here a little of Adamson's testimony:

"Q. That is, if there is one number you have one number for the ship, and if there are several numbers you have the several numbers. A. Several numbers, yes, and the different pieces are specified under that number, what jobs should be done, and what pieces are to be worked on, and what part of the machinery is to be worked on. That all comes under the heading for that. You see it will be stated what part of the machinery is to be worked on under a certain number. Well, all that part of the machinery that goes in that machine, that goes into the ship, is numbered according to that heading, under the heading of which it comes. Q. After you number it, what do you do with it? A. Get it delivered to the lathe, if it is to be turned, or planing machine, or whatever machine it is to be worked on; it is put there and goes to the charge of the man that is to work on it. Q. How is it put there, whether under your supervision, or how? A. Yes, I tell the man in the shop to deliver it to that machine, and I see that it is there, and I give the man his instructions about it. Q. You give the man his instructions? A. As to what is to be done. Q. That is, the man at the machine? A. Yes, sir. Q. What do you do with respect to the time or noting the time that the man at the machine takes the job and the time when he finishes it? A. I take note of when I give the man the job and I know when the job is finished, and the time it comes off that machine, and then I know what time he has been on it, I know how long it takes."

Adamson was enabled to recognize the time cards of the men over whom he had supervision in the main by his check marks found thereon in checking up the items, but by other means of identification also, and, being so recognized and identified, the cards were offered and admitted in evidence over objection. This is but an illustration as to how these time cards were proven.

As another illustration, George Allen was foreman blacksmith in the blacksmith shop. He checked up the time of his men every night, and recognized the cards by his signature upon them. And so of William Macdonald, chief draftsman, who also identified the cards by his signature, and of Charles Grotefend, foreman of the city shop, who distinguished the cards of his men by his initials, C. W. G. All the time cards offered in this way were objected to.

Along with these cards were offered in many instances the clock cards, they being identified by the same witnesses, which were also objected to by counsel for the respondent.

In a number of instances the men themselves were put upon the stand and identified their own time cards, in corroboration of the identification by the foreman.

Mr. Richard W. Curtis, who was chief clerk for the United, further describes the manner in which the accounts are made up. It was his duty to make all the charges and take care of the entire office force. That means all the timekeepers and clerical force on both sides of the bay. He had full charge of the timekeeping department, and departments in the yard, in so far that he kept in touch with every department regarding all the work going on in the yard, and the material that was being used in the different classes of work. In

the case of the Hilonian, as in other jobs, he looked after all the material and labor and kept in constant contact with the foremen of the different departments regarding the work. Respecting the time cards, he says:

"The time cards, after being checked up, were turned over to me each day, and I would look all the time cards over, and I would take these cards over to the yard, and upon any of them that I might find anything that was in doubt, or to my mind not satisfactory, I would call in the men and the foreman connected with that department, and question them regarding these cards and also the stock cards. I would then and there straighten out whatever difficulties might arise. Also regarding the timekeeper on the various ships, and also I might mention the 'Hilonian.' It was my duty to keep in constant contact with these timekeepers, and to check up with them daily as to the work performed on their ships, and correct any and all errors that might occur; in other words, make a daily adjustment with the timekeeper as to the labor performed on the ship."

He was then asked, "In the case of the 'Hilonian,' did you do that with Mr. Putzar, the timekeeper?" To which he replied, "Mr. Putzar was the timekeeper on the 'Hilonian,' and that being part of my duties, I checked up with him daily." The witness further testifies:

"After the jobs are finished it is my duty to take up the reports of each foreman; that is, I mean by the report, this list that was issued from the office that was given to the foreman to keep track of the work. I take these reports and after checking them up with the foremen consolidate that into a heading for the charge or the bill, and then they being of no further use to us we destroy them, because if we kept them all it would take a great deal of room, and secondly, as a general rule, they are very dirty and oily. Q. This heading is that the heading that appears at the head of the bill as seen on 'Exhibit No. 1' and the other exhibits attached to the complaint in this case (handing)? A. These headings are the result of the consolidation of the reports of the work furnished by the different foremen of the different departments of our yard. Q. What office do they perform as a record in the office of the United Engineering Works? A. They are the original record. It is the only record that we keep. Q. Now, with reference to the time cards and the material cards; what is done with them? A. The time cards and the material cards are turned in every day, and after they are all in they are, after being checked up daily by the different foremen, turned over to me, and I also go through them. In going through these cards I refer to the lists of the different foremen, and if I see anything that is wrong with the card, or that I think might be cloudy in any way, I refer to the foreman or the man on the job. After that is done, if there is a timekeeper on the job, he gets these cards to check up. Q. That is the ship cards you are speaking of? A. I am speaking of the ship cards, yes. Q. After he has checked them up, what becomes of them? A. After he has checked them up, and we arrive at a satisfactory settlement for the day's work, and the cards are duly checked, these cards are not kept.

"Q. You speak of the timekeeper checking them up. State whether or not in this case Mr. Putzar kept an independent record of the time. A. Mr. Putzar, to my knowledge kept a handbook, as all timekeepers do. What I mean by handbook is, they kept track of the men independently of our record. Then the cards were demanded each day by Mr. Putzar, and he checked them up with his handbook. I know this to be a fact, because I made it my business to ask Mr. Putzar each day if the cards were satisfactory, but in this case Mr. Putzar transcribed them onto the sheets and he checked them up on these sheets from his handbook. The time cards were then turned over to me with these sheets, and I checked the time cards with the sheets. Q. What did Mr. Putzar do in the way of certifying to the correctness of the sheets? A. Mr. Putzar had a form book and had a carbon sheet, and Mr. Putzar transcribed these cards onto the sheet. He would then sign the original, and turn

it over to me after being satisfactory both to himself and to me as to its correctness. Q. Now, with respect to the shop cards; what course would they go through? A. The shop cards, after being duly checked up by the foremen of the different departments, were turned in to the office. I would go over the shop cards with the timekeeper in the office. What I mean by going over them is this: I would take these cards and look over the lists of work and over the individual cards of the men, and check them up. If I saw anything that was wrong in any way or doubtful, I would call these men in. These cards were finally turned over to me then after due checking, and I segregated them and consolidated them in the charge that was rendered to the different ships, and to the charges rendered to the 'Hilonian' in this case. Q. What would finally become of those cards in case there was no dispute concerning them? A. If there was no dispute, and we did not hear anything regarding the bill but what was satisfactory, we did not keep these cards, because the accumulation was so great that we could not handle them, and they would be destroyed. Q. How does it happen, then, that you have in your possession the cards relating to this particular job? A. The cards in all cases are kept for a certain period. After that, if we do not hear any objection, we destroy them; but, if we hear that the parties concerned have any doubt as to any of the charges on the bill, we keep the card pertaining to that item or to that class of work. Q. The particular cards that have been offered in evidence in this case, who segregated them? A. The cards that were offered in evidence in this case I segregated myself personally. Q. And in whose possession were they up to the time of their being brought here? A. They were in my possession. Q. Is that the usual, ordinary, and customary course of keeping accounts of the United Engineering Works? A. Yes, sir; these cards, and the timekeeper, and this manner I have explained is the usual and customary course of keeping accounts of the United Engineering Works. Q. And the material tags? A. Yes, sir."

In further explanation of Exhibit 1, alluded to by the witness, it should be stated that it consists of 140 items descriptive of the work done, followed by an itemized statement of the material used, and the hours of labor performed on the job, and rate per hour charged. The account thus made up, under the heading designated, according to the witness, constitutes the original record; it being the only record kept. In this relation, it may be noted also that Curtis was enabled to recognize the time cards of some of the workmen who were not called and of others who testified in the cause.

In addition to the evidence thus adduced to establish libelant's case, libelant introduced the time sheets of Putzar, containing a record made by him of the workmen on the ship, and the time each was engaged as it pertained to the several job numbers designated relating to the repair work. This record was not entirely made up by Putzar. The sheets made up from September 17th on until the completion of the repairs are in the handwriting of Curtis, which Curtis explains was done at the request of Putzar. Putzar was unable to do the work for lack of time. But after the sheets were written up Putzar took them away, and on the following day returned them, stating they were correct, and signed them and returned the originals to Curtis. These time sheets were made up in duplicate, Putzar keeping one of them; the other, when signed by him, was delivered to Curtis for the United. The time sheets thus delivered to the libelant were received in evidence over the objection of respondent. But later in the examination of Curtis, the duplicates retained by Putzar were offered by respondent and received in evidence also.

It is claimed that Putzar did not keep an independent record from which to tabulate these sheets, but Curtis' testimony shows that he did, and he is corroborated by other witnesses. This independent record, if one was kept, should be in the hands of respondent. Putzar could have been called and the fact shown, if none existed, and the respondent not having called its own timekeeper leaves a presumption that the proof would not sustain its contention in that regard.

The materials required for the repairs are kept account of by the foremen of the different departments giving their written orders upon the storekeeper for each particular item of materials needed as the work is being carried on, and these are charged to the job numbers, so that it is readily ascertainable what material has been used in respect of each job number. The United has its storeroom where it keeps its supplies, with a storekeeper in charge, and the orders of the foremen are drawn upon the storekeeper and against these supplies. These orders bear their date and the job number, with a description of the articles or items of materials wanted, and a memorandum of what "used on," as "Hilonian Piston Rods," "Crank Bearings, Hilonian," "Rudder Hilonian," and the like, and are signed by the foreman giving the order, either by his initials or full name. These orders were identified in large numbers by the persons giving them, and were offered and received in evidence over objection.

As to the reasonableness of the work, Curtis testifies that it was usual, customary, and reasonable, and Gray that it was just under the conditions.

Now, the contention of respondent is that libelant has not made out its case even upon its own theory, and the strong grounds of that contention are that these time cards, the material and supply orders, and the Putzar time sheets were not competent evidence in support of libelant's case, or at least were not the best evidence, but that the men who had personal knowledge of the work done and materials furnished should have been called to establish the fact.

Beyond question, the Putzar sheets were competent evidence against respondent. They were written up by Putzar personally, or under his direction, and by him approved as correct. Putzar being the agent or representative of the respondent for the purpose of keeping time, and having kept the time of the men on the ship, his statements of account are binding on respondent as admissions made by it, and the Putzar sheets are therefore competent evidence to establish libelant's account.

As it otherwise pertains to the time of the men and the materials used in the repairs, it has long been established that original entries, made in the usual course of business, the entries having been made at the time the particular transactions were had, for the purpose of keeping account against the party to be charged, are competent evidence, of a secondary character, of the facts recorded by the entries. To render them competent, the person making the entries, and having primary knowledge of the transactions, must be shown to be dead or unavailable as a witness. But if the party making the entries is called to testify concerning them, and recognizes the entries to be his

or made with his knowledge of the fact, but has no independent recollection of the fact recorded, the original entries may be admitted, and constitute prima facie evidence for the consideration of the court or jury. 2 Wigmore on Evidence, §§ 1521, 1537; Merrill & Alderman v. Ithaca & Owego R. R. Co., 16 Wend. (N. Y.) 586, 30 Am. Dec. 130; Manchester Assurance Co. v. Oregon R. Co., 46 Or. 162, 79 Pac. 60, 69 L. R. A. 475, 114 Am. St. Rep. 863; Insurance Co. v. Weide, 9 Wall. 677, 19 L. Ed. 810.

In the present case the shop cards may well be regarded as original entries. They are not journal entries in the ordinary system used by business men and concerns in keeping their accounts, but they are individual entries in a card system devised for the purpose of keeping an expense account. Where the men making up the cards were not themselves called, their foremen were, who were practically as well acquainted with the facts recorded by the cards as the men. Neither the men nor the foremen were able to testify from independent recollection. Hence the cards were admissible as prima facie evidence of what they purport to state respecting the hours of work and the material used. Like proofs have been admitted in cases of much analogy to the present in the Seventh and Eighth Circuit Courts of Appeal. Mississippi River Logging Co. v. Robson, 69 Fed. 773, 16 C. C. A. 400; Wisconsin Steel Co. v. Maryland Steel Co., 203 Fed. 403, 121 C. C. A. 507.

The proofs further show that the account sued on, as it respects Schedule 1, was made up from these time and material cards and from the Putzar time sheets, and, having been so made up, we conclude the libelant is entitled to recover on the account, unless it be that the contract stands in the way of his recovery on this theory. Nor do we think that the testimony of Heynemann and Gardner is potent to overcome this conclusion. These men were both expert engineers, and have made an estimate of the cost of the repairs made on the Hilonian. The aggregate of the estimate is much less than libelant's demand. We think, however, that their estimate is less reliable than the statement of account by libelant for the reason that in making it up they had to rely wholly upon the representation of Klitgaard as to what repairs were made and the materials required to complete the work; the repairs having been fully completed and the ship turned over to respondent at the time. Being in this position, waiving the fact that Klitgaard was not himself under oath, it was impossible that they should have been fully advised in the premises so as to give a wholly reliable estimate of the costs of the work.

It being ascertained that the contract entered into was for making the repairs on a time and material basis at their reasonable worth, but with a limitation as to the ultimate cost, libelant was bound to do the work within that limitation unless relieved from the obligation by the assent of the respondent or the mutual concurrence of the parties. Many changes, modifications, and additions were made to the original contract. This is conceded. And the question is presented whether such modifications and changes have so destroyed the integrity of the contract as that it could no longer be performed in any part and the

segregation of prices made in conformity with the original intent and purpose of the parties. That is to say, notwithstanding the modifications and changes, whether the parties are still able to apportion the work done at the price agreed upon and that done on a quantum meruit basis, or whether under the conditions of the contract the prices are apportionable to the work done under and within the contract and that done without and beyond the contract.

It will be remembered that the specifications attending the contract for doing the repair work contained 15 different items. Now, following Siversen in his cross-examination. He says as to the first item:

"This work was done, and more work was done to the air-pump" than was specified.

And as to the further work:

"All parts of the air-pump was removed to the shop and put in the lathe to true up the faces. * * * And I think the air-pump bearing was bored out. * * * The part that the air-pump sits on was also bored out. * * * There were additional studs put into the condenser, under the holes."

As to specification No. 2, instead thereof a balance cylinder on low pressure was put in.

As to No. 3, that work was all done; and the same as to No. 4. But on redirect the witness Siversen says the work was done, but not in the way the specifications provided.

"The steel plates that are mentioned here were so corroded that it was concluded that we could not make a job of it by using them, and they were removed, and the guides were planed off on the back, and new and heavier steel plates were put on. * * * The shoes were made new; new shoes cast, and I think they were of a different pattern in some manner to what they had been before. * * * They were filled with metal (challenge metal), the part that goes up against the guide, and the part that goes up against the backing guide as well."

These changes were made after consultation with Putzar and Klitgaard.

As to No. 5, the witness says:

"There was some eccentric straps remetaled, but I don't remember which ones they were. I think though that the high pressure and the low pressure were among them, but I don't remember now if those straps were remetaled, or if there were brass liners cast for them; I think there was brass liners cast and placed in those straps. I might have that mixed up with some other job. I would not say, but I think there was some brass liners cast in semicircular form and screwed into the top half of the straps and fitted in that way, and also had to be offset on account of the liner from the valve stem to the eccentric not being fared. * * * I am not positive whether these brass liners, as I say, were put in there or remetaled, but I think it was the brass liners."

No. 6 was done and completed as specified.

No. 7 was not done as specified, but instead a bronze patch was put on and fitted for the bolts and pumped full of red lead putty. On redirect, the witness says No. 7 "was not done at all. * * * There was a patch put on the bed-plate, a bronze patch. Q. That is

an entirely different thing from what the specifications call for? A. Yes, entirely different from putting a column in, of course."

No. 8 was completed as specified.

No. 9 relates to the crank-shaft. "The work was all done with the exception of the removing of the crank-shaft and the boring of the bearings in place." And there was additional work. On redirect the witness further testifies that there is only one way to answer as to No. 9, and then proceeds to delineate the many particulars as to how the work was done.

No. 10, the work was done as specified.

No. 11, the work was all done, but other work was entailed in placing the plate "that was not originally calculated on."

No. 12 was done according to specification, but witness does not remember whether the bitumastic was covered with two inches of cement as called for.

As to No. 13, witness answered that he did not know. But on redirect, the witness Taylor says the work was all done "and a great deal more than the specifications covered." And as to this he testifies:

"Q. When the work was first pointed out to you to be done, was all the work to be done under that section 13 included that you did under that head? A. No, sir. Q. Why did you do so much more work under that head No. 13, from that which was originally pointed out as the work to be done under that? A. In the forepeak after it was filled with water and the bulkhead examined, it showed evidence of leakage around the ends of the stringers where they connect to the bulkhead, and I informed Mr. Christy of that fact, and they had a conference. * * * They decided to cut out the loose rivets and make up shoes and several other jobs. I don't recollect all that was done to that bulkhead."

As to No. 14, the witness Siversen does not know.

No. 15 was completed according to the specifications.

In corroboration of Siversen, Klitgaard, the chief engineer for respondent and the person who drew the specifications, says as to item No. 1 the studs on the air-pump were not enlarged as specified, "but additional studs were put in there."

As to No. 2, the work was not found necessary as called for in the specifications, but in compensation therefor it was agreed:

"That we would fit a 12-inch balance piston on top of the low-pressure valve pipe it up to the condenser and lengthen the valve stems, fit the nuts, etc., that were found necessary to fit the new conditions."

Mr. Wilhelmson, wrongly alluded to as Williamson in some parts of the testimony, denies that the new work was to be done as compensation for the old, or that any agreement of the sort was entered into. And Gray denies that any such agreement was made.

The witness Klitgaard further testifies that item 3 was completed as specified.

As to No. 4, he says:

"Instead of putting in these extra screw-stays which it calls for here, heavier plates were put on the back of the guides. Instead of reconstructing the H. P. and L. P. shoes as the specification calls for, there were new castings made."

And other changes are noted. As to this also, he further states that he and Wilhelmson agreed that the new work was to be in compensation for that specified. Again, Wilhelmson denies the agreement; so does Gray.

As to No. 5, Klitgaard admits the change practically as delineated by Siversen, but claims, as before, that the new work was done, under agreement with Wilhelmson, as compensation. This alleged agreement Wilhelmson and Gray both emphatically deny.

Item No. 6 Klitgaard affirms was completed as specified.

As to No. 7, he says:

"The iron column which was referred to in this item was not put in, but instead of that, in recompense, a bronze patch was fitted on."

Wilhelmson and Gray both deny the "recompense" agreement.

No. 8 was completed as specified.

As to No. 9 there is no dispute. The crank-shaft did not go to the shop, and certain other work was done not anticipated.

No. 10 was completed as specified, and No. 11 also.

"No. 12 was completed with the exception that the engine-room tank-tops were not covered with cement. She was cemented under the boilers only."

No. 13 Klitgaard says was completed as specified.

No. 14:

"The windlass was not repaired, after a consultation with Capt. Saunders and Mr. Wilhelmson; we found it was not necessary; and instead of that, as recompense, we put two channel iron supports under the break of the forecastle head."

This agreement is again denied by Wilhelmson and Gray.

No. 15 was completed.

There is some corroboration of Klitgaard's testimony respecting the supposed "compensation" agreements with respect to the exchange of work, by Capt. Saunders, Kinsman, and possibly one or two others. But upon a careful balancing of all the testimony upon the subject, we are fully satisfied that no such agreements were entered into or existed. It is unnecessary to attempt to analyze the testimony relating thereto. It is so voluminous that it is well-nigh impossible to do it were we so disposed. The parties were in accord that the changes, modifications, and additions should be made as the work progressed and the necessity or desirability therefor developed; but the agreements for exchange of one piece of work for another as claimed by respondent are not established by the weight of the evidence. After all, this conclusion but accords with respondent's statement in its answer, namely:

"That during the progress of said work it was mutually agreed that certain omissions, modifications, and changes in said specifications and the work to be performed under said contract should be made, and the same were made and omitted without an agreement between the parties as to the value of said omissions, changes, and modifications. That certain work and materials were also furnished to said steamer by said libelant during said period of time between August 23 and September 25, 1909, in addition to the work and materials called for by said contract, and for which no price was agreed upon other than that the same would be compensated for at its just and reasonable value."

It must be now fully apparent that the contract specifying a lump sum as an upset price was so departed from that it is wholly and utterly impossible to apportion the contract price to the work which was done in pursuance of the contract and that which was done to take the place of and over and beyond the specifications. There can be no adjustment whatever on such a basis.

The respondent has wholly failed to sustain its contention, and it results that the libelant is entitled to recover.

Some questions have arisen respecting shop time and overtime charges. By reason of the demands of the laborers' union, the hours of service per day were reduced; but the same wages per day were required to be paid notwithstanding. This all transpired before the present controversy arose. But in getting the result of a man's time and consequently the wages due him, the hours were increased above those actually served and the rate per hour was lessened. The example given by counsel for libelant is very apt. A person working 8½ hours is credited with 10 hours' service at a rate of 65 cents per hour, resulting in a day's wage of $6.50, instead of being credited with 8½ hours' service at the rate of $.7644 plus per hour, which results in the same thing, or a day's wage of $6.50. The charge was the same in either event, and nobody has been hurt by the peculiarity of the bookkeeping. The overtime query is explained upon a like basis.

Beyond this, some miscellaneous irregularities are attempted to be pointed out; but, without following them in detail, it is sufficient to say that they do not affect the cause at its final outcome, and we conclude that libelant is entitled to recover the entire amount claimed by its first cause.

As to the second cause of libel, after a careful examination of the testimony, we readily concur with the findings of the trial court.

Objection is made to the allowance by the lower court of costs to libelant. This was a matter resting within the sound discretion of the trial court, and it is not apparent that there has been any abuse of that discretion.

So of the interest which libelant here claims on the unliquidated demand. We think the trial court properly disallowed the same.

The decree of the court below will be affirmed, with costs on appeal to the appellee.

COLUMBIA BOX CO. v. SAUCIER.

(Circuit Court of Appeals, Eighth Circuit. March 27, 1914.)

No. 4004.

1. COURTS (§ 366*)—UNITED STATES COURTS—STATE LAWS AS RULES OF DECISION—CONSTRUCTION OF STATE STATUTES.

A decision by the highest court of a state that a state statute requiring the guarding of machinery abolished the defense of assumption of risk by the employé is binding upon the federal courts, even though the statute contains no express provision to that effect, but the conclusion was

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

reached by the state court by a consideration of the language and purpose of the act in the light of general principles of law.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 954–957, 960–968; Dec. Dig. § 366.*

State laws as rules of decision in federal court, see notes to Wilson v. Perrin, 11 C. C. A. 71; Hill v. Hite, 29 C. C. A. 553.]

2. MASTER AND SERVANT (§ 204*)—INJURIES TO SERVANT—ASSUMPTION OF RISK —STATUTE.

Rev. St. Mo. 1909, § 7828, requiring an employer to guard all dangerous machinery when possible, as construed by the highest courts of that state, abolishes the defense of assumption of risk by the employé.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 544–546; Dec. Dig. § 204.*

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

In Error to the District Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

Action by Etienne Saucier against the Columbia Box Company. Judgment for the plaintiff, and defendant brings error. Affirmed.

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.

John C. Robertson, of St. Louis, Mo., for defendant in error.

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

HOOK, Circuit Judge. Etienne Saucier, an employé of the Columbia Box Company in its factory at St. Louis, Mo., whose duty was to pick up and carry away the scraps of wood which fell from the sawing tables, lost his balance on the slippery floor, and in an effort to regain himself his arm came in contact with a rapidly revolving circular saw and was severed. He sued the company for damages and recovered judgment. In his petition he counted specifically upon the failure of the company to comply with a statute of Missouri (section 7828, R. S. 1909) requiring that dangerous machinery "be safely and securely guarded when possible," also upon its negligence with respect to the condition of the floor. No point is made here as to the latter. The saw, like others there, ran perpendicularly through the center of a table with half its width above the top. It was dangerous and could have been, but was not, guarded. Though Saucier's employment did not include work at the table with the saw, he knew the saw was there, was in motion, and was unguarded.

[1] As stated by counsel for the company:

"The sole question involved in this case is whether the plaintiff Saucier assumed the risk of injury that might result from the unguarded condition of the saw by which his arm was cut off."

Counsel relies on St. Louis Cordage Co. v. Miller, 61 C. C. A. 477, 126 Fed. 495, 63 L. R. A. 551, and the other cases following it which hold that, though a state statute requiring the employer to safeguard dangerous machinery is violated, the employé assumes the risk if, knowing the danger, he continues at work. But if the highest judicial

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

tribunal of the state has declared that the statute has abolished the defense of assumption of risk in such cases, obviously it must be so regarded in the courts of the United States. And this is so though the statute, as in the case at bar, contains no express words to that effect, but the conclusion of the state court is reached in its application and by a consideration of its language and purpose in the light of general principles of law. In Williams v. Gaylord, 186 U. S. 157, 163, 22 Sup. Ct. 798, 800, 46 L. Ed. 1102, there was an attempt to distinguish between the construction and the application of a state statute by a state court and an assertion that the latter is not binding upon the courts of the United States. The Supreme Court said:

"We are unable to accept the distinction. To accept it would deprive the state courts of the power to declare the implication of state statutes, and confine interpretation to the mere letter. The Supreme Court of California declared the effect of the act of 1880 as deduced from the language and purpose of the act, and this was necessarily an exercise of construction. The very essence of construction is the extension of the meaning of a statute beyond its letter, and it can seldom be done without applying some principle of law general in some branch of jurisprudence, and if whenever such application occurs the authority of the state courts to interpret the statute ceases, the federal tribunals, instead of following, could lead those courts in declaring the meaning of the legislation of the states."

[2] Both the Supreme Court and the Courts of Appeals of Missouri in construing and applying the statute involved in this case and other similar legislative acts have announced the following conclusions which we believe to be the settled doctrine in that state: A statute imposing upon employers specific duties for the safeguarding of dangerous machinery, appliances, and places of labor extends to a field not covered by general principles of law in which, without the statute, the duties would not exist and their omission would not be negligent. Such statutes are not solely for the individual benefit of the employés, but proceed also from broad considerations of public policy—the interest of the state in the protection of the lives and limbs of its citizens. Partly for this reason a violation is sometimes, as by a section of the statute at bar, made a public offense. By construction of such statutes a cause of action is given for disobedience resulting in injury equally as if given in express terms. Negligence need not be proved except as failure to comply with the law may be so regarded or so termed. Contributory negligence is a defense as in cases under general rules of law. Assumption of risk rests upon an implied contract between employer and employé. The positive command of the statute to safeguard cannot be defeated by an implication of a contract between the employer and employé that the latter shall assume the risk resulting from the former's disobedience. But there is a qualification of the doctrine of assumption of risk which does not generally obtain elsewhere. It is that if the employé remains at work when the danger is so glaring and imminent that no prudent man would do so it is regarded as a case of contributory negligence. In other respects the phrase "assumption of risk" has the same meaning as elsewhere. The qualification mentioned is not material in the case at bar. Only those cases in the Supreme Court of Missouri which bear most directly upon the question of assumption of risk in connec-

tion with the violation of a legislative act need be referred to. It may be said at this point the section of the revised statutes in question is a revision of section 3 of the act of April 20, 1891 (Laws 1891, p. 160), which required the guarding of belting, shafting, gearing, and drums. In the revision the words "machines" and "machinery" were inserted. A decision under the old section on the matter in hand would be as authoritative as one under the new.

In Durrant v. Mining Co., 97 Mo. 62, 10 S. W. 484, the statute violated required operators of coal mines to provide certain safety devices and gave a right of action for injury occasioned by willful violation. It was urged that plaintiff's knowledge of defendant's failure would defeat the action. The court said: "Such a declaration of law would in effect nullify the statute."

Lore v. American Mfg. Co., 160 Mo. 622, 61 S. W. 678, involved the statute now before us prior to its revision. The plaintiff slipped and fell on a slippery floor, and her hand and arm were crushed by the cogs of gearing defectively guarded. The condition of the floor was put aside as not the sole cause of the injury, and a recovery was sustained on the ground that defendant had not complied with the statute. The trial court had denied defendant's request for the following instruction:

"If the jury believe from the evidence that the condition of the guard at and prior to the time of plaintiff's injury was apparent and obvious to her, then it was one of the risks which she assumed in entering defendants service, and plaintiff cannot recover for any injury caused by the condition of the guard."

This case is cited in Missouri as authority for the doctrine that there is no assumption of risk as against the command of the statute, but a careful reading of it shows consideration was given to plaintiff's brief period of employment before the accident, though if the rule of assumption of risk was to be recognized that consideration was plainly for the jury.

In Butz v. Construction Co., 199 Mo. 286, 97 S. W. 897, the petition charged that the direct cause of plaintiff's injury was defendant's violation of a city ordinance requiring certain safety measures in construction of buildings. The Supreme Court said:

"That the defendant was guilty of a violation of the ordinance in regard to this floor on which the plaintiff was required to work in having it in the condition that it was at the time of the plaintiff's injury is not disputed; and that the plaintiff did not assume the risk to him by reason of that condition, arising from the failure of the defendant to discharge the duty imposed upon it by the ordinance, is conceded in deference to a long line of decisions by the court."

Of course a court might well forbear discussing a principle of law upon concession of counsel, but it would not for that reason announce or apply one of which it did not approve.

Huss v. Heydt Baker Co., 210 Mo. 44, 108 S. W. 63, arose under the statute before us prior to its revision. There also the plaintiff slipped upon a greasy floor and his hand was thrown into unguarded cog wheels. It was, however, his duty to attend to the condition of

the floor and a neglect of it was made the subject of an instruction on contributory negligence. The court said:

"The plea of assumption of risk may rest upon a different basis, and we do not discuss it, for the reason that, while the court refused to strike out such plea in the answer, yet, when the case was submitted to the jury, the instructions submitted no such issue."

Simpson v. Witte Iron Works, 249 Mo. 376, 155 S. W. 810, is the latest case in the Supreme Court of Missouri to which our attention has been directed. Like the case here it involved section 7828 of the Revised Statutes. The court said:

"The particular section in judgment in this case imposes a positive duty on the part of the employer to do two things: (1) To provide safe and secure guards when possible for certain agencies of motion and power 'when so placed as to be dangerous' to employés. * * * If these statutory directions are obeyed, then the employer is not liable for injuries occasioned by such agencies to such employés. If they are not obeyed, then the employer's disobedience is an act of negligence, and he is responsible for any and all injuries directly caused by such failure, saving the defense of contributory negligence. Lore v. American Mfg. Co., 160 Mo. 608, 61 S. W. 678; Millsap v. Beggs, 122 Mo. App. loc. cit. 5, 6, 97 S. W. 956. The responsibility of the employer arises in such cases not only to the injured employé but to the state, for other sections of the act make his disobedience of any of its provisions (including the one under review) a misdemeanor punishable to the extent provided in such sections. R. S. 1909, §§ 7846–7851, inclusive. This double liability is imposed by the general tenor of the act and relates to every requirement contained in any provision of any valid section of the factory act."

The decisions of the Missouri Courts of Appeals, inferior to the Supreme Court, though not controlling (Federal Lead Co. v. Swyers, 88 C. C. A. 547, 161 Fed. 687), may be noticed because they show complete harmony in the appellate courts of that state upon the question here. Their language is clear, direct, and positive. Bair v. Heibel, 103 Mo. App. 621, 77 S. W. 1017; Stafford v. Adams, 113 Mo. App. 717, 88 S. W. 1130; Lohmeyer v. St. Louis Cordage Co., 137 Mo. App. 624, 119 S. W. 49; Collins v. Paper Mill Co., 143 Mo. App. 333, 127 S. W. 641; Austin v. Shoe Co. (Mo. App.) 158 S. W. 709.

The above conclusion makes it unnecessary to consider whether Saucier, whose work was not with the saw but merely in the vicinity of it, must have appreciated it was dangerous to him, nor need we consider the request that we review the former decisions of this court on the subject.

The judgment is affirmed.

POPE, District Judge, concurs in the result.

UTZ & DUNN CO. et al. v. REGULATOR CO. et al.

(Circuit Court of Appeals, Eighth Circuit. March 27, 1914.)

No. 3936.

1. BANKRUPTCY (§ 76*)—INVOLUNTARY PROCEEDINGS—QUALIFICATION OF PETITIONERS—ESTOPPEL.

Creditors who, after the making of a general assignment in good faith by their debtor with knowledge of the facts, assented thereto, and assigned their claims to the assignee, which sold the property and incurred expense on the faith of the assent of the creditors generally, were estopped to join in a petition in bankruptcy against the debtor alleging the assignment as the sole act of bankruptcy, and the estoppel extends to purchasers of their claims who bought at the instance and with the money of another creditor for the sole purpose of joining it in the petition to make the required number.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 50, 56, 97, 99, 100; Dec. Dig. § 76.*]

2. JUDGES (§ 56*)—DISQUALIFICATION TO ACT—WAIVER—CONSENT OF PARTIES.

Judicial Code, § 20 (Act March 3, 1911, c. 231, 36 Stat. 1090 [U. S. Comp. St. Supp. 1911, p. 133]), which requires a district judge when having any interest in a cause, etc., "on application by either party" to take steps to secure the assignment of another judge to hear the case, does not prohibit a judge from acting nor declare his judicial action void merely because of the existence of disqualifying ground, and where his interest in the matter to be determined is slight, and neither party objects, but both request him to proceed to avoid delay, he may properly and legally do so.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 235–245; Dec. Dig. § 56.*]

Appeal from the District Court of the United States for the District of Utah; John A. Marshall, Judge.

In the matter of the Regulator Company, alleged bankrupt, and others. The Utz & Dunn Company and others, petitioning creditors, appeal from an order dismissing their petition. Affirmed.

R. N. McConnell, of Los Angeles, Cal., for appellants.

Benner X. Smith, of Salt Lake City, Utah (Frank B. Stephens and Robert B. Porter, both of Salt Lake City, Utah, on the brief), for appellees.

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

HOOK, Circuit Judge. This is an appeal by petitioning creditors from an order of the District Court refusing to adjudge the Regulator Company, a mercantile corporation of Utah, a bankrupt. The sole act of bankruptcy charged was that the bankrupt had made a general assignment for the benefit of creditors. It was necessary that at least three creditors petition for the adjudication. Section 59b, Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 561 [U. S. Comp. St. 1901, p. 3445]). Three creditors petitioned, namely, the Utz & Dunn Company, W. F. Bland, and Ernest Chambers. Bland and Chambers were not originally creditors, but were vendees of Worms & Loeb and the Mitchem Mill Remnant Company to whom the bankrupt was indebted

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

in small sums. In order to secure the required number of petitioners, the attorney of Utz & Dunn Company bought their claims, caused them to be assigned to Bland and Chambers, who were his salaried employés, and charged the cost to their accounts on his books. At the trial of the petition the court held that the vendors Worms & Loeb and the Remnant Company had estopped themselves from questioning the assignment for the benefit of creditors and that the disability extended to their vendees, thus leaving but one qualified petitioning creditor.

[1] The assignment was made April 25, 1912, to the Utah Association of Credit Men for the equal, pro rata benefit of all creditors without preference or priority except as provided by law. The petition in bankruptcy was filed July 15, 1912. In the interval between the two instruments the circumstances occurred upon which the ruling of estoppel was based. When the assignment was made, the assignee at once took possession of the property, sent notices to the creditors outlining the policy of liquidation, and requested the creditors severally to assign their accounts to it. Worms & Loeb and the Remnant Company each responded by sending a statement of account and a written assignment of it to the Association of Credit Men containing authority to enforce payment and to settle, compromise or adjust at their pro rata share of expense. Other creditors did likewise. In the letters transmitting the accounts and assignments Worms & Loeb asked the assignee to protect their interests and the Remnant Company asked to be kept posted. On May 8, 1912, the assignee mailed to the creditors including the two just named a synopsis of an inventory of the property and a letter generally descriptive of it, and inviting proposals to purchase on the 18th. The attorney for Utz & Dunn Company which afterwards became the principal petitioner in bankruptcy went to Salt Lake, Utah, to attend the sale. His actions there were in harmony with the assignment and the plans of the assignee. He bid for the property both in writing and verbally, but all bids were rejected by the assignee. He then asked and obtained from the assignee an option for a fixed period to purchase the property at a specified price, and on May 24th, within the life of the option, he closed it by acceptance in writing. For some reason, which does not appear, the purchase was not consummated. The attorney claims that as regards his bids and the acceptance of the option he acted for himself personally and not for his client Utz & Dunn Company. He was shown a list of creditors and was advised that most of them, including Worms & Loeb and the Remnant Company, had already assigned their accounts to the assignee. The property was then sold to another purchaser for about $1,000 less than the sum fixed in the option. A committee of creditors acting in conjunction with the assignee approved the sale. About the time and after Worms & Loeb and the Remnant Company assigned their claims to the assignee, the latter incurred and paid costs and expenses of administering the trust amounting to about $1,000 including $600 paid to preserve an advantageous and valuable lease. The attorney for Utz & Dunn Company purchased the accounts of Worms & Loeb and the Remnant

Company July 9, 1912, and caused them to be assigned to his employés Bland and Chambers solely to qualify them as petitioners in the bankruptcy proceeding begun July 15th. No notice of this second assignment was given the assignee before the petition in bankruptcy was filed. The original assignment for the benefit of creditors was made in good faith, and there was no complaint of fraud or that the assignee was not administering its trust fairly, economically, and expeditiously. The expenses and trouble of the assignee would have been paid and incurred had not Worms & Loeb and the Remnant Company transferred their accounts to it; the assignee acted not in reliance on those transfers but upon a general consideration of the whole situation of which the transfers were a part. However, the two creditors joined the others in approving the assignment and their affirmative conduct, which was more than mere acquiescence, was an assurance to the assignee that they chose it to administer the estate in preference to a resort to proceedings in bankruptcy. We think the trial court was right in holding the two creditors precluded from setting up the assignment as an act of bankruptcy and that their disability extended to their subsequent vendees Bland and Chambers. The case is not one of mistake in choice of inconsistent remedies as in Bierce v. Hutchins, 205 U. S. 340, 27 Sup. Ct. 524, 51 L. Ed. 828, and Nauman v. Bradshaw, 113 C. C. A. 274, 193 Fed. 350; but it is an attempt by two of a number of creditors to use a lawful act of their debtor which they had approved and confirmed with full knowledge of all the circumstances and in the carrying out of which they had joined, as the reason and ground for an antagonistic proceeding. Had the assignment been fraudulent, or had they been deceived or denied the opportunity of free choice, the case might be different. An assignment for the benefit of creditors is not void. It is not even voidable in the sense of an unauthorized or irregular act that may be ratified or a wrong that may be condoned. It is valid and effective until displaced by the superior force of proceedings under the act of Congress. Randolph v. Scruggs, 190 U. S. 533, 537, 23 Sup. Ct. 710, 712 (47 L. Ed. 1165):

"There is no objection to a debtor's distributing his property equally among his creditors of his own motion, if bankruptcy proceedings do not intervene."

Worms & Loeb and the Remnant Company should be held to their assent and participation in the assignment out of consideration for the other creditors who joined them in that course, the assignee who proceeded with the liquidation of the estate, and the purchaser at the assignee's sale. The rule of estoppel in such cases is well settled. In re Hanyan, 104 C. C. A. 667, 181 Fed. 1021; s. c. (D. C.) 180 Fed. 498; Stroheim v. Perry & Whitney Co., 99 C. C. A. 68, 175 Fed. 52; Canner v. Webster Tapper Co., 93 C. C. A. 541, 168 Fed. 519; Moulton v. Coburn, 66 C. C. A. 90, 131 Fed. 201; Clark v. Henne & Meyer, 62 C. C. A. 172, 127 Fed. 288; Simonson v. Sinsheimer, 37 C. C. A. 337, 95 Fed. 948; In re Romanow (D. C.) 92 Fed. 510.

[2] The assignee for the benefit of creditors intervened and joined the bankrupt in resisting the petition in bankruptcy. During the trial the assignee proposed to prove some claims which had been assigned

to it by creditors, and it was then brought to the attention of the district judge that a certain Utah corporation was a creditor and had transferred its account to the assignee. He promptly said he was a stockholder in that corporation and if it was to come into the controversy he was disqualified and could not hear it. The matter was raised alone by the judge, and to avoid his objection, and so that he would continue with the trial, counsel for both parties agreed that the corporation mentioned be withdrawn "from this controversy." No further reference was made to the matter at the trial, nor is it the subject of an assignment of error. It is now for the first time contended here that the judge was wholly disqualified and that the order appealed from is void. Section 20 of the Judicial Code provides that:

"Whenever it appears that the judge of any district court is in any way concerned in interest in any suit pending therein, or has been of counsel or is a material witness for either party, or is so related to or connected with either party as to render it improper, in his opinion, for him to sit on the trial, it shall be his duty, on application by either party, to cause the fact to be entered on the records of the court; and also an order that an authenticated copy thereof shall be forthwith certified to the senior circuit judge for said circuit then present in the circuit; and thereupon such proceedings shall be had as are provided in section fourteen."

Section 14 provides for the assignment of judges from other districts in enumerated cases. Section 20 is a revision of the Act of March 3, 1821, c. 51, 3 Stat. 643, Rev. Stat. § 601 (U. S. Comp. St. 1901, p. 484), but without change relevant here. It, with section 21 on personal bias or prejudice, covers the subject of disqualification of judges of the District Courts of the United States and controls the question before us. Like the statutes in some states, it does not prohibit a judge from acting nor declare his judicial action void merely because of the existence of disqualifying ground. Its operation is made to start "on application by either party," upon which the fact is entered on the record and proceedings follow for another judge. The matter is left to the parties litigant, and if they will not act then to the conscience of the judge. Where the parties desire him to continue, his sense of propriety will in most cases save him from an equivocal position. The statute proceeds upon a recognition of the fact that the interest of a judge, his relationship or connection, prior professional representation, or knowledge of facts in issue, may at times be so slight or inconsequential that the rights of the parties would be best subserved by his proceeding with the cause with their consent. Postponement and delay for slight ground might work denial of justice. Experience shows that where there is real reason judges are generally the first to discover and insist upon their disqualification. The confidence in them, rarely abused, is shown by the provision of section 20, which expressly commits one of the grounds to their own judgment. The law has been on the statute books of the United States for nearly a century, and the noticeable dearth of decisions under it indicates that cause for difference or controversy has seldom been given.

Spencer v. Lapsley, 20 How. 264, 15 L. Ed. 902, arose under the old statute which authorized the District Judge to certify the cause in

certain contingencies to the most convenient circuit court in an adjoining state. Such a certification on motion of the plaintiff was attacked by the defendant. The Supreme Court said:

"The act of Congress proceeds upon an acknowledgment of the maxim 'that a man should not be a judge in his own cause,' and requires a judge found in that predicament, on motion of either party, to make an order for the removal of the cause to another competent jurisdiction. No other order in this cause was made by the District Judge, and he was not authorized to act under the statute, except on motion, and when the motion was made the order was entered."

Consent of the parties will authorize a judge subject to this statute to continue in the exercise of jurisdiction. Coltrane v. Templeton, 45 C. C. A. 328, 106 Fed. 370. See In re Eatonton Electric Co. (D. C.) 120 Fed. 1010. In some jurisdictions there is by statute an absolute prohibition without exception against action by judges in interest or relation; in others, the parties are expressly authorized to consent; and in some the interests or relations are merely named as grounds of disqualification. Similar to the first of these is the prohibition in section 3 of the Court of Appeals Act of March 3, 1891, c. 517, 26 Stat. 827 (U. S. Comp. St. 1901, p. 548):

"That no justice or judge before whom a cause or question may have been tried or heard in a District Court, or existing Circuit Court, shall sit on the trial or hearing of such cause or question in the Circuit Court of Appeals." Judicial Code, § 120.

Moran v. Dillingham, 174 U. S. 153, 19 Sup. Ct. 620, 43 L. Ed. 930, and American Const. Co. v. Railway, 148 U. S. 372, 13 Sup. Ct. 158, 37 L. Ed. 486, involved the application of this statute. In McClaughry v. Deming, 186 U. S. 49, 22 Sup. Ct. 786, 46 L. Ed. 1049, there was a judgment of a tribunal organized contrary to the express direction of the law. The rule there recognized is that "a judge, who is prohibited from sitting by the plain direction of the law, cannot sit, and the consent that he shall sit gives no jurisdiction." These cases are not in point here. It has frequently been held by courts of the states on general principles that, where there is no statute prohibiting the judge from acting or declaring his action void, the action may be erroneous but is subject to consent or waiver. Moses v. Julian, 45 N. H. 52, 84 Am. Dec. 114; Stearns v. Wright, 51 N. H. 600; Crosby v. Blanchard, 7 Allen (Mass.) 385; L. & N. Ry. Co. v. Taylor, 93 Va. 226, 24 S. E. 1013; Jewett v. Miller, 12 Iowa, 85; Stone v. Marion County, 78 Iowa, 14, 42 N. W. 570; In re Taber, 13 S. D. 62, 82 N. W. 398; Barnes v. McMullins, 78 Mo. 260; Shope v. State, 106 Ga. 226, 32 S. E. 140; Hilton v. Miller, 5 Lea (Tenn.) 395.

The judge below was confronted by his natural desire on the one hand, and his official duty and the desire of the parties on the other. He would have failed in duty had he renounced a jurisdiction imposed by law, however disagreeable. The parties had come with their witnesses and were in the course of trial. His concern in the litigation which developed was remote, almost trivial. He was not a party to the proceeding, nor was the creditor in which he had a stockholding interest a party by name. The legal title and control of its account

had been transferred to the assignee for the benefit of creditors. Its account was not in dispute; the real question at the end was where or by whom the estate of the debtor should be administered—the court of bankruptcy or the assignee for the benefit of creditors. With full knowledge of the facts, the parties desired him to proceed; neither filed the application prescribed by the statute. Though the form of withdrawal of the creditor did not change the situation, we think it was the duty of the judge to go on with the trial.

The order is affirmed.

BLANTON v. UNITED STATES.

CHINN v. SAME.

(Circuit Court of Appeals, Eighth Circuit. March 16, 1914.)

Nos. 3945, 3946.

1. POST OFFICE (§ 48*)—OFFENSES AGAINST POSTAL LAWS—INDICTMENT—SUFFICIENCY.

An indictment charging a scheme by which defendants, well knowing the requisites of a valid and vendible soldier's additional homestead entry right, should make or procure false and fraudulent affidavits and assignments, and then, representing the statements therein to be true, offer them for sale and sell them as valid with a guaranty which they did not intend to fulfill of their validity and that if they proved defective they would refund the money paid, replace the papers with others, or furnish further proofs, and which further negatived the validity of such pretended rights and evidences and the truthfulness of the statements and representations and charged that it was all done to secure money from persons named and the general public without giving or intending to give anything of equivalent value or to refund the money or replace the worthless papers with genuine ones, and that, in the execution of such scheme, they mailed a letter in a post office, signed by one of the defendants and addressed to a person named, a copy of which was set forth, sufficiently charged a use of the mails in aid of a scheme to defraud or obtain money by false pretenses in violation of Pen. Code, § 215 (Act March 4, 1909, c. 321, 35 Stat. 1130 [U. S. Comp. St. Supp. 1911, p. 1653]).

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 67–80; Dec. Dig. § 48.*]

2. POST OFFICE (§ 35*)—OFFENSES AGAINST POSTAL LAWS—USE OF MAILS TO DEFRAUD—SOLDIER'S SCRIPT—"SCHEME TO DEFRAUD."

A scheme to sell false and worthless instruments appearing on their face to be genuine "soldier's script" or the paper evidences of soldiers' additional homestead entry rights, consisting of an affidavit as to the right and an assignment thereof, with a copy of the soldier's discharge, in which a large traffic has grown up, is a scheme to defraud or obtain money by fraudulent pretenses within Pen. Code, § 215 (Act March 4, 1909, c. 321, 35 Stat. 1130 [U. S. Comp. St. Supp. 1911, p. 1653]), prohibiting the use of the mails in aid of such schemes, notwithstanding the lack of official origin of such script or that false swearing would not constitute perjury, since, though the rights to which they relate come from the government and the government officials make their own investigations when they are attempted to be exercised, such affidavits and assignments have a value in lawful private traffic according to customary accepted standards.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. § 55; Dec. Dig. § 35.*]

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

3. CRIMINAL LAW (§ 423*)—EVIDENCE—ACTS OF CONSPIRATORS.

On a trial for using the mails in aid of a scheme to defraud by selling false and worthless instruments as genuine soldier's script, where, though it appeared that those jointly indicted pretended to act independently, one of them conducting the correspondence with old soldiers, a second procuring from them or their widows false affidavits and assignments, and a third pretending to purchase the instruments so obtained and resell them, the evidence justified the jury in believing that there was a general scheme to defraud in which all took part and that the effort to make their acts appear independent was a pretense, the evidence as to what each did was properly admitted, though no conspiracy was charged, as a joint scheme to defraud, with acts to effectuate it, has the features of a conspiracy.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 989–1001; Dec. Dig. § 423.*]

4. POST OFFICE (§ 35*)—OFFENSES AGAINST POSTAL LAWS—USE OF MAILS TO DEFRAUD.

Where defendants, engaged in a scheme to defraud by selling worthless instruments as genuine soldier's script, also bought and sold valid script, the depositing in the mail of a letter advertising the business and soliciting correspondence on the subject without describing any particular homestead right violated Pen. Code, § 215 (Act March 4, 1909, c. 321, 35 Stat. 1130 [U. S. Comp. St. Supp. 1911, p. 1653]), forbidding the use of the mails in aid of schemes to defraud, though it did not appear that the script afterwards sold to the addressee was fraudulent.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. § 55; Dec. Dig. § 35.*

Nonmailable matter, see notes to Timmons v. United States, 30 C. C. A. 79; McCarthy v. United States, 110 C. C. A. 548.]

5. CRIMINAL LAW (§ 761*)—INSTRUCTIONS—ASSUMPTION OF FACTS.

It was proper to refuse instructions which recited as facts matters that were in issue.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731, 1738, 1754–1764, 1771, 1853; Dec. Dig. § 761.*]

6. CRIMINAL LAW (§ 829*)—INSTRUCTIONS COVERED BY THOSE GIVEN.

It was proper to refuse instructions stating legal principles which were embodied in the general charge.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

7. CRIMINAL LAW (§ 814*)—INSTRUCTIONS—ASSUMPTION OF FACTS.

An instruction on circumstantial evidence, which proceeded on the erroneous assumption that the evidence against defendants was entirely circumstantial, was properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1821, 1833, 1839, 1860, 1865, 1883, 1890, 1924, 1979–1985, 1987; Dec. Dig. § 814.*]

8. CRIMINAL LAW (§ 784*)—INSTRUCTIONS—WEIGHT OF EVIDENCE.

Where the evidence against defendants was not entirely circumstantial, an instruction as to the strength of such evidence essential for a conviction, and that it should always be cautiously considered, was properly refused, as it is not proper to instruct the jury upon the insufficiency of a part only of the testimony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1883–1888, 1922, 1960; Dec. Dig. § 784.*]

9. CRIMINAL LAW (§ 830*)—INSTRUCTIONS—MODIFICATION.

A requested instruction was properly refused unless it ought to have been given in the very terms in which it was proposed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2012, 2017; Dec. Dig. § 830.*]

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

10. CRIMINAL LAW (§ 809*)—INSTRUCTIONS—MISLEADING INSTRUCTIONS.
An instruction which would tend to mislead the jury was properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1961–1967; Dec. Dig. § 809.*]

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

W. E. Blanton and W. W. Chinn were convicted of using the mails in aid of a scheme to defraud, and they separately bring error. Affirmed.

Thomas M. Seawel, of Springfield, Mo. (Oscar T. Hamlin, of Springfield, Mo., on the brief), for plaintiffs in error.

Thad B. Landon and Leslie J. Lyons, both of Kansas City, Mo. (Hugh C. Smith, of Kansas City, Mo., on the brief), for the United States.

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

HOOK, Circuit Judge. W. E. Blanton, W. W. Chinn, Thomas A. Wakefield, and T. A. Wakefield, Jr., were jointly indicted for using the mails in aid of a scheme to defraud and to obtain money by false and fraudulent pretenses contrary to section 215 of the Penal Code. The Wakefields pleaded guilty. Blanton and Chinn were tried, convicted, and sentenced, and they separately prosecuted these writs of error. Another party who was discharged at the trial is excluded from the list of defendants. The assignments of error which merit notice may be grouped according to the general subjects to which they relate, as follows: (1) The sufficiency of the fourth count of the indictment upon which alone conviction resulted; (2) the sufficiency of the evidence to convict; (3) the admission of evidence; and (4) the refusal of instructions.

The fraudulent scheme charged, in the execution of which the mails were used, related to the sale of so-called "soldiers' additional homestead entry rights." Section 2304, Rev. Stat. (U. S. Comp. St. 1901, p. 1413), provides that soldiers who had served for 90 days in the army of the United States during the Rebellion and were honorably discharged and remained loyal should be allowed to enter 160 acres of land under the homestead act. Exceptional, favorable terms and conditions are granted by section 2305. Section 2306 (page 1415) provides that every person entitled under section 2304 who may have "heretofore" entered under the homestead laws less than 160 acres shall be permitted to enter an additional quantity not exceeding altogether the original maximum. Section 2307 extends the right to the widow of the soldier and in case of her death or remarriage then to his minor children. The statute was embraced in the revision of June 22, 1874, and speaks as of that date. It was construed as granting a bounty or gift, assignable or vendible by the beneficiaries, and as not requiring their personal residence upon the public land selected and entered. Webster v. Luther, 163 U. S. 331,

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

16 Sup. Ct. 963, 41 L. Ed. 179. The rights being assignable, a large traffic in them grew up, or rather in the paper evidences consisting of an affidavit of the soldier or his widow or children as the case might be, showing identity and the existence of the statutory conditions, an assignment of the right often executed in blank, and a copy of the soldier's discharge. Though these instruments did not originate with the officers of the government and were not expressly prescribed by the statute, they came to be generally regarded by the public as the evidence of the additional entry right and the ownership of such right by the assignee or holder. They were, inaccurately, called "soldiers' script" and became a common subject of barter and sale.

[1, 2] The scheme to defraud charged in the fourth count of the indictment was substantially that defendants, well knowing the requisites of a valid and vendible soldier's additional homestead entry right, should make or procure affidavits and assignments in which the statutory conditions were falsely and fraudulently stated to exist, and then, representing the statements contained were true, offer them for sale and sell them to the public as valid with a guaranty which they did not intend to fulfill of the validity of the rights sold, and that if they proved defective for any cause they would upon the return of the papers refund the money paid or replace the papers with others calling for an equal quantity of land or would furnish further proofs if required. The validity of the pretended rights and evidences and the truthfulness of the statements and representations were negatived, and it was charged that it was all to be done by defendants to secure money from certain persons named and the general public without giving or intending to give anything of equivalent value or to refund the money paid or replace the worthless papers with others that were genuine. This was stated with much elaboration and detail. It was also charged that in the execution of the scheme the defendants mailed a letter in the post office at Springfield, Mo., dated April 11, 1910, signed T. A. Wakefield, and addressed to C. A. Moore, Baker City, Or.; a copy being set forth. We think the count of the indictment fully sufficient and that it is not subject to any of the criticisms made. It contains all the essentials of description of the fraudulent scheme required in such cases and a direct charge of the substantive offense. Brooks v. United States, 76 C. C. A. 581, 146 Fed. 223; Lemon v. United States, 90 C. C. A. 617, 164 Fed. 953. An argument is made on the peculiar character of the evidence of the additional rights or so-called "soldier's script." Such instruments being fair on their face and having a recognized value in the market on the faith of their genuineness and the truth of their recitals, but being in fact false and worthless, could well be the medium of a scheme to defraud or of obtaining money by fraudulent pretenses, notwithstanding their lack of official origin or that false swearing would not constitute perjury. Though the rights to which they relate come from the government, and the government officials make their own investigations when they are attempted to be exercised, yet the affidavits and assignments have a value arising in the course of lawful private traffic. It is a value according to customary, accepted standards in har-

mony with the law, and a false assertion of verity and worth when neither exists may be used as an efficient means of defrauding. The essence of the scheme charged consisted in obtaining money from the public for instruments which were not what they purported and were represented to be nor what purchasers were led to believe by promises of defendants which they did not intend to fulfill.

[3, 4] It is contended that the evidence was insufficient for conviction, that the defendants were independent dealers each acting for himself alone as vendor or vendee, and that since no conspiracy was charged and no such concert of action was proved as would make the acts of one admissible against another each should be judged solely by his own conduct. The defendants were charged jointly and the instructions of the trial court accurately expressed the necessity of proof of joint participation. The court further said:

"It is not necessary that they shall all have the same function to perform in the carrying out of the scheme; but simply that they knowingly and intentionally combined and participated in the scheme as a whole, each one doing his part to the accomplishment of it, a larger part or a minor part, it may be, but nevertheless a substantial part at some time and in some form in the progress of the scheme to carry it out."

The evidence of what each one did was properly laid before the jury (Fizpatrick v. United States, 178 U. S. 304, 20 Sup. Ct. 944, 44 L. Ed. 1078), and under the guidance of the instructions the jury found all were participants in a scheme to defraud. We think the verdict was supported by substantial evidence. It is true that all the script they bought and sold was not fraudulent, nor did all the defendants have an interest in every transaction, but there was a substantial part of their business wholly fraudulent in which all defendants participated, showing an association in a continuous course of dishonest conduct, and, as regards the ultimate purchasers, an indifference whether the thing sold was good or bad. In a case typical of this class a veteran of the Civil War who had a name like or similar to that of a homestead entryman who according to the government records had entered less than 160 acres of land prior to June 22, 1874, would be approached first by correspondence and then personally, and an affidavit would be obtained from him falsely reciting his identity with the entryman and also an assignment of his pretended right of additional entry. Ordinarily this was not difficult to do because of the advanced age of those dealt with; but sometimes to overcome obstacles interpolations were made in the papers after they were signed and delivered and without the authority of the signers. Blanton, who had lists of names and abstracts from official records from which he got the names of original entrymen and of the old soldiers, generally conducted the preliminary correspondence, Chinn the negotiations with the old soldiers or their widows, and T. A. Wakefield the sales of the "script" obtained. The papers were transmitted by Wakefield to the purchasers through a bank with which all the defendants did business; the bank received the proceeds and then disbursed them according to previous directions. The disbursements regarded by themselves indicated a sale from one defendant to another; but, as we have said, the evidence justified the jury in be-

lieving that in a larger and true sense there was a general scheme to defraud in which all took part. Wakefield, who pretended to buy from Blanton, did not pay until he got the money from his purchasers. The portion of each, and Chinn's also, came from the proceeds of the sale. If Wakefield made no sale, there was no money to distribute. Wakefield guaranteed the purchasers that if the papers proved void he would upon their return to him refund the money paid or replace the papers with others calling for an equal number of acres of land. The guaranty was specious but worthless. When a purchaser sought to locate the "script" on public land, he delivered the papers to the government officials, their investigation disclosed the fraud, but they retained the papers, and a return of them to Wakefield could not be made. There was also a promise of additional proof, if required; but it was obviously valueless where the very foundation of the claim was false.

Complaints of the purchasers were met by promises which yielded nothing. They were put off on one pretext or another, but lost their money. There were so many cases in this class of fraudulent, worthless papers, so much money taken for them from innocent purchasers, and so many fruitless complaints from purchasers that with the other evidence the jury were justified in believing there was a prepared course of action designed to defraud and not a number of separate, isolated transactions each to be judged solely by itself; also, that the effort to make what each defendant did appear independent of the conduct of the others was a pretense. The letter charged in the fourth count to have been deposited in the mails did not by its terms describe any particular homestead right, nor did the evidence show that the "script" Wakefield afterwards sold Moore, the addressee, was fraudulent, or that Blanton and Chinn were interested in it, still by heading and text it advertised the business in which Wakefield was engaged and generally solicited correspondence on the subject. In their joint and fraudulent venture Wakefield was the salesman, and whatever advertised or aided him was for the benefit of all. They were working together, and they mixed their business good and bad. They made no distinction in this particular among themselves or towards those they solicited to purchase, and the use of the mails to exploit or advertise the business was to effectuate that which was unlawful as well as that which was not. When the letter was put in the mails, their fraudulent course of business was still afoot; it had begun and had not been concluded or abandoned. The complaints of the admission of evidence, so far as properly assigned as error, are answered by what has been said. See, also, St. Clair v. United States, 154 U. S. 134, 149, 14 Sup. Ct. 1002, 38 L. Ed. 936; Sprinkle v. United States, 73 C. C. A. 285, 141 Fed. 811. A joint scheme to defraud with acts to effectuate it has the features of a conspiracy.

[5-10] The remaining assignments of error are for denials of special requests for instructions. Some recite as facts matters that were in issue and some erroneous propositions of law. Where they were right in form and substance, the legal principles were embodied in the general charge of the court to which no exception was taken. The most

serious complaint is of the denial of a request respecting circumstantial evidence which was not correctly covered by the general charge. We think, however, the denial was right. After the first few words, the request proceeds on the erroneous assumption that the evidence against the accused was entirely circumstantial, speaks of the strength of such evidence essential for conviction, and says it should always be cautiously considered. A requested instruction is properly refused unless it ought to have been given in the very terms in which it is proposed. Brooks v. Marbury, 11 Wheat. 78, 6 L. Ed. 423. An instruction as to evidence which would have a tendency to divert the minds of the jury from the controlling effect which other proper evidence may have on their decision should be refused. Ayers v. Watson, 113 U. S. 594, 606, 11 Sup. Ct. 201, 34 L. Ed. 803. A court may properly decline to give an instruction which would tend to mislead the jury. Agnew v. United States, 165 U. S. 36, 51–52, 17 Sup. Ct. 235, 41 L. Ed. 624. A request to instruct the jury upon the insufficiency of a part only of the testimony is objectionable. Smith v. Condry, 1 How. 28, 11 L. Ed. 35. The record discloses no reversible error.

The judgment is affirmed.

SAN PEDRO, L. A. & S. L. R. CO. v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. March 27, 1914.)

No. 3955.

1. MASTER AND SERVANT (§ 13*)—STATUTORY REGULATIONS—HOURS OF SERVICE—"EMPLOYÉ."

Act March 4, 1907, c. 2939, § 2, 34 Stat. 1416 (U. S. Comp. St. Supp. 1911, p. 1321) makes it unlawful for any common carrier to permit any employé subject to that act to remain on duty for longer than 16 consecutive hours, and provides that whenever any such employé shall have been continuously on duty for 16 hours he shall be relieved and not permitted again to go on duty until he has had at least ten consecutive hours off duty, and that no such employé who has been on duty 16 hours in the aggregate in any 24-hour period shall be permitted to continue or again go on duty without having had at least 8 consecutive hours off duty. Section 1 defines "employé" as used therein as meaning persons actually engaged in or connected with the movement of any train. *Held*, that it was a violation of the act to require a fireman, after 16 continuous hours of duty in the movement of a train, to remain on duty for the purpose of watching his engine and keeping his fires alive until the coming of a relief crew, whether or not he thereby performed a duty in connection with the movement of the train, since the statute is highly remedial and should be liberally construed to effect its purpose, which is to promote the safety of employés and travelers and which would be defeated by excessive hours of service of any kind without rest.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 14; Dec. Dig. § 13.*

For other definitions, see Words and Phrases, vol. 3, pp. 2369–2377; vol. 8, p. 7649.]

2. MASTER AND SERVANT (§ 13*)—STATUTORY REGULATIONS—HOURS OF SERVICE.

Where a railway fireman, as required by the rules, reported a half hour before the schedule time for leaving a station, such half hour was a part

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

of the 16 hours' continuous service after which, under 34 Stat. 1415, the company was forbidden to permit him to continue on duty.

[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 District of Utah; John A. Marshall, Judge.

Civil action for penalties by the United States against the San Pedro, Los Angeles & Salt Lake Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Dana T. Smith, of Salt Lake City, Utah, for plaintiff in error.

Philip J. Doherty, Sp. Asst. U. S. Atty., of Washington, D. C. (Hiram E. Booth, U. S. Atty., of Salt Lake City, Utah, on the brief), for the United States.

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

HOOK, Circuit Judge. [1] The question in this case is whether a railroad company violates the hours of service act (Act March 4, 1907, c. 2939, 34 Stat. 1415 [U. S. Comp. St. Supp. 1911, p. 1321]), by requiring a fireman to watch his engine and keep the fires alive, until the coming of a relief crew, after 16 continuous hours of duty in the movement of a train in interstate commerce. Two instances substantially alike were charged by the government. In each case after 16 hours of service the train was tied up at a station short of its destination and all the crew but the fireman were relieved from duty. The fireman was required to watch his engine and keep it alive until another crew came and took charge. It was stipulated that while there he was not required or permitted "to do anything in connection with the actual movement of the train from" that station and that it was not intended he should have any responsibility for the movement if occasion arose. In one case the excess service charged was 8½ hours; in the other, 2 hours and 14 minutes, during part of which the engine and train were pulled on their way by another engine with another crew, the fireman still continuing to watch and fire. In other words, one fireman was on duty of one kind or another 24½ consecutive hours, and the other, likewise, 18 hours and 14 minutes. The railroad company contended that the time beyond 16 hours was not employed in or in connection with the movement of a train and therefore should not be counted. The trial court held with the government.

When the definitions of the first section of the statute are read into the prohibitions of the second, the law applicable here is as follows:

It shall be unlawful for any common carrier by railroad, engaged in interstate commerce, to require or permit any person in its service actually engaged in or connected with the movement of any train in such commerce to be or remain on duty for a longer period than 16 consecutive hours, and whenever such person shall have been contin-

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

uously on duty for 16 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 16 hours in the aggregate in any 24-hour period shall be required or permitted to continue or again go on duty without having had at least 8 consecutive hours off duty.

In this legislation Congress had in view the many serious railroad accidents caused by the unfitness for duty of men, engaged in or having to do with the movements of trains, who had endured excessive periods of continuous, unbroken service without intervals for rest. The remedy adopted was by limiting the maximum of the hours of service and the minimum for the intervals between. It was thought futile to attempt to control the employés in their use of their off time; therefore, as being more practical and efficient, the command was laid upon and confined to those who gave them employment in their regular occupations. The statute is highly remedial and should be liberally construed to effect its purpose. United States v. Kansas City Southern, 121 C. C. A. 136, 202 Fed. 828. It is to be noted that the employés within the statute are those "actually engaged in or connected with the movement of any train"; but obviously the purpose of the legislation would be defeated if they might be required or permitted by their employers to occupy the hours intended for rest with railroad service of another kind. The particular character of the labor required or permitted in the intervals would seem immaterial. In Baltimore & Ohio R. Co. v. Commerce Commission, 221 U. S. 612, 31 Sup. Ct. 621, 55 L. Ed. 878, it was said:

"The length of hours of service has a direct relation to the efficiency of the human agencies upon which protection to life and property necessarily depends. * * * If then it be assumed, as it must be, that in the furtherance of its purpose Congress can limit the hours of labor of employés engaged in interstate transportation, it follows that this power cannot be defeated either by prolonging the period of service through other requirements of the carriers or by the commingling of duties relating to interstate and intrastate operations."

To promote the safety of employés and travelers upon railroads the statute broadly contemplates the efficiency, as affected by reasonable opportunities for rest, of a class of men not ordinarily hired from day to day but engaged in regular service in connection with the movement of trains or subject to call for such service. It is contended that the excess service here was of another kind, and being at the end of the 16 hours is therefore immaterial, as it does not appear when thereafter the fireman returned to work. That is too narrow a view of the legislation, since it ignores the effect upon their efficiency of excessive hours of service of any kind without rest. But, taking the narrower view, it cannot be seriously doubted that the statute would be violated if the other service immediately preceded the 16 consecutive hours in a train movement. The attentiveness of mind so essential to safety in transportation might be as effectively impaired by loss of rest while oiling machinery in the shops or attending an engine on a siding as while serving on a moving train. Likewise if the train service aggregating 16 hours in a 24-hour period

were divided by intervening service of another kind. See United States v. Chicago, etc., R. Co. (D. C.) 197 Fed. 624. If this were not so, the requirements of a minimum of 10 hours' relief after 16 consecutive hours of duty, and of but 8 hours' relief after an aggregate of 16 hours of duty out of 24, would often work inconsistently. The shorter rest might follow the longer labor if the employé could without restraint be shifted in his work. We also think a railroad company cannot lawfully require or permit an employé within the statute who has served the 16 hours to turn then to other duty without the prescribed relief. United States v. Great Northern (D. C.) 206 Fed. 838. The 10-hour and 8-hour periods for rest were proportioned to sixteen hours of duty, not to 16 hours of one kind plus an indefinite number of another. This conclusion makes it unnecessary to consider whether a fireman who, after 16 consecutive hours of service as such, watches his engine on a siding and keeps it in a state of preparedness for his successor, is performing a duty in connection with the movement of the train. See United States v. Missouri Pacific (D. C.) 206 Fed. 847.

[2] It is not denied that the half hour before the schedule time for leaving the initial station should be counted, the fireman having reported as required by the rules (United States v. Illinois Central [D. C.] 180 Fed. 630; United States v. Denver & R. G. [D. C.] 197 Fed. 629); nor the further delay in departure (United States v. C., M. & P. S. [D. C.] 195 Fed. 783).

The judgment is affirmed.

MISSOURI PAC. RY. CO. v. OLESON.

(Circuit Court of Appeals, Eighth Circuit. March 23, 1914.)

No. 4010.

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 866*)—REVIEW—REFUSAL TO DIRECT VERDICT.

The question presented in a national appellate court on a challenge of a refusal to direct a verdict is not whether or not there is any evidence to sustain the verdict rendered, but it is (1) whether or not there was substantial evidence to sustain it, and (2) whether or not the evidence in support of the verdict requested was so conclusive that, in the exercise of a sound judicial discretion, the court should not sustain the verdict rendered. It is the duty of the trial court to direct a verdict at the close of the trial when the evidence is undisputed and when, upon a question of fact it is so clearly preponderant, or of such a conclusive character, that the court would be bound in the exercise of a sound judicial discretion to set aside a verdict in opposition to it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3467–3475; Dec. Dig. § 866.*]

2. TRIAL (§ 68*)—REVIEW—REOPENING CASE—DISCRETION OF COURT.

The reopening of a case after the trial is closed to permit further evidence is a pernicious practice, but it is within the sound judicial discre-

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

tion of the trial court in exceptional cases and is fatal only in the case of an abuse of that discretion.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 158–163; Dec. Dig. § 68.*]

Hook, Circuit Judge, dissenting in part.

In Error to the District Court of the United States for the District of Nebraska; Thos. C. Munger, Judge.

Action by Ole Oleson against the Missouri Pacific Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Edgar M. Morsman, Jr., of Omaha, Neb., for plaintiff in error.

Brown, Baxter & Van Dusen and M. L. Donovan, all of Omaha, Neb., for defendant in error.

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

SANBORN, Circuit Judge. The defendant below, the Missouri Pacific Railway Company, specifies two errors in this case, that the court denied its motion at the close of the trial to direct a verdict in its favor, and that after the evidence was closed, and after the defendant had made its motion for a directed verdict the court permitted counsel to recall the plaintiff and to introduce his testimony relative to the location of the leaning post over which he had testified that he fell.

In his complaint the plaintiff alleged that he stumbled, fell, and broke his leg over a leaning post placed by the railway company so near and permitted by it to lean over the sidewalk on the public street so long that it was thereby guilty of negligence that caused his injury. The defendant denied the allegations of the complaint and averred that, if the plaintiff was injured, his own negligence directly contributed to cause that injury.

[1] The question presented in a national appellate court on a challenge of a refusal to direct a verdict is not whether or not there is any evidence to sustain the verdict rendered. It is (1) whether or not there was substantial evidence to sustain that verdict, and (2) whether or not the evidence in support of the verdict requested was so conclusive that in the exercise of a sound judicial discretion the court should not sustain a contrary verdict. It is the duty of the trial court to direct a verdict at the close of a trial when the evidence is undisputed and when, upon a question of fact, it is so clearly preponderant or of such a conclusive character that the court would be bound in the exercise of a sound judicial discretion to set aside the verdict in opposition to it. Canadian Northern Ry. Co. v. Senske, 201 Fed. 637, 644, 120 C. C. A. 65, 72; Southern Pacific Co. v. Pool, 160 U. S. 438, 440, 16 Sup. Ct. 338, 40 L. Ed. 485; Union Pacific R. R. Co. v. McDonald, 152 U. S. 262, 283, 14 Sup. Ct. 619, 38 L. Ed. 434; Delaware, Lackawanna & Western R. R. Co. v. Converse, 139 U. S. 469, 11 Sup. Ct. 569, 35 L. Ed. 213; Patillo v. Allen-West Commission Co., 131 Fed. 680, 686, 65 C. C. A. 508, 514; Chicago Great Western

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

Ry. Co. v. Roddy, 131 Fed. 712, 713, 65 C. C. A. 470, 471; Woodward v. Chicago, Milwaukee & St. Paul Ry. Co., 145 Fed. 577, 578, 75 C. C. A. 591, 592. An examination of the evidence in the record before us has convinced that this case falls within neither of these classes. There was substantial evidence before the jury that the defendant constructed a spur track from its main track westerly over the south half of a city block to the east side of Eighteenth street in the city of Omaha, where it placed a beam near or over the end of this track, one end of which beam rested against the east side of a stump and the other end against the east side of a post to stop and prevent the cars from running off the end of the track; that this post was a railroad tie or a larger timber set on end in the ground 2 or 3 feet and extending upright 3 or 4 feet above the ground; that in the course of time it had become cracked and bent westward so that the top of it extended over the sidewalk from 12 to 18 inches and was about 21 inches above it; that this post had been in this leaning position for at least 25 days before the accident; that the plaintiff in the evening of March 15, 1912, was walking along this sidewalk, which was covered with 12 to 17 inches of snow, when one of his feet slipped under the post and he fell over it and broke his leg. This evidence, though met by testimony and circumstances which challenge it and which may be conceded to have rendered the findings upon the issues in the case doubtful, failed to present a case in which there was no conflict in the evidence or one in which the evidence that the defendant was free from causal negligence, or that the plaintiff was guilty of contributory negligence, was so conclusive in favor of the defendant that the court below should, in the exercise of a sound judicial discretion, have set aside the verdict for the plaintiff. A recital of the material evidence, its digest and analysis, would furnish no precedent in subsequent cases, and hence would serve no useful purpose, and it is sufficient to say that, when taken all together, this evidence presented fair questions of fact for the jury, and there was no error in the refusal of the court to direct them to return a verdict for the defendant.

[2] Nor was there reversible error in the permission granted the plaintiff, after the motion for a directed verdict had been made at the close of the trial to reopen the case and testify again regarding the exact location of the leaning post. At the opening of the trial he had testified that the post over which he fell was at the end of the south of two spur tracks that ended on the east side of Eighteenth street, and thereafter testimony that this post was at the end of the north track, and that it was the only post in the block which projected over Eighteenth street, had been received. To remove controversy relative to its exact location, the court permitted him to return to the stand and to testify that the post was at the end of the south rail of the north track. The record is convincing that if this ruling were error, it did not prejudice and could not have prejudiced the defendant because the undisputed proof was that there was but one post on the block where this accident happened, leaning over the sidewalk on the east side of Eighteenth street, and its exact location was immaterial. The reopening of a case after the trial is closed to permit further evi-

dence is a pernicious practice, but it is within the sound judicial discretion of the trial court in exceptional cases and is fatal to the trial only where there has been an abuse of that discretion. Alaska United Gold Min. Co. v. Keating, 116 Fed. 561, 565, 53 C. C. A. 655, 659. The reopening of the trial of this case was so harmless that it constituted no such abuse, and the judgment below must be affirmed.

It is so ordered.

HOOK, Circuit Judge. I concur in the foregoing except the statement that the reopening of a case after the trial is closed is a pernicious practice. Like every judicial power it should be carefully exercised to promote justice, but I doubt that what has long been authoritatively settled as resting in the sound discretion of trial courts should be so characterized.

UNITED STATES v. UNION PAC. R. CO.

(Circuit Court of Appeals, Eighth Circuit. March 27, 1914.)

No. 3999.

1. CARRIERS (§ 37*) — CARRIAGE OF LIVE STOCK — STATUTORY PENALTY — LIABILITY.

At the junction point of three railroads, all of whom were under a common control, there was a terminal company, which was a separate corporation, part of whose officers were officers of the railroad companies, but which had employés and equipment and which transferred the cars or trains from one railroad to the other. The terminal company had filed certain schedules of rates with the Interstate Commerce Commission, but it made no charges against the three carriers for the transfer of the cars from one to the other or to the stockyards, and did not hold itself out to the public as a connecting carrier. The defendant carrier accepted a car load of horses to be transported on the line of one of the other carriers connecting with it at the junction point. The horses reached the junction shortly prior to the expiration of the time for unloading as required by the Twenty-Eight Hour Law (Act June 29, 1906, c. 3594, 34 Stat. 607 [U. S. Comp. St. Supp. 1911, p. 1341]), and were placed on a side track. The terminal company removed them to the stockyard for unloading three hours after the time had expired. *Held*, that while the initial carrier might employ the terminal company to do the work of transferring the car to the connecting carrier for it, it was liable, both to the shipper and to the government for the penalty imposed by the Twenty-Eight Hour Law, for the acts of such employé until the car was delivered to the connecting carrier.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 95, 927; Dec. Dig. § 37.*

Liability of carrier for failure to feed, water, and rest live stock and for violation of Twenty-Eight Hour Law, see note to St. Joseph Stockyards Co. v. United States, 110 C. C. A. 435.]

2. CARRIERS (§ 37*)—CARRIAGE OF LIVE STOCK—LIABILITY OF INITIAL CARRIER.

The duty of a connecting carrier of live stock is not discharged until it has been imposed upon the carrier next in order.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 95, 927; Dec. Dig. § 37.*]

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

3. CARRIERS (§ 37*)—CARRIAGE OF LIVE STOCK—LIABILITY—ACTS OF SUBORDINATE AGENT.

A carrier of live stock may employ a subordinate agency to perform a service undertaken by it, but the agency must be subordinate to the carrier, and not to one who neither employs it, pays it, nor has any right to interfere with it.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 95, 927; Dec. Dig. § 37.*]

In Error to the District Court of the United States for the District of Utah; John A. Marshall, Judge.

Action by the United States of America against the Union Pacific Railroad Company. Judgment for the defendant, and the United States brings error. Reversed and remanded for new trial.

Hiram E. Booth, U. S. Atty. of Salt Lake City, Utah (William M. McCrea, Asst. U. S. Atty., of Salt Lake City, Utah, on the brief).

George H. Smith, of Salt Lake City, Utah (P. L. Williams, of Salt Lake City, Utah, N. H. Loomis, of Omaha, Neb., and John V. Lyle, of Salt Lake City, Utah, on the brief), for defendant in error.

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

HOOK, Circuit Judge. This was an action by the government to recover a penalty from the Union Pacific Railroad Company for violating Act of June 29, 1906, c. 3594, 34 Stat. 607 (U. S. Comp. St. Supp. 1911, p. 1341), commonly called the Twenty-Eight Hour Law. A car load of horses was shipped from Denver, Colo., to Salt Lake City, Utah. The owner of the horses who went with them consented in writing, as authorized by the statute, that the period of confinement without unloading for rest, water, and feeding should be extended to 36 hours. The route was over the Union Pacific and Oregon Short Line railroads, Ogden, Utah, being the junction point. When the Union Pacific train containing the car in question reached the yards at Ogden it went from the main line of that road onto a siding and the trainmen left it there. Thirty-five hours and twenty minutes had then elapsed since the horses were last unloaded. A switching crew took the car and delivered it at the stockyards about a mile distant 3 hours and 40 minutes later. The horses had then been confined 39 hours. The defense was that when the train went from the main line to the siding the car was no longer under defendant's jurisdiction, but was in the custody of the Ogden Union Railway & Depot Company, an independent corporation, for whose acts or neglect it was not responsible, and that the lawful period of confinement had not expired when it gave up possession. The trial court directed a verdict for defendant.

[1-3] Though the terminal company was incorporated and had its own engines and employés, the evidence showed that in the handling of the car of horses it did not act as an independent carrier, but was a mere agency or instrumentality which defendant used to perform its transportation duties. The Union Pacific Railroad entered Ogden from the east and ended there, the Southern Pacific (Central Pacific) ran thence to the coast, and the Oregon Short Line went through the

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

city in a northerly and southerly direction. These three systems of railroad were then operated as one under a common management, and the terminal company at Ogden served them exclusively. Tracks belonging to them were embraced in the terminals, and the company was officered, in part at least, by their officials. A tariff was filed by the terminal company with the Interstate Commerce Commission, but it related only to certain switching charges on traffic originating or destined there, and did not embrace ordinary transportation rates, or charges for the transfer of trains or cars from one of the railroads to the other, or charges for the transfer of cars of stock from one of the railroads to the stockyards for unloading according to the statute, when destined beyond as in this case. It performed all such work without charge of any kind, except that the terminal expenses and costs of operation were apportioned between and paid by the interested railroad companies on the basis of the number of cars handled, of which an account was kept. In respect of these matters the terminal company was a clearing house for the adjustment between them of the expense of operating the common facilities. The car of horses was shipped over the Union Pacific and Oregon Short Line connecting at Ogden. The terminal company did not hold itself out to the public as a connecting carrier, and the shipper did not know it as such. It was the duty of the Union Pacific to deliver the car to the Oregon Short Line, and until it did so it remained responsible for the horses and for compliance with the statute regulating their confinement. According to general principles of law the duty of a connecting carrier is not discharged until it has been imposed upon the carrier next in order. Condon v. Railroad, 55 Mich. 218, 21 N. W. 321, 54 Am. Rep. 367; Texas & Pacific Ry. Co. v. Reiss, 183 U. S. 621, 626, 22 Sup. Ct. 253, 46 L. Ed. 358. Also, when a carrier has undertaken a service, it "may employ a subordinate agency; but it must be subordinate to him, and not to one who neither employs it nor pays it, nor has any right to interfere with it." Bank of Kentucky v. Adams Express Co., 93 U. S. 174, 182, 23 L. Ed. 872. See Covington Stockyards Co. v. Keith, 139 U. S. 128, 136, 11 Sup. Ct. 461, 35 L. Ed. 73.

True, these principles are applied as between carrier and shipper, but by analogy they apply also to duties imposed by public statute to prevent cruelty to stock in transportation. The limit of 36 hours was near expiration when the car reached Ogden. Thirty-nine hours had elapsed when it reached the stockyards for unloading. It had not been delivered to the Oregon Short Line, the connecting carrier, but in the meanwhile was in the custody of a local instrumentality which defendant selected and used to discharge its duties both to the shipper and under the statute and for whose conduct it was responsible. The terminal company was an employé of the defendant, incorporated, it is true, but as much so as if its individual servants had done the work.

The judgment is reversed, and the cause remanded for a new trial.

SMITH v. THOMPSON.

(Circuit Court of Appeals, Eighth Circuit. March 27, 1914.)

No. 131.

1. BANKRUPTCY (§ 400*)—EXEMPTIONS—SUFFICIENCY OF CLAIM.
A claim to exemption in a bankrupt's schedule was in these words: "The deduction to be taken from the said stock of groceries, $500, or its equivalent in cash out of the proceeds of said stock, $500." *Held*, that the claim was sufficient under Code Civ. Proc. Neb. § 521, which provides that, if a debtor is the head of a family and has no homestead, "he may have in lieu thereof the sum of $500, in personal property," that it was optional with the trustee to set apart the exemption in goods, but that where he failed to do so the bankrupt was entitled to the exemption of $500 from their proceeds.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 670–675; Dec. Dig. § 400.*]

2. BANKRUPTCY (§ 395*)—EXEMPTIONS—LIBERAL ADMINISTRATION OF EXEMPTION LAWS.
In a court of bankruptcy, the administration of an exemption law should comport with the beneficent spirit that prompted its enactment. The court should be helpful to those whose condition requires them to invoke it, and should not attempt to defeat the exemption by niceties in practice.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 658; Dec. Dig. § 395.*]

Petition to Revise Order of the District Court of the United States for the District of Nebraska; Thomas C. Munger, Judge.

In the matter of Allie W. Thompson, bankrupt. Petition by I. E. Smith, trustee, to revise order allowing an exemption to the bankrupt. Affirmed.

James W. Orr and S. E. Harburger, both of Atchison, Kan., for petitioner.

W. H. Richards, of Humboldt, Neb., F. M. Hall, of Lincoln, Neb., and F. N. Prout, of Fairbury, Neb., for respondent.

Before HOOK, ADAMS, and SMITH, Circuit Judges.

HOOK, Circuit Judge. [1] A voluntary bankrupt in Nebraska claimed in his schedule an exemption in these words:

"The deduction to be taken from the said stock of groceries, $500; or its equivalent in cash out of the proceeds of said stock, $500."

The trustee disallowed the exemption, and the referee sustained him, on the ground that the bankrupt had not specifically selected the articles to the allowed value. The District Court reversed the referee, and directed that the amount of the exemption be paid in cash from the proceeds of the stock which had been sold in the meantime. The statutes of Nebraska provide for an exemption of a homestead and household furniture, clothing, family pictures, etc.; but, if the head of a family has no homestead, then (section 521, Civil Code) "he may have in lieu thereof the sum of five hundred dollars in personal property." The bankrupt duly claimed the articles specifically exempt-

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

ed, but, having no homestead, was entitled to the exemption provided by way of substitute. The District Court was entirely right.

[2] In every court the administration of an exemption law should comport with the beneficent spirit that prompted its enactment. A court of equity especially should not attempt to defeat the exemption by niceties in practice. It should be helpful to those whose condition requires them to invoke it. The exemption in question here was not of described articles, but was generally of personal property up to a maximum value out of a larger mass. The substance under the statute was the value, not the particular character of the items. The trustee came into possession of the whole, and it was his duty to set apart the exempt portion. Bankr. Act July 1, 1898, c. 541, § 47a, 30 Stat. 557 (U. S. Comp. St. 1901, p. 3438). Even if the bankrupt should have specified, we see no substantial objection to his leaving it to the trustee. Had the bankrupt set out the items and valued them, the trustee would still have supervised the valuation. However regarded, the matter is a little detail of administration, which should not defeat the claim for exemption, plainly made and asserted.

But it is urged the court gave the full amount in money, and therefore the bankrupt did not bear his share of the shrinkage on the sale. Even were there a shrinkage, which does not appear, the bankrupt's claim was in the alternative, with the choice in the trustee for the advantage of the estate. In sales of stocks of merchandise it is frequently beneficial to general creditors that the face value of claims or liens on part be transferred to the proceeds of all. But, if that should not have been done here, it was the duty of the trustee to set off the exemption in specie and to ignore the alternative. The exemption should not be destroyed by his act or neglect. If precedent were needed for the order of the trial court, it may be found well reasoned in Burke v. Trust Co., 67 C. C. A. 486, 134 Fed. 562; In re Kane, 62 C. C. A. 616, 127 Fed. 552; In re Friedrich, 40 C. C. A. 378, 100 Fed. 284; In re Andrews & Simonds (D. C.) 193 Fed. 776; In re Hargraves (D. C.) 160 Fed. 758.

The petition to revise is denied.

BOARD OF TRADE OF CITY OF CHICAGO v. PRICE et al.

(Circuit Court of Appeals, Eighth Circuit. March 16, 1914.)

No. 3547.

INJUNCTION (§ 114*)—PARTIES—PERSONS AIDING IN TRESPASS.

A defendant who, with knowledge of the character of the business, aided and assisted a concern of which his brother was the head in conducting an illegal bucket shop, in which business it purloined and used complainant's market quotations, although he was not shown to be pecuniarily interested, is equally responsible for the trespass, and complainant is entitled to an injunction against him, as well as those directly interested.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 202–220; Dec. Dig. § 114.*]

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

Appeal from the Circuit Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

Suit in equity by the Board of Trade of the City of Chicago against Thomas E. Price and others. Decree for defendant Price (179 Fed. 399), and complainant appeals. Reversed.

Henry S. Robbins, of Chicago, Ill. (Martin H. Foss, of Chicago, Ill., on the brief), for appellant.

Chester H. Krum, of St. Louis, Mo. (Thomas B. Harvey, of St. Louis, Mo., on the brief), for appellee.

Before HOOK and SMITH, Circuit Judges, and POPE, District Judge.

HOOK, Circuit Judge. The Price Commission Company, afterwards called the St. Louis Brokerage Company, conducted what is known as a bucket shop in St. Louis, Mo. The Board of Trade of the City of Chicago sued to enjoin the purloining of its market quotations. The injunction on final hearing in the trial court against two defendants connected with the concern established that in carrying on the business they were using the quotations without right or authority; and we think that conclusion was adequately supported by the evidence. But the court held the evidence insufficient to show that the appellee, Price, was interested in the business, and dismissed the case as to him. The question on this appeal is whether, if not interested in a proprietary way, he yet so knowingly aided and assisted the others that he should have been included in the injunction.

The character of the property of the Board of Trade in its quotations and its right to prevent the unauthorized use of them is fully explained in Board of Trade v. Christie, 198 U. S. 236, 25 Sup. Ct. 637, 49 L. Ed. 1031, Board of Trade v. Cella Com. Co., 76 C. C. A. 28, 145 Fed. 28, and McDearmott Com. Co. v. Board of Trade, 77 C. C. A. 479, 146 Fed. 961, 7 L. R. A. (N. S.) 889, 8 Ann. Cas. 759. One who knowingly aids, assists, or facilitates the conduct of a business which is contrary to law and is a trespass upon the private rights of others cannot escape responsibility merely because he has no proprietary or pecuniary interest in it. He who gratuitously helps is held with him who profits. A careful examination of the evidence has convinced us that the appellee was fully informed of the character of the business and the methods employed in carrying it on; also that, though he may not have been financially interested in it with his brother, who confessedly was at the head of it, he nevertheless aided and assisted by his joint control and handling of the funds upon which the business necessarily depended from day to day. Had the funds been deposited in bank to the joint credit of himself and his brother, with authority to each separately to check, instead of being kept in a safe-deposit box rented in their names jointly, as was the case, and had he given the employés his individual checks on the account as often and under the same circumstances as he got and delivered them the box of money, and received it from them and returned it to the safety vault, it would hardly be denied that he was facilitating and assisting the conduct of the business. The peculiar and irregular methods employed, which

were hardly those of a legitimate venture, sustained the business during the illness and absence or tardiness of the brother. The moneys so handled were the working capital and the funds of the patrons, and without them the business would have stopped. Shortly before the testimony was closed, what the appellee had been doing was intrusted to an employé of the business; but he was also a trusted employé of the appellee in his private affairs.

It is urged that the Price Commission Company had stopped operations. The record shows there was merely a change of name to St. Louis Brokerage Company, without change of personnel or methods. We do not understand the business itself was abandoned. Moreover, the business was managed largely from hand to hand, and could be closed quickly and begun again without much loss or trouble. In cases like that at bar, the prior continuous conduct for a long period in which the rights of others were violated is to be regarded more strongly than quick changes at the end, the significance of which is doubtful.

The decree dismissing the cause as to the appellee, Price, is reversed, and the cause is remanded for a decree of injunction against him.

E. I. DU PONT DE NEMOURS POWDER CO. v. MAZENAC.

(Circuit Court of Appeals, Eighth Circuit. March 16, 1914.)

No. 3836.

TRIAL (§ 267*)—REQUESTS FOR INSTRUCTIONS—SUBSTITUTION BY COURT.

The refusal of instructions requested by defendant in an action by a servant to recover for personal injuries *held* not error in view of an instruction given which was even more favorable to defendant on the theory upon which the instructions were asked.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 668–672, 674; Dec. Dig. § 267.*]

In Error to the District Court of the United States for the District of Colorado; Robert E. Lewis, Judge.

Action at law by Frank Mazenac against the E. I. Du Pont De Nemours Powder Company. Judgment for plaintiff, and defendant brings error. Affirmed.

George Q. Richmond and F. A. Williams, both of Denver, Colo., for plaintiff in error.

Julian G. Dickinson and A. H. Felker, both of Denver, Colo., for defendant in error.

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

HOOK, Circuit Judge. Mazenac sued his employer, the powder company, and recovered judgment for the loss of two fingers alleged to have been caused by the negligent act of a fellow servant in starting a machine in which he had placed his hand in the performance of a directed duty.

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

The defendant complains of the refusal of the trial court to give several instructions requested by it on the defenses of contributory negligence and assumption of risk. The principal controversy at the trial and substantially the only one was whether the machine was at rest when plaintiff placed his hand in it, as he claimed it was, or, on the other hand, was already in motion as claimed by defendant. The requests proceeded upon the latter assumption and in that view were important. But the trial court took a short cut and charged the jury that if they found "that the machine was in operation when plaintiff put his hand in it he cannot recover." Obviously defendant was not entitled to a more favorable declaration of law. The question of fact was properly submitted to the jury and it found against the defendant. Another instruction refused was in effect that an employer discharges its full duty by prescribing such rules and methods for the operation of its machinery by its employés as would afford reasonable protection if observed, whether they observe them or not; and having prescribed them it is not liable if one employé is injured by the disobedience or neglect of another. It is enough to say of this that in Colorado, where the case at bar arose, the fellow-servant doctrine has been abolished.

The subjects of the remaining assignments of error are the overruling of a motion for a new trial; a claim of excessive damages; an amendment of the complaint; the refusal to set aside the verdict; the receiving and entering of the verdict; the insufficiency of the evidence to warrant the verdict; certain portions of the charge of the court, no exceptions having been taken; and the refusal to charge as specially requested though the principles stated were embodied in the general charge. Repeated decisions on federal appellate practice so completely dispose of these matters that they do not require discussion.

The judgment is affirmed.

MISSOURI, K. & T. RY. CO. v. GOODRICH.

(Circuit Court of Appeals, Eighth Circuit. March 16, 1914.)

No. 4007.

1. CONSTITUTIONAL LAW (§ 309*)—DUE PROCESS OF LAW—PRESCRIBING EFFECT OF SPECIAL APPEARANCE.

It was competent for the Legislature of Texas to enact a statute providing that one who appeared specially in an action to attack the service thereby submitted himself to the jurisdiction of the court, and such statute does not deny due process of law, since the defendant by appearing, even though specially, subjected itself to the local practice.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 929, 930; Dec. Dig. § 309.*]

2. JUDGMENT (§ 504*)—COLLATERAL ATTACK—GROUNDS—ERROR IN PROCEEDINGS.

Whether a state court should have continued a cause after denying defendant's motion for dismissal is not a jurisdictional question which can be raised in a suit to enjoin a collection of the judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 944–947; Dec. Dig. § 504.*]

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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 District of Kansas; John C. Pollock, Judge.

Suit by the Missouri, Kansas & Texas Railway Company against L. E. Goodrich. From an order denying an injunction against the defendant, the complainant appeals. Affirmed.

W. W. Brown, of Parsons, Kan. (James W. Reid, of Chanute, Kan., and Joseph M. Bryson, of St. Louis, Mo., on the brief), for appellant.

J. A. L. Wolfe, of Sherman, Tex., for appellee.

Before HOOK, ADAMS, and SMITH, Circuit Judges.

HOOK, Circuit Judge. This is an appeal by the railway company from an order of the District Court of the United States for the District of Kansas refusing to enjoin Goodrich from enforcing a judgment he obtained against it in a state court of Texas. The company contends that the Texas court was without jurisdiction and the judgment was rendered without due process of law because it was not doing business in that state and the person upon whom process was served there was not its agent. It appeared specially in that court and moved to dismiss the action for the reasons now urged. The motion was denied and, over its protest, it was ruled to answer or suffer default. It answered and the action proceeded to judgment.

[1, 2] A statute of Texas holds a party who specially appears, as the company did, to have submitted himself to the jurisdiction of the court. See York v. State, 73 Tex. 651, 11 S. W. 869. Without statute the rule is that one may confine his appearance to an attack upon the service without submission generally. Harkness v. Hyde, 98 U. S. 476, 25 L. Ed. 237; De Witt v. Monroe, 20 Tex. 289. But it was competent for the state to prescribe new consequences to a special appearance in its courts if it left the party free to stay out, and that was the case here. A statute to that effect is not a denial of due process of law. York v. Texas, 137 U. S. 15, 11 Sup. Ct. 9, 34 L. Ed. 604; Kauffman v. Wooters, 138 U. S. 285, 11 Sup. Ct. 298, 34 L. Ed. 962. When the company voluntarily appeared, though specially, it subjected itself to the local practice. Whether the state court should have continued the cause after the motion to dismiss was denied is not a jurisdictional question.

The order denying an injunction is affirmed.

HALL-BORCHERT DRESS FORM CO. et al. v. ELLANAM ADJUSTABLE FORM CO. et al.

(Circuit Court of Appeals, Second Circuit. March 10, 1914. On Petition for Rehearing, April 7, 1914.)

No. 207.

1. PATENTS (§ 167*)—SCOPE.

A patentee obtains a monopoly only of what he discloses and claims; the invention being determined by the specification, reference to the prior art being useful only to clear up obscurities, and not to enlarge the claims beyond their legitimate scope.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 243; Dec. Dig. § 167.*]

2. PATENTS (§ 328*)—INFRINGEMENT—DRESS FORMS.

The Ufford dress form patent, No. 908,910, describing a device calling for a shoulder section which is always maintained in its proper position to the neck section and movable "in and out only," *held* not infringed by a device permitting a movement of the shoulder section both horizontally and vertically.

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, holding a patent to be valid and infringed. The patent is No. 908,910, granted January 5, 1909, to Charles A. Ufford for a dress form, which is a device for aiding women in making and fitting gowns, cloaks, waists, etc. It is a mannikin, usually made of papier maché covered with cloth, and representing a woman's body. It is composed of a number of parts the relative positions of which may be changed so as to represent bodies of different size and contour lines. The claims involved read as follows:

"3. A dress form divided horizontally below the shoulders and divided vertically to constitute front and rear shoulder sections on each side and front and rear neck sections, combined with means to pivotally connect the lower inner corner of each shoulder section to the adjacent neck section, and means to adjustably connect the upper inner corner of each shoulder section to the adjacent neck section.

"4. A dress form divided horizontally below the shoulders and vertically in a plurality of planes to constitute front and rear shoulder sections on each side and a front and rear neck section, means connecting the upper portion of each shoulder section with the neck section to permit said portion of the shoulder section to move in and out only, and means constituting a pivotal connection between the lower edge of each shoulder section and the neck section."

Maurice Block, of New York City (F. W. Wright and Walter C. Noyes, both of New York City, of counsel), for appellants.

McLaughlin, Russell, Coe & Sprague, of New York City (Nathan Heard, of Boston, Mass., and Rufus W. Sprague, Jr., of New York City, of counsel), for appellees.

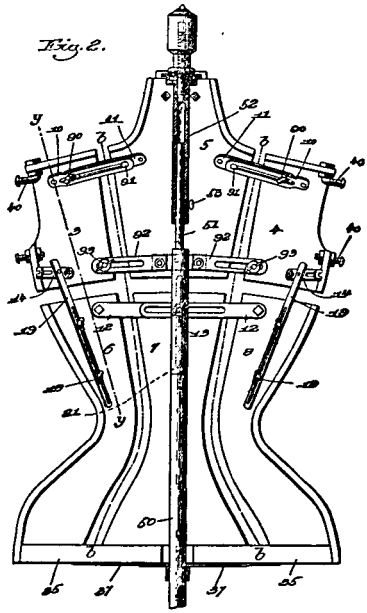
Before LACOMBE, COXE, and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge (after stating the facts as above). [1] A patentee obtains a monopoly only of what he discloses and claims.

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

Reference to prior art is useful to clear up obscurities, but it is in the specification (with such light as the drawings may throw upon it) that we are to find what the alleged invention is. When its language is plain and positive, its disclosure specifically set forth in unmistakeable terms, it is not to be modified by later theories of experts so as to enlarge the claims beyond their legitimate scope. Especially true is this when the art is a crowded one, and certainly this art was crowded when the patentee filed his application.

[2] Turning now to the specifications: It is indicated that dress forms had already been made in sections, adjustably secured to each other so as to increase or decrease the size of the whole form or parts thereof. The patentee states that his objects are to provide novel and simple methods of adjusting portions of the form without changing or adjusting other portions. The present controversy is concerned with the adjustment of neck and shoulder pieces. That part of his device is very clearly described in the paragraph quoted below which read in connection with Fig. 2 of the drawings, indicates precisely what his construction is and how it operates. In the drawing *5* is the neck section, *3* and *4* are the shoulder sections. Figure 2 shows the inside of the back half of the form. The inside of the front half of the form, with similar adjustable connections between the sections is shown in Figure 1 which need not be reproduced.



The specifications state:

"For adjustably connecting the shoulder sections to the neck section I have provided a construction which not only holds the shoulder sections properly spaced from the neck sections, but also serves to guide said shoulder sections as they are adjusted toward and from the neck sections. The device herein shown for accomplishing this comprises a slotted member *10* secured to the shoulder section and overlying a second slotted member *11* secured to the neck section. These slotted members are clamped together by means of clamping bolts *90*, and the slotted members *10* have studs *91* rigid therewith which play in the slots of the member *11*. By this construction, the shoulder section is always maintained in its proper position relative to the neck section and may also be clamped to hold it properly spaced from the neck section. *92* are other slotted members which are secured to the neck sections both front and rear at the lower edge thereof, and which are adjustably secured to the lower corners of the shoulder sections by clamping bolts *93*."

Except in abnormal cases the line of the human figure, especially the female figure, from the base of the neck to the tip of the shoulder (the so-called shoulder line) makes an angle more or less wide with the horizontal. It is apparent that if a shoulder section were moved away from the neck section horizontally the shoulder line would be

distorted, there would be a step up between the outer tip of the neck section and the inner tip of the shoulder section, which would be most undesirable. The patentee's device avoids this—as he says, "the shoulder section is always maintained in its proper position to the neck section." His adjustable connection is not horizontal, but parallel to the drawing. He does not state that it is thus parallel, but it would not operate as his device does operate unless it were thus parallel, and the drawing shows it parallel. This device comprises: First, a slotted member *11* secured to the neck section by a fastening *11a*. Second, a similar slotted member *10* secured to the shoulder section by a fastening *10a*. The slots overlie each other; through them there passes a clamping bolt *90* (the clamp is not shown in the drawing): as the shoulder piece moves in or out the bolt plays forward or back through the slots. The slotted member *10* has a stud integral therewith which plays in the slot of member *11*. It is manifest that with this means of adjustment the movement in and out of the shoulder section cannot be horizontal but must be on the line of the shoulder. However far off the shoulder section is moved, its shoulder line prolonged would exactly meet the shoulder line on the neck piece, and vice versa. In the device there are four points always in the same straight line and from that line it is impossible for the slots to depart without distortion or breaking of the device. Two of these points are the fastenings *10a*, *11a*; they are permanently fixed. Whether they are clamped so tight that the parts *10* and *11* cannot move radially, or whether they are so loosely clamped that these parts could move on them as axes is immaterial. If they were loosely clamped there might be such radial play of the slotted members—provided either the clamping bolt *90* or the stud *91* were removed. But the patentee includes them both as elements of his combination, and when both are in the slots radial play of the slotted members is impossible. The patentee very aptly expresses this in claim 4, which states that the means connecting the upper portion of each shoulder section to the neck section permits "said portion of the shoulder section to move in and out only." With this means of connection there can be no tilting of the shoulder up or down; to the line of the shoulder as designed by the maker of the form it must always conform. If the form is to be used for making a waist for a woman whose shoulder line is less sloping, or more sloping, it would seem that this device would not permit an adjustment to conform thereto: it could provide for broader or narrower shoulders but not for a markedly different shoulder line.

Turning again to the drawing, we see that the connection between the lower part of the shoulder section and the neck section is not parallel to the shoulder line, but horizontal. If its adjusting devices were arranged in the same way as in the upper connection the top part of the shoulder section would be moving out on one right line and the bottom part on a different right line. Therefore the lower connection is arranged with a single slotted member *92*, and with the clamping bolt *93* only, the stud being dispensed with; thus securing a pivotal connection.

There is much testimony as to the great commercial success of the "later Ufford dress form." If, however, the form which has thus

commended itself is the one of which samples were submitted on the argument as complainant's commercial dress form, increase of sales seems of little importance, because its upper connections between shoulder and neck pieces have been so modified as to admit of the very tilting of the shoulder which the device of the patent would effectually prevent. The shoulder piece has a greater range of movement than "in and out only." Complainant's expert admits that in these commercial forms there is, for upper connection, one slotted member instead of two so that pivotting is permitted at the top of the shoulder section instead of the device preventing it; he also admitted that in the complainant's forms which he had seen the shoulders could be raised slightly. How much this enlarged range of adjustment over that which the patent called for contributed to commercial success we do not know and the record does not disclose. Presumably the greater the adjustability of a dress form, the more acceptable it would be to the user.

However it is not necessary now to pass upon the question of the validity of the patent. Defendant's connecting device (a toggle joint both above and below) most certainly is not such an one as will restrict the movement of the shoulder section so as to permit its upper portion "to move in and out only." On the contrary, it can be also moved horizontally and up or down, as the user may wish. Ufford's patent covered a connection in which the shoulder line of the original form must always be maintained; no carelessness of adjustment could disturb it. In defendant's form whether it be maintained or not depends on the will of the user, who can not only broaden the shoulders on the given line but can also tilt them so as to secure a different line. About this there can be no dispute, complainant's expert admits it and examination of Exhibit A Defendant's Form demonstrates it. If the connections which complainant uses in its commercial forms were patented, Exhibit A might infringe them, but we cannot see how it infringes a patent the very object and purpose of which is absolutely to insure movement in one direction only.

The decree is reversed, with costs.

On Petition for Rehearing.

LACOMBE, Circuit Judge. This petition calls attention to the following clause of the opinion, in which after describing the upper adjustable connection between shoulder and neck pieces, with its slotted members *10* and *11*, their fastenings (not lettered in the drawings, but plainly shown therein and expressly enumerated in the specifications; for convenience we designated them *10a* and *11a*), the clamping bolt *90* and the stud *91*, we said:

"In the device there are four points always in the same straight line and from that line it is impossible for the slots to depart without distortion or breaking of the device. Two of these points are the fastenings *10a* and *11a*; they are permanently fixed. Whether they are clamped so tight that the parts *10* and *11* cannot move radially, or whether they are so loosely clamped that these parts could move on them as axes is immaterial. If they were loosely clamped there might be such radial play of the slotted members, provided either the clamping bolt *90* or the stud *91* were removed. But the pat-

entee includes them both as elements of his combination, and when both are in the slots radial play of the slotted members is impossible."

The petitioner suggests that this last statement is incorrect; that there *can* be radial play of the slotted members, when *10a* and *11a* are loosely clamped, even if *90* and *91* are both in the slots. The criticism is sound, if *10a* and *11a* are both loosely clamped there can be such motion; indeed, as is shown in an ingenious little model attached to the petition, there may be the greatest latitude of motion, the shoulder piece can be moved in and out and up or down, or in any combination of these directions, perpendicularly or horizontally or diagonally.

But this circumstance is not persuasive to the granting of a reargument. The opinion was not based on the proposition that the patentee had expressly stated anywhere that the fastenings *10a, 11a* were to be clamped tight. All that he says about them is that the slotted member *10* is "secured" to the shoulder section and the slotted member *11* is "secured" to the next section. The patentee so clearly, so positively, and so frequently points out that the function of his device is to secure movement "in and out only," movement "not in horizontal lines," movement which will always maintain the shoulder section "in its proper position relative to the neck section," that any method of securing the slotted members to their respective sections which will allow the latitude of motion in any direction which the model admits of cannot be the sort of securing which the patentee had in mind. The petition shows that this restriction of movement to a line of direction which will always preserve the shoulder line cannot be obtained if *10a* and *11a* are so loosely clamped as to allow radial movement of the slotted members. Therefore the slotted members must be "secured" to their respective sections, so that the function of the device will be preserved. Since that can be accomplished only by clamping the fastenings *10a* and *11a* tightly, they must be tightly clamped, although the patentee did not expressly say so (unless the word "secured" may be construed to imply it); his statement of function sufficiently indicates that they must be tight otherwise the slotted members would have a radial movement and the line of the shoulder might be distorted when the shoulder section was moved out to broaden the shoulders.

Petition for rehearing is denied.

UNITED STATES v. BROUGHTON.

(District Court, S. D. Alabama, S. D. March 13, 1914.)

No. 4080.

1. SLAVES (§ 24*)—PEONAGE—INDICTMENT.

An indictment against defendant for peonage in compelling a convict, for whom defendant had become surety for the payment of a fine and costs, to work, alleged that defendant threatened such convict that if he refused to work out the debt he would have him arrested and put in jail, and that after such threat the convict did not voluntarily work, and did against his free will continue to work for defendant under the contract until a later date. The indictment further alleged that the convict was

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

coerced and intimidated, but did not allege any wrongful act on defendant's part by which he was coerced or intimidated. *Held*, that the indictment was insufficient to charge that the convict was held in a condition of peonage.

[Ed. Note.—For other cases, see Slaves, Cent. Dig. § 113; Dec. Dig. § 24.*]

2. CONSTITUTIONAL LAW (§ 83*)—INVOLUNTARY SERVITUDE—LABOR CONTRACT —PEONAGE.

Code Ala. 1907, § 7632, provides that when a fine is assessed the court may allow defendant to confess judgment with good and sufficient sureties, and section 6846 declares that when this is done a convict may contract to render services for the surety in payment of the fine and costs, and if he does so, and refuses without sufficient excuse to perform the services, he must on conviction be fined not less than the amount of the damages which the party contracting with him has suffered by reason of his failure, or refusal, etc. *Held*, that section 6846, having been sustained by the highest state courts, was not in violation of Const. U. S. Amend. 13, prohibiting slavery or involuntary servitude except as a punishment for crime, the execution of the surety labor contract not operating to relieve the convict from his status as a prisoner, liable to perform the judgment for fine and costs, but merely to transfer his custody and services from the state to the surety; and hence his service for the latter does not constitute peonage.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 150–151½; Dec. Dig. § 83.*]

G. W. Broughton was indicted for peonage. On demurrer to indictment. Sustained.

Indictment for violation of section 5526, R. S. (U. S. Comp. St. 1901, p. 3715), and section 269, Penal Code (Act March 4, 1909, c. 321, 35 Stat. 1142 [U. S. Comp. St. Supp. 1911, p. 1670]).

O. D. Street, Sp. Asst. U. S. Atty., of Birmingham, Ala., and Alex. D. Pitts, U. S. Atty. of Mobile, Ala.

F. W. Hare and John McDuffie, both of Monroeville, Ala., for defendant.

Wm. L. Martin, of Montgomery, Ala., for State of Alabama.

TOULMIN, District Judge. The first count of the indictment is admitted by the attorneys for the United States to be insufficient, and it is by them nol. prossed.

The second count alleges that, after said Fields entered upon the performance of the contract mentioned therein, the defendant threatened him that if he refused to work and labor for him to work out said debt he would have him arrested and put him in jail. The indictment fails to allege that anything was said or done by Fields to call for such alleged threat. There is no allegation that he had refused to work, or that he had expressed any unwillingness to work and labor under said contract. The alleged threat was but an idle threat under the circumstances, if intended as a threat at all. It was in fact a simple statement of what the state law provided for, and authorized to be done. Moreover, the alleged threat, if construed as such, was entirely conditional. Its execution was dependent on a contingency, a possible occurrence, which could only be brought about by the act of said Fields. However, he continued to perform work

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

and labor for the defendant, and so far as appears to the contrary, from any fact or facts alleged in the indictment, without complaint, presumably therefore in compliance with said contract. But it is alleged that after said threat said Fields "did not voluntarily work," and "did, against his free will," continue to work for the defendant under said contract until a later date. These allegations may be true as a matter of fact based on the presumption that convicts do not voluntarily work, especially when such work is imposed as a punishment for crime committed. But it is alleged that Fields was coerced and intimidated. How, it is not shown. He may have been restrained by the force of law and authority. But what wrongful act of the defendant is alleged by which said Fields was coerced and intimidated? The court finds none. The allegations in the indictment referred to are mere allegations of conclusions, and not of any fact or facts on which such conclusions are or may be based. There are none from which the court is able to say that said Fields was held to involuntary servitude. There is in fact no direct allegation in said second count that Fields ever refused to work for the defendant, or ever left his service. It may be implied from the allegation that Fields continued to work and labor for the defendant under the said contract until on or about the 14th of September, 1910.

Said count, however, charges as a conclusion that the defendant did, in the manner aforesaid, hold said Fields in a condition of peonage. There is no allegation that he was held in or to a condition of involuntary servitude, or that he was arrested and returned to a condition of peonage.

In my opinion the said second and third counts make no case of involuntary servitude or peonage, and the demurrers thereto are sustained.

The facts of this case, as I can learn and understand them from the indictment and demurrers thereto, so far as the same set out the facts, are substantially as follows:

[1] E. W. Fields was convicted in one of the state courts of Alabama of the offense of selling mortgaged property and was sentenced to pay a fine, for which judgment, and in addition thereto court costs, was rendered against the defendant by the court, whereupon the defendant in this case, G. W. Broughton, with said E. W. Fields confessed judgment before the court for the aggregate amount of said fine and costs. This was at the July term, 1910, of said court. On the 8th day of July, 1910, said E. W. Fields entered into an agreement to work and labor for said G. W. Broughton on his plantation in Monroe county, Ala., and under his direction, as a farm hand, to pay said fine and costs, for the term of 19 months and 29 days, at the rate of $6 per month together with his board, lodging, and clothing during said term of service, which was to end on the 7th day of March, 1912, and provided "said work is not dangerous in its character." This agreement was signed by both E. W. Fields and G. W. Broughton. It was signed in open court and was approved by the judge of the court. After said agreement was signed, said Fields entered the service of, and did work and labor for, said Broughton

while in his custody and under his direction, and during the time said Fields was so working for said Broughton the latter stated to Fields (called in the indictment "threatened" said Fields) that if he refused to perform work and labor for him he would have him arrested and put in jail. Fields continued to work and labor for said Broughton under the said contract until the 14th day of September, 1910, when, before he had worked out his term of service for the payment of the fine and costs, he refused to work and left the custody and control of said Broughton. On the 15th of September, 1910, Broughton personally appeared before the judge of the court of Monroe county, Ala., and on oath stated, in substance and effect, the facts which I have already recited as to the conviction of Fields, the fine and costs, the confession of judgment by Fields and Broughton as surety, the making of the agreement between them and its contents, with the averment that Fields had failed and refused, without a good and sufficient excuse, to perform said labor as agreed in said contract. This statement was in form an ordinary affidavit, upon which a warrant of arrest was issued and duly executed. It is not shown by any fact or facts that said Fields was, after his arrest under said warrant, returned to a condition of involuntary servitude or peonage or otherwise punished. For all that appears from the facts stated, he was not held at all or restrained of his liberty.

[2] The contention of the attorneys for the government is that by a confession of judgment by the convict with surety, as provided by the law of the state, the convict ceased to be a prisoner, and that he was released from the conviction.

The statutes of the state do not so provide, but do provide, in certain contingencies, for the convict's arrest and trial as for a misdemeanor. The statutes referred to are as follows:

"When a fine is assessed, the court may allow the defendant to confess judgment, with good and sufficient sureties, for the fine and costs." Section 7632, Code Ala. 1907.

"Any defendant, on whom a fine is imposed on conviction for a misdemeanor, who in open court signs a written contract, approved in writing by the judge of the court in which the conviction is had, whereby, in consideration of another becoming his surety on a confession of judgment for the fine and costs, agrees to do any act, or perform any service for such person, and who, after being released on such confession of judgment, fails or refuses without good and sufficient excuse, to be determined by the jury, to do the act, or perform the service, which in such contract he promised or agreed to do or perform, must, on conviction, be fined not less than the amount of the damages which the party contracting with him has suffered by such failure or refusal, and not more than five hundred dollars; and the jury shall assess the amount of such damages; but no conviction shall be had under this section, unless it is shown on the trial that such contract was filed for record in the office of the judge of probate of the county in which the confession of judgment was had, within ten days after the day of the execution thereof." Section 6846, Code Ala. 1907.

See, also, section 6847, Code Alabama 1907.

Numerous decisions of the Alabama Supreme Court hold that said statutes are valid as tested by the Constitution of the state, and that the conviction provided for under said statutes, and the fine and costs imposed thereon, are not paid or a judgment confessed therefor,

the defendant must be imprisoned in the county jail or be sentenced to hard labor for the county, and that imprisonment under such conviction is not violative of the provision of said Constitution prohibiting imprisonment for debt. The Supreme Court of the state has repeatedly held that the relation of debtor and creditor does not exist under the circumstances stated; that the state has full control over the convict, and until he has by his labor paid the fine and costs, for which he has confessed judgment, he may be arrested and fined or sentenced to hard labor for a refusal to work out his fine and costs, as for an escape. Neither fines nor costs in criminal cases are debts within the meaning of the constitutional provision, that no man shall be imprisoned for debt. Caldwell v. State, 55 Ala. 133; Lee v. State, 75 Ala. 29.

In 75 Ala. 29, the Supreme Court of Alabama said:

"Where the foundation of the injury complained of was the nonpayment of a debt—a debt created by contract—then by no device could the debtor be imprisoned for its nonpayment."

The court "limited the exemption to contract liabilities," and said, "For it is manifest that fines, forfeitures, mulcts, damages for a wrong or tort, are not a debt within the clause of the Constitution," which declares that no person shall be imprisoned for debt. There are money liabilities that are not debts incurred by contract inter partes. "A convicted defendant could be sentenced to imprisonment, or hard labor, for the nonpayment of the costs of his conviction. Such costs were only a money liability, but they were not a debt contracted."

In the case cited (75 Ala. 29) there was a demurrer to the indictment alleging the unconstitutionality of the statute (the Alabama statute, section 6846, code 1907). The court said:

"The particular objection to the statute is that it authorizes imprisonment for debt. We do not so understand the statute. The charge against the defendant was, not that he refused to pay a debt he had contracted, but that he ran away from the hard labor imposed on him as a punishment for the offense he had committed. He had not worked out the sentence to hard labor, to which he had been condemned. The statute * * * offers to convicted offenders the opportunity of selecting their own task master, the kind of service they will render, and of having a voice in the measure of compensation. * * * The confessed judgment, and the contract approved by the court, do not satisfy the offended law, nor pay the penalty imposed. They are but the condition on which the offender is permitted to select how and whom he will serve, in satisfying the broken law. No one would question the constitutionality of a statute, making it indictable for one sentenced to hard labor, to escape or flee from the service. We regard the present statute as substantially that identical thing, tempered to the offender by a humane impulse; and hence we hold it constitutional."

There are eight or nine other decisions by the Supreme Court of Alabama following the case last cited on the same subject and to the same effect. A different justice wrote the opinion in each of the several decisions referred to except one. Justice Stone wrote the opinion in 75 Ala. 29, cited supra, and in one of the later cases when he was Chief Justice. Smith v. State, 82 Ala. 40, 2 South. 629; Wynn v. State, 82 Ala. 55, 2 South. 630; Ex parte Joice, 88 Ala. 128, 131, 7 South. 3; Ward v. State, 88 Ala. 202, 7 South. 298; Ex

parte Davis, 95 Ala. 16, 11 South. 308; McQueen v. State, 141 Ala. 100–102, 37 South. 360; Bailey v. State, 161 Ala. 75–82, 49 South. 886.

In 95 Ala. 16, 11 South. 311, the court said:

"The party confessing judgment with the defendant for the fine and costs becomes the transferee * * * of the state to compel the satisfaction of the fine and costs by exacting the involuntary servitude of the convict, 'who himself contracts to change masters for this purpose.'"

In 88 Ala. 202, 7 South. 298, the court said:

"When a defendant, having been fined on conviction of a misdemeanor, has entered into a written contract to perform service for a surety in a confessed judgment for the fine and costs, and the contract has been duly approved and recorded, * * * he is regarded as performing compulsory service as a punishment, and is criminally liable for a failure or refusal to serve as stipulated."

In 88 Ala. 131, 7 South. 3, the court said:

"Imprisonment, as a satisfaction of the fine imposed, has always prevailed in Alabama, and in every other country where an enlightened system of criminal jurisprudence obtains. It is the only practical alternative, where the defendant refuses to pay or secure the fine."

In 82 Ala. 40, 2 South. 629, the court held that:

"A confession of judgment in a criminal case, by the convict and his surety, under contract between them for the performance of labor or services by the former, makes it a misdemeanor for him to leave or escape from such service, * * * contemplates only the payment of the fine and costs, for the nonpayment of which, under the constitutional provisions, * * * imprisonment or hard labor may be imposed. * * * The hirer becomes the transferee only of the right of the state to compel the satisfaction of such fine and costs."

The defendant in this case invokes the statutes of the state of Alabama, as construed by the Supreme Court of the state, as his defense and for his protection. He contends that on the law, as applicable to the facts shown in this case, he is not guilty of holding said Fields to a condition of involuntary servitude; nor is he guilty of holding said Fields to a condition of peonage, under the facts shown by the record in the case.

The federal courts uniformly follow and are guided by the decisions of the highest court of the state upon the construction of the Constitution and statute of the state, and upon the question whether the statute as construed violated any provision of the state Constitution. If the act of the state Legislature, as construed by its highest court, conflicts with the federal Constitution, in a case that involves a question of a right under the Constitution and laws of the United States, it is the duty of this court to so decide and to thus enforce the provisions of the federal Constitution. Fallbrook Irrig. Dist. v. Bradley, 164 U. S. 154, 17 Sup. Ct. 56, 41 L. Ed. 369; First Nat. Bank v. Liewer, 187 Fed. 16–18, 109 C. C. A. 70; Clapp v. Otoe County, Neb., 104 Fed. 473, 45 C. C. A. 579; City of Beatrice v. Edminson, 117 Fed. 427–430, 54 C. C. A. 601.

The United States Supreme Court, in 164 U. S., cited supra, said:

"We should not be justified in holding the act to be in violation of the state Constitution in the face of clear and repeated decisions of the highest court

of the state to the contrary, under the pretext that we were deciding principles of general constitutional law." 164 U. S. 155, 17 Sup. Ct. 62, 41 L. Ed. 369; United States v. Clement (D. C.) 171 Fed. 974; Sunset Telephone & Telegraph Co. v. City of Pomona, 172 Fed. 829–831, 97 C. C. A. 251.

The thirteenth amendment of the Constitution of the United States provides that:

"Neither slavery nor involuntary servitude, except as a punishment for crime where the party shall have been duly convicted, shall exist within the United States."

There is no doubt that Congress may enforce this amendment by legislation punishing the holding of a person in involuntary servitude, except as a punishment for crime. In the exercise of that power, Congress has enacted what is known as the law denouncing peonage and punishing one who holds another in the condition of involuntary servitude. There is no doubt of the validity of this legislation. Its constitutionality is not questioned.

United States Revised Statutes, §§ 1990, 5526, prohibit peonage. What is peonage? It is a condition of compulsory service, based upon the indebtedness of the peon to the master. The basal fact is indebtedness between debtor and creditor. Clyatt v. U. S., 197 U. S. 207, 25 Sup. Ct. 429, 49 L. Ed. 726. The court in the Clyatt Case said:

"We need not stop to consider any possible limits or exceptional cases, such as * * * the power of the Legislature to make unlawful and punish criminally, an abandonment by an employé of his post of labor in any extreme cases."

The court clearly implying that there are extreme cases wherein the Legislature had the power to criminally punish.

The Supreme Court of Alabama has repeatedly held that section 6846 of the Code of 1907 was constitutional; that the convict Fields was put in the possession and custody of the defendant as the transferee of the state, under whose direction he was to work and labor to pay the fine and costs imposed on said Fields as a punishment for an offense he had committed against the law; that the said convict was not held to pay a debt, but to pay the fine and costs incident to his trial and conviction. Said courts have further held that the relation of debtor and creditor was not created or authorized by said statute, and that imprisonment under the statute for the nonpayment of the fine and costs would not be imprisonment for debt. As said by the court in 88 Ala. 131, 7 South. 3:

"It is the only practicable alternative where the defendant refuses to pay or secure the fine."

The United States Circuit Court of Appeals for this (fifth) Circuit, said:

"Federal courts will follow the decisions of the state court of last resort with reference to the construction of state statutes. * * * If we differed from the reasoning of the Alabama Supreme Court, * * * we would be constrained by established rules to be governed by decisions of that court as to the construction of the contracts and statutes involved here." Thompson v. Sloss-Sheffield Steel & Iron Co., 209 Fed. 840, 126 C. C. A. 564; Dickson v. Wildman, 183 Fed. 398–399, 105 C. C. A. 618.

The Supreme Court of Alabama has frequently held that the holding the convict for any contractual liability, whether in money or property, is imprisonment for debt within the meaning of the Constitution, and unauthorized. Ex parte Hardy, 68 Ala. 303; Tarpley v. State, 79 Ala. 271; Winslow v. State, 97 Ala. 70, 12 South. 423.

I am not convinced that there is any right under the Constitution and laws of the United States involved in this case. But if there was, and there is a doubt as to the constitutionality of the Alabama statute in question, it should not be declared unconstitutional. A reasonable doubt must be solved in favor of the legislative action and the statute be sustained. Cooley's Con. Lim. pp. 182–184; Sadler v. Langham, 34 Ala. 320, 321.

On the facts of this case, as I find them, and under the law applicable to those facts, my opinion is that the defendant is not guilty of unlawfully holding the said E. W. Fields in a condition of involuntary servitude; and further find that the defendant is not guilty of the charge of holding said Fields in a condition of peonage.

UNITED STATES v. REYNOLDS.

(District Court, S. D. Alabama, S. D. March 13, 1914.)

No. 4086.

SLAVES (§ 24*)—PEONAGE—INDICTMENT.

An indictment for peonage in holding a convict to labor to pay a fine and costs for which defendant had become surety, failing to allege that the convict ever entered upon the performance of the service for the surety, or did any work or labor as agreed, or was ever in the surety's custody or control, was fatally defective.

[Ed. Note.—For other cases, see Slaves, Cent. Dig. § 113; Dec. Dig. § 24.*]

J. A. Reynolds was indicted for peonage. On demurrer to special plea. Overruled.

O. D. Street, Sp. Asst. U. S. Atty., of Guntersville, Ala., and Alex. D. Pitts, U. S. Atty., of Mobile, Ala., for the United States.

F. W. Hare and John McDuffie, both of Monroeville, Ala., for defendant.

John McDuffie, of Monroeville, Ala., and Wm. L. Martin, Asst. Atty. Gen. for State of Alabama.

TOULMIN, District Judge. This case is submitted on the indictment and a special plea setting up certain facts as those constituting the defense in the case, and reciting in connection therewith certain statutes of the state of Alabama, being sections 6846, 6847, and others, Code Ala. 1907.

The facts averred are substantially the same as those found by the court to exist in the case of the United States v. Broughton, 213 Fed. 345, this day decided by this court. The allegations of fact in the

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

two indictments are substantially the same, with the exception that the convict Rivers, on his conviction by the court for failing and refusing to work and labor under the direction of said Reynolds, to pay the fine and costs imposed on him for larceny and for which Reynolds was his surety, was sentenced to pay a fine and costs in the last conviction, and that he confessed judgment with surety for said fine and costs, and then and there agreed to work and labor for said surety to pay said fine and costs. There is no allegation that said Rivers ever entered upon the performance of said service, or did any work or labor as agreed on, or was ever in the custody or under the control of his said surety.

Considering and treating the objections filed by the United States attorneys to said plea in bar as demurrers to the same, the court overrules said demurrers.

The court finds on the facts, and the law applicable thereto, that the defendant is not guilty as charged in the indictment. For a fuller expression of the views of the court in this case, I refer to the opinion in United States v. Broughton, this day filed.

In re SWANSON.

(District Court, W. D. Washington, N. D. May 5, 1914.)

No. 5148.

1. EXEMPTIONS (§ 52*)—"PROPERTY" EXEMPT—MONEY ON DEPOSIT.
   Under Rem. & Bal. Code Wash. § 563, par. 4, providing that there shall be exempt from execution and attachment to each householder two cows, with their calves, five swine, etc., and that in case such householder shall not possess or desire to retain such animals as he may select from his "property," and retain other property, not to exceed $250 in value, a householder who did not have such animals was entitled to retain in lieu thereof money on deposit in a bank; there being no reason for excluding money from the meaning of the words "other property" (citing 6 Words and Phrases, pp. 5693–5728; vol. 8, pp. 7768–7770.)
   [Ed. Note.—For other cases, see Exemptions, Cent. Dig. § 40; Dec. Dig. § 52.*]

2. EXEMPTIONS (§ 4*)—STATUTES—LIBERAL CONSTRUCTION.
   Exemption statutes are uniformly liberally construed, with the view of effectuating the object of the lawmaker, which is to provide a limited protection to the home.
   [Ed. Note.—For other cases, see Exemptions, Cent. Dig. § 4; Dec. Dig. § 4.*]

In Bankruptcy. In the matter of A. G. Swanson, bankrupt. On petition to review an order of the referee setting aside $245 as exempt in lieu of certain animals. Order confirmed.

Charles D. Fullen, of Seattle, Wash., for petitioning creditor.

F. B. Carpenter, of Seattle, Wash., for bankrupt.

NETERER, District Judge. [1] A petition has been filed to review the order of the referee setting aside $245 to the bankrupt in lieu of certain personal property as exempt under section 563, par. 4, Rem.

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

& Bal. Code of Washington. From the certificate of the referee it appears that the bankrupt is the head of a family, and is entitled under the section to exercise the right of exemption, and had on deposit in bank $245, and did not have the animals mentioned in the section of the Washington statutes referred to, which reads as follows:

"To each householder, two cows, with their calves, five swine, two stands of bees, thirty-six domestic fowls, and provisions and fuel for the comfortable maintenance of such householder and family for six months, also feed for such animals for six months: Provided, that in case such householder shall not possess or shall not desire to retain the animals above named, he may select from his property and retain other property not to exceed two hundred and fifty dollars, coin, in value."

It is contended by the petitioning creditor that the words "property" and "other property," used in this statute, "did not refer to and can have no reference to *money* or *cash*," and he cites In re Scheier (D. C.) 188 Fed. 744, and In re Gerber, 186 Fed. 693, 108 C. C. A. 511, as decisive of the issue here.

The Gerber Case has no application to the facts certified by the referee. The court in that case simply held that the right given by the Washington statute under paragraph 3, § 563, to select "other household goods, utensils and furniture" provided in that section was confined to other property of the same kind. The reading of the section of the statute is conclusive of the fact that the selection was limited to the same character of property. The section which is material reads:

"To each householder, one bed and bedding, and one addition[al] bed and bedding for each additional member of the family, and *other household goods and utensils and furniture* not exceeding $500, coin, in value."

The selection is thus specifically limited to "other household goods, utensils, and furniture." An examination of In re Scheier, supra, discloses that the only question presented to the court upon which expression was made is (quoting from the syllabus):

"Individual partners cannot claim exemption from partnership property as against partnership debts in bankruptcy, though the other partner or partners may have consented thereto."

And the further question that:

"The statute does not permit the debtor to select other property in lieu of provisions and fuel for his family, and feed for the animals therein [section 563, par. 4] named."

It must be clear that the first suggestion has no application here, and I think it is manifest that the second is equally remote. This section exempts to the householder two cows, with their calves, five swine, two stands of bees, thirty-six fowl, and if the householder "shall not possess or shall not desire to retain the animals * * * he may select from his *other property* * * * not to exceed $250 coin in value." The bankrupt did not have the "animals," and selected in lieu thereof the $245 in the bank. This section further exempts "provisions and fuel for the comfortable maintenance of such householder and family for six months; also feed for such animals for six months"; but there is no provision to select any other prop-

erty in lieu of "provisions and fuel * * * and * * * feed for such animals," and that is all that the court sought to determine in that case.

I do not think there is any merit in the contention that money is not contemplated as "property," or "other property," in the exemption statute quoted. Webster defines property to be the exclusive right of possessing, enjoying, and disposing of a thing, ownership, and estate, whether in lands, goods, or money.

"Property is nomen generalissimum, and extends to every species of valuable right and interest, including real and personal property, assessments, franchises, and other incorporeal hereditaments." Words and Phrases, 5693.

Bouvier defines property as:

"The right and interest a man has in lands and chattels to the exclusion of others."

Property is by modern writers divided into two classes, real and personal. The animals enumerated in the section quoted and money belong to the same general property class, both being personal property. There is no reason, either in logic or common sense, why the court should limit the meaning of the words "other property," as used in the statutes, in the absence of a limitation to other like property, so as to exclude money. The lawmakers in the two specific cases mentioned, where other property has been enumerated, have specifically limited the term to property of the same kind or character, or have made no provision for the selection of property in lieu thereof.

The Supreme Court of Illinois in Fanning v. First National Bank, 76 Ill. 53, has held, under a statute providing, where the debtor has no property than such as was specifically exempt, that he could, under a statute which exempts $100 worth of other property to be selected by him, claim and have set aside to him $100 on deposit in bank.

[2] The exemption statutes are enacted to provide a limited protection to the home. The welfare of the dependents is the special object of the law's concern, and these statutes are by the Washington courts, and uniformly, liberally construed with the view of effectuating the object of the lawmaker. Every viewpoint from which this subject can be approached, it seems to me, requires that the order of the referee should be confirmed.

An order may be presented.

In re DOW.

(District Court, E. D. South Carolina. April 15, 1914.)

ALIENS (§ 61*)—PERSONS CAPABLE OF NATURALIZATION—"WHITE PERSONS"—SYRIANS.

The meaning of the words "white persons," as used in Rev. St. § 2169, as amended in 1875 (U. S. Comp. St. 1901, p. 1333), authorizing the naturalization of aliens "being free white persons," cannot be determined on any ground of complexion or race, but in view of the conditions existing in 1790, when they were first used in the naturalization statute, must be

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

limited to persons of European nativity or descent. As so construed, a Syrian is not entitled to naturalization.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 119–122; Dec. Dig. § 61.*

For other definitions, see Words and Phrases, vol. 8, pp. 7446, 7447.]

On rehearing. Application for naturalization denied.

For former opinion, see 211 Fed. 486.

T. Moultrie Mordecai, of Charleston, S. C., for applicant and the Syrian American Ass'ns.

SMITH, District Judge. At the instance of the applicant and other Syrians interested, a rehearing was granted in this case, which has been had, and argument has been heard on behalf of the applicant himself as well as from counsel appearing on behalf of the Syrian American Associations of the country.

Deep feeling has been manifested on the part of the Syrian immigrants because of what has been termed by them the humiliation inflicted upon, and mortification suffered by, Syrians in America by the previous decree in this matter which they construe as deciding that they do not (as they term it) belong to the "white race."

In the first place, such was not the decision of this court. The decision of the court in this case was that a modern Syrian was an Asiatic, and was thus not included in the term "white persons" as contained in section 2169 of the U. S. Revised Statutes as amended in 1875, and first used in the Statute of 1790. In the second place, there was no justifiable reason for either humiliation or mortification. The grant of the privilege of citizenship is purely discretionary with the people of the country. It is entirely distinct from the admitting to entry and residence. It carries with it great powers of good and evil in the exercise of the ballot and great responsibilities in the duties of the jury box. The immigrant such as the present applicant is freely admitted here. He comes from a land where he deems himself oppressed, to a free country where he is allowed to enjoy life, liberty, and the pursuit of happiness in as full democratic measure as the citizens of the country themselves. That he should further be allowed to take part in the government as a voter and exercise the weighty judicial powers of a juror is an entirely different matter. That this should be refused to him is no real ground for humiliation. Congress has admittedly seen fit to exclude from that privilege Chinese, Japanese, Malays, Mongols generally, and American Indians. It is no more a humiliation for a Syrian to be excluded from a privilege (not a right) than it is to an educated and cultivated person from China, Japan, or the Malay Peninsula.

The true ground of this supposed humiliation is that the applicant and his associates conceive the refusal of this privilege to mean that they do not belong to a white race, but to a colored and what they consider an inferior race. The inconsistency of this attitude is apparent. The statute does admit to citizenship the very race they term inferior. It admits persons of "African nativity and African descent."

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

So that if the applicant and his associates did belong to the race they so deem inferior, they could be admitted to that very privilege the refusal of which so humiliates them. The admitting a black African and excluding a brown Asiatic may be arbitrary and unreasonable, but it cannot be said to be humiliating, and at any rate it is certainly a matter wholly for Congress in its pure discretion.

It may be that in 1870 when Congress enlarged the provisions of the statute as to aliens who could be naturalized by extending the privilege to persons of African nativity, and African descent, it considered that the immigration of that character would be inconsiderable, whereas if it opened the privilege to persons of Asiatic nativity and Asiatic descent it might be overwhelming; but that conclusion cannot be said to involve any humiliation to the Asiatic.

The previous decision in this case was that the term "white persons," as used in the statute, meant persons of European nativity or European descent. The applicant was excluded because he was an Asiatic and not an European. Whether he belonged to a white race or not was not decided as not pertinent to the issue.

The applicant and his associates now seek to have that decision reconsidered and reversed upon the following grounds:

(1) That the term "white persons" in the statute means persons of the "Caucasian race," and not persons white in color.

(2) That he is a Semite or a member of one of the Semitic nations.

(3) That the Semitic nations are all members of the "Caucasian" or white race.

(4) That the matter has been settled in their favor as the European Jews have been admitted without question since the passage of the statute and that the Jews are one of the Semitic peoples.

(5) That the history and position of the Syrians, their connection through all time with the peoples to whom the Jewish and Christian peoples owe their religion, make it inconceivable that the statute could have intended to exclude them.

The judge upon an application for naturalization is called upon to pass upon the question whether the applicant is entitled under the terms of the statute. The present applicant denies that he is a person of African nativity or African descent. He asserts that he is a person of Asiatic nativity and of Asiatic descent. The question is then presented to the court whether such an Asiatic is a white person as intended by the statute.

At first reading the term "white" denotes color. Construed literally the statute might be interpreted to mean such a person as under the ocular inspection of the court seemed to be white in color. What standard of "white" is the judge to adopt? The clear white of a Scandinavian, or the swarthy olive or brown of a person from the south of Portugal?

Disease and other causes sometimes cloud and darken the fairest skin and lighten the darkest. It is manifest that it would be absolutely impossible for a judge to determine whether an applicant is a white person by ocular inspection. Again, out of the multitude of

judges in this country, how could there be any uniform rule under such a test? No two judges would agree upon the same standard or grade of colorization. The spectacle would be presented of one judge excluding and another admitting persons of the same grade of complexion. For these and other similar reasons the strict "color test" as the test under the statute has been repudiated by the courts of the country.

As a substitute for this test, some courts have followed in a way what may be termed the test of race. In other words, the words "white persons" have been construed as meaning persons of the "white race," and it has been held that if a person belonged to a so-called white race he was entitled to naturalization, no matter what his complexion. What is the white race? Or what was known as the white race in 1790? Most of the courts in this country that have attempted to deal with the question have referred to the white race as the "Caucasian" race, and said that a member of the Caucasian race was entitled to be naturalized without regard to complexion. Very few agree as to what peoples are members of the Caucasian race, and the term "Caucasian" received its wide currency in the United States largely from the fact that for 70 years after the statute of 1790 a large number of persons of a black complexioned race were held as slaves, and one of the justifications advanced was that they did not belong to the superior race which was styled Caucasian supposing that term referred to white. The term "Caucasian" in its application to race originated with one Blumenbach, who in 1781 published in German a work attempting to classify the races of mankind in which he classed as "Caucasian" the inhabitants of Europe and of the Caucasus and of Asia Minor, Western Asia including Syria, and of Northern Africa.

Blumenbach determined his classification neither by complexion nor by philological or scientific ethnological principles as now understood. He put together as one race in his own words "altogether the inhabitants of the world known by the ancient Grecians and Romans." The peoples possessing according to Blumenbach "according to European ideas of beauty the form of the face and skull most perfect." For the designation "Caucasian" he was indebted to the following circumstances:

"Of all the odd myths that have arisen in the scientific world, the 'Caucasian mystery' invented quite innocently by Blumenbach is the oldest. A Georgian woman's skull was the handsomest in his collection. Hence it became his model exemplar of human skulls, from which all others might be regarded as derivations; and out of this, by some strange intellectual hocus-pocus, grew up the notion that the Caucasian man is the prototypic 'Adamic' man and his country the primitive center of our kind." Huxley, Methods & Results of Ethnology (Ed. of 1894).

Or as said by Latham:

"Blumenbach had a solitary Georgian skull and that skull was the finest in his collection, that of a Greek being the next. Hence it was taken as the type of the skull of the more organized division of our species. More than this, it gave its name to the type and introduced the term Caucasian. Never has a single head done more harm to science than was done in the way of posthumous mischief by this well-shaped head of a female from Georgia." Latham, "The Nationalities of Europe."

The scientific conclusion of scholars of the present day is that the inhabitants of the Caucasus are to be classed with the Mongols, and not with the Europeans, so that Blumenbach derived his term from a skull more likely to have been Mongolian than European, or it may be the skull of some traveler or captive in the Caucasus.

"The ill chosen name of Caucasian invented by Blumenbach in allusion to a South Caucasian skull of especially typical proportions, and applied by him to the so-called white races, is still current; it brings into one race peoples such as the Arabs and Swedes, although these are scarcely less different than the Americans and Malays who are set down as two distinct races." E. B. Tylor in article on Anthropology, Encyclo. Brit. (11th Ed.).

Subsequent to 1781, and Blumenbach's ill-chosen classification, came the great development of philological study initiated by the acquisition of the Sanscrit and Zendic or Iranian languages. The discovery that Sanscrit, the ancient language of Northern India, and Zend or Iranian, the ancient language of Northern Persia held affinities of a definite character with Gothic, Celtic, Slavonic, Latin, and Greek, stimulated the scientific study of philology, and its inferences carried to an extreme, persuaded many to determine racial by language affinities, wholly oblivious of the fact that there are many instances where a language of one race has been imposed upon or accepted by those of another race.

This philological development led to the coining of the word "Aryan," taken from the Vedic or old Sanscrit and Zend, and all persons speaking or having spoken one of the so-called "Aryan" tongues, i. e., one of the Sanscrit, Iranian, Slavonic, Gothic, Celtic, Latin, Greek group of languages were called "Aryans" and recognized as belonging to a white race, leading to the manifest absurdity of classing among whites the black Dravidian inhabitant of Ceylon and Southern India, because he spoke a dialect or descendant of Sanscrit, and the almost equally dark inhabitant of Southern Persia because he spoke a modern Persian dialect or descendant of ancient Iranian, and excluded from the "Aryan brotherhood" of whites the Magyars, the Finns, and the Turks because they spoke tongues of the Ugric or Turanian group, and the Basques because they spoke a language of a kind all to itself.

The ethnological and historical absurdity of this became apparent. The history of India showed that a conquering white complexioned race had imposed their language upon a dark complexioned race now called Dravidian, and had become submerged into its enormously preponderant population, notwithstanding the determined effort to prevent it by the institution of a rigid system of caste; and that a similar result had taken place in Persia. The term "Aryan" has thus become more or less discredited, and has been (at least in its application to the family of languages) succeeded largely by that of Indo-European. During this philological-ethnological attempt to adapt present physical conditions to past linguistic ones, the point of supposed original distribution of the white races shifted. Blumenbach, who does not appear to have known either the Sanscrit or Iranian tongues, placed it in the Caucasus. His successors—whom Huxley calls "brilliant Uhlans"—removed it to the Hindoo-Koosh-Pamir region, the

supposed home of the speakers of Vedic and Zend, and Latham attempts to place it on the Sarmatian plains.

Ethnologists and philologists do not agree as to this, nor do they agree as to who are the white races. They will rank different peoples as "Aryans" or "Indo-Europeans" or "Semites" or "Hamites," differing even as to who are included in these; but when it comes to "white" no agreed classification exists. The term white is generally joined to some other by the word "or," viz., Aryans or white races, etc.

If there be no such race as the "Caucasian race," and the term Caucasian be incorrect as properly describing the white races, then the whole argument based upon the Syrian being one of a Caucasian race falls to the ground. It may be added that up to this time neither history nor archeological investigations seem to show that any Semitic speaking race came from the Caucasian region. Their recorded movements are apparently from the south and the east.

A Syrian not only would not appear to be of a Caucasian race, but it does not appear clear that he is of a Semitic race.

The applicant and his friends claim among other grounds to be Semites because they speak a so-called Semitic tongue, viz., Arabic. The Berbers and Moors of Northern Africa and the modern Egyptians also speak Arabic, yet none of them are classed as Semites. Does the history of Syria bear out their contention?

By Syria is generally included all that part of Asia lying east of the Mediterranean Sea, south of the Amanus branch of the Taurus range of mountains, west of the Arabian or Syrian desert, and north of the boundary of Egypt, say north of a point somewhat over 100 miles south of Jerusalem. It is exceedingly difficult to trace the "origin" of any very ancient people, but when history opens, this region seems, according to present acceptance, to have been in possession of a people called Hittites or "Khatti." Their language is still a mystery, but from their sculptured representations and the few proper names that survive in other languages, and their pictured representations on extant sculptures, they are generally supposed to have been a non-Semitic, possibly a Mongolic race. The central and southern part of this region next apparently was under Egyptian rule. Whether that rule was only that of a military government or tax gatherer, or included any interpenetration of Egyptian settlers, it does not seem possible to say. This rule in turn seems to have been succeeded by another Hittite dominion. It does appear that subsequent thereto occupation was taken by people speaking a Semitic tongue. The Phœnicians first, and with them apparently Arameans, and then the Hebrews. Whether this was a complete dispossession or an amalgamation of the conquerors with the Hittite population, the latter taking the language of their masters, cannot yet be told.

It has been suggested that it was this Hittite peoples of a different race (the accursed inhabitants of Canaan) that the invading Hebrew was told so savagely to destroy. Deut. vii, 2, and xx, 16, 17.

The historical record in the Old Testament tells us that nothwithstanding this injunction many of the inhabitants were spared and con-

tinued to occupy the land, afterwards the land ruled by the Hebrews, and doubtless to mix and amalgamate with their conquerors. Uriah, the Hittite, was an officer in the army of David.

As the mist clears, the Hittite dominion overthrown, we find the country as to the southern part in Hebrew hands, as to the coast and center in Phœnician, and as to the north, toward Damascus and beyond in what may be termed Aramean, or according to Winckler, mixed Hittite and Aramean, but all speaking a Semitic language. Then come the invasions: First, the Assyrian with its recorded depopulation, and the removal of the people and the substitution of others. Next, the Babylonian, with a like sequence, intermixed with Egyptian inroads, and then the Persian, to the clemency of whose sovereigns according to the Bible record was due the restoration of the Jew to Jerusalem, surrounded by a population whose race and descent is not known, but who were apparently not regarded by the Jews as a part of them.

After the Persian dominion, came the conquest of Alexander, and the overlordship of his successors, during whose dominion parts of the country seem to have been largely Hellenized, both in immigration and language. Large parts of Syria were inhabited by a Greek speaking people (although not necessarily of Greek descent), and the words of Christ though supposed to have been spoken in Aramæic have been transmitted (excepting His last words on the cross) to us in Greek. Then came the Roman conquest, the destruction of Jerusalem, and the devastation of the country and wasting of the people that preceded the Pax Romana. Greek influences seem to have continued and Greek overlordship held good under the Byzantine Emperors, varied only by temporary raids and control of the Persian Sasanians until the Arabian Mohammedan storm swept over the land in the seventh century, crushing and killing all that opposed. Then followed the crusades, with the temporary Latin military occupation of Jerusalem and a small part of lower Syria for about a century, and in 1260 the terrible and ruthless Mongolian invasions under the dynasty of Jenghis Khan, that invasion which literally destroyed Bagdad and its inhabitants and largely populated Persia with a Mongol people. And then finally, in 1516, the Turkish victory over the Arabic overlordship and the Turkish conquest and occupation of the country.

Now of what race are the Syrians? They no longer speak Hittite or Phœnician or Syriac or Greek; they speak Arabic, but that does not show them to be Semites, for so do the Berbers and Moors and Egyptians of North Africa. They are not Aryan or Indo-European. They may be a mixture of every race that has possessed the country. How large the Turkish and Mongolian intermixture may be cannot be told. Syria, according to the accounts, varies: In the north its inhabitants are Turkish more or less mixed. In the south its inhabitants are Arabian largely mixed with African blood. In the center is the Lebanon District, the ancient Phœnician country, from which the applicant comes. This is largely inhabited by the peoples known as Maronites, who are Christian, and the Druses, who are Mahommedan of a

peculiar sect. Both speak Arabic—an impure Arabic according to some travelers.

The present applicant comes from Batrun or Batroun on the coast of the Lebanon District. That is, he comes from the coast in ancient times occupied by the Phœnicians. Batroun is between Beirout and Tripoli near the site of the ancient but long destroyed Phœnician city of Gebal, called by the Greeks Byblos. He is a Maronite—a Christian.

The inhabitants of this region are said by some accounts to average lighter in color than the inhabitants of the rest of Syria, although there are many dark ones among them. The Mahommedan Druses are said to be lighter than the Maronites, but taken as a whole the inhabitants of this district are very considerably darker in complexion than Europeans. Their complexions are said to have a yellowish tinge more characteristic of the Turk and Mongol than the olive of southern Europe or the brown of the Arab. And these accounts agree with the appearance of the usual Syrian immigrant in this country with some striking exceptions. The representatives of the Syrians before the court have claimed that their features show them to be of Semitic race, but the presiding judge confesses himself unable to say that such is the case, and equally unable to say, from ocular inspection as well as from the historical facts so far as they exist, whether the modern Syrian is basally in race a Hittite, a Phœnician, an Aramaean, an Arabian, or a Mongolian, or a compound of all.

The mere fact of habitancy in a country once occupied by another race is not of itself proof of descent from that race. The Mongol or Bedouin herdsman who occupies the sites of those cities is not thereby entitled to claim descent from the builders of Nineveh and Babylon. The modern swart Arabic speaking fellahin of modern Egypt is not from that circumstance alone to be taken as a descendant from the builders of the Pyramids and the carvers of the hieroglyphic writings.

There is no known ocular, microscopic, philological, ethnological, physiological, or historical test that can settle the question of the race of the modern Syrian; but the applicant and his associates are certainly Asiatics in the sense that they are of Asian nativity and descent and are not Europeans.

There is no known reason based on physiological or philological data for joining the Semitic races to the Indo-European races as one branch or variety of the human race greater than there is for joining the Turanian races to them.

The reason why Blumenbach and his school joined them does not seem to have been on grounds of complexion or language, but because they had been in historical contact and seemed to share a common spiritual and intellectual heritage, a wholly misleading circumstance. The beginnings of modern civilization, according to recent archæological discoveries, go back to Ancient Babylonia and Ancient Egypt, where apparently independently the arts and practices from which have developed modern civilization, learning, and religious exercises, first took definite shape. Yet the first beginners in Babylonia were Sumerians or Akkadians, an apparently non-Indo-European and non-

Semitic race, and the first Egyptians were also of another race now called the Hamitic. And neither of these races would now be claimed as either white or Caucasian.

The so-called Semitic races may be superior races to the so-called Indo-European. Their spiritual and intellectual legacy to the world may be of a higher value, but these circumstances do not justify their inclusion with the latter as one branch to be styled Caucasian and the exclusion of other races.

When it comes down to strict logical analysis, the inhabitant of Syria, if he cannot rest on complexion, must find other grounds than race, habitancy, or language, to establish any community of race with the European races assuming those last to be the white race.

The claim that the admission of the European Jew to citizenship would include the admission of the Syrian, as both are Semites, is not apparently well founded under either the racial or geographical interpretation of "white persons" in the statute. It is most difficult, according to ethnological authorities, to attempt to class the European Jew as a separate people in any racial sense. The term Jew as applied to Europeans means as a rule a religious not a racial distinction. The European Jews have many of them resided longer in their present European quarters than the Christian nations among whom they live. The Jew in Portugal, Spain, Italy, and Hungary may well have been there before the Goth, the Visigoth, the Lombards, the Vandals, and the Huns overran those countries. The European Jew has become racially, physiologically, and psychologically a part of the peoples he lives among. He speaks their tongues, he thinks their thoughts, and his blood is as intermingled with theirs as theirs is with his. No one can tell how much Jewish blood has been incorporated with the Christian peoples of modern Europe, and no one can tell how much so-called Aryan blood runs in the veins of the modern European Jew. He varies in complexion as much as other Europeans. The Jew of Northern Germany and Northern Russia is frequently blue eyed and fair haired. The Jew of Spain and Portugal is as dark as his fellow citizens. The modern European Jew is practically the same as any other modern European. The theory that the modern European Jew has as a general rule any marked difference in physiognomy differentiating him as a "Semite" from other Europeans has after careful examination been discarded.

But there are communities professing the Jewish religion in North Africa and the east who are as dark as Negroes or the peoples among whom they live, and who probably by intermixture of blood are physiologically the same.

The European Jew is as white as the peoples among whom he lives, and the African or Asiatic Jew as dark. The exclusion of the last two has no connection with the admission of the first. A professing Jew from Syria who was not of European nativity or descent would be as equally an Asiatic as the present applicant, and as such not within the terms of the statute.

The other arguments based upon the particular merits of the inhabitants of the Lebanon District of Syria and the inferences to be drawn

from the fact that the Jewish and Christian religions took their rise among peoples at that time inhabiting Syria are appeals to considerations to be addressed to Congress and not to a court of law.

The modern inhabitant of the Lebanon District, it may, however, be said, does not inhabit the scene either of the followers of the religion exhibited in the Old Testament or of the labors of Christ. That is the southern part of Syria commonly called Palestine. The coast of the Lebanon District is Phœnicia, whose inhabitants, so far from professing the monotheistic and ethical tenets of the Old Testament, were the followers prior to their conversion to Christianity of rites and beliefs held up as among the most repulsive (according to modern ideas) of all those of the ancient historical worlds.

Let it be as claimed in the argument for the applicant that Christ appeared in the form of the Jew and spoke a Semitic language. The apostrophic utterance that He cannot be supposed to have clothed His Divinity in the body of one of a race that an American Congress would not admit to citizenship is purely emotional and without logical sequence. The test imposed by Congress is not a religious one. The matter regulated is a purely secular domestic one. The pertinent statement rather is that a dark complexioned present inhabitant of what formerly was ancient Phœnicia is not entitled to the inference that he must be of the race commonly known as the white race in 1790, merely because 2,000 years ago Judæa, a country whose inhabitants have since entirely changed, was the scene of the labor of one who proclaimed that He had come to save from spiritual destruction all mankind. An attempt to consider the question on racial lines reveals to the investigator how difficult it is to come to any conclusion as to the nationalities of Europe alone. It may be that there are some Scandinavian or Slavonic communities that are comparatively of pure blood, but it is beyond human power to say how much Tartar blood there is in Russia; how much Slavonic blood in Prussia, and Germany generally; how much Teutonic and Celtic blood in France; how much Celtic and Iberian blood in Ireland; how much Celtic, Latin, and Saxon blood in England; how much Iberian, Celtic, Gothic, Arabic, and Moorish blood in Spain; how much blood from the ancient historical world in Italy; how much European blood there is in the European Jew; and how much Jewish blood in all Europe. If this be true as to Europe, the difficulties appear infinitely greater with regard to Asia, and its mixed peoples of every shade except white.

The conclusion is that it becomes a matter of futile speculation.

The broad fact remains that the European peoples taken as a whole are the fair skinned or light complexioned races of the world, and form the peoples generally referred to as "white" and so classed since classification based on complexion was adopted. All of which foregoing discussion may seem wholly out of place in a reasoned legal opinion as to the construction of a statute, except as illustrating the Serbonian bog into which a court or judge will plunge that attempts to make the words "white persons" conform to any racial classification.

The real question is: What does the statute mean, to whom did the terms "free white persons" refer in 1790, in the understanding of the makers of the law?

Blumenbach's "Caucasian" classification was certainly not generally known or current in the United States in 1790. His work was not translated into English and published until 1807, and then it was published in London. The United States had been settled by European peoples. They were in 1790 a busy, occupied, hardworking people, with very few libraries, few colleges, and not many schools. It is safe to assume that no member of the congress that passed the act of 1790 knew either Sanscrit or ancient Persian, or had the remotest idea of the connection between the Aryan or Indo-European languages. He would certainly have repudiated the idea that a black Ceylonese or a dark South Persian was in the language of the enthusiastic supporters of the theory that all speakers of Aryan languages are of one race, an "Aryan brother." His general idea of Western Asia generally was that it was ruled by the "Grand Turk" or the "Sublime Porte," and inhabited by Turks and Mohammedans of the pernicious and obnoxious nature of the inhabitants of the Barbary States. American missionaries had not yet penetrated those mystic regions, and brought back accounts of the peoples who inhabited them. All the average citizen of the states knew of Syria was derived from Greek and Latin historians, perhaps supplemented by Rollin's History, or some other synopsis of the same kind, followed by the impression from the history of the crusades that the Mohammedan or Saracenic conquest had obliterated the ancient inhabitants. All the world was foreign, unknown, and black to him except the American Indians (whom he counted almost as vermin) and the inhabitants of Europe, from whence he or his fathers came. He neither expected nor desired immigrants from any other quarter. Certainly not from Syria, the emigration whence has only been of late years. He never saw or heard of elaborate classification of mankind based on skulls or languages or measurements of the tibia or toes. His only classification was "color." The belief in the descent of all men from Adam still was accepted. The rightfulness of slavery as approved by all ancient codes, including the Old Testament, was also still generally accepted in America, although by many it was then accompanied with the modification that the right must be exercised by a superior over an inferior race. The average citizen of the states was at that time firmly convinced of the superiority of his own white European race over the rest of the world, whether red, yellow, brown, or black. He had enslaved many of the American Indians on that ground. He would have enslaved a Moor, a Bedouin, a Syrian, a Turk, or an East Indian of sufficiently dark complexion with equal readiness on the same plea if he could have caught him. The opposite west coast of Africa was accessible for the slave supply; the other sources were not, and the trader who went to get his slaves from them was likely to be made a slave himself.

So far as the knowledge of the writer of this opinion goes, the person in public political life who appears from written expressions to

have had any extended idea on the subject and who may have doubted the descent of all men from Adam was Thomas Jefferson, and he doubted it with Voltaire on general principles of reason, and not on the scientific arguments of to-day, and Jefferson was not a member of the Congress that passed the statute of 1790.

"White persons," therefore, to the average citizen of the United States in 1790, would seem to have meant Europeans, and when he used the words "aliens being free white persons" he could only have referred to Europeans.

With this interpretation of the statute the eligibility of any applicant for naturalization on this ground can be determined by a fixed uniform rule. The judge need neither examine his complexion with a microscope nor measure his skull or his limbs or features, nor inquire into his paternity and maternity for past several generations. The test becomes mainly one of geography.

Is the applicant from Europe and a member of the peoples inhabiting Europe, and there regarded as white, or a descendent of an emigrant from them? If he is, he is entitled to naturalization if he be otherwise fit for it. If he is not, if he is an Asiatic, whether Chinese, Japanese, Hindoo, Parsee, Persian, Mongol, Malay, or Syrian, he is not entitled to the privilege of naturalization, no matter what his fitness otherwise may be.

The argument that the statute as it stands may be arbitrary, illogical, unjust, even absurd in its provisions, in that it makes color, race, or geographical habitancy, and not moral and mental merit, the basis for granting the privilege of citizenship, is one to be addressed to Congress and not to a court of law.

Nothing could be more difficult and invidious for a court to attempt than to determine an applicant's right to naturalization upon any ground of complexion or race. No matter who may be refused, if the applicant does not apply on the basis of being of African nativity or African descent, the refusal is construed as meaning that the applicant is not a white person and is therefore of an inferior race. Still the statute is there and requires the court to exclude the applicant unless he be a "white person" and it is the duty of the judge to obey. Under the construction of the statute as it appears to this court to be based on reason, authority, and the history of the legislation, the difficulty disappears and the refusal can carry no sting to the applicant, whether a Syrian or a Japanese.

For the reasons stated in this opinion and in the former opinion in this case, filed February 18, 1914, and reported (D. C.) 211 Fed. 486, and in the opinion in Re Shahid, filed June 24, 1913, and reported in (D. C.) 205 Fed. 812, all of which should be read and taken together as forming the final conclusion and decision of the court, the order made refusing the application on the ground that the applicant is an Asiatic is affirmed. Whether he is of a white race, or whether the modern Syrians are racially or intrinsically free white persons, or whether any other Asiatic people is also of white race, is not decided as not pertinent to the issues of the application. All that the court decides is that the applicant, not being of European nativity or de-

scent, is not a white person within the meaning of the naturalization statute.

As the matter involves the construction of a statute law of the United States, it is to be hoped that an appeal from this order will be taken to the Supreme Court of the United States and a settlement had of this most vexed and difficult question.

WELLMAN v. BETHEA.

(District Court, E. D. South Carolina. April 10, 1914.)

COURTS (§ 340*)—FEDERAL COURTS—POWER TO VACATE JUDGMENT—CONFORMITY STATUTE.

Rev. St. § 914 (U. S. Comp. St. 1901, p. 684), requiring "the practice and pleadings, forms and modes of procedure in civil actions" to conform as near as may be to those existing at the time in the courts of the state, does not render a state statute, conferring on the courts of the state power to set aside their judgments and decrees at any time within one year after their rendition, applicable to the federal courts, and in general a federal court has no power to entertain a motion to set aside a judgment after the term at which it was rendered.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 900; Dec. Dig. § 340.*]

At Law. Action by Sarah S. Wellman, in her own right and as widow of Ora E. Wellman, against John C. Bethea, administrator of John H. Bethea, deceased. On motion by defendant to vacate judgment. Motion denied.

Mitchell & Smith, of Charleston, S. C., for plaintiff.

Gibson & Muller, of Dillon, S. C., and Willcox & Willcox, of Florence, S. C., for defendant.

CONNOR, District Judge. This is a petition, or a motion, in the cause by defendant, seeking relief from a judgment rendered herein at the special January term, 1913. The motion is based upon the provisions of section 225, Code of Civil Procedure of South Carolina, which provides that:

"The court may likewise, in its discretion, and upon such terms as may be just * * * at any time within one year after notice thereof, relieve a party from a judgment, order, or other proceeding, taken against him," by "surprise, or excusable neglect, and may supply an omission in any proceeding."

Defendant contends that, under the statute (section 914, U. S. Rev. Stat. [U. S. Comp. St. 1901, p. 684], 4 Fed. Stat. Anno. 563), power to grant this motion is conferred upon the federal courts which provides that:

"The practice, pleadings, and forms, and modes of proceeding in civil causes, * * * in the Circuit * * * 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 the state within which such Circuit or District Courts are held, any rule of court to the contrary notwithstanding."

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

The motion is resisted by plaintiff, insisting that the terms "practice, pleadings and forms and modes of procedure" refer only to those steps which are taken prior to, and at the trial of, civil actions; that the statute does not confer power upon the federal courts to vacate, set aside, or modify their judgments after the adjournment of the term at which they are rendered. It is insisted that the relief demanded upon this motion pertains to power and not procedure, and that this is vested in the equitable jurisdiction of the court and can be invoked only by an original suit in equity.

It appears from the record herein that the plaintiff sued defendant, as clerk of the court of Dillon county, in this district, and "as the duly qualified administrator of the estate of John H. Bethea, deceased." She states, as her cause of action, that the defendant's intestate wrongfully and unlawfully caused the death of her husband while in the state of Delaware, whereby, according to the statutes in force in that state, she became entitled to sue for and recover the damages sustained by her, by reason of the wrongful and unlawful act of defendant's intestate. She sued for $25,000 damages, alleged to have been sustained, etc.

Defendant, in his answer, admitted that his intestate caused the death of plaintiff's husband and denied that plaintiff was entitled to recover the amount of damages demanded. Neither the complaint nor the answer contained any averment in regard to the amount of assets which went into the hands of defendant, or the disposition thereof. When the cause came on for trial, defendant's counsel consented that the jury, then impaneled, should return a verdict fixing plaintiff's damage at $4,000. Upon this verdict judgment was rendered by the court that:

"Said Sarah C. Wellman, the plaintiff, recover of said John C. Bethea, clerk of court, as administrator of the estate of John H. Bethea, deceased, the sum of $4,000, so found, with $30 cost."

Upon this judgment an execution was issued and returned unsatisfied except to the extent of $28 "collected from John C. Bethea, administrator." Plaintiff, thereupon instituted an action against defendant and the Atlantic Insurance Company, surety on his bond "as clerk of the court and as administrator." In her complaint, plaintiff sets up the aforesaid judgment. She alleges that, after defendant "had knowledge and notice of plaintiff's claim and suit," one M. Helen Medlin brought suit against him as administrator of John H. Bethea for an alleged demand of $1,440, due by said John Bethea, for board, etc., and that defendant permitted judgment to be rendered against him for said demand and paid the full amount thereof from the assets in his hands as administrator. She alleges that defendant wrongfully paid such judgment, and, "by reason of the further fact that said defendant did not plead plene administravit or insufficient assets to the suit of this plaintiff, the said defendant is personally liable to the full amount of said judgment of $4,000 with interest." No devistavit is alleged other than the payment of said judgment. This second action is based upon the theory that the judgment in this action, in the absence of a plea of plene administravit, fixes defendant

with assets to the full amount of the judgment and the failure to pay same entitles her to a judgment against him and his surety for the full amount thereof. Defendant, in his affidavit herein, avers that he is advised that his failure to plead plene administravit fixes him with assets to the full amount of the judgment. He asks, in this motion, that the judgment be vacated or so modified that he may file an amended or supplemental answer, setting up the plea, and that, if issue is joined thereon, the same may be tried. He avers that his failure to file the plea was the result of excusable mistake. Plaintiff, resisting the motion, relies upon the principle that a federal court has no power to vacate or modify a judgment after the adjournment of the term at which it is rendered. Defendant concedes the general principle. He also concedes that the facts upon which he relies for relief do not bring the case within any of the exceptions thereto, but insists that the provisions of section 225, Code of South Carolina, confers power upon the court to grant the relief demanded.

In Bronson v. Schulten, 104 U. S. 410, 26 L. Ed. 797, Mr. Justice Miller, after stating the principle that judgments are under the control of the court, which pronounces them, during the term at which they are rendered, or entered of record, and may be set aside, vacated, or modified, says:

"But it is a rule equally well established that after the term has ended all final judgments and decrees of the court pass beyond its control, unless steps be taken during that term, by motion or otherwise, to set aside, modify, or correct them; * * * and this is placed upon the ground that the case has passed beyond the control of the court."

The learned justice gives an interesting history of the exceptions to the rule and others which "crept into practice in a large number of the state courts," saying:

"This practice has been founded in the courts of many of the states on statutes which conferred a prescribed and limited control over the judgments of a court after the expiration of the term at which it was rendered. * * * It can easily be seen how this practice is justified in courts of the states where a system has been adopted which amalgamates the equitable and common-law jurisdiction in one form of action, as most of the rules of procedure do. * * * The question relates to the power of the courts and not to the mode of procedure. It is whether there exists in the court the authority to set aside, vacate, and modify its final judgment after the term at which they were rendered; and this authority can neither be conferred upon nor withheld from the courts of the United States by the statutes of a state or the practice of its courts."

This case has been frequently cited and uniformly approved. Phillips v. Negley, 117 U. S. 665, 6 Sup. Ct. 901, 29 L. Ed. 1013; Hickman v. Ft. Scott, 141 U. S. 415, 12 Sup. Ct. 9, 35 L. Ed. 775; Tubman v. B. & O. R. R., 190 U. S. 38, 23 Sup. Ct. 777, 47 L. Ed. 946.

In Re Metropolitan Trust Co., 218 U. S. 312, 31 Sup. Ct. 18, 54 L. Ed. 1051, Mr. Justice Hughes says:

"Nor could the court exercise the general power which it possesses to * * * set aside its orders or decrees prior to the expiration of the term at which the final decree is entered."

An examination of the decisions of the Circuit Courts and Circuit Courts of Appeal, with but two apparent exceptions, hereafter noted,

discloses a uniform agreement with Bronson v. Schulten, supra. It is not necessary to extend this opinion by quotations from the large number of decisions found in the Federal Reporter. They are cited and discussed in Judge McDowell's dissenting opinion in Virginia T. & C. Steel & Iron Co. v. Harris, 151 Fed. 430, 80 C. C. A. 658. In United States v. Wallace (D. C.) 46 Fed. 569, Judge Simonton (District Court of the Fourth Circuit) said:

"No court of the United States can revise or amend its own final decree or judgment for errors of fact or of law after the end of the term in which such decree or judgment was rendered"—citing, among other cases, Bronson v. Schulten, supra; Foster's Fed. Practice, § 379.

In Hughes, Fed. Proc. (2d Ed.) 412, it is said:

"While the federal courts will follow the state practice as to the mere form of the judgment, their control over it from that time forward is regulated by the federal decisions and statutes, and not by the state practice. They may correct the record, after the term, in mere clerical errors, but in no other way. Under the federal practice and decisions a judgment cannot be set aside after the term during which it is rendered, though the statute may provide summary remedies by motion for the purpose of regulating judgments in its own courts."

These authoritative decisions undoubtedly hold that the court has no power or authority to make any order affecting the validity or legal effect of a judgment after the adjournment of the term at which it is rendered. We are, however, confronted with the decisions in Va. T. & C. Steel & Iron Co. v. Harris, 151 Fed. 428, 80 C. C. A. 658 (C. C. A. 4th Cir.), which is a controlling authority, unless in conflict with decisions of the Supreme Court of the United States upon the same question, or unless it can be distinguished from the instant case. There, in an action of ejectment, judgment was rendered against defendant in error and, within one year thereafter, he applied to the same court to vacate the judgment for that it had been rendered against him by reason of excusable mistake or neglect on his part. The movant invoked, as authority in the court to entertain the motion, section 274, Code of N. C. 1883 (Rev. 1905, § 513). This statute is substantially the same as section 225, Code of South Carolina, and as statutes of like character enacted in other states. A careful examination of the opinion of Judge Goff, concurred in by Judge Waddill, gives force to the contention that the decision, as an authority, is to be construed as applicable only to an action of ejectment and should not, especially in the light of the decisions of the Supreme Court, be extended to judgments rendered upon other causes of action. The learned judge, writing the opinion, referring to the "insistence that the provisions of the North Carolina Code were not applicable," says:

"Prior to the enactment of section 914, Rev. St. U. S., the rule may have been otherwise, but since the enactment of that legislation, certainly in actions of ejectment, it has been held that the practice, pleadings, and forms adopted in the states, by virtue of state legislation, should, in cases coming within their purview, govern procedure in the courts of the United States held in such states respectively."

He cites Equator Co. v. Hall, 106 U. S. 86, 1 Sup. Ct. 128, 27 L. Ed. 114; Smale v. Mitchell, 143 U. S. 99, 12 Sup. Ct. 353, 36 L. Ed.

90; and Traveler's Prot. Ass'n v. Gilbert, 111 Fed 269, 49 C. C. A. 309, 55 L. R. A. 538.

The extent to which a decision of an appellate court is controlling or binding authority upon an inferior court is frequently difficult to determine. The principle seems to be that a decision of the Circuit Court of Appeals, of this circuit, upon the point, or question, presented upon this record, is authoritative, unless manifestly in conflict with a decision of the Supreme Court—a suggestion not to be adopted unless it so appears beyond reasonable doubt. The principle by which courts are governed in ascertaining the extent to which the decisions of other courts and courts of superior authority are conclusive and within the doctrine stare decisis is stated by Chief Justice Marshall in Cohens v. Virginia, 6 Wheat. 264, 5 L. Ed. 257, in which he says:

"It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision. The reason of this maxim is obvious."

Mr. Justice Curtis, in Carroll v. Carroll's Lessees, 16 How. 275, 14 L. Ed. 936, citing with approval the language used by the Chief Justice, says:

"There must have been an application of the judicial mind to the precise question necessary to be determined to fix the rights of the parties."

In applying the foregoing language to the instant case, it is well to note the restrictive language used by Judge Goff. He says, "Certainly, in actions of ejectment," etc. The significance of this language is made manifest by referring to the cases cited by him. In Equator Co. v. Hall, 106 U. S. 86, 1 Sup. Ct. 128, 27 L. Ed. 114, it was held that, by virtue of a statute of the state of Colorado, applying only to actions of ejectment, a party against whom a judgment has been rendered is entitled, upon an application made at any time before the next succeeding term of the court, to have such judgment vacated without showing any cause therefor. The reasons upon which this statute is based, applying to the peculiar character of the action of ejectment, are clearly pointed out by Mr. Justice Miller. Referring to the action of ejectment, he says:

"This form of action, with its inconclusive results, would be the law in Colorado for the recovery of the possession of real estate, but for the statutes of that state. * * * The framers of those statutes, in abolishing the old common-law action of ejectment with its accompanying evils, and in substituting an action between the real parties, plaintiff and defendant, found it necessary to provide a rule on the subject of new trials in actions concerning the titles of land."

The learned justice concludes:

"We are of opinion that, when an action of ejectment is tried in a Circuit Court of the United States according to the statutory mode of proceeding, that court is governed by the provisions concerning new trials as it is by the other provisions of the state statute. There is no reason why the federal court should disregard one of the rules by which the state Legislature has guarded the transfer of the possession and title to real estate within its jurisdiction."

In Smale v. Mitchell, 143 U. S. 99, 12 Sup. Ct. 353, 36 L. Ed. 90, the same question was presented, upon the Illinois statute, giving the party against whom a judgment, in an action of ejectment, has been rendered, a right to have it set aside upon application in one year thereafter. Mr. Justice Field discusses the question, stating the reason upon which the state statute is founded and citing Equator Co. v. Hall, supra, reaching the same conclusion. In neither of these opinions is any reference made to the section 914, R. S. A careful examination of them discloses that they are based upon an entirely different principle of law confined, as the court is careful to say, to actions of ejectment. Judge Field, after stating the rule that at common law, by reason of the fact that it "proceeded upon a fictitious demise between fictitious persons, its determination decided nothing beyond the right of plaintiff at the date of the alleged demise," says:

"The law of Illinois changes this rule of the common law and makes a judgment in the action of ejectment conclusive as to the title established in such action upon the party against whom it is rendered and parties claiming under him, by title arising after the commencement of this action, subject to certain exceptions named"—citing the state statute giving the right to a second trial, etc.

It is because, under the statutes abolishing the common-law action of ejectment with "its inconclusive results" and providing that in actions for the recovery of land, the judgment shall fix the title, thereby making the judgment a muniment of title, that the federal courts, upon elementary principles of federal law, regard the statutes in such states, giving the absolute right to the party against whom the judgment is rendered, to have a second trial, as "a substantial right in that it increases the security of holders of real property, that in case their title to real property is brought into litigation it will be more fully examined and satisfactorily ascertained and established than by confining the parties to a single trial as in other controversies, except when another trial is ordered for cause." Adopting the language of Judge McDowell in respect to the principle upon which the Equator Co. and the Smale Cases are based, it is manifest that:

"The statutes in the two cases mentioned are in practical affirmation of the common-law rule that a judgment in ejectment is not final; they are rules of property; they fall directly under the provisions of section 721, R. S. [U. S. Comp. St. 1901, p. 578]."

It would seem manifest that these two cases, upon the authority of which the conclusion in the Harris Case is based, are not in conflict with the decision in Bronson v. Schulten, supra, and the cases in which it is cited and followed. It is not reasonable to suppose that the learned judges who decided and wrote the opinions in these cases, subsequent in date to the Bronson Case, and the enactment of section 914, R. S., overlooked it, or intended to overrule it. It is true that the North Carolina statute, relied upon to sustain the power to grant the motion in the Harris Case, is not restricted to actions of ejectment, nor does it confer the right to have a second trial as a matter of right. The statute is remedial, and it was within the power of the court to apply it to the facts in that case. Without questioning pro hac vice the correctness of the conclusion, reached by the court, in that case,

although vigorously questioned in an exhaustive and well-considered dissent by Judge McDowell, its scope should not be so extended as to bring it into conflict with an almost uniform current of authority in the federal courts. Certainly, if the learned and accurate judge who wrote the opinion had intended to question these decisions or announce a rule in the Fourth Circuit different from that prevailing in the other circuits, he would not have failed to say so—especially in view of the dissenting opinion in which all of the authorities are cited. I am constrained to reach the conclusion that the Harris Case is controlling authority in the Fourth Circuit, only upon a motion to vacate a judgment based upon the state statute, rendered in an action of ejectment. With this limitation upon that decision, I am of the opinion that this motion should be decided upon the authority of Bronson v. Schulten, supra, and later cases in which that authority is followed.

Defendant's counsel urge the language used by Judge Simonton in Bryce v. Southern Ry. Co. (C. C.) 129 Fed. 966. The facts in that case were peculiar and the observations of Judge Simonton, while always entitled to most respectful consideration, can hardly be regarded as the expression of an opinion upon the question presented here, especially in view of his unmistakable opinion expressed in United States v. Wallace (D. C.) 46 Fed. 569. The only other decision, which in any manner conflicts with the authorities cited is found in Traveler, etc., Co. v. Gilbert, 111 Fed. 269, 49 C. C. A. 309, 55 L. R. A. 538. In that case the question is discussed only as it bore on the right of the plaintiff to invoke the equitable power of the court to vacate the judgment. Conceding that the inference can be drawn from the decision that, in the opinion of the court, the state statute gave a complete and adequate remedy at law, it cannot be regarded, in the light of the decisions of the Supreme Court and other Circuit Courts of Appeals as a controlling authority on the question presented in this case. It is manifest that the case was decided on its merits, and that the observation of the judge in regard to the statute is obiter. Prior to the enactment of the statutes referred to, it was well settled that the court had no power to vacate or modify its judgments after the expiration of the term at which they were rendered. The judgment roll, when made up in accordance with the course and practice of the court, imported absolute verity, and all questions which were raised, or should have been raised, upon the pleadings, became res judicata.

After a careful and anxious consideration of the decided cases, I am constrained to conclude that I have no power, under section 225 of the Civil Code of South Carolina—and it is conceded that, if such power exists, it must be found there—to entertain the motion. I refrain from any expression of opinion in regard to the merits of the defendant's contention. Such relief as, upon the facts appearing upon the affidavits, he may be entitled to, must be sought by invoking the equitable power of the court. It has occurred to me that possibly, under the provisions of the New Equity Rules (Nos. 22 and 23; 198 Fed. xxiv, 115 C. C. A. xxiv), the motion, or petition, could be treated as a suit in equity, be docketed on the equity calendar, and proceed-

ed with in accordance with the practice and procedure in such cases. When, by the adoption of the Code of Civil Procedure in North Carolina, the mode of procedure was changed, the Supreme Court of that state sometimes treated an original action brought when under the reformed procedure a motion in the cause was the prescribed remedy, as such motion. This practice was adopted because of the radical change made in the mode of procedure. This indulgence to the want of familiarity by the members of the bar was discontinued and the provisions of the Code enforced. I could not, however, under the most liberal construction of the new rules, pursue the course suggested. The mode of instituting a suit in equity, by filing the bill, etc., has not been changed.

The motion is denied without prejudice to defendant's right to proceed in such way as he may be advised. The costs will be taxed against the defendant.

PHOTO DRAMA MOTION PICTURE CO., Inc., v. SOCIAL UPLIFT FILM CORPORATION.

(District Court, S. D. New York. February 10, 1914.)

1. COURTS (§ 299*)—JURISDICTION OF FEDERAL COURTS—COPYRIGHT SUITS.

   Allegations in a bill that complainant is the owner of a statutory copyright and that it has been infringed by defendant are sufficient to give a federal District Court jurisdiction of the suit.

   [Ed. Note.—For other cases, see Courts, Cent. Dig. § 841; Dec. Dig. § 299.*]

2. INJUNCTION (§ 152*) — MOTION FOR PRELIMINARY INJUNCTION — PRESUMPTIONS OF FACT.

   On motion for a preliminary injunction, all disputed or doubtful questions of fact must be resolved against complainant.

   [Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 337, 343; Dec. Dig. § 152.*]

3. COPYRIGHTS (§ 46*)—ASSIGNMENT—RECORDING.

   The author of a book assigned his right of copyright, and after it had been copyrighted by the assignee the dramatic and motion picture rights therein were reassigned to him. He afterward executed a paper which recited that the other party "secures the exclusive dramatic rights, including moving picture rights," and also the "exclusive leasing" of the play. It also provided that it should be binding on the heirs, executors, and assigns of the parties. *Held*, that the paper was clearly intended as an assignment of all the author's dramatic rights, but that it was void as against a subsequent purchaser of any of such rights without notice, where it was not recorded in the copyright office within three months, as required by Copyright Act March 4, 1909, c. 320, § 44, 35 Stat. 1084 (U. S. Comp. St. Supp. 1911, p. 1485).

   [Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 44; Dec. Dig. § 46.*]

4. COPYRIGHTS (§ 46*)—BOOK—ASSIGNMENT OF MOTION PICTURE RIGHTS—NOTICE OF PRIOR UNRECORDED ASSIGNMENT.

   Since the amendment of the copyright statute by Act Aug. 24, 1912, c. 356, 37 Stat. 488, under which a copyright on a drama proper and one on a moving picture play may be separately secured, the owner of the dramatic and motion picture rights in a copyrighted book may sell and assign the two separately, and notice to the purchaser of the motion

picture rights alone that his assignor had sold the dramatic rights did not charge him with notice of an unrecorded assignment covering also the motion picture rights.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 44; Dec. Dig. § 46.*]

5. COURTS (§ 493*)—CONFLICTING JURISDICTION—STATE AND FEDERAL COURTS—COPYRIGHTS.

The jurisdiction of a federal court to enjoin infringement of a statutory copyright, which under the statute is exclusive, is not affected by the pendency in a state court of a cross-suit between the same parties involving a claimed common-law copyright relating to the same subject-matter.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1346–1352; Dec. Dig. § 493.*]

In Equity. Suit by the Photo Drama Motion Picture Company, Incorporated, against the Social Uplift Film Corporation. Application for an injunction pendente lite granted.

Reginald Wright Kauffman, author of the "House of Bondage," prior to publication assigned his right of copyright to the Moffatt, Yard & Co. The Moffatt, Yard & Co. duly copyrighted the book and thereafter reassigned to the author the dramatic and motion picture rights. On July 12, 1913, by letter, the author granted to one Joseph Byron Totten, rights, etc. See letter following:

"July 12th, 1913.

"Mr. Joseph Byron Totten—Dear Mr. Totten: With the slight corrections that we have made to it, I am very much pleased with your dramatic version of the 'House of Bondage,' and this note is by the way of being an O. K. for it. Upon your assurance that Mr. Rumsey tells you that the understanding with Anite Scott is null and void, I am glad to confirm the contract that you sent me while I was in Paris, and, on the assumption that the Scott understanding is indeed null and void, I write you now to so confirm it. The contract has been sent to America. I shall write for it at once and immediately sign it. Meanwhile, this is to serve as your authority to the effect that you have the right to make a play of the 'House of Bondage' and to mark it under the terms of the contract above referred to.

"Very truly yours, [Signed] Reginald Wright Kauffman."

No other instrument in writing was executed between the author and Mr. Totten. Thereafter on the 4th day of December, 1913, Mr. Kauffman made and executed an assignment in writing over the motion picture rights to the complainant motion picture company, which was thereafter duly filed by the complainant in the office of the register of copyrights in the library of Congress. The affidavits show that, at the time Mr. Kauffman assigned the motion picture rights to the complainant, he stated that he had already assigned the dramatic rights to Mr. Totten. It appears that Mr. Totten assigned whatever rights he possessed to the defendant Social Uplift Film Corporation. Mr. Totten never filed any assignment or claim of assignment in the office of the register of copyrights. This suit is brought by the complainant to enjoin the defendant from making any motion picture photo play based upon the book of "House of Bondage."

Archibald Ewing Stevenson, of New York City, for complainant.
John J. Curtin, of New York City, for defendant.

HAND, District Judge. [1, 2] The jurisdiction of this court is beyond question, being dependent only upon the allegations in the bill that the plaintiff is the owner of a statutory copyright and that that copyright has been infringed. The case must therefore stand or fall on the merits. Both sides concede that Kauffman had by assign-

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

ment the statutory dramatic rights and the moving picture rights, since each necessarily traces its title to him. Since this is a motion for a preliminary injunction, all disputed facts must be resolved against the plaintiff, and I must therefore assume that the condition in the letter of July 12, 1913, had been fulfilled. This is perfectly consistent with the decision of Mr. Justice Seabury and for precisely the same reason. If there be doubt about that fact, any court will take it against the moving party upon motion for preliminary injunction. I must also assume that the agreement, incorporated by reference in the letter, was in fact in its present form when Kauffman accepted it. I shall take it that this contract became the measure of the rights assigned to Totten.

The relevant questions then become three: Did the contract convey moving picture rights? Was it such an assignment as required registration under section 44? Was Kingsley's prior knowledge that Kauffman had assigned the dramatic rights equivalent to knowledge that he had assigned moving picture rights? That these are the only relevant questions appears upon reflection. Kauffman had only a statutory copyright in the right to dramatize. This necessarily follows from the fact that the book had been itself copyrighted, which involves a publication and the loss of all common-law rights. Indeed, he avers as much in the fifth and sixth articles of his complaint in the state court. When Totten used those rights to make a drama or a dramatic composition, it may be that he got common-law rights in the resulting drama, and that the plaintiff here will infringe those rights; but that is another question, quite separate from whether Totten got anything but statutory rights. In short, it may well be that Totten could enjoin Kingsley for infringing his common-law dramatic rights by a moving picture show, while Kingsley could enjoin Totten from presenting any moving picture show at all.

Totten's rights to dramatize or to make moving pictures being statutory was within section 44, if the letter and contract of July 12, 1913, were an assignment for lack of registration, unless Kingsley had notice, before he paid the consideration, for any subsequent notice is of no consequence.

I shall assume for this motion that Totten's contract covered moving picture rights, without meaning finally to decide that question. There remain, then, only the question of whether the contract was within section 44, and whether Kingsley's notice was enough to put him out of the position of a bona fide purchaser.

[3] The word "assignment" does not, it is true, appear in the instrument on which the defendant relies, but the recital uses this phrase, "the party of the first part secures the exclusive dramatic rights including moving pictures rights," and the phrase of transfer is, "the party of the first part has the exclusive leasing of the play." Finally, the contract is not to become void in case of Kauffman's or Totten's death, but is to be carried out by their "heirs, executors or assigns."

I cannot think that there is any doubt of the intention of this language to create an assignment of all the dramatic rights which Kauff-

man had. The test is whether anything remained in him. I can see nothing which could remain after the use of the words, "exclusive leasing," except the right personally to perform any drama which might be made from the book, or the right personally to present in moving pictures any scenario. The word "leasing," however, is to be interpreted in connection with the recital which is in more general form. Moreover, the intent is to be gathered somewhat from the relative situation of the parties, one an author and the other a dramatic promoter. It would be absurd to suppose that Kauffman meant to retain the right to compete, certainly as regards moving pictures.

However, it is really not necessary to consider whether or not this is a license or an assignment, because a license falls before an assignment taken in good faith anyway. It would be absurd to protect a subsequent purchaser against a prior unrecorded assignee and leave him open to prior unrecorded licenses which should defeat him. Gates Iron Works v. Fraser, 153 U. S. 332, 348, 14 Sup. Ct. 883, 38 L. Ed. 734; Faulkner v. Empire State Nail Co., 67 Fed. 913, 15 C. C. A. 69 (C. C. A. 2d Cir.).

[4] The sole question remaining is of Kingsley's notice. If notice of dramatic rights necessarily includes notice of moving picture rights, then he had notice of Totten's rights; but I think since the amendments of August 24, 1912, 37 Stat. 488, c. 356, that they do not. It was undoubtedly held in Kalem Co. v. Harper Bros., 222 U. S. 55, 32 Sup. Ct. 20, 56 L. Ed. 92, Ann. Cas. 1913A, 1285, that the owner of dramatic rights might forbid their dramatic representation by moving pictures, and to the present time the only right to protect moving pictures arises from the words "dramatic" or "drama."

Thus, the statutory right to protect against the making of a moving picture scenario from a book still arises from section 1, subd. "b," and the statutory right to protect against infringement of the scenario arises from section 1, subd. "d." Yet the proceedings for registration of the moving picture play are now specifically controlled by sections 5 and 11 of the amendment of 1912, and it appears that it is one thing to secure the copyright upon a drama proper and another to secure it on a moving picture play.

A man having general statutory dramatic rights like Kauffman might make a play and perform it under his common-law rights without publication, or he might copyright the play, and he would still not have copyrighted or published his moving picture rights. If he wrote such a scenario and made his film, he could get a separate copyright upon that. Of course, he could sell his statutory or common-law copyright of the play and keep the moving picture copyright, or he could sell each.

It seems to me clear that, if he could do this, he could sell separately the right to dramatize and the right to make a moving picture play, dividing his statutory dramatizing rights, and thus giving each assignee the right when he had exercised those rights to get his own copyright for a drama, or for a moving picture show.

Hence, when Kauffman told Kingsley that he had sold his dramatic rights at the moment while he was selling his moving picture

rights, he told him something which it was perfectly legal and natural for him to do. Kingsley was not called upon to assume that Kauffman was a knave and was then stealing his money; nor, indeed, is that yet proved. Kingsley need have found nothing suspicious in the transaction and got a good title, although it was subject to defeat by registration of the prior assignment before January 12, 1913.

[5] Therefore the plaintiff's title is unquestioned, and a temporary injunction should pass. It is said, however, that I should do nothing till the state court has acted. There is absolutely no reason to apply here the doctrine of Zimmerman v. So. Relle, 80 Fed. 417, 25 C. C. A. 518. This suit is for relief which no state court could give—an injunction under a statutory copyright. All that is open to the state court in the other suit is to enjoin an infringement of Totten's common-law copyright, if any, arising from his drama, which was itself produced under his statutory assignment of the dramatizing rights arising under section 1b. If the plaintiff's proposed moving picture show was borrowed from Totten's drama, he may get an injunction under his common-law copyright, if he has any, since the public performance of a drama is not a publication (Boucicault v. Fox, 5 Blatch. 87, 96, Fed. Cas. No. 1,691), and even though the moving picture play was itself made under valid statutory moving picture rights conveyed to Kingsley, because, though Kingsley got thereby the right to make a moving picture play from the book, he got no right in making it to copy Totten's play, if in fact he did so. As I have before suggested, there is nothing legally impossible in enjoining the plaintiff because it has copied Totten's drama, and the defendant because it is making a moving picture play. If it be suggested that the state court might go further and grant an injunction against the plaintiff here upon the theory that any moving picture play which it might perform infringed Totten's rights arising from a conveyance of Kauffman's statutory moving picture rights. I will not consider it, because that would be to assume jurisdiction to enjoin the infringement of a statutory copyright, which, of course, no state court would do. Even if that were possible, it would not, however, relieve me of the duty of protecting the plaintiff's copyright here when the jurisdiction of this court was involved, though the same facts might be involved in each suit.

Let an injunction go pendente lite forbidding the defendant from performing or advertising that it will perform any moving picture play based upon the book in question.

BERNITT et al. v. SMITH-POWERS LOGGING CO. et al.

(District Court, D. Oregon. April 20, 1914.)

No. 3646.

JOINT ADVENTURES (§ 5*)—ACTION BETWEEN PARTIES—ACCOUNTING.

Evidence *held* to require a finding that complainants were the owners of a half interest in certain log booms, dolphins, and other structures in a river for the catching and storing of logs, and, having been ousted by defendants from a right to participate in the operation thereof, were en-

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

titled to recover one-half of the value of such property, together with an accounting of income from the time when defendants refused to continue the joint operation of the booms with complainants up to the time they were ousted and wholly deprived of the further use and occupancy thereof.

[Ed. Note.—For other cases, see Joint Adventures, Cent. Dig. § 7; Dec. Dig. § 5.*]

In Equity. Suit between E. W. Bernitt and another against the Smith-Powers Logging Company and others. Decree for complainants.

See, also, 184 Fed. 139.

Watson & Beekman, of Portland, Or., and John F. Hall and W. U. Douglas, both of Marshfield, Or., for plaintiffs.

John D. Goss and J. C. Kendall, both of Marshfield, Or., for defendants.

WOLVERTON, District Judge. The testimony in this case is so voluminous that I can scarcely do more than state my conclusions.

About the year 1882, E. B. Dean, David Wilcox, and C. H. Merchant were partners doing business as E. B. Dean & Co., and at that time were to purchase or were in control of certain tidelands, comprising the channel of Coos river and what is known as the false channel thereof. E. B. Dean & Co., either before entering into the agreement about to be noticed or subsequently thereto, acquired the title to these tidelands, excepting one tract which they held under lease. The firm entered into an oral agreement with E. W. Bernitt, Wm. Klahn, George Wullf, and David Young, whereby the parties to the agreement were to construct and operate upon the tidelands mentioned and in the channel of Coos river, and in the said false channel, log booms and dolphins for the purpose of catching and storing sawlogs, piles, and other timbers therein, and making up rafts for transportation elsewhere about Coos Bay. By the terms of the agreement Dean & Co. were to receive one-half the boomage charges, and the other parties were each to receive one-eighth of such charges, and they were all to contribute to the maintenance of such booms in like proportion; it being understood that Bernitt, Klahn, Wullf, and Young were to capture the logs as they came down Coos river and assemble them in the booms, among which would be logs of Dean & Co., for which work there was to be a charge of 25 cents per thousand log measure. It was this remuneration that it was agreed should be divided among the parties in the proportion above indicated. Beyond this, Bernitt, Klahn, Wullf, and Young were privileged to put the logs in rafts and transport them to the mills about the bay, and for this service make their own charges, in which Dean & Co. were to have no share.

There is little or no dispute touching the agreement relative to the construction and operation of these logging booms and the boomage charges to be made, and the division of the charges among the parties

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

concerned, whether it be called a partnership agreement or not. The booms were constructed at large expense in pursuance of the terms of the agreement, one being known as the upper and the other as the lower boom. E. B. Dean & Co. contributed one half of this expense and Bernitt, Klahn, Wullf, and Young the other half.

Since the construction of the booms the firm of E. B. Dean & Co. was dissolved by the death of David Wilcox, and thereafter the Dean Lumber Company, a corporation, became the owner of the partnership property. This latter company was for a time in the hands of a receiver, but eventually the property passed to C. A. Smith, and from him to the C. A. Smith Lumber & Manufacturing Company. Later the booms and boom privileges, or the lumber company's interest therein, including the lands upon which they were constructed, were conveyed to the Smith-Powers Logging Company. C. A. Smith is the principal stockholder in the C. A. Smith Lumber & Manufacturing Company, and that company is the principal stockholder in the Smith-Powers Logging Company, so that the lumber company dominates the logging company.

E. W. Bernitt and Victor Wittick have duly succeeded, through mesne and intermediate conveyances and transfers, to the original interest of Bernitt, Klahn, Wullf, and Young in such booms, together with the rights and privileges thereunto appertaining. There is much evidence in the record respecting the devolution of this interest in the booms, and it is not altogether harmonious or clear. I am persuaded, however, that the plaintiffs are, by fair and just intendment, the present owners of such interest.

It is one of the contentions of counsel for defendants, E. B. Dean & Co. having been dissolved by the death of Wilcox, that the alleged partnership agreement between the company and Bernitt and others was likewise dissolved, and that henceforth the agreement, if duly consummated in the beginning, was nugatory and without binding force. In answer to this, the record shows that all persons and corporations succeeding to E. B. Dean & Co. have recognized the agreement and have treated with Bernitt and others and their successors under the strict terms thereof. Hence it can make no difference that Dean & Co. were dissolved or that the dominant estate changed hands from time to time. The rights and privileges of Bernitt and others were at all times recognized and respected down to the present ownership of the premises upon which the booms are constructed and maintained, and it is now too late to controvert plaintiffs' interest in the booms. The logging company, which is now the owner of the lands and premises upon which the booms are constructed, expressly recognized the rights and privileges of plaintiffs by consenting to their use and operation of the booms for the logging season of 1907–08, under the arrangements that had previously obtained. That it did this the testimony abundantly shows. For the subsequent season of 1908–09 the logging company permitted the use of the booms by plaintiffs, but refused to recognize their right to compensation under the old agreement, and it is alleged that in June, 1909, the logging company wholly ousted plaintiffs from the use and occupation. This allegation seems not to be controverted

by the defendants, and must be taken as true. Further than this, the evidence shows the fact quite clearly.

As to the nature of the interest that plaintiffs possess in the booms, it is wholly unnecessary to determine. It is sufficient to know that Bernitt and others, under an agreement with E. B. Dean & Co., though verbal, expended their means along with Dean & Co. in the construction and maintenance of the booms. We may call it an easement, or license, or what you will; but it was a valuable right, of which they ought not, in justice and equity, to be deprived without remuneration according to the value of the plant and their interest therein. The right or license is assuredly irrevocable to the extent at least that it could not be appropriated by another without just compensation. What the defendant the logging company did in the present case was to oust the plaintiffs and appropriate the interest that plaintiffs possessed in the booms, and it has thus rendered itself liable to plaintiffs for that interest, which is a one-half interest in the booms and dolphins and appliances for holding the logs in place within the booms.

There is considerable dispute as to the value of this interest. Bernitt thinks the booms ought to be worth $10,000, $11,000, or $12,000—what he estimates they cost to construct. It is not very clearly shown what they did cost, no record having been kept of the expenditures attending construction, and the estimate is tinctured largely with conjecture. Elsewhere the witness says the upper boom cost in the neighborhood of $3,000 and the lower $4,500, which together amount to very much less than the aggregate estimate. The booms have been in existence a long time; the first having been built about 1882, and the other some two or three or four years later. They have therefore been in use for 30 years, more or less, and the deterioration by the ravages of time and the elements must have been very considerable. Another condition to be considered is that the general government required the booms to be so changed in part as to leave a portion of the channel of Coos river open and free to navigation. This requirement imposed a large amount of expense for reconstruction. The plaintiffs were unable to meet that expense, and the booms with an open channel through them without reconstruction would be rendered of much less value than in their original condition. When the lumber company transferred the booms to the logging company a valuation thereof was made, which was fixed at $2,000. This, it should be said, included a small tract of tidelands needed for enlarging the booms. The estimate seems to have been fairly made, with a purpose of arriving at the true value, and not with any view that it should be self-serving in anticipation of the present controversy. I attach little value to the tidelands included in the estimate, and conclude that $2,000 is a fair estimate of the value of the booms at the time plaintiffs were ousted by the logging company, thus making the value of plaintiffs' one-half interest $1,000.

Plaintiffs also seek an accounting for boomage charges on logs captured, and for certain logs rafted by them and transported to the mills of the C. A. Smith Lumber & Manufacturing Company and the Simpson Lumber Company.

It is alleged by the bill of complaint that since November, 1908, plaintiffs have caught in said booms for the logging company and the lumber company 5,000,000 or 6,000,000 feet of timber and sawlogs, on which there is due plaintiffs the sum of 12½ cents per 1,000 feet for sawlogs and one-eighth of one cent per foot for piles, and that plaintiffs have rafted to the mill of the lumber company a large portion thereof, upon which there is due 35 cents per 1,000 feet for sawlogs and one-half of one cent per foot for piles; plaintiffs being unable to state the exact amount due.

It is further alleged that during the months of November and December, 1908, the plaintiffs caught and stored in said booms for the Simpson Lumber Company a quantity of logs and piling, and rafted a large portion of such logs and piles to the mills of said company, for which services the Simpson Lumber Company is indebted to plaintiffs, but that the Smith Lumber Company and the logging company have prevented the payment thereof, and in effect appropriated the amount due to their own use. Also, that during the months of January, February, and March, 1909, plaintiffs caught in said booms certain logs for one Clarence Gould, and subsequently rafted and delivered a large portion thereof to the lumber company, and that said lumber company purchased such logs from Gould with the agreement that it would pay plaintiffs boomage and rafting charges, but has refused to account to plaintiffs for same.

These allegations set forth in effect the matters pertinent to an accounting.

Plaintiffs are entitled to an accounting from the time when the defendants refused to continue the joint operation of the booms with plaintiffs up to the time when plaintiffs were ousted and wholly deprived of further use and occupancy, which, as we have seen, was in June, 1909. This leaves for ascertainment the amount the defendants are liable to account for to plaintiffs.

There were caught in the booms for the Simpson Lumber Company during the logging season of 1908 and 1909 4,045,273 feet of logs. Of these 2,966,771 feet were rafted and transported by the plaintiffs. Plaintiffs were entitled to one-half the boomage charges, namely, 12½ cents per 1,000 upon the whole, and rafting charges of 35 cents per 1,000 upon the latter amount, totaling $1,544.03. To this should be added $18.93 for piles boomed and rafted, making a grand total of $1,562.96. Against this the logging company is entitled to a credit of $295.30, leaving a balance due on the Simpson Lumber Company account of $1,267.66. I arrive at this deduction from the fact that the Simpson Lumber Company had an account with Bernitt and Wittick, or perhaps with Bernitt alone but for account of both of them, upon which there was a balance due Bernitt and Wittick of $304.70, and the logging company intercepted the payment of the balance by directing the Simpson Lumber Company to account to it for all logs delivered to such lumber company from the booms. Later the logging company paid to the Simpson Lumber Company $600 to be applied on the Bernitt and Wittick account, and it was so applied and

the amount charged to the logging company. This discharged the balance due and left $295.30 to be applied as a credit to the logging company, and I so apply it here.

The Gould logs were also caught in the boom, of which there were 1,924,460 feet. A large portion of these were rafted and delivered by Bernitt and Wittick to the lumber company; the true amount not being ascertained. The lumber company should have known the amount, but did not disclose it, and withheld the boomage and rafting charges. Bernitt and Wittick were unable to state the true amount rafted and transported, but were depending upon the statement of the lumber company therefor. I therefore charge the lumber company with one-half the boomage charge and the rafting and transportation charges in addition upon the whole of said logs, amounting, together with a charge of $10.57 for booming and rafting a small amount of piling, to $924.68.

Beyond these matters, Bernitt testifies that 4,000 logs passed through the booms, which would run from 900 to 1,000 feet to the log, upon which he should have received one-half of the boomage charges, but did not. For this he should have credit, which amounts to $475, averaging the logs at 950 feet to the log.

These various sums, namely, one-half value of boom $1,000, due on Simpson Lumber Company logs $1,267.66, due on Gould logs $924.68, and for one-half boomage on other logs $475, aggregating $3,667.34, the plaintiffs are entitled to recover from the defendants, the C. A. Smith Lumber & Manufacturing Company and Smith-Powers Logging Company, and such will be the order and decree of the court, with costs to plaintiffs.

In re ELK VALLEY COAL MINING CO.

(District Court, W. D. Kentucky. April 18, 1914.)

1. BANKRUPTCY (§ 223*)—FEES OF REFEREE—COMMISSIONS.

Where the property of a bankrupt was purchased at trustee's sale by a lienholder whose claim exceeded the purchase price, and who was required by order of court to give a bond for the payment only of such sum as should be necessary to pay prior liens and the costs of administration, the referee is not entitled to commission on the remainder of the price bid, which was not disbursed by the trustee even in form.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 888–894; Dec. Dig. § 223.*]

2. BANKRUPTCY (§ 223*)—COMPENSATION OF REFEREE—SPECIAL ALLOWANCES.

Under General Orders in Bankruptcy XXXV, cl. 2 (89 Fed. xiii, 32 C. C. C. A. xxxiv), a referee is entitled only to necessary expenses incurred by him in publishing or mailing notices, in traveling, in perpetuating testimony, or in the performance of other duties under the act and allowed by special order of the court. He is not entitled to the allowance of a per diem for his services when away from home, to traveling expenses of a clerk, nor to clerk or stenographer's hire, unless the necessity therefor is shown.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 888–894; Dec. Dig. § 223.*]

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

In Bankruptcy. In the matter of the Elk Valley Coal Mining Company, bankrupt. On petition of Sallie J. Thompson to review order of referee. Reversed.

See, also, 210 Fed. 386.

The Referee, pro se.

J. W. Linton, of Russellville, Ky., for respondents.

EVANS, District Judge. Mrs. Sallie J. Thompson had a lien upon most of the bankrupt's estate and proved her very large claim as one thereby secured. At the sale of the property she bid upon it some $80,000, but, in view of her lien on the property purchased, she was required to and did only give a bond in the following terms, to wit:

"In the District Court of the United States for the Western District of Kentucky.

"In the Matter of Elk Valley Coal Mining Company, Bankrupt.

"In Bankruptcy.

"Bond for Purchase Money.

"Six months after date, we, Sallie J. Thompson, principal, H. C. Thompson, C. A. Rogers, L. N. Birk, and J. M. Thompson, sureties, jointly and severally promise to pay John Craig Brown, trustee of the bankrupt estate in the above-entitled cause, the sum of ten thousand dollars ($10,000.00), with interest thereon from date hereof at the rate of six per cent. per annum until paid; it being the amount fixed by order of the court in the above-styled cause to meet the payment of all legal taxable cost in said cause and meet the payment of all prior lien claims in said matter, and also being payment of part of the purchase money for the Elk Valley Coal Mining Company property, known as Elk Valley mine and Diamond Block mine and all personal property connected therewith and office furniture and fixtures in bankrupt's office in Drakesboro, Ky., this day sold by the said John Craig Brown, trustee aforesaid, by virtue of an order of the court in the said cause granted on September the 30th, 1912, and of which property at said sale the said Sallie J. Thompson became the purchaser. This bond is to have the force and effect of a judgment with a lien reserved upon all of said property to secure the payment of this bond.

"Witness our hands this the 18th day of November, 1912:

"Sallie J. Thompson,
"By J. M. Thompson,
"H. C. Thompson,
C. A. Rogers,
L. N. Birk,
J. M. Thompson."

"Witnesses:
"E. A. Taylor,
"Walker Wilkins.

At that time there appeared to be no probability that any greater sum than $10,000 would be needed to pay claims prior to hers, and the result showed that such was indeed the fact. However, after the trustee was appointed, he filed a petition before the referee asking that the principal and sureties on the bond be ruled to pay to him the entire $10,000, and interest, except the sum of $822, paid thereon on October 5, 1913, and the further sum of $300, paid thereon on October 20, 1913. A show-cause order was made, and to it Mrs. Thompson and her sureties filed a response. The referee held the response to be insufficient, and made the rule absolute. Thus the case is again before us, but all questions except those pertaining to the claims made by the referee for his compensation and those made by the trustee for his

have probably been settled, and the present opinion will be confined to the claims of the referee alone, leaving all other questions and any claim of the trustee open to be disposed of at a later time.

The referee's claim as made out by him is as follows:

In the District Court of the United States for the Western District of Kentucky.

In the Matter of Elk Valley Coal Mining Company, Bankrupt.

In Bankruptcy.

Statement of Referee's Cost and Commissions.

July 22, 1912.	Railroad fare from Elkton to Central City and return	$ 4 60
" " "	Hotel fare	1 50
Aug. 23, "	Railroad fare for self and clerk from Elkton to Central City and return	9 20
" " "	Hotel fare for self and clerk	3 00
Aug. 30, "	Railroad fare for self and clerk from Elkton to Central City and return	9 20
" " "	Hotel fare for self and clerk	3 00
Sept. 12, "	Railroad fare for self and clerk from Elkton to Central City and return	9 20
" " "	Hotel fare for self and clerk	3 00
Sept. 29, "	Carriage from Elkton to Russellville	3 00
" " "	Railroad fare for self and clerk from Russellville to Central City	2 20
" " "	Hotel fare for self and clerk	2 00
" 30, "	" " " " " "	3 00
" " "	Railroad fare for self and clerk from Central City to Elkton	4 60
Oct. 11, "	Railroad fare for self and clerk from Elkton to Russellville and return	4 80
" " "	Hotel fare for self and clerk	3 00
" 26, "	Railroad fare for self and clerk from Elkton to Central City and return	9 20
" " "	Hotel fare for self and clerk	3 00
" 29, "	Railroad fare for self and clerk from Elkton to Central City and return	9 20
" " "	Hotel fare for self and clerk	3 00
Nov. 14, "	Railroad fare for self and clerk from Elkton to Central City and return	9 20
" " "	Hotel fare for self and clerk	3 00
" 30, "	Carriage from Elkton to Russellville and return	3 00
" " "	Hotel fare	50
" " "	Livery feed in Russellville	35
Dec. 12, "	Railroad fare for self and clerk from Elkton to Central City and return	9 20
" " "	Hotel fare for self and clerk	3 00
Sept. 24, 1913.	Railroad fare from Elkton to Central City and return	4 60
" " "	Hotel fare	2 50
	Clerk hire for 10 days at $10.00 per day	100 00
	Stenographer hire	150 00
	Out of town 13 days at $10.00 per day	130 00
		$ 505 05
	Mailing notices	505 25
	Filing claims	39 75
	Commissions	822 40
		$1,872 45

In the District Court of the United States for the Western District of Kentucky.

In the Matter of Elk Valley Coal Mining Company, Bankrupt.

In Bankruptcy.

Mailing	241	notices	first creditors' meeting at 25c per notice.....	$ 60 25
"	"	"	second " " " " " "	60 25
"	"	"	petition for sale of property " " "	60 25
"	"	"	of sale, for sale of property at 25c per notice....	60 25
"	"	"	report of trustee of sale.....	60 25
"	"	"	creditors' meeting to elect trustee.....	60 25
"	"	"	" " Sept. 24, 1913.....	60 25
"	93	"	on exceptions to labor claims.....	23 25
"	241	"	final meeting of creditors.....	60 25
				$ 505 25
Filing 159 claims at 25c per claim.....				39 75
1% commissions on $82,240.00.....				822 40
				$1,367 40

As will be seen, he claims commissions on the sum of $82,240, and shows that the trustee has paid to him the $822 collected on that bond, and also has paid to himself or his predecessor $300 out of money so collected. One trustee, however, has died, and another has been appointed in his stead, and, as we have stated, this opinion will deal only with the referee's claim, and will leave open such claims, if any, as may be made on behalf of either trustee.

Section 40a of the Bankruptcy Act as amended is as follows:

"Referees shall receive as full compensation for their services, payable after they are rendered, a fee of fifteen dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and twenty-five cents for every proof of claim filed for allowance, to be paid from the estate, if any, as a part of the cost of administration, and from estates which have been administered before them one per centum commissions on all moneys disbursed to creditors by the trustee, or one-half of one per centum on the amount to be paid to creditors upon the confirmation of a composition." Act Feb. 5, 1903, c. 487, § 9, 32 Stat. 779 (U. S. Comp. St. Supp. 1911, p. 1500).

Section 72 of the act is in this language:

"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 services than that expressly authorized and prescribed in this act."

General Order in Bankruptcy XXXV, cl. 2 (89 Fed. xiii, 32 C. C. A. xxxiv), is as follows:

"The compensation of referees, prescribed by the act, shall be in full compensation for all services performed by them under the act, or under these general orders; but shall not include expenses necessarily incurred by them in publishing or mailing notices, in traveling, or in perpetuating testimony, or other expenses necessarily incurred in the performance of their duties under the act and allowed by special order of the judge."

These provisions are very explicit, but we may note certain authorities which bear instructively upon them: 1 Loveland, § 98, and cases cited; Collier (9th Ed.) pp. 617, 1085, 1086, and cases cited.

[1] It will be recalled that Mrs. Thompson was required to give bond only in the sum of $10,000, with interest, and that the bond itself stipulated that that "was the amount fixed by order of the court in the above-styled cause to meet the payment of all legal taxable costs in said cause and meet the payment of all prior lien claims in said matter." The order referred to must have been based upon the obvious proposition that Mrs. Thompson was entitled to all the purchase money to be derived from the sale of the bankrupt's property by virtue of her lien thereon, except prior claims made up mainly of the costs of this proceeding, taxes due, labor claims, and certain costs and expenses of administration incurred in an effort to operate the property by the trustee under the direction of the court.

Under these circumstances, it would seem that there was no fair need for Mrs. Thompson to pay money to the trustee merely to put it in a position to be tolled for fees by the officers of the court. The money derived from the sale of the property outside of the $10,000 was not only due by her, but was due to her, and need not be collected or disbursed. Hence we conclude that only the $10,000, or such parts of it as were needed, was money to be "disbursed" by the trustee, within the proper sense of that word as used in section 40a of the act. The remaining part of the purchase money was to be retained by Mrs. Thompson, to whom it was going as the holder of the lien on the property for which she had bid at the sale. In respect to that large amount the matter was merely formal, and there was no receipt or disbursement of money by the trustee, even in form, nor was any necessary.

[2] Coming now to the various items of the referee's claim in detail, we have concluded that he is in strictness entitled only to such commissions on the $10,000 as section 40a authorizes. He is, of course, also entitled to $15, the fixed or filing fee, and to the 25 cents for each of the 159 claims proved against the estate, this amounting to $39.75.

We think the referee is also entitled to his own traveling expenses whenever it was necessary for him to travel to any place other than his own office or home in order to transact business in connection with the bankrupt's estate, but, unless something more is shown, he is not entitled to the traveling expenses of a clerk.

The record shows no state of fact which would support the referee's claim for clerk hire, and the same considerations apply to his claim for stenographer's hire, and certainly the record shows nothing to support the referee's claim of $10 per day for being "out of town." We are not disposed to make a special order allowing any of these items. While the referee's traveling expenses may be charged for and paid, he cannot charge extra for his own work merely because it is done away from home; the labor being no greater at one place than another. Great abuses might result unless the restrictions imposed by the act and by the General Orders in Bankruptcy are enforced.

As to the various items of the referee's account, amounting in the aggregate to $505.25, for "mailing" various notices to creditors upon various subjects, we have concluded that no one of these items is sustainable upon the basis of charging a "fee" of 25 cents for mailing each

notice. The utmost that can be allowed for this service is the amount of proper *"expenses"* incurred in mailing the notices as contemplated in General Order XXXV, cl. 2. The amount of such proper expenses would have to be shown by proof, but none appears in the record.

We do not understand that Mrs. Thompson and her sureties seriously object to the payment to the referee of the $822, if that is to be in full of all his claims. If we are right in this supposition, we need not ascertain at this time the exact amount at which the referee's compensation should be fixed under the views we have expressed, but, if we are mistaken in our supposition, then, if counsel cannot agree upon the correct result to be worked out, we will go over it with them at some convenient time. And it may be that further testimony will be necessary, and if so, reasonable time can be given for taking it.

It results that the order of the referee sought to be reviewed, so far as it made the rule absolute to pay the amount claimed by the referee for his compensation, was erroneous, and to that extent must be, and is, reversed and set aside. Further proceedings upon that phase of the case may be had pursuant to the views expressed in this opinion. In other respects the questions arising on the petition for a review of said order are left open and undetermined.

Orders accordingly may be prepared, unless the parties interested speedily reach some settlement.

COURTNEY v. NEW YORK, N. H. & H. R. CO.

(District Court, D. Connecticut. April 28, 1914.)

No. 1845.

1. MASTER AND SERVANT (§ 258*)—INJURIES TO SERVANT—COMPLAINT—MASTER'S KNOWLEDGE OF DANGER.

   A complaint for injuries received by an engineer from the explosion of oil while he was filling the headlight, which alleged a defective condition of the headlight and of the oil, in order to be good against demurrer, must allege that the use of the oil in the manner set out was likely to cause the explosion, and that the defendant knew or should have known of that fact.

   [Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 816–836; Dec. Dig. § 258.*]

2. MASTER AND SERVANT (§ 97*)—INJURIES TO SERVANT—LIABILITY OF MASTER—UNAVOIDABLE ACCIDENT.

   If the explosion of oil, while an engineer was filling a locomotive headlight, was so unprecedented that neither the engineer nor the railroad company could reasonably anticipate such an effect from the use of the oil in the particular manner, the explosion would be an unavoidable accident, for the consequence of which the company would not be liable.

   [Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 163; Dec. Dig. § 97.*]

3. MASTER AND SERVANT (§ 265*)—INJURIES TO SERVANT—RES IPSA LOQUITUR.

   The doctrine of res ipsa loquitur does not apply where an oil can exploded while an engineer was filling a locomotive headlight, since the oil

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

and the lamp were at that time both under the control of the plaintiff, and common experience would not attribute the accident to a defect in the oil rather than to carelessness in handling it.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 877–908, 955; Dec. Dig. § 265.*]

Action by Frederick Courtney against the New York, New Haven & Hartford Railroad Company. Demurrer to the complaint sustained.

Charles F. Roberts and Edward H. Rogers, both of New Haven, Conn., for plaintiff.

Joseph F. Berry, of New Haven, Conn., for defendant.

THOMAS, District Judge. [1] The fourth, sixth, and seventh paragraphs of the complaint are as follows:

"Fourth. On said 3d day of March, 1913, shortly before midnight, the plaintiff, in the performance of his duty as a locomotive engineer employed by the defendant on the said engine of said freight train, and while engaged in interstate commerce between Massachusetts and Connecticut, as aforesaid, in operating and driving the locomotive engine attached to said regular freight train and at a point within close proximity of the defendant's railroad station at Great Barrington, in the state of Massachusetts, necessarily, and in the performance of his said duty as a locomotive engineer, climbed and entered upon the front of said engine which was under his care and management as a locomotive engineer as aforesaid, for the purpose of refilling with oil the headlight lamp which was attached to the front of said engine, and which headlight lamp had, within a short time prior thereto, become extinguished, through a lack of oil in said lamp, and by reason of the defective and insufficient condition of said lamp."

"Sixth. The plaintiff thereupon examined said lamp and ascertained that the oil in said lamp was exhausted, that the bulb or tank of said lamp was cold, whereupon the plaintiff proceeded to fill said lamp with oil, supplied by the defendant for the purpose, and while so at work, and while in the exercise of due care, said lamp, and the oil can which the plaintiff was using, exploded, and the plaintiff was, by reason and in consequence of said explosions, severely bruised, burned, and injured, and as a result thereof suffered and incurred great physical and mental pain and a severe and long and lingering sickness and a severe nervous shock."

"Seventh. When said freight train left State Line said lamp was not properly filled and equipped with oil sufficient for the trip from State Line to Bridgeport by reason of the negligence of the defendant, its servants, agents, and employés, and said lamp was at said time defective and insufficient by reason of the negligence of the defendant, its servants, agents, and employés, and the said lamp was in a defective and insufficient condition and was not in a proper condition for the trip from State Line to Bridgeport, as aforesaid, by reason of the negligence of the defendant, its servants, agents, and employés, and said oil furnished by the defendant, its servants, agents, and employés, and used by the plaintiff aforesaid, was of a poor and low grade and of a dangerous, explosive, and combustible character, and was not of a sufficient proof against explosion, and all of which the plaintiff was at said time ignorant."

In order to make the complaint proof against demurrer, it is incumbent upon the plaintiff to allege that the use of oil furnished to the plaintiff and the manner in which he claimed to have used it, as set forth in the complaint, was likely to cause an explosion, and that the defendant knew or ought to have known of this fact.

[2] If the event was so unprecedented that neither the plaintiff nor

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

the defendant, in the exercise of reasonable care, could know of the effect likely to be caused by the use of oil in this manner, it would then be a case of inevitable accident, for which no one was responsible.

[3] Plaintiff contends that the doctrine res ipsa loquitur applies to the facts in this case and seeks to justify his contention by citing many cases. In all of the cases cited the courts have held that the mere fact of the accident unexplained is some evidence of negligence on the part of the defendant. The rule established in those cases is as follows:

"When the thing causing the injury is shown to be under the control of the defendant, and the accident is such as in the ordinary course of business does not happen if reasonable care is used, it does, in the absence of explanation by the defendant, afford sufficient evidence that the accident arose from want of care on its part."

The reason why this rule of law is not applicable to the case at bar is because of the fact that the thing causing the accident, namely, the oil being poured into the lamp, was in exclusive control of the plaintiff rather than of the defendant, and therefore the reason for the rule does not exist. Where illuminating oil, being poured into a cold lamp, both the oil and the lamp being in the exclusive control and custody of the plaintiff, and an explosion occurs, it cannot be said that common experience points more closely to a defect in the oil or lamp attributable to the master than to some carelessness on the part of the servant using it; prima facie such negligence will be attributed to the person charged by law with the duty of managing and maintaining the thing causing the injury. The maxim res ipsa loquitur does not apply where the accident might have been due to improper handling as well as to improper furnishing the thing causing the accident. In the case of Lennon v. Rawitzer, 57 Conn. 583, 587, 19 Atl. 334, 336, the court says as follows:

"But, assuming it to be as cited, there are several conditions which are essential to lay the foundation for any presumption. One is that the thing must be under the management of the defendant or his servants. Here the actual management at the time was controlled by the plaintiff, which would at least require caution in applying the rule, lest the plaintiff's own carelessness be visited on the defendants."

The allegations of the complaint do not show either actual or constructive knowledge on the part of the defendant that the accident here in question would be likely to occur in using oil as it was used.

The demurrer is sustained.

UNITED STATES v. ERIE R. CO. (two cases).

(District Court, S. D. New York. April 29, 1914.)

CARRIERS (§ 32*)—REGULATION—INTERSTATE COMMERCE ACT—"COMMON CARRIER."

Interstate Commerce Law (Act Feb. 4, 1887, c. 104, 24 Stat. 387 [U. S. Comp. St. 1901, p. 3171]) § 22, provides that nothing contained in the act shall be construed to prevent the principal officers of any railroad company from exchanging passes or tickets with other railroad companies for their officers and employés. Hepburn Act June 29, 1906, c. 3591, 34 Stat. 584 (U. S. Comp. St. Supp. 1911, p. 1288), declares that no common carrier "subject to the provisions of the act" after June 1, 1907, shall directly or indirectly issue or give any interstate free tickets, passes, or transportation for passengers, provided that the provision shall not prohibit the exchange of passes for officers, agents, and employés of common carriers and their families, and the amendment of 1910 (Act June 18, 1910, c. 309, § 7, 36 Stat. 544 [U. S. Comp. St. Supp. 1911, p. 1287]) declares that the provision shall not be construed to prohibit the privilege of passes or franks or the exchange thereof between carriers for the officers, agents, employés, and their families of such telegraph, telephone, and cable lines and the officers, agents, employés, and their families of other common carriers, "subject to the provisions of the act." *Held*, that the term "common carrier," as so used, was not limited to "common carriers subject to the provisions of the act," and hence a common carrier, subject to the act, was not limited to the exchange of passes with other carriers equally subject to the act, but was authorized to exchange passes with transatlantic steamship lines and foreign railroads not subject to the act.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 83–85; Dec. Dig. § 32.*

For other definitions, see Words and Phrases, vol. 2, pp. 1313–1319; vol. 8, p. 7607.]

Suits by the United States against the Erie Railroad Company. Suit No. 1 was instituted by the United States against the railroad company to restrain it from issuing passes to agents of transatlantic steamship lines, and suit No. 2 to restrain it from issuing passes to the agent of the Great Eastern Railway of England. On final hearing. Decrees for defendant.

John C. Knox, Asst. U. S. Atty., of New York City.
George F. Brownell, of New York City, for defendant.

HOUGH, District Judge. From a date prior to 1887, and continuously since that time, the Erie Railroad has been in the habit of issuing passes to certain agents or officials of the transatlantic steamship lines using the port of New York. Between the railroad and steamship companies there has been an interchange of passes for the purpose of maintaining relations from which profit was desired. The steamship companies control much through freight; so does the Erie Railroad; and each hoped to get more freight through the influence of those gratified by said interchange of passes. The Erie Railroad also maintains an agent in England, whose business it is to solicit through freight; he receives passes over the lines of the Great Eastern Railway

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

of England, in return for which the defendant issues a pass over its lines to the American agent of the English railway. This arrangement likewise has continued for many years and antedates 1887. It is admitted that the defendant is a corporation engaged in interstate traffic and is subject to the provisions of what is commonly known as the Interstate Commerce Law; and it is also admitted that neither the ocean carriers nor the Great Eastern Railway of England is subject to said act, although all are common carriers, within the ordinary meaning of those words.

Section 22 of the Interstate Commerce Law has from the passage of the first statute in 1887 contained these words:

"Nothing in this act shall be construed * * * to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employés."

Since the Hepburn Act of 1906 the first section of the Interstate Commerce Law has contained these words:

"No common carrier subject to the provisions of this act, shall, after January 1, 1907, directly or indirectly issue or give any interstate free ticket, free pass or free transportation for passengers: * * * Provided, that this provision shall not be construed to prohibit the interchange of passes for the officers, agents, and employés of common carriers, and their families; nor to prohibit any common carrier from carrying passengers free with the object of providing relief in cases of general epidemic, pestilence, or other calamitous visitation."

The amendment of 1910 inserted the following words (next after those above quoted):

"And provided further that this provision shall not be construed to prohibit the privilege of passes or franks, or the exchange thereof with each other, for the officers, agents, employés, and their families of such telegraph, telephone and cable lines, and the officers, agents, employés and their families of other common carriers subject to the provisions of this act."

The proviso of 1910 is evidently intended to cover the case of employés of cable, telegraph, and telephone lines, which were in that year brought within the purview of the Interstate Commerce Law, but I am quite unable to see any reason for the rest of said proviso.

The object of these actions is to enjoin the defendant from continuing the long-standing practice above outlined because the common carriers or railroads referred to in the quoted sections of the law must be held to mean, not common carriers and railroads generally, but "common carriers subject to the provisions of this act." These suits were laid before the Commerce Court and were dismissed without prejudice because the court was divided in opinion. Shortly after the passage of the Hepburn Act, this question came before the Interstate Commerce Commission (Petition of Frank Parmelee Co., 2 Interst. Com. Com'n R. 39), and it was there plainly held that no interchange of passes would be permitted between ordinary common carriers or common carriers at common law and "common carriers subject to the provisions of this act." The position of the Commission is in substance that the general prohibition of the Hepburn Act is only modified by the proviso to the extent of "making a special exception of the giving of passes by way of interchange to the employés of any other

common carrier subject to the act." This seems to me assertion rather than reasoning, but there is really very little more to say about it. To decide this matter as one of law is making bricks without straw, for every one admits that the object of the court must be to carry out the intent of the Legislature; yet, if by "intent" is meant conscious purpose, it is, I think a safe presumption that Congress never considered the point here involved.

In the absence of any real intent, it is the habit of courts to endeavor to ascertain whether, from the language used, an imputed intent can be spelled out. Applying this method, it is a fair query to ask whether the context indicates throughout the act that "common carriers" is to be synonymous with "common carriers subject to the provisions of this act." As amended to date, I find the following instances of the use of the phrase "common carriers" in illustrative positions: In section 1 there is a proviso:

"That nothing in this act shall be construed to prevent telephone, telegraph and cable companies from entering into contracts with common carriers for the exchange of services."

Here "common carriers" must refer to common carriers generally, for otherwise telegraph and telephone companies might find themselves hampered in extending their business with concerns entirely unconnected with interstate commerce.

The penal provision which is a part of the anti-pass legislation begins with the expression:

"Any common carrier violating this provision shall be deemed guilty of a misdemeanor," etc.

Here the phrase evidently refers only to carriers subject "to the provisions of this act."

The provisions of section 1 relating to private sidings and lateral branch lines declare that, "if any common carrier shall fail to install and operate any such switch," the Commission shall investigate the matter, and make an order "directing the common carrier to comply with the provisions of this section." Here evidently the phrase can refer only to carriers "subject to the provisions of this act."

Section 3, relating to interchange of traffic, does not consistently use the phrase "carrier subject to the provisions of this act"; yet I think it plain that, in every instance where the phrase "carrier" is used, it means "carrier subject to the provisions of this act." Section 5 (the anti-pooling provision) prohibits combinations "with any other common carrier or carriers," which phrase I think is plainly intended to cover any and all carriers, whether the same be subject to the provisions of the Interstate Commerce Law or not. Section 6 (relating to published tariffs) does not always use the phrase "common carrier subject to the provisions of this act," but in my judgment it can only mean such carrier, as may be seen from the context. This is especially noticeable in the subsection relating to the expedition of military traffic in time of war, which declares that "carriers shall adopt every means within their control to facilitate and expedite the military traffic." This can only refer to "carriers subject to the provisions of this act." Section

13, which gives to "any common carrier" the right to complain of the acts or omissions of "any common carrier subject to the provisions of this act," specifically puts the two classes of carriers in contradistinction. In section 15 it is provided as proper for a common carrier to give information "to another carrier or its duly authorized agent for the purpose of adjusting mutual traffic accounts in the ordinary course of business of such carriers." The phrase "another carrier" must mean in many instances a carrier not subject to the provisions of this act. The reparation section (No. 16) provides that the Commission may make an order "directing the carrier to pay to the complainant the sum to which he is entitled." This, of course, can only refer to a "carrier subject to the provisions of this act," and the same may be said of the subsequent portions of the same section relating to the duty of carriers to comply with the Commission's order, the penalty upon a carrier for neglecting to obey an order, and the right of the Commission to apply for a court decree enforcing an order.

The so-called Carmack amendment to section 20 nowhere employs the phrase "carrier subject to the provisions of this act"; yet every carrier affected is in a certain sense within the provisions of the act. The language of this amendment, however, does not seem to me enlightening, because it is really new and different legislation not germane to the general purposes of the statute.

The foregoing examination of the act satisfies me that no attempt has been made to give to the phrases "common carrier" and "common carrier subject to the provisions of this act" an identical meaning, and all arguments based on such identity fail.

It is another admitted canon of interpretation that the statute is to be construed with reference to the object intended to be accomplished. The Interstate Commerce Law is clearly a remedial act and is to be benevolently interpreted, but it can hardly be said that it has been the intention of even its most affectionate supporters to bring all the business or all the operations of the "carriers, subject to the provisions of this act," within the compulsion of the statute. So far as many heads of legislation are concerned, it is historically known that only a small proportion of our legislators have been willing to extend the power of Congress over interstate commerce to its limit. It has hitherto been deemed sufficient to legislate over a limited field only; and I find it impossible to perceive, either in the language of the act, the history of its preparation, or the literature which has grown up around it, any clear intent to upset the settled habit, not only of this defendant, but all American carriers, of seeking or encouraging business in foreign fields, or fields not within the power of Congress, by methods which are still permissible within the congressional field of regulation. Admittedly the Erie Railroad can exchange passes with the New York Central, and why it is obnoxious to the object of the Interstate Commerce Law for the Erie to do the same thing with foreign carriers who are in business relations with it is more than I can see.

Indeed, the "object" of a statute rarely means more than a supposed governmental policy, and it has been said that such policy is too unstable a ground upon which to rest the judgment of the court in the

interpretation of statutes. Hadden v. Collector, 5 Wall. 107, 18 L. Ed. 518.

The argument of inconvenience is easy to advance, but very misleading. In doubtful cases it is true that a statutory construction occasioning great inconvenience or productive of inequality and injustice is not to be preferred if another and more reasonable construction can be found. Knowlton v. Moore, 178 U. S. 41, 20 Sup. Ct. 747, 44 L. Ed. 969. It is vigorously urged here as matter of notoriety that there are already municipalities in this country which are in a sense common carriers in that (in New York and Boston) they maintain ferries for hire, and also that the United States itself is reputed to own a railway common carrier in the Canal Zone, and is about to construct and operate a similar common carrier in Alaska. On these facts the argument is based that every official of the United States from the highest to the lowest, and all the officers or employés of New York and Boston, may be favored with passes to the great detriment of the public. The jumping of such intellectual fences as these may be left until we come to them. To my mind the argument only shows how fallacious is reasoning ab inconvenienti.

To sum this matter up, it is plain that the contention of the government is not to be found in the letter of the statute, nor is it discoverable in the spirit thereof, because there is no evidence of actual intent on the part of the Legislature, because, viewing the whole act, the phrase "common carrier" is not and was not intended to be synonymous with the phrase "common carrier subject to the provisions of this act," and because there is no reason shown why Congress should be thought to have given the privilege of exchanging passes with one kind of common carrier and not with another, when such exchanges are made and always have been made with all common carriers for the same reasons, viz., a desire to curry favor with persons having business to place.

If these well-known reasons no longer meet approval, if mutual backscratching has become sinful, the remedy is another statute, not stretching the present one.

Bills dismissed.

GEORGE B. MATTHEWS & SONS et al. v. JOSEPH WEBRE CO., Limited.

LOISEL v. DORNIER, Sheriff, et al.

(District Court, E. D. Louisiana. April 24, 1914.)

No. 1860.

1. BANKRUPTCY (§ 20*) — JURISDICTION OF STATE COURTS — FORECLOSURE OF MORTGAGE.

After the filing of an involuntary petition in bankruptcy, the state court had no jurisdiction to grant executory process to foreclose a mortgage on the real estate of the bankrupt, and its order of sale was void, since the jurisdiction of the bankruptcy court vested on the filing of the petition, and the title and possession were then in the bankrupt, who could hold it for the purpose of maintaining jurisdiction as well as a receiver or trustee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 23; Dec. Dig. § 20.*]

2. BANKRUPTCY (§ 213*)—LIENS—ENFORCEMENT—FORECLOSURE OF MORTGAGE.

Where there was a growing crop on the mortgaged real property of a bankrupt which the trustee had been directed by the creditors to cultivate and harvest, the mortgagee would not be permitted to foreclose, though he might have any relief to which he would be entitled in equity, and, when the property was eventually sold, he could not suffer any diminution of right or be subjected to any greater expense than by a foreclosure in the state court.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 334–342; Dec. Dig. § 213.*]

3. BANKRUPTCY (§ 217*) — JURISDICTION OF STATE COURTS — FORECLOSURE OF MORTGAGE.

A trustee in bankruptcy by applying to a state court to set aside an order granting executory process for the foreclosure of a mortgage could not impair or affect the jurisdiction of the bankruptcy court to enjoin the foreclosure.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 323, 330, 340; Dec. Dig. § 217.*]

In Bankruptcy. Proceeding by George B. Matthews & Sons and others against the Joseph Webre Company, Limited. On petition by Victor Loisel, Trustee, for an injunction against Joseph B. Dornier, Sheriff, and others. Injunction issued.

W. B. Le Bourgeois and Ralph J. Schwarz, both of New Orleans, for trustee.

E. N. Pugh, of Donaldsonville, for mortgage creditor.

FOSTER, District Judge. [1] In this matter it appears that a petition for involuntary bankruptcy was filed against the Joseph Webre Company, Limited, on February 13, 1914. Seven days later Edward N. Pugh filed a petition in the Twenty-Seventh Judicial District Court for the parish of St. James, praying for executory process to foreclose a mortgage of $20,000 on practically all the real estate belonging to the bankrupt. Under the proceedings in the state court the sheriff attempted to seize the property on February 26th and proceeded

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

to advertise it for sale under the order of that court. On March 6, 1914, the Webre Company was adjudicated a bankrupt, and on March 20th a trustee was elected and qualified on the next day. Thereafter the trustee applied to the state court to have the order granting executory process set aside; but this was denied, on the ground that the title did not vest in the trustee until the date of the adjudication, before which time the proceedings in the state court had been entered, and on the authority of Hiscock v. Varick Bank, 206 U. S. 28, 27 Sup. Ct. 681, 51 L. Ed. 945.

Notwithstanding the high regard I have for the opinion of Judge Wortham, I am constrained to differ with him. In the Hiscock Case, supra, certain insurance policies were pledged to the bank, and the court found the bank had both title to and possession of the policies for more than two years before the filing of the petition. Naturally it declined to interfere with their sale under the provisions of a valid pledge. The same rule prevails where a state court has obtained jurisdiction by virtue of a seizure predicated upon a valid lien or hypothecation prior to the vesting of jurisdiction in the federal court. But in this case both the title to and possession of the property were in the bankrupt at the moment the petition for bankruptcy was filed, and the bankrupt could hold it for the purpose of maintaining jurisdiction of the bankruptcy court as well as a receiver or the trustee. Whitney v. Wenman, 198 U. S. 539, 25 Sup. Ct. 778, 49 L. Ed. 1157.

The question here presented is one of jurisdiction and not of title, and undoubtedly the jurisdiction of this court vested with the filing of the petition for bankruptcy. In Mueller v. Nugent, 184 U. S. 14, 22 Sup. Ct. 275, 46 L. Ed. 405, the court said:

"It is as true of the present law as it was of that of 1867 that the filing of the petition is a caveat to all the world, and in effect an attachment and injunction."

This doctrine has been repeatedly affirmed by the Supreme Court, with some differentiation at times it is true, according to the facts of the particular case; but the rule has always been applied to a state of facts such as are here presented. In Acme Harvester Co. v. Beekman Lumber Co., 222 U. S. 306, 32 Sup. Ct. 99, 56 L. Ed. 208, the court said:

"Whatever may be the limitations of the doctrine declared by this court, speaking by the late Chief Justice Fuller, in Mueller v. Nugent, * * * it is none the less certain that an attachment of the bankrupt's property after the filing of the petition and before adjudication cannot operate to remove the bankrupt's estate from the jurisdiction of the bankruptcy court for the purpose of administration under the act of Congress. * * * The filing of the petition is an assertion of jurisdiction with a view to the determination of the status of the bankrupt and a settlement and distribution of his estate. The exclusive jurisdiction of the bankruptcy court is so far in rem that the estate is regarded as in custodia legis from the filing of the petition. It is true that under paragraph 70a of the act of 1898 the trustee of the estate, on his appointment and qualification, is vested by operation of the law with the title of the bankrupt as of the date he was adjudicated a bankrupt; but there are many provisions of the law which show its purpose to hold the property of the bankrupt intact from the time of the filing of the petition, in order that it may be administered under the law if an adjudication in bankruptcy shall follow the beginning of the proceedings."

There are many decisions of Circuit Courts of Appeal to the same effect; but I consider it unnecessary to cite them.

As a matter of strict interpretation, under the bankruptcy law it would be immaterial whether the petition to foreclose was filed in the state court before or after the filing of the petition for bankruptcy, as the jurisdiction of the federal court is essentially exclusive. See In re Watts & Sachs, 190 U. S. 27, 23 Sup. Ct. 718, 47 L. Ed. 933. But in the exercise of that comity that is always observed by courts it is not likely that the jurisdiction of the state court would be disturbed in the matter of a foreclosure of a mortgage if it had in fact attached first, for the trustee is not bound to take possession of mortgaged property, unless it is for the benefit of all the creditors, and it makes little difference which court shall sell it and administer the proceeds. I have had occasion several times to grant permission to mortgage creditors to foreclose in the state court where the trustee offered no objection, and in the matter of McLoughlin, Trustee, v. Knop, Civil Sheriff, 214 Fed. 260, No. 14,662 of the docket of this court, a matter growing out of the bankruptcy of James J. Woulfe, where it appeared the petition to foreclose was filed in the state court before the adjudication in bankruptcy, and the order of seizure and sale was not executed until after the adjudication, I held that, as executory process was in the nature of an equitable levy, the jurisdiction of the state court attached with the filing of the petition, and the application of the trustee for an injunction was dismissed. In this case the Twenty-Seventh Judicial District Court was entirely without jurisdiction of the res, and the order of sale is necessarily void.

[2] The trustee sets up that there is a growing crop on the plantation, and that he has been directed by the creditors to cultivate and harvest same. If he is to follow these instructions, of course the mortgage creditor cannot be permitted to foreclose at this time. It would be competent for him, however, to come into this court and ask for any relief to which he would be entitled in equity, and when the property is eventually sold he could not, under the rules and orders of this court, suffer any diminution of right or be subjected to any greater expense than he would be by foreclosure in the state court.

[3] It is contended on the mortgage creditor's behalf that the trustee, having gone into the state court, is concluded by the judgment therein. Such, however, could not possibly be the case. No action of the trustee could impair or affect the jurisdiction of this court over the bankrupt's estate. U. S. Fidelity & Guaranty Co. v. Bray, 225 U. S. 205, 32 Sup. Ct. 620, 56 L. Ed. 1055.

The injunction will issue as prayed for.

POWER & IRRIGATION CO. OF CLEAR LAKE v. CAPAY DITCH CO. et al.

(District Court, N. D. California, Second Division. March 10, 1914.)

No. 14.

COURTS (§ 312*) — JURISDICTION OF FEDERAL COURTS — SUIT BY ASSIGNEE — CHOSE IN ACTION.

Under the provision of Judicial Code (Act March 3, 1911, c. 231, § 24, 36 Stat. 1091 [U. S. Comp. St. Supp. 1911, p. 135]), that no District Court shall have cognizance of any suit to recover on a chose in action in favor of an assignee, unless it could have been prosecuted in such court if no assignment had been made, a District Court is without jurisdiction of a suit by an assignee of the rights of the grantor in an instrument in form a deed, to have the same declared a mortgage in accordance with the contract of the parties, and to redeem therefrom, where for want of diversity of citizenship the assignor could not have maintained the suit in such court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 865–875; Dec. Dig. § 312.*]

In Equity. Suit by the Power & Irrigation Company of Clear Lake against the Capay Ditch Company, the Yolo County Consolidated Water Company, the Yolo Water & Power Company, J. M. Adamson, L. D. Stephens, and Joseph Craig. On motion of defendants to dismiss bill. Motion sustained.

Charles S. Wheeler and John F. Bowie, both of San Francisco, Cal., for plaintiff.

A. E. Shaw, Bert Schlesinger, Denson, Cooley & Denson, Theodore A. Bell, and Mastick & Partridge, all of San Francisco, Cal., for defendants.

DOOLING, District Judge. The plaintiff is a corporation organized under the laws of the state of Arizona. The complaint avers that the Central Counties Land Company, a corporation organized under the laws of the state of California, was on November 18, 1907, the owner of certain lands in Lake county, and on that day borrowed from defendant Capay Ditch Company three several sums of money, $5,625, $8,320.75, and $10,625, and executed and delivered to said ditch company its three several promissory notes for the said amounts, all payable on or before August 1, 1908. That contemporaneously, and as a part of the same transaction, and solely for the purpose of securing the payment of said notes, the said Central Counties Land Company executed and delivered to said ditch company an instrument in writing, in form a grant, bargain, and sale deed, but intended as a mortgage, conveying to said ditch company the said lands in Lake county; that on December 18, 1911, the said ditch company conveyed said lands to defendant Yolo County Consolidated Water Company, which company thereafter conveyed the said lands to defendants L. D. Stephens and Joseph Craig, who in turn conveyed the same to defendant Yolo Water & Power Company, and that each and all of the defendants named took said conveyances with full knowledge of

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

the real nature of the original deed from the Central Counties Land Company to the Capay Ditch Company; that plaintiff is the successor in interest of said Central Counties Land Company, and all of the title to said lands has by mesne conveyances become and is now vested in plaintiff, and that all of the demands of said Central Counties Land Company against the defendants have been transferred to plaintiff.

This action seeks to have the deed to the Capay Ditch Company adjudged a mortgage, and that leave be granted plaintiff to redeem said lands by paying whatever is found to be due to such of the defendants as may be entitled to it. Possession of the lands is also sought, as well as an accounting of the rents, issues, and profits thereof. It is further asked that a receiver be appointed to take charge of said lands and preserve the same, and that defendant Yolo Water & Power Company be enjoined from doing certain contemplated work thereon. A number of other averments of the complaint are omitted from this statement, because they have no bearing upon the question to be determined at this time. This question arises upon a motion to dismiss the bill upon several grounds, the one chiefly insisted upon being that the court is without jurisdiction because the suit is one upon a chose in action, and, as the Central Counties Land Company, because a citizen of this state, could not maintain the action in this court, neither can plaintiff, its successor, do so, although a citizen of another state. This brings up for consideration the following provisions of section 24 of the Judicial Code:

"No District Court shall have cognizance of any suit * * * to recover upon any promissory note or other chose in action in favor of any assignee, * * * unless such suit might have been prosecuted in such court to recover upon said note or other chose in action, if no assignment had been made."

It is strongly urged that this is not a suit upon a chose in action, but is a suit to quiet title. However the action may be denominated, it seems quite clear to me that what is sought here is the enforcement of the original contract between the Central Counties Land Company and the Capay Ditch Company, and the rights asserted are based wholly thereon.

The court is asked to declare the instrument, in form a deed, to be a mortgage, and to do this because the parties agreed that it was such. If it were not for this agreement, plaintiff would have no cause of action against defendants. This agreement is a chose in action, and this suit, being to recover upon it, falls within the terms of section 24 above quoted, and cannot be maintained.

The motion to dismiss will, therefore, be granted.

BEGOLE v. BIGELOW et al.

(Circuit Court of Appeals, Sixth Circuit. May 5, 1914.)

No. 2413.

1. TAXATION (§ 679*) — TAX SALE — PURCHASE AND RESALE BY THE STATE — STATUTE.

Under the Michigan Tax Law of April 6, 1869 (Pub. Acts Mich. 1869, No. 169) § 124, which provided that the Auditor General should furnish annually a list of the state tax lands remaining unsold for five or more years, which should be offered at the next tax sale, a sale of lands listed by the Auditor General within less than five years from the time they were bid in by the state was void.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1361, 1362; Dec. Dig. § 679.*]

2. TAXATION (§ 615*) — TAX SALE — PURCHASE AND RESALE BY THE STATE — STATUTE.

That section was prospective and not retroactive in its operation, and did not apply to lands bid in by the state before its enactment.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1264; Dec. Dig. § 615.*]

3. TAXATION (§ 618*)—SALE FOR TAXES—VALIDITY OF TAX.

A sale of lands for delinquent taxes, part of which tax was levied to pay a salary to the sheriff, who was legally entitled only to fees, was void.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1274; Dec. Dig. § 618.*]

4. TAXATION (§ 679*)—SALE FOR TAXES—RESALE BY THE STATE—STATUTE.

Pub. Acts Mich. 1893, No. 206, as amended by Pub. Acts 1897, No. 229, §§ 140–143, denying a purchaser from the state of lands bid in by it at a tax sale the right to the possession of the lands until six months after notice of the sale was served upon the owner of the lands under the last recorded deed in person, or by registered mail if he were a nonresident, before its amendment by Pub. Acts 1899, No. 204, which provided for service of notice upon the personal representatives or heirs of a deceased owner, failed to make provision for a case where the owner had died, and a notice mailed to such owner and received by his executor was ineffective to bar the rights of the heirs.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1361, 1362; Dec. Dig. § 679.*]

5. TAXATION (§ 696*)—SALE FOR TAXES—RESALE BY STATE—CONSTRUCTION OF STATUTE.

Since that statute gave the owners of the land the right to redeem, it will be construed favorably to the former owners, and the court will not read into it a provision which would deprive the heirs of their property without a hearing or an opportunity to redeem.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1393; Dec. Dig. § 696.*]

6. TAXATION (§ 679*)—SALE FOR TAXES—RESALE BY STATE—CONSTRUCTION OF STATUTE.

Even though the tax sale to the state gave the state the absolute ownership of the lands as against the heirs, the effect of the statute was to give to the heirs a title in the property which came into existence at the time of the sale by the state, to which the title of the state's grantee was subject until after the required notice had been given, and until that time the grantee did not have even a colorable right of entry upon the premises.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1361, 1362: Dec. Dig. § 679.*]

*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.

Bill by Fred H. Begole against Sarah Z. Bigelow and others. Judgment for the defendants, and plaintiff appeals. Affirmed.

D. H. Ball, of Marquette, Mich., for appellant.

C. M. Wilson, of Grand Rapids, Mich., for appellees.

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

SATER, District Judge. [1, 2] The plaintiff seeks a reversal of the judgment rendered by the trial court dismissing his bill to quiet title to certain lands in Ontonagon county, Mich. The plaintiff's claim to absolute ownership rests on tax sales made in 1873, 1884, and 1898. The circumstances surrounding such sales will be sufficiently stated later. The defendants are the heirs at law of Horatio Bigelow.

The patents for the tracts in question were issued to Bigelow in 1853 and in the following year were recorded in the office of the register of deeds for such county. The lands became delinquent for taxes levied for the year 1867 under the tax law of 1853 (Comp. Laws of Michigan, 1857, p. 287 et seq.), and, on account of such taxes, were, on October 5, 1868, offered for sale, and for want of other purchasers were sold to the state. On April 6, 1869 (Pub. Acts 1869, No. 169), an entirely new general tax law was enacted and became operative. Section 124 of that act provided that the Auditor General should furnish annually in the month of September to each county treasurer a list of all state tax lands remaining unsold for five or more years from the date on which they were bid off by the state, and that they should at the next tax sale be offered for sale to the highest bidder. On July 5, 1873, within less than five years from the date on which the lands in question had been bid in by the state, the Auditor General listed them for sale. Notice of the sale of the state's interest in them for the taxes of 1867 was given, and on October 6th following they were bid in by one Butler. If it be assumed that the law of 1869 vested in the state the right to sell the lands, it is clear that, as they were listed by the Auditor General and advertised for sale within less than five years from the time they were bid in by the state in 1868, such listing and sale were premature and the sale was therefore invalid. But section 124 of the act of 1869, under which the attempted sale was had, was prospective and not retroactive in its operation. Clark v. Hall, 19 Mich. 356; Auditor General v. Supervisors, 36 Mich. 70, 75; Auditor General v. Saginaw County Supervisors, 62 Mich. 579, 591, 29 N. W. 492; Auditor General v. Shiawassee County Supervisors, 74 Mich. 536, 546, 42 N. W. 143. The last three cases were cited with approval in Auditor General v. Midland County Supervisors, 84 Mich. 121, 126, 47 N. W. 579. The statute of 1869 being prospective only in operation, a sale thereunder for taxes previously assessed was void (Nowlen v. Hall, 128 Mich. 274, 87 N. W. 222), and the deed to Butler, which was not given until 1885, was a nullity. The title remained in the state, if the sale to it in 1868 was valid; otherwise it was still in Bigelow.

[3] The lands became delinquent for the taxes of 1869 and 1870 and for 1872 to 1880, both inclusive. A part of the taxes levied in each of such years, as is sufficiently shown by competent evidence, was imposed by the supervisors of the county to pay the salary of the county sheriff. As the premises were offered for sale from time to time on account of such delinquent taxes, they were, for want of purchasers, bid in by the state. In May, 1884, they were sold by it to one Turner, who took his deed for the same in the following August. Under the statute in force at the several times the taxes for the abovementioned years were levied, there was no provision of law for the payment of a salary to the sheriff. His compensation was derived wholly from fees. The inclusion of a tax for his salary in the levy of each of such years was illegal, invalidated the sale made in 1884, and rendered the deed to Turner void. Hewitt v. White, 78 Mich. 117, 43 N. W. 1043; Collins v. Rea, 127 Mich. 273, 86 N. W. 811. The conclusion reached in such cases accords with the teachings of Lacey v. Davis, 4 Mich. 140, 157, 158, 66 Am. Dec. 524; Case v. Dean, 16 Mich. 12, 32; Boyce v. Sebring, 66 Mich. 210, 219, 33 N. W. 815; Seymour v. Peters, 67 Mich. 415, 420, 35 N. W. 62.

From the foregoing it follows that, as the tax deeds to Butler and Turner, based on the tax sales of 1873 and 1884, respectively, were invalid, none of the subsequent deeds by which it is claimed the premises passed to and were eventually lodged in the plaintiff was effectual to confer title on him.

[4] The lands again became delinquent for taxes for the years 1888 to 1894, inclusive, and were again, whenever offered for sale, bid in by the state for want of other purchasers. In consequence of an adjudication by the county circuit court, made in proceedings duly instituted under Act 206, passed in 1893, the lands were sold in August, 1898, to the plaintiff, and a deed for the same was delivered to him in the following September. That act was amended in 1897 (Act 229). The amendatory act provided (sections 140–143), that a sale of lands, like those in question, for taxes and the delivery of a deed for the same should not cut off the title of the owner until six months after a given notice, whose form is set out in section 140, had been served by the grantee in the tax deed on the owner or owners of such lands under the last recorded deed and to the mortgagee or mortgagees named in the last recorded mortgage or the assignee thereof, if his name appeared on the record; that, if such persons should be nonresidents of the state, the sheriff, if he could obtain from the record or by inquiry their post office address, or if their last address were known to him, should send to them by registered letter a copy of the statutory notice, and return the receipt or receipts received for such letter or letters to the county clerk's office; that such grantee or grantees, or the mortgagee or mortgagees, or assignee of the last recorded mortgage might then at any time within six months redeem the lands and receive a deed therefor by making proper payment to the grantee named in the tax deed; and that any such person lawfully chargeable with notice by registered mail, together with his heirs, executors, administrators, or assigns, who should refuse or neglect to redeem in the pre-

scribed statutory manner, should thereafter be barred from questioning the validity of the tax title or the tax deed given for the premises to the purchaser at the sale. The amendatory act further denied a writ of assistance or other process to the tax sale purchaser for the possession of the land, and forbade his entering into the same until six months after the service of such statutory notice. Bigelow, the owner of the lands under patent from the United States, and a resident of Boston, Mass., died in 1888, leaving the defendants as his heirs at law, and also a will in which he named an executor, who duly qualified and entered upon the discharge of his duties as such. His will, in so far as the record discloses, was not admitted to probate in Michigan. The plaintiff, who purchased subject to the provisions of the act of 1897, undertook in 1898, subsequent to his procurement of a tax deed for the lands, to serve notice on Bigelow at Boston by registered letter directed to him. The letter containing the notice was received by Bigelow's executor, and the receipt given by him on delivery of the letter was filed in the office of the county clerk. By virtue of the sale and of such notice so served the plaintiff asserts an absolute title in himself. Is his contention, which is disputed by the defendants, sound?

[5, 6] The tax law was again so amended in 1899 (Act 204) as to provide for service on the personal representative of a deceased owner of lands, or, if there be none, then upon his heirs, and, if the residence of the person or persons thus entitled to notice could not be ascertained, that service might be had by publication. The lands in question descended, on Bigelow's death, if the title remained in him until that time, directly to the defendants as his heirs at law, subject, however, to the payment of his debts and the expenses of administration after his personal estate had been exhausted. Marvin v. Bowlby, 142 Mich. 245, 105 N. W. 751, 4 L. R. A. (N. S.) 189, 113 Am. St. Rep. 574, 7 Ann. Cas. 559. There is no evidence that the sale of the premises was required for either of such purposes. Ordinarily an amendment such as that last mentioned is accepted as an admission of an imperfection in the previous enactment (Re Klein, 197 Fed. 241, 251, 116 C. C. A. 603 [C. C. A. 6]); but aside from this it must be held that the statute under which the sale was conducted, although its object was to give every taxpayer his day in court (Cole v. Auditor General, 132 Mich. 262, 264, 93 N. W. 890), failed to cover a case such as is here presented, in that it did not provide for notice of the sale, or of the plaintiff's asserted right, to persons situated as were the defendants. As the statute gave the right to redeem, it must be regarded favorably to the defendants, and be liberally construed. Pike v. Richardson, 136 Mich. 414, 99 N. W. 398; Dubois v. Hepburn, 10 Pet. 1, 22, 23, 9 L. Ed. 325; Cooley on Taxation (3d Ed.) 1023; Masterson v. Beasley, 3 Ohio, 301. A court will not read into the law a provision which would deprive them of their property without a hearing or of the opportunity of exercising the right of redemption. If the several sales to the state for the taxes for the years 1888 to 1894 were regular, the state as between itself and the heirs of the original owner acquired absolute title to the lands. Hickey v. Rutledge, 136 Mich. 128, 98 N. W. 974.

However this may be, the effect of the sale made in 1898, as determined by the local courts, was to give such heirs a title which they did not possess after the respective sales to the state—a title which did not come into existence until after the sale of 1898 was made. That sale transferred the whole of the state's title, a part of it passing to the defendants as heirs of the original owners, and the residue to the plaintiff. Hickey v. Rutledge; Griffin v. Kennedy, 148 Mich. 583, 587, 112 N. W. 756; Adkin v. Pillen, 136 Mich. 682, 100 N. W. 176. Plaintiff's tax deed from the state did not therefore convey to him an absolute title. Had the statute provided for notice to the executor or to Bigelow's heirs, and had it been regularly given, an absolute title would not have vested in the plaintiff until six months after the return of the proof of such notice to the county clerk. Boucher v. Trembley, 140 Mich. 352, 103 N. W. 819; Pike v Richardson. Until the expiration of such period the defendants, as the owners of the property, would have had the sole right of possession and the right to redeem. Adkin v. Pillen. The plaintiff, notwithstanding his tax deed, did not acquire even a colorable right of entry, and, if he entered upon the premises, he was a trespasser. Corrigan v. Hinckley, 125 Mich. 125, 126, 83 N. W. 1020; Huron Land Co. v. Robarge, 128 Mich. 686, 87 N. W. 1032.

Other questions presented need not be considered.

The decree of the district court is affirmed.

THE IOWA.

(Circuit Court of Appeals, Fourth Circuit. February 7, 1914.)

No. 1176.

1. SHIPPING (§ 80*)—LIABILITY OF VESSELS—INJURY TO LICENSEE ON BOARD.

Libelant, who had business with an officer of a steamship to which he had sold supplies and which was loading lumber at a pier, went on board from the pier in the daytime when the loading was in progress and started to walk along the deck between the open hatchway through which the lumber was being passed and the side next the pier, when he was struck by a sling of lumber coming over the side and knocked into the hatchway and injured. The vessel was properly constructed, equipped, and manned. The loading operations were in plain sight and the danger was obvious. Libelant could have passed to the other side of the hatch and proceeded in safety, and there was evidence that he was repeatedly called to by the stevedores and warned. *Held*, that he assumed the risk and could not recover from the vessel for his injury.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 335, 341, 352; Dec. Dig. § 80.*]

2. SHIPPING (§ 80*)—LIABILITY OF VESSELS—DANGEROUS CONDITIONS—OPEN HATCHWAYS.

That the hatchways of a ship, when in port and at a loading berth, are open and unguarded except by the usual coamings, is not an evidence of negligence on the part of the ship, but a usual condition which is to be expected, and any one going on board, although lawfully there, is required to take notice of such condition and avoid injury therefrom.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 335, 341, 352; Dec. Dig. § 80.*]

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

Appeal from the District Court of the United States for the Eastern District of Virginia, at Norfolk; Edmund Waddill, Jr., Judge.

Suit in admiralty by M. Snider against the steamship Iowa; S. E. Adams, master and claimant. Decree for respondent, and libelant appeals. Affirmed.

This is a libel in rem against the steamship Iowa for personal injuries sustained by appellant on account of the alleged negligence of the officers of the vessel in causing a draft of lumber to be swung suddenly over the side of the vessel, striking the appellant and throwing him down hatch No. 5, by reason whereof he sustained the injuries upon which this suit is based.

Among other things it is alleged that in response to a letter written by the chief officer of the Iowa, on the 21st day of May, 1912, the appellant proceeded to the pier of the Norfolk & Western Railway, known as the Merchandise Pier, at Lamberts Point, to board the vessel, and in company with one John Zimmerman boarded the vessel by means of a ladder which was extended from the pier to the deck of the ship; and that the said vessel was then being laden with lumber which was lowered into the hold of the vessel by means of a fall and tackle and by other means.

Appellant also alleges that when he reached the deck he was directed by the chief officer of the vessel to come to the cabin of said chief officer; that he boarded the vessel on the port side thereof, which was the side of the vessel lying next to the Merchandise Pier, and in obedience to the direction of the chief officer proceeded to walk along the deck on the port side thereof towards the chief officer who was standing near his, the chief officer's, cabin; and that while on the deck of the vessel as aforesaid the chief officer, servants, and agents thereof negligently, carelessly, and improperly caused to be swung over the side of the vessel a large piece of timber or lumber against appellant, whereby he was violently struck by said timber and thrown for a distance of about 30 feet into the hold of the vessel and was greatly injured, crippled, and wounded without any fault on his part.

Appellee and claimant in his answer denies that appellant was on board at his invitation, or that his injury was due to the carelessness or negligence of his agent, employés, officers, or otherwise, but through the fault and negligence of the appellant himself. And also further denies the material allegations of the complaint and says, among other things, that the appellant was not invited by the chief officer of the ship to walk in the direction he did on this occasion, as alleged in the libel, and that the accident was not caused by any want of ordinary care on the part of himself or the chief officer, and also denies that the said officer himself failed to exercise such care in any respect whereby said appellant received the injuries complained of.

Further answering, respondent says: "That the steamship Iowa is a British steamship of the burden of 5,360 tons net, 500 feet long, 58 feet beam, 37 feet deep, with twin screws, triple expansion engines, constructed of steel, only ten years old and strong, properly equipped and provided with all proper, necessary, and modern appliances for operation as a freight carrying ocean steamship, and provided and manned with a skillful and competent crew of officers and men, under the command of this respondent. That said steamship, prior to the date of the accident, had arrived at the port of Norfolk for the purpose of completing her cargo and had engaged the services of one William E. Dillion, a competent stevedore of experience and repute, to take on the portion of cargo of lumber that was being handled at the time when appellant received his injuries, said Dillion being engaged as an independent contractor, he to furnish all labor and to have entire conduct and charge of said operations and the laborers engaged therein, the steamship to furnish only the gear, the winch, and the steam, and her officers having no duty nor responsibility connected therewith, save to see the cargo properly stowed after being placed in the hold. That Dillion engaged his gangs of stevedores and set them to work on the 21st day of May, 1912, said work being carried on in the usual way, the manner, and dangers of which were well known to the appellant and open and obvious to every one. That notices were also posted at all entrances leading to the deck of the ship, warning persons not to come on board without an order.

"Said libelant, on the morning of the accident, under the circumstances aforesaid, recklessly and carelessly ventured upon the deck of said steamship between the incoming loaded sling and the hatch No. 5, taking his position near said hatch and despite several warnings given him by the employés of the stevedore, Dillion, carelessly and recklessly remained in said position until the loaded sling came in contact with him, striking him with little force, but sufficiently to cause him to fall over into the open hatch, down which he fell a distance of only eight feet, being caught by one of the stevedores as he fell."

As a further defense respondent says: "That if, however, the injury was caused in any manner or to any extent by negligence or want of care on the part of any one other than the libelant himself, such negligence or want of care was not on the part of the steamship, or her officers or employés, but, if it existed at all, which this respondent denies, it existed on the part of William E. Dillion, his servants, agents, and employés, who was an independent contractor and upon him was the entire responsibility, as has heretofore been set forth."

The libel was filed in the lower court on May 22, and came on for hearing before the district judge on March 27, 1913. All the eyewitnesses of the accident were examined in the presence of the district judge, and a decree was entered on January 25, 1913, in which the lower court held that the appellant was not entitled to recover against the steamship, from which decree this appeal was taken.

S. M. Brandt, of Norfolk, Va., for appellant.

Floyd Hughes, of Norfolk, Va. (Hughes & Vandeventer, of Norfolk, Va., on the brief), for appellee.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

PRITCHARD, Circuit Judge (after stating the facts as above). It is contended by counsel for appellant that there were no findings of fact by the court below, and therefore the rule that the decree of the trial judge will not be disturbed upon mere questions of fact depending upon the credibility of witnesses who testified before him, unless there be found a decided preponderance of evidence against the same, does not apply in this instance.

[1] Appellant insists that he was invited on board the ship and directed to pass along the port side of the deck, and that thereby the owner assumed the obligation that the same was in a safe condition and suitable for use; that, where one invites another upon his premises for any purpose he must exercise ordinary care to render the premises reasonably safe for the visit. In support of his contention, appellant testified that he lives at Lamberts Point and sells merchandise to ships; that he received a note from the chief officer of the Iowa as shown in the statement of facts; that in response to said note, on the morning of May 21, he went on board the ship accompanied by a colored man named Zimmerman; that this was his first order from the steamer; that when he went on the gangway the colored man went in front with his bag of merchandise, and witness went to the front of the steamer and stopped to see which way to go; that he did not see anybody there; that in the meantime the chief officer had seen witness and called to him and said, "Snider, come up straight to me, come up to me;" that the chief officer was only 20 or 25 feet away when he said, "Snider, come up straight to me;" that he was on the side of the ship nearest to the pier, which was the side of the ship that was tied

up to the pier; that there was nothing in front of witness; that he went along the side of the ship close to the dock; that, when witness started across to where the chief officer was standing, it was a clear passageway that he saw; that he did not hear anybody "holler" at him; that Mr. Dillion did not call to him; that he had never seen Dillion until he came to the court; that the colored man, Zimmerman, was a little behind him; and that all he remembered was that when passing close to the hold he was struck with a sling of lumber on his left side; that the lumber was coming from the pier on the port side; that he saw no lumber on the pier when he got on the ship; that there was "hollering," but witness was so excited that he did not know anything about who did it; that he saw people working on the other side of the ship, a majority of whom were colored; that if anybody called or said anything of danger he would not have gone there; that there was nothing there to warn him; that if there had been he would not have walked there; that he did not see lumber before it struck him; and that just as it passed him, he was struck and knocked straight into the hold.

On cross-examination witness stated that he was conducting a ship chandlery business; that he was building up business mostly on barges; that he never had an order from this steamer before; that he went on board to solicit business the day before the accident, but that the cargo was not yet stowed in the hold; that he went down on the morning of the accident and saw persons working in the back part, but not in the front part; that they were working at all the hatches he saw; that witness was in such a hurry to get to the chief officer that he did not notice at all how things were; that Mr. Dillion did not "holler" at witness nor curse him nor tell him to get out of the way; that if Mr. Dillion had done so he would not have walked there.

John Zimmerman, who accompanied appellant for the purpose of carrying a bag of merchandise for the ship, testified on behalf of appellant that when he got on board the ship appellant was coming behind; that they were both on the port side; that appellant was looking back on the stern of the ship and then turned and looked at the bow and motioned for him to come up; that he thought it was one of the officers that motioned to appellant; heard nothing said, but saw the motion made. Appellant directed him to take the bag of merchandise, and that he put it on his shoulder and turned around and saw the pile of lumber and "hollered" at appellant, but that appellant could not get out of the way. He said that appellant could have got out of the way, he supposed, if they had not frightened him so by "hollering"; that, after he "hollered," all the rest "hollered" at him; that the draft of lumber struck him on the right side; that when he "hollered" the winch was dragging on the ship to the hatch; it was going as fast as it could go dragging along.

Shadrack Clayton testified that he was a longshoreman and stevedore, and worked for Mr. Dillion; that he was at hatch No. 5; that he was working in the hold of the vessel; that No. 5 hatch was being brought to the cattle deck; that he had just made ready to knock the hatch off, and heard some one make a noise; that he looked up and thought it was a bale of cotton until he got to it and found that a man had come

down; that the man fell directly in the hatch on the scantling stuff that witness was handling; that they stopped work to get him out, and would have stopped to put on the hatches. This is the evidence offered in chief by appellant.

Respondent introduced a number of witnesses, the first one being W. H. Chapman, chief officer of the ship, who testified that he was on duty the day the accident occurred; that the vessel carries no passengers, but fitted first class; that it has modern gear; that it is a roomy ship about the deck; that it has more room than most ships, because of the small hatches; that witness met appellant a day or two before the accident occurred at Lamberts Point; that he had authorized members of crew to get what they wanted from appellant and he would settle the bill; that a representative from the store visited the ship, but he cannot say whether it was appellant or Alberts; that it was agreed that certain articles of merchandise were to be delivered on board the ship; that on the morning of the accident witness was standing on the port side of the ship when he saw appellant somewhere about the bottom of the gangway. The ship was loading with lumber at hatch No. 5; the stevedores were engaged in taking lumber on the side of the ship; that there was no difficulty about a person's standing on deck seeing the operation, and slings coming over and going into the hatch; there being no obstruction to the view; that when he saw appellant at the foot of the ladder he started to his room to get papers all ready for him and the money; that the next thing that called his attention to appellant was just as he was getting to the entrance of his room he heard a noise or shout and turned around and saw appellant in the act of getting pushed over the hatch; at that time witness' back would be to the hatch and appellant; that appellant in passing on the fore part of the hatch his side was to the hatch and his back would be to the ship's side; that he had not seen appellant from the time he saw him at the foot of the ladder until he heard the shout which caused him to turn around; that he was then just in the act of being pushed from the hatch; that he does not know where appellant was standing; that he was on the after port side of the hatch and in the act of falling in the hatch; that witness saw him fall; that he gave no directions or signs or indications to appellant on the morning of the accident as to what part of the deck he should pass over; that the hatch is about 13 feet square, or, rather, 13 by 16 feet; the coamings of the hatch about 1 foot 9 inches on the sides and 2 feet in the amidships, and they slope a little towards the sides; that from the port side of the hatch to the port side of the ship is about 19 feet 6 inches; that when accident happened nothing went wrong with ship's gear or machinery so far as he knew; that none of the crew had any connection with loading the cargo at hatch No. 5; that where one with business in the mate's room lands on the deck of the ship when the vessel has her port side to the wharf and taking cargo from the wharf into hatch No. 5, according to the usual custom such person should go along the deck on the side where the cargo is not working whether they have to cross the deck or otherwise; that the danger of attempting to go along the port side of the deck to witness' room is that cargo is coming across the deck; that in loading

cargo like that there is always a man attending to the cargo; that the cargo would be coming in on the left side of the vessel, and a man going down on the port side, whether he would be going between the loaded sling and the hatch depends on whether the sling was close to the hatch or close to the ship's side.

On cross-examination witness stated that he was sure that he did not call appellant when he saw him at the bottom of the ladder; that he did not tell Hickman that he had called appellant; that he did not tell Mr. Albert that he called appellant and that he got hurt on that account; that he did write Mr. Snider a letter requesting him to come on board the ship on the morning of the 21st, not later than 8 o'clock; that the ladder was the only means provided for a person to get into that vessel; that if a person alighted from the ladder, immediately upon getting aboard the vessel on the port side, he would have to walk to get to the passageway leading to the witness' room by the nearest way from 30 to 35 feet; that a person of appellant's build, he supposes, could have walked it in about half a minute; that he could not say on this particular day how the winch was being driven, slowly or fast; that it was driven in the usual way so far as he knew; that, if he had called appellant when he came aboard on the port side of the vessel, the shortest route for him to take would be to continue on the port side of the vessel to the passageway leading to his cabin; that he would not think that appellant would attempt to cross where the work was all the time; that when the sling was at the pier, and had not reached the point where it was even with the rail, a man alighting from the ladder on the port side of the vessel, when he got on the deck, could see over the side of the vessel from where he was standing and see the sling; that the rail is about three feet six inches high; that witness cannot say that he warned appellant nor that any of ship's crew warned him; that this vessel was laden very much the same as every other vessel; that there are different ways in different ports, but the same machinery, the same mode, and the same kind of gear.

Samuel Creighton, gangwayman, testified that he was at No. 5 hatch on the morning the appellant was hurt; that just as the draft landed on the deck he saw appellant coming between hatch No. 5 and 6 and warned him to stop and not come there; and that when he was just opposite the hatch he warned him not to come; that he was at the tail end of the draft; that the man steadied the draft and just as the witness got there the draft struck him and overbalanced him; witness said he heard others "holler" at him and that he bore his weight down on the tail end of the draft "so as to keep it from hitting appellant with the force it was swinging."

Witness N. Farrow testified that he was at hatch No. 5 on the morning of the accident; that he gave the signal to go ahead as the draft came over the side, and, when it was clear in order that it might drag across the deck, he signaled to shut off the steam; that the sling was in plain view coming over the side when he first saw appellant about 10 feet from the hatch. Witness also corroborated the statement of witness Creighton to the effect that Dillion and others notified appellant of his danger. Also, stated that he did not see the chief

officer make any motions to him, and that if the chief officer had made any motions he could have seen the same as he was in a position to see what the chief officer was doing at that time.

On cross-examination witness stated that when the appellant was hurt he saw the mate somewhere forward of hatch No. 5 on the port side of the vessel; that he did not know that he went inside; did not see or hear him call appellant; he was right before witness' eyes; witness knows he did not call appellant to him and did not motion to him.

Witness S. E. Adams, master of the ship, testified that the ship was a modern vessel in every sense of the word; that the stevedore had full charge of discharging and loading the ship. He also testified that the stevedore furnished all hands and that the ship furnished steam, winches, and the cargo gear—the falls and blocks; the steamship, power and gear, and the stevedore, the labor; that the stevedore had charge and direction of the operations of the gangs of stevedores and the operation of machinery; that witness was on the ship at the time of the accident, but cannot say that he was on the deck at that particular time; that the work was being carried on in the usual way; that one having business with the mate and having come up the ladder, as in this instance, should immediately go right across the ship's deck, where there is a free passageway and proceed on the starboard side, thus keeping away from the material that is being loaded; that there was nothing in the situation of the ship or its surroundings to obstruct the view of any one on the ship or walking on its deck, and that the slings and hatches were in plain view.

On cross-examination witness testified, among other things, that the ship carries a donkeyman as a part of the crew to keep steam for the winches; his duty is separate and distinct from the duty performed by a fireman or engineer; winches are used entirely for loading vessels; the donkeyman is down below firing coal to the boiler to provide steam for the winches; the winch is the moving power; they have a mast and derrick, and the fall goes from the winch to the derrick, and then down; hold No. 5 is just a little forward of amidships toward the bow. That notice is put there as a general warning to any and every one, and is always hung out at the gangway in every port and place the boat goes as a general reminder to every one that comes there to beware; that witness did not mean to say that appellant had no right to go on the ship.

Witness Dillion testified that he loaded the steamship Iowa, and that the officers had nothing to do with it; that he was acquainted with Mr. Farrow, the winchman, for about two and one-half years, and that he was a very capable man; that Creighton, the gang tender, was all right; that witness had known him six or seven years; that he is an experienced man; that a man named Ned Bland was gang tender that morning, but asked Creighton to take his place; that on the morning of the accident he was on the cattle deck; that the men were working; that he started up the ladder and was about to the top of it when his attention was directed, and looking over his shoulder saw appellant about five feet abaft of the hatch; that he "hollered" at the man not to come up to the coamings, to stay back or he would get hurt; that wit-

ness then climbed over the coaming and walked to the port side of hatch No. 5; that he "hollered" and shouted at appellant and did everything in his power to keep him out of danger; that appellant paid no attention and walked directly into the draft; that if appellant had stopped when he first "hollered," and not continued on, that he would not have been hurt at all; that he believes that the winchman "hollered," Smith "hollered," and the man at the gangway "hollered"; everybody shouted trying to get the man out of the way; that there was nothing the winchman could have done to stop the sling after it came over the ship's rail; nothing more than he did do; and that the gang tender could not have done anything to stop the draft but to throw himself in and try to hold it.

Cornelius Smith testified that he had had 27 years' experience as stevedore; that for the last year or two had been attending gangway; that he was at hatch No. 5 as gangway tender on the day of accident; that vessel was taking cargo and that they had two more drafts of lumber; that he saw appellant come up the ladder and go on the deck accompanied by a colored man; that appellant asked, "Where is the mate?" that the mate was coming forward across the end of No. 5 hatch to his quarters, and witness said, "There he is now;" that appellant started over in a rush and witness said to him, "Be careful if you are going that way;" that appellant looked around again and stopped about half way between there and the other hatch; that Mr. Dillion "hollered," "Stop! You want to get killed!" and that the winchman stopped the winch, and appellant went towards the colored man in a half twisted manner; that there was a draft coming and he took two of three steps towards draft and that it pushed him right off; that the drag was coming by its own weight into the ship; that the winchman cut off the steam as the draft came over the ship; that the sling was handled as usual; that Mr. Dillion cursed the appellant who was standing about seven or eight feet from the draft at the time, and it looked at that time as if he was going to walk in front of it after Mr. Dillion "hollered"; that he saw the chief officer after appellant got on the deck walking towards his quarters; that he was in a position to see if the chief officer spoke to him; and that he did not speak to him nor did he see the chief officer make any motions towards him; that he pointed out the chief officer to appellant and then turned around, and if he "hollered" then, he didn't know anything about it; that he told appellant when he came on the deck that he had better be careful or he would be hit by something flying around there.

Appellant was recalled by his counsel and in reply to the testimony of Smith, who had testified that he had told witness to be careful and not to walk up that way, that he was liable to get hurt, stated that he did not see anybody; that nobody spoke to him; that witness did not have time to speak to him, and does not know that Mr. Dillion "hollered" at him, or that anybody was "hollering" at him; that he does not drink and was not drunk that day; that he did not see any danger, and that he would not have walked into it and got killed; that there was nothing swinging in front of him when he started across; it was just as clean as the floor of the courtroom.

From the foregoing it will be seen that there is a sharp conflict of evidence between appellee and the witnesses on behalf of appellant.

The principal facts relied upon by appellant to support his contention are:

(a) That when he went aboard the ship just before the accident it was in response to an invitation contained in a letter from the chief officer of May 21, 1912.

(b) That when he reached the deck of the ship he went to the front of the steamer and stopped to see which way to go; that he did not see anybody there; that in the meantime the chief officer had seen witness and called to him and said, "Snider, come up straight to me, come up to me;" that he had boarded the vessel on the port side and in obedience to the direction of the chief officer proceeded to walk along that side of the vessel towards the chief officer, who was standing at the time near his, the chief officer's, cabin; and that under these circumstances he was justified in assuming that the passage on that side of the vessel was unobstructed and free from danger.

It is contended by counsel for appellant that:

"When the ship's officers invited him aboard, they assumed the obligation that the ship was in a safe condition, suitable for the use that they induced appellant to make of the ship."

It is urged by counsel that appellant is corroborated by witness Zimmerman. While Zimmerman said that he saw some one motion to appellant, yet he did not know who it was, nor did he hear any directions given to appellant by any one at that time. This is the only testimony presented to corroborate the evidence offered by appellant as to what occurred on board the ship just prior to the accident. While, on the other hand, Zimmerman corroborates the witnesses who testified that a number of parties on the ship called to appellant and notified him of his danger.

The appellant is flatly contradicted by the chief officer, who says that when he saw appellant at the foot of the ladder he went to his room to get the papers and money with which to make a settlement, and that the next he saw of appellant was just at the time he was going to enter his room; that he heard a noise on the ship and turned around and saw appellant in the act of getting pushed over the hatch; that he gave no directions to appellant or any signs or indications as to where he should walk on that occasion.

Smith, the gangtender at No. 6 hatch, stated he was standing near appellant when he first landed on the ship's deck, and that appellant asked him where the mate was, and he pointed out the chief officer as he was going across forward hatch No. 5, going to his quarters, and that appellant started over in a rush, when the witness said, "Be careful, if you are going that way, you will be hit by a sling." He also testified that Mr. Dillion and others were "hollering" at appellant, and warning him of the danger. In fact, a number of witnesses, who were working in and about the hatches, stated positively that appellant was repeatedly warned as to the dangerous situation which confronted him, thus corroborating the chief officer to the effect that he did not call appellant or give him any directions as to where he should go.

Farrow, the winchman, states that he was in a position to see what the chief officer was doing, and that he did not see the chief officer make any motions to appellant, nor did he hear any conversation between him and appellant; that he saw the chief officer go off toward the hatch in the direction of his room. This witness also corroborates the chief officer, and there were other witnesses who corroborated him as to what occurred between him and appellant on that occasion.

It appears from the testimony of a number of witnesses that the danger was open and obvious, and that one in the position of appellant, after he went aboard the ship, could not avoid observing the true situation.

The appellant, according to his own testimony, had been a ship chandler for more than a year prior to the accident, engaged in selling different articles of merchandise to ships. It also appears that he had gone on board this ship the day before for the purpose of soliciting orders.

Appellant, residing as he did in a community where ships were constantly coming in and going out, had every opportunity of observing the construction of ships as well as the method by which they were loaded and unloaded, and he must have had knowledge as to the location of the hatches and the condition of the same when a vessel is being loaded as on this occasion. It is inconceivable that one boarding the ship by means of a ladder on the port side at a time when it was being loaded with lumber as on this occasion should have failed to observe the operations incident thereto.

As we have stated, the court below made no specific findings of fact, yet it is presumable that the court considered and passed upon this question and was of the opinion that appellant had not established his contention, as respects this point, by a preponderance of evidence. Be that as it may, we think that the greater weight of the evidence is to the effect that appellant for some inexplicable reason elected to walk along the port side of the ship, notwithstanding the dangers which confronted him, rather than walk across the ship and then along the starboard side where there was no danger or obstruction. In other words, we do not think that appellant has shown by a preponderance of the evidence that he was induced to walk along the port side of the ship by the carelessness or negligence of the owner, its officers, or any of its servants.

It clearly appears that when appellant reached the deck of the ship, he was in a place of safety, and in addition thereto, he was repeatedly warned by those who were standing near him that it would be dangerous to attempt to go along the port side. According to the undisputed testimony of many of the witnesses, he could have passed in safety on the starboard side of the ship; but he failed to heed the warning that was given him in time to avoid being struck by the sling of lumber.

[2] In the case of Elder Dempster Shipping Co. v. Pouppirt, 125 Fed. 732, 60 C. C. A. 500, decided by this court, the third syllabus is as follows:

"A passenger who voluntarily leaves a place of safety on a ship without necessity, and goes to a part of the ship where there is danger, of which he

has knowledge, or which is obvious, assumes the increased risk therefrom, and he cannot recover from the ship or its owners for an injury so received because he was not given warning, which, under such circumstances, was unnecessary."

While the appellant had a right to be on board the ship and go from one point to another, yet he was not justified in assuming that all the hatches would be closed and the passageway unobstructed, in view of the fact that the ship was being loaded preparatory to its departure, and this would be true if it had not been shown that he was warned of the danger and advised not to attempt to reach the cabin on the port side of the ship. It is a matter of common knowledge that hatches are an essential part of a ship, and from the evidence in this case we must infer that appellant was fully informed as to this fact.

In the case of Dwyer v. National S. S. Co. (C. C.) 4 Fed. 493, Benedict, District Judge, said:

"Hatchways are well-known features and sources of dangers on a ship. They are intended to be open a large portion of the time, especially when in port, not only for the purposes of loading and unloading cargo, but also for ventilation. An open hatchway on a ship, when provided with the usual coamings, is not evidence of a neglect of duty on the part of the shipowner. On the contrary, a shipowner has the right to allow the hatchways of his ship to remain uncovered and unprotected, except by the usual coamings; and all persons moving upon the decks of a ship are chargeable with notice of the probable presence of open hatchways on the deck. Neither is it the duty of the shipowner to maintain a guard stationed at the hatchway of his ship for the purpose of protecting persons from injury by falling into it. Such a duty would be burdensome in the extreme, and is not required by the law. Murray v. McLean, 57 Ill. 378. The requirement would be unreasonable, has never been observed in practice, nor, so far as I know, declared in any adjudicated case.

"The case cited, where the injury arose from defective machinery, afford no support to the position taken by the plaintiff, because here there is no pretense that the injury arose from any defect, weakness, or faulty construction of the grating. The cases cited, declaring a liability for injury arising from holes in thoroughfares, improperly protected holes in floors, and the like, are equally inapplicable here. The deck of a steamer is not a highway, and is a place where open hatchways must be maintained, and therefore are to be expected and avoided."

As is shown by the statement of facts, the vessel in question is a British steamship, of 5,360 tons burden, 500 feet long, 58 feet beam, 37 feet deep, with twin screws, triple expansion engines, constructed of steel, properly equipped with all proper, necessary, and modern appliances for operation as a freight carrying ocean steamship, and manned by a skillful and competent crew of officers and men.

There is no evidence to indicate that that portion of the ship over which appellant attempted to cross was defective, or that appellee had been negligent in the construction thereof.

The owner of a vessel of this kind must exercise reasonable care for the safety and protection of such persons as he may expect to come on board for any legitimate purpose, in keeping the passageways of the same in a reasonably safe condition. He must exercise such care as a reasonably prudent man would under similar conditions; but while this is so, he is not required to anticipate that persons boarding

the vessel for the transaction of business with the ship or otherwise, will assume risks where the danger is open and obvious and such as is essentially incident to the proper conduct of the business of the ship. The opening of hatches for the purpose of loading and unloading freight is as essential to the transaction of the business in which the ship is engaged as the operation of any part of the machinery of the vessel, and therefore a ship cannot be held guilty of negligence in opening its hatches for such purposes nor in loading lumber in the manner it did on the occasion in question.

A careful consideration of all the evidence in this cause impels us to the conclusion that the lower court did not err in entering the decree of which appellant complains.

It necessarily follows that the same should be affirmed.

Affirmed.

AMERICAN AGRICULTURAL CHEMICAL CO. v. HOGAN.

(Circuit Court of Appeals, First Circuit. April 21, 1914.)

No. 1011.

1. EVIDENCE (§ 509*)—SUBJECTS OF EXPERT TESTIMONY—MATTERS OF COMMON KNOWLEDGE—CAUSE OF SCABS.

   Expert opinion that the scars upon plaintiff's body were caused by acid burns is admissible, even though the scars were described and shown to the jury; the effect of acid not being a matter of such common knowledge as to preclude such testimony.

   [Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2312, 2313; Dec. Dig. § 509.*]

2. EVIDENCE (§ 506*)—EXPERT TESTIMONY—MATTER DIRECTLY IN ISSUE.

   An expert may be asked a question involving an inference to be drawn, or a point to be decided, by the jury.

   [Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2309; Dec. Dig. § 506.*]

3. APPEAL AND ERROR (§ 1170*)—HARMLESS ERROR—OBJECTION TO QUESTION—CURE BY ANSWER.

   An objection to a question asked an expert is trivial where the answer thereto was not prejudicial to the party objecting.

   [Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4032, 4066, 4075, 4098, 4101, 4454, 4540–4545; Dec. Dig. § 1170.*]

4. COURTS (§ 349*)—STATE LAWS AS RULES OF DECISION—IMPEACHMENT OF WITNESSES.

   The Massachusetts rule allowing the former testimony of a witness to be introduced for the purpose of impeaching his subsequent testimony, without his attention having been first called to the former testimony, unless a party seeks to contradict his own witness, will be followed by the federal courts sitting in that state.

   [Ed. Note.—For other cases, see Courts, Cent. Dig. § 925; Dec. Dig. § 349.*

   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.]

5. APPEAL AND ERROR (§ 1048*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

   Error in admitting the former testimony of a witness for the purpose of contradicting his later testimony is harmless, where the testimony so ad-

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

mitted was in substantial agreement with his later testimony so that the attempted contradiction failed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4140–4145, 4151, 4158–4160; Dec. Dig. § 1048.*]

6. WITNESSES (§ 410*)—CORROBORATION OF IMPEACHED WITNESS BY FORMER STATEMENTS.

The exception to the rule excluding previous consistent statements of a witness, which permits evidence of such statements where the imputation was made that the testimony of the witness was a recent fabrication, does not require the admission of such statements where the only impeachment was a showing by cross-examination that the witness was an employé of the party, with a suggestion that he had received recent favors from his employer which favors were not, however, shown to have been of any substantial benefit.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1284; Dec. Dig. § 410.*]

7. APPEAL AND ERROR (§ 971*)—REVIEW—DISCRETION OF TRIAL COURT—CORROBORATION OF IMPEACHED WITNESS.

The trial court has a reasonable discretion in the admission of evidence of previous consistent statements to corroborate the testimony of a witness, and the appellate court is loth to disregard a reasonable exercise of such discretion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3852–3857; Dec. Dig. § 971.*]

8. TRIAL (§ 253*)—REQUESTED INSTRUCTION—DISREGARD OF ISSUE.

Where an employé claimed that the fall of material upon him was caused by the fact that it was not in a proper condition, a requested instruction that the plaintiff, while working on the pile of material, assumed the risk of the fall of the upper portion thereof when the lower portion was undermined, was erroneous as disregarding the contention as to the condition of the material.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613–623; Dec. Dig. § 253.*]

9. TRIAL (§ 267*)—REQUESTED INSTRUCTIONS—MODIFICATION.

A modification of such instruction by the addition of a proviso requiring the jury to find that the defendant was acting as a reasonable man in giving instructions to work on the pile of materials was proper.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 668–672, 674; Dec. Dig. § 267.*]

10. WITNESSES (§ 397*)—INCONSISTENT TESTIMONY OF PLAINTIFF—EFFECT.

Where an employé contended that the burns received by him when a pile of fertilizer fell upon him were acid burns, a slight inconsistency in his testimony, given at separate trials, as to the temperature of the fertilizer, did not amount to taking contrary positions at the two trials and therefore did not require the direction of a verdict for the defendant.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1265, 1266; Dec. Dig. § 397.*]

11. TRIAL (§ 191*)—INSTRUCTIONS—ASSUMING FACTS.

Requests for instructions which assume as a fact that the testimony of plaintiff was inconsistent with his former testimony, when the jury might have found otherwise, and which were instructions as to the facts rather than the law, were properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 420–431, 435; Dec. Dig. § 191.*]

In Error to the District Court of the United States for the District of Massachusetts; Clarence Hale, Judge.

Action by John Hogan against the American Agricultural Chemical

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

Company. Judgment for the plaintiff, and defendant brings error. Affirmed.

Richard Stone, of Boston, Mass. (Robert B. Stone, of Boston, Mass., on the brief), for plaintiff in error.

George R. Farnum, of Boston, Mass. (Hannigan & Fox, of Boston, Mass., on the brief), for defendant in error.

Before BINGHAM, Circuit Judge, and BROWN and MORTON, District Judges.

BROWN, District Judge. This writ of error is for review of rulings of the District Court in an action for negligence, wherein the plaintiff, Hogan, had a verdict. The previous opinion of this court may be found in 195 Fed. 494, 115 C. C. A. 404.

The chemical company, plaintiff in error, is a manufacturer of fertilizer. Its process includes the mixing of phosphate rock and sulphuric acid, and involves chemical reaction. From the mixer the material is dropped into a den or bin below the mixer, and there accumulates. Subsequently a door in the den is opened, and the laborers, with picks and forks, work the material through an opening in the floor, so that it drops into hand carts below.

Hogan, the plaintiff, while engaged in this work as a laborer, was severely burned by the material upon which he was working.

The declaration is in two counts; the first alleging:

"Said negligence consisted in ordering him to work in a place which, by reason of the presence of a large quantity of acid, was dangerous, and known, or should have been known, by the defendant to be dangerous; said injury was directly caused by the escape of said acid, which, coming in contact with the plaintiff's body, burned his legs, abdomen, and back."

The second count alleges:

"That the said defendant negligently put him to work in a place unsafe because of the risk of the collapse and fall of dangerous substances, and carelessly failed to instruct or warn him of and concerning the aforesaid dangers, or to promulgate proper rules, or to take measures to protect him from the said dangers while working in said place."

It was not contended by the defendant that the risk of burning by acid was an ordinary risk of the business or a risk known to or assumed by the plaintiff.

If, as a matter of fact, the material was dangerous by reason of the acid that it contained, and the plaintiff was ordered to work upon the material while in such condition, he was exposed to an unusual and extraordinary risk, and the jury was justified in finding the defendant negligent.

The plaintiff testified that while he was at work upon the pile of material in the ordinary way, and without undermining it, the stuff slipped out of the pile and covered him to the waist, that his legs went into the opening in the floor, and that the stuff was "steamy, hot, and gassy—very hot." The plaintiff contended that if the stuff had been in proper condition to work it would have been impossible for the material to collapse in this way.

The defendant denied not only that the material was dangerous as containing acid, but also that there was any risk of collapse unless the plaintiff was negligent in undermining the material, thus causing it to fall upon him. The defendant also contended that, while the material was not dangerous by reason of acid, it was hot, and that the plaintiff well knew this, and, in spite of warning, undermined the material, and thus brought it down upon himself.

There was a decided conflict of testimony upon the questions whether the plaintiff's burns were caused by acid, and whether the material was in such condition as to be likely to fall even if properly handled. An examination of the testimony, however, shows that the trial judge was clearly right in denying the defendant's requests for the direction of a verdict. There was testimony which entitled the plaintiff to go to the jury both upon the question whether the burns were due to acid and upon the question whether the material was in such condition as to involve the risk of collapse.

[1] There was considerable testimony to the effect that the burns were due to acid. Two physicians and a professor of chemistry testified for the plaintiff upon this subject, and one of the physicians testified as to the character of the scars while they were exhibited to the jury, and gave his opinion as to their origin. The defendant objects to the expert opinion as to whether the scars were caused by acid burning, upon the extraordinary ground that after the experts had given a full and complete description of the injuries the addition of their opinion, based entirely upon the physical situation of the scars, was error, for the reason that matters of common observation and of common knowledge are for the jury alone.

[2] That the character of wounds or the effect of acid on human flesh are matters of such common knowledge as to render inapplicable the ordinary rule which permits a doctor to give his opinion as to the cause of a wound or other physical injury is a proposition so clearly without merit that it needs no discussion. Nor is it an objection that the expert is asked a question involving an inference to be drawn or a point to be decided by the jury. This unsound objection, however, is so common that it may be useful to point out that in Transportation Line v. Hope, 95 U. S. 297, 298 (24 L. Ed. 477) it was said of the testimony of an expert:

"It is not an objection, as is assumed, that he was asked a question involving a point to be decided by the jury."

[3] The objection to the testimony of Prof. Gill, that the material after a certain time would be safe to work, on the ground that after the conditions had been described by the expert it was for the jury to say whether or not it was safe, and not for a chemist, involves this erroneous assumption. Furthermore, the objection is trivial, in view of the fact that the statement of the expert was in no wise prejudicial to the defendant.

[4] Error is also assigned to the admission against objection of testimony given by Dr. Drake at the former trial, for the purpose of contradicting his present testimony. It was objected that the attention of the witness had not been called to his previous statements in order to lay a foundation for contradiction. While this is generally required,

it appears to be unnecessary under the Massachusetts practice, except when a party seeks to contradict his own witness. See cases collected in Mass. Digest, vol. 7, cols. 15,787, 15,788; Mattox v. United States, 156 U. S. 237, 245, 252, 15 Sup. Ct. 337, 39 L. Ed. 409; Wigmore on Evidence, § 1026 and section 1028, note 1, p. 1193. Ordinarily the rules of evidence and the law of evidence of the state prevail in the federal courts sitting within the limits of the state. Ryan v. Bindley, 1 Wall. 66, 17 L. Ed. 559; Bucher v. Cheshire R. Co., 125 U. S. 555, 583, 8 Sup. Ct. 974, 31 L. Ed. 795; Ex parte Fisk, 113 U. S. 713, 720, 5 Sup. Ct. 724, 28 L. Ed. 1117; Nashua Savings Bank v. Anglo-American Co., 189 U. S. 221, 228, 23 Sup. Ct. 517, 47 L. Ed. 782. In Conrad v. Griffey, 16 How. 38, 47 (14 L. Ed. 835), the rule as generally established is applied, with the remark, "The rule of evidence is a salutary one, and cannot be dispensed with in the courts of the United States."

But that case did not involve the existence of a well-established state practice to the contrary.

[5] We see no sufficient reason for not following the state rule. But even were the plaintiff able to show technical error in admitting the testimony, this is not enough. The plaintiff in error must not only show an erroneous ruling admitting testimony, but that the testimony admitted was prejudicial in character.

The testimony admitted was a stenographic account of the former testimony of the witness that was in substantial agreement with his present testimony; the variations being so slight that the attempted contradiction failed. There is clearly no merit in the objection as applied to the particular facts of this case.

[6] It is further urged that the court erred in excluding evidence of the statement of the witness Kinney made immediately after the accident. It is conceded that as a general principle the testimony of a party's witness cannot be corroborated by previous statements made by him to the same effect, even if other inconsistent statements have been introduced in evidence. Commonwealth v. Jenkins, 10 Gray (Mass.) 485. The rule is also stated in Ellicott v. Pearl, 10 Pet. 412, 439, 9 L. Ed. 475.

The plaintiff in error contends that the general rule is subject to exception. In Griffin v. Boston, 188 Mass. 475, 74 N. E. 687, the court seems to have based the right to rehabilitate the credit of the witness upon the fact that the purpose of cross-examination was to show the witness' testimony to be a recent fabrication created under the influence of defendant's counsel. No such imputation is now made. It is urged that counsel in cross-examination attacked the witness on the ground of bias, by questions designed to support an argument that Kinney was testifying with an intent to favor the defendant, under the influence of recent favors received since the time of the accident. Upon cross-examination it appeared that Kinney was in the employment of the defendant, and that his employment at the time of the accident was working in the dens and had been changed to that of being a janitor in the boarding house. The witness stated that the job was no better, with no more pay, and that he would as soon have one job as the other.

In Commonwealth v. Tucker, 189 Mass. 457, 485, 76 N. E. 127, 137 (7 L. R. A. [N. S.] 1056), it was said that the rule of Griffin v. Boston "should be construed with some strictness, so as not to nullify the general rule." It seems to have been considered largely a matter of discretion of the trial judge.

The cross-examination was of the familiar character in examining an employé of a party. There was the usual imputation of bias arising from employment, with a further suggestion that the witness had received recent favors in a change of employment, although there was no proof that this change amounted to any substantial benefit.

It was further brought out that the witness Kinney had refused to talk with the plaintiff's lawyer.

All of this falls short of establishing improper influence or undue pressure, or recent fabrication. In view of the ordinary method of cross-examination, there would be left but little of the general rule excluding previous statements if an exception were established by ordinary cross-examination as to bias arising from such circumstances as appeared in the present case.

[7] A reasonable discretion in such matters should be allowed to the trial judge, and the appellate court, we think, should be loth to disregard a reasonable exercise of this discretion either in receiving or rejecting such evidence affecting the credit of the witness. The trial judge expressly stated that if it was in his discretion he should not allow the proof. We think, under the circumstances, there was no error in his rejection of the testimony.

[8] It is also urged that the court's qualification of certain requests for instructions as to assumption of risk was erroneous. The fifteenth request was as follows:

"15. The plaintiff, while engaged in shoveling, or working, on a pile of fertilizer, assumed the risk of the fall of the upper portion of such pile when the lower portion thereof was dug into, or undermined."

[9] The defendant clearly was not entitled to this instruction, since it was so general as to disregard the plaintiff's contention that the material was in such condition as to give rise to the risk of collapse. It was predicated upon the defendant's contention that the material was in suitable condition. The modification objected to is the addition of the words—

"providing you find that the defendant was acting as a reasonably prudent man in giving these instructions."

We think this was a proper modification, or at least a modification which, fairly interpreted, introduced the element which was lacking in the request; that is, that the instruction to go to work was given when the material was in the ordinary condition.

A like modification was given to the nineteenth and twentieth requests, and apparently for the same reason. Reading the instructions which are excepted to in connection with the context and with the whole of the charge, however, we are of the opinion that the jury were fully and clearly instructed, and that no prejudicial error could have arisen from these modifications.

[10] It is also urged that the court erred in the refusal to order a verdict because of the plaintiff's inconsistent testimony, and in its refusal of instructions as to plaintiff's inconsistent testimony. In support of these assignments of error, the plaintiff relies upon the opinion of this court in Smith v. Boston Elevated Ry. Co., 184 Fed. 387, 106 C. C. A. 497, 37 L. R. A. (N. S.) 429. These requests apparently are based upon a misconception of the point decided in that case, in which, after a verdict had been set aside by the Circuit Court of Appeals, there was the substitution of a new and inconsistent case by the uncorroborated testimony of a party. It was found upon consideration of the testimony in the two trials that there was complete departure from the original claim, and the making of a new and inconsistent claim. We find no such inconsistency between the plaintiff's testimony in the present trial and the testimony of the plaintiff in the former trial. So far as the first count is concerned, there is obviously no inconsistency, since mere knowledge that the material was of high temperature would be wholly insufficient to show knowledge of the danger of burning by acids. The argument as to inconsistency does not meet the contention of the plaintiff that he was negligently exposed to the danger of burning by acids, or to the danger of the collapse of the material by reason of its unsuitable condition. The inconsistency can be of no consequence except on the defendant's theory that the material was in the ordinary condition and suitable to be worked upon though hot. At both trials the plaintiff consistently contended that he was injured by acid burning, and that the defendant negligently exposed him to this danger.

The inconsistency upon which the defendant relies relates only to the plaintiff's knowledge of the temperature of the material upon which he was working. It is not quite clear whether the defendant fairly came up to the point of contending that it was usual to set the men to work when the material was so hot as to involve serious burning otherwise than by acid. From the testimony of Hogan and of Coleman, a former superintendent, it might have been found that under ordinary conditions of work the heat of the material was but moderate.

Reading the extracts from the testimony at the two trials, we find that at the last trial, although Hogan says at one time, in answer to cross-questions, that the material was not hot, at other times he says it was not very bad, not very hot, and that it must be a little hot; whereas at the first trial he testified that it was pretty hot. Clearly it would have been error to direct a verdict on the ground of such inconsistency.

[11] The eleventh and twelfth requests for instructions were properly refused for the above reasons, and also for the reason that they assumed the fact of inconsistency when the jury might have found otherwise, and because they were not properly requests for instructions in law, but erroneously involved instruction as to fact.

The case of Smith v. Boston Elevated Ry. Co. has no proper application when there are merely slight discrepancies in the testimony at two trials, not amounting to the taking of inconsistent and contrary positions as to a cause of action. The court properly instructed the jury that they might consider discrepancies as bearing upon the credit

of the plaintiff, and this was as far as the court was required to go upon this question.

The charge as a whole was sufficiently favorable to the defendant, and we find no substantial error either in the charge or in the rulings upon testimony.

The judgment of the District Court is affirmed, and the defendant in error recovers costs in this court.

P. E. SHARPLESS CO. v. LAWRENCE et al.

(Circuit Court of Appeals, Third Circuit. April 27, 1914.)

No. 1761.

1. TRADE-MARKS AND TRADE-NAMES (§ 98*)—INFRINGEMENT—UNLAWFUL COMPETITION—DAMAGES.

In theory, a technical trade-mark is a species of property, and, when invaded or appropriated, the owner thereof is entitled, not only to protection against further trespass, but to recover profits issuing therefrom, as incident to and a part of his property right; while in suits for unfair competition the complaint is not for an appropriation of a property right, but for a tort committed by defendant, for which complainant is entitled to recover compensatory damages actually sustained by reason of the wrong.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 112; Dec. Dig. § 98.*

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.]

2. TRADE-MARKS AND TRADE-NAMES (§ 98*)—UNLAWFUL COMPETITION—DECREE—"DAMAGES."

In a suit for infringement of a trade-mark and for unlawful competition, complainants were denied a recovery for infringement of the trade-mark, but were granted a decree for unlawful competition, which provided that complainants should recover of defendant "damages" sustained by reason of defendant's unlawful acts, together with the costs of suit, with leave to apply for reference to a master to ascertain and assess the damages. On appeal the decree was affirmed; the order of affirmance concluding with a command for execution and further proceedings according to right and justice and the laws of the United States, the appeal and cross-appeal notwithstanding. *Held*, that the word "damages" was used in its legal sense, to mean the indemnity recoverable by a person who has sustained an injury either in his person, property, or relative rights through the default of another, a sum of money adjudged to be paid by one person to another as a compensation for a loss sustained by the latter in consequence of an injury committed by the former; and hence the decree as affirmed did not justify an order directing a master not only to assess damages, but also to take an account of profits made by defendant as the result of its unlawful competition.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 112; Dec. Dig. § 98.*

For other definitions, see Words and Phrases, vol. 2, pp. 1812–1820; vol. 8, pp. 7625, 7626.]

Appeal from the District Court of the United States for the Eastern District of Pennsylvania; J. Whitaker Thompson, Judge.

Petition by the P. E. Sharpless Company for mandamus to the District Court of the United States for the Eastern District of Pennsyl-

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

vania, commanding it to so reform an order appointing a master to assess damages in a suit by William A. Lawrence and another, doing business as W. A. Lawrence & Son, against the P. E. Sharpless Company for infringement of a trade-mark and unlawful competition as to conform the order to the mandate of the Circuit Court of Appeals, affirming a judgment in favor of complainants and against petitioner, (208 Fed. 886); also cross-petition for mandamus by complainants. Cross-petition dismissed, and mandamus granted, on the original petition of the Sharpless Company as prayed.

Duell, Warfield & Duell, of New York City (C. H. Duell, F. P. Warfield, H. S. Duell, and R. W. France, all of New York City, of counsel), for W. A. Lawrence.

H. T. Fenton, of Philadelphia, Pa., for P. E. Sharpless Co.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

GRAY, Circuit Judge. The above entitled cause was an appeal by the defendant below and a cross-appeal by the complainant below, from an interlocutory decree in equity, entered March 24, 1913, on final hearing by the United States District Court for the Eastern District of Pennsylvania. The appeal and cross-appeal were decided November 24, 1913, by this court, in an opinion and decree affirming the decree below and dismissing the cross-appeal. 208 Fed. 886. Thereafter, on December 27, 1913, the mandate in this court issued accordingly and was presented and filed in the court below.

The action was begun by a bill in equity, alleging two distinct causes of action; one of them an averment of ownership by complainants of a trade mark at common law and by force of a registration thereof, dated March 27, 1906, for domestic Neufchatel cheese, with an allegation of infringement thereof by defendant; and the other of them, an allegation of unfair competition in the use by defendant of two certain tin foil package labels for said domestic Neufchatel cheese made and sold by it; with prayers, specific and general, for equitable relief.

After issue joined and proofs taken, the cause came on to be heard, and was adjudicated in by a decree entered March 24, 1913, wherein the relief prayed in the bill, as to the first cause of action, viz., the trade-mark, was denied; and the relief prayed as to the second, viz., unfair competition, was granted.

Accordingly, the trade-mark, whether at common law or as registered, was decreed to be invalid as a basis of the exclusive right claimed by the complainant. It was decreed, however, that the defendant was guilty of unfair competition in the sale of Neufchatel cheese, in respect to the use of two certain labels, referred to and described. These labels were adjudged to be an unlawful simulation of plaintiffs' label, and to have been used by defendant on Neufchatel cheese in willful and fraudulent competition with plaintiffs.

It was further decreed that a perpetual injunction issue, enjoining the defendant, etc., from any further use on its packages of Neufchatel cheese of said labels, or any like label in imitation of plaintiffs' label. The decree then closes as follows:

"That the complainant recover of the defendant damages sustained by said complainant from the unlawful acts of the defendant herein adjudged, in its use of said two labels recited in paragraphs 2 and 3 hereof, in the packaging and sale of Neufchatel cheese, together with its costs of suit in this behalf expended, with leave to complainant to apply hereafter for a reference to a master to ascertain and assess said damages, should it be so advised."

Thereupon the defendant appealed to this court from so much of said decree as adjudged the charge of unfair competition against it; and plaintiffs, by cross-appeal from so much of the decree as adjudged the issue of a technical trade-mark against them. Said appeal and cross-appeal came on to be heard in this court, and were disposed of in an opinion which referred to the distinct causes of action, as follows:

"In this proceeding, William A. Lawrence & Son sought relief against the P. E. Sharpless Company, averring (1) infringement of a trade-mark, and (2) unfair competition. The decree adjudged the trade-mark invalid, but granted an injunction on the second ground. Each party has appealed from the decree, the plaintiffs from so much of it as declares their trade-mark invalid, and the defendant company from so much as restrains the unfair competition."

Pursuant to its opinion, this court, on the 24th day of November, 1913, made its decree, affirming the interlocutory decree aforesaid, and dismissing said cross-appeal, and on the 27th day of December, 1913, issued its mandate, reciting said decree, concluding as follows:

"You are therefore hereby commanded that such execution and further proceedings be had in said cause as, according to right and justice and the laws of the United States ought to be had, the said appeal and cross appeal notwithstanding."

After the presentation and filing of this mandate in the trial court, upon a motion made by plaintiffs for the entry of an order appointing a master, and against the objection of the defendant on the hearing of said motion, the court entered, on the 19th of January, 1914, the following order:

"And now, January 19, 1914, on motion of Duell, Warfield & Duell, attorneys for the plaintiffs in the above entitled cause, for the appointment of a special master herein, it is ordered and decreed that the case be referred to John Douglass Brown, Jr., residing at Philadelphia, as special master to ascertain, take, state and report an account of the number of packages of Neufchatel cheese made, used or sold by defendant under" (the denounced labels), "and also the gains, profits and advantages which the defendant has received or which have accrued to it from infringing upon the rights of the plaintiffs by the manufacture, use and sale of Neufchatel cheese under said labels, and the damages which the plaintiffs have suffered by said infringement."

Thereupon the present petition, sworn to and subscribed in behalf of the defendant, was presented to this court on the 5th day of February, 1914. An order on the plaintiffs to show cause was granted by this court on the 3d of March, 1914, and an answer pursuant to said rule filed by them. In this answer, the facts set forth in the petition as above recited are not denied.

It is contended by the petitioner that the decretal order of January 19, 1914, above set forth; is in substance a new decree, in substitution for paragraph 4 of the final decree of March 14, 1913, as affirmed by this court and ordered by its mandate to be executed as affirmed; that said new decree is a radical enlargement of the scope of the original

decree so affirmed, in that it is not limited to a recovery of the "damages which the complainants have suffered" from the unfair competition adjudged. It is further contended that the language of the decree so affirmed is the correct measure of recovery for unfair competition, and that the enlargement of the original decree, so as to include the recovery of gains, profits and advantages in addition to the damages originally adjudged, is applicable only to the infringement of trademarks, as to which the prayer of the bill was denied.

[1] The latter contention presents some difficulties. In theory, a technical trade-mark, like a patent right, is a species of property, and when it is invaded or appropriated, the owner thereof is entitled, not only to protection from further trespass, but, to the recovery of the profits issuing therefrom, as incident to and a part of his property right. In suits for unfair competition, on the other hand, the complaint is not of an appropriation of a property right, but of a tort committed by the defendant, in that his conduct has been unlawful by reason of the consequential injury to the plaintiff. In such a case, it is contended the recovery should be for damages actually suffered by the plaintiff, and for those only, the wrong complained of being somewhat analogous to that which would be the basis of an action on the case at common law.

It is true, however, as contended by the plaintiffs below, that courts of equity, in granting injunctive relief in cases of unfair competition, have sometimes decreed that the plaintiffs should recover of defendant, not only damages, but the profits, gains and advantages that have accrued to the defendant by reason of his unfair competition. Such an enlargement of the scope of the decree is generally made on the ground that the unfair competition is adjudged to have been willful and fraudulent, and the recovery of profits in such cases is a punitive addition to the ordinary decree of compensatory damages. A number of cases have been cited in the brief of plaintiffs below, where, under these circumstances, an accounting of profits has been allowed in cases of unfair competition. We have examined all of them, and it is to be observed that in almost every case the recovery of such profits was included in the decree in addition to the recovery of damages, and in none of them was the precise question here presented discussed. The distinction between the recovery of damages and profits was thus recognized.

Plaintiffs have quoted the following language of this court in Rowley v. Rowley, 193 Fed. 390, 113 C. C. A. 386:

> "The general rule undoubtedly is that, on such a reference in a case of unfair competition, it is the duty of the master to fairly take an account of profits realized by the defendant upon all articles or goods manufactured or sold by him under the conditions of unfair competition, as established by the decree of the court."

[2] In view of the purpose for which it was cited, this language might be somewhat misleading. It is therefore necessary to state what was before the court in that case. The court below had only decreed an injunction. From this decree an appeal was taken. Pursuant to direction of this court, the decree was modified by the court below, and

it was adjudged that the plaintiffs recover from the defendant, not only *damages* sustained by reason of unfair competition, but also profits realized thereby. Reference was made to a master for an accounting of damages *and* profits, in accordance with the decree. The case finally came before this court again, on an appeal involving exceptions to the master's report. It will thus be seen, that in using the language above referred to, this court was dealing with a case in which there was a decree in the court below for both damages *and* profits.

What we conclude from the cases cited is, that courts of equity in cases of unfair competition may, upon what seems to them sufficient grounds, include in their decrees an accounting of profits as well as an award of damages. We think, however, that the distinction between a decree for the recovery of damages and one for the recovery of profits, should not be lost sight of, and in general is not lost sight of, and that the latter is not included in the former.

In the present case, the decree of the court below, as it was affirmed by this court, was for the recovery of the "damages sustained by said complainant from the unlawful acts of the defendant herein adjudged in its use," etc., * * * "with leave to apply hereafter for a reference to a master to *ascertain and assess said damages.*"

This brings us to the real question in the case. We do not see why this plain and intelligible language should be subject to any process of interpretation. It concerns the administration of justice and affects the interest of litigants, that the plain and obvious meaning of the language of a judgment or decree should be upheld. The word "damages," as a word of art, has a clear and definite legal meaning. It is defined by Bouvier to be "the *indemnity* recoverable by a person who has sustained an injury either in his person, property or relative rights through the act or default of another." The word has also been defined as "a sum of money adjudicated to be paid by some person to another as a compensation for a loss sustained by the latter in consequence of an injury committed by the former."

These and other definitions given by the courts, though in varying language, all include the concept of indemnity or compensation for actual loss. It is a legal term of clear import, and an unnecessary and harmful confusion of thought would ensue from treating it otherwise. In the recent case of the Pennsylvania Railroad Company v. International Coal Company, 230 U. S. 184, 33 Sup. Ct. 893, 57 L. Ed. 1446, the Supreme Court of the United States, in dealing with the eighth section of the act to regulate commerce, giving a right of action to a shipper injured by any act of a common carrier prohibited by the statute, and making "such common carrier * * * liable to the person injured thereby for the full amount of *damages* sustained in consequence of any such violation of the provisions of the act," used this significant language:

"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."

We are of opinion, therefore, that this court, in affirming the decree of the court below, "that the complainant recover of defendant the

damages sustained by said complainant from the unlawful acts of the defendant herein adjudged," did not and could not do otherwise than impute to the words, "damages sustained by said complainant," the legal meaning attaching thereto, as above indicated. The decree, therefore, was fixed and determined by the affirmance of this court, and could not be changed or amended by the court below. It was not competent for the court below, by the so-called decretal order, to treat the word "damages" as a generic term, including more than actual pecuniary damage suffered by the plaintiffs, and to so enlarge its scope as to include elements not contemplated by the decree as we have affirmed it. If profits, as well as damages, were to be recovered, they should have been included in the decree, and as we have above indicated, it was quite within the competency of the court, upon finding willful and fraudulent competition, to have so decreed.

It is not a question now, whether such profits could or should have been so awarded. We are dealing merely with the question, whether the plain meaning of the decree, as entered in the court below and affirmed by this court, can be practically altered by a decretal order instructing the master as to the measure of damages. The decree can only be enforced as it was understood by this court in affirming it. The command of the mandate of this court, "that such execution and further proceedings be had in said cause, as according to right and justice and the laws of the United States ought to be had, the said appeal and cross-appeal notwithstanding," did not therefore authorize the court below to depart in any respect from the judgment of this court. The court below had no authority to make its so-called decretal order of January 19, 1914, in regard to gains, profits and advantages which the defendant had received, by infringing upon the rights of the plaintiffs.

Counsel for the plaintiffs below dwelt much upon certain language used in the opinion delivered by this court in affirming the decree of the court below. The language in question is as follows:

"But we do not feel bound to pass upon the validity of the trade-mark. The question presented—namely, the generic character of the device—is of some nicety, and in a case that called for its decision would need close examination and discussion. We must not be understood as intimating any opinion, or even any prepossession, either for or against the view adopted by the District Judge; we merely state our opinion, that, as the plaintiffs have obtained full relief against the defendant, they are not entitled to insist that it should be based upon one ground rather than upon another."

We do not think the language quoted justifies the contention of the plaintiffs below, that this court intended that they should have the same relief in this case as though they had established a technical trade-mark. This court was affirming the decree of the court below, which declared invalid plaintiffs' trade-mark, but disclaimed intimating any opinion for or against the view adopted by the District Judge, because it was of opinion that the plaintiffs had obtained full relief against the defendant. What that full relief was, in the opinion of this court, is stated in the language following that referred to above:

"The essential matter is, that the defendant has been restrained from using the labels complained of, and for the present the plaintiffs must be content with that fact."

It was therefore the injunctive relief which this court had in mind, as the full and complete remedy in the plaintiffs' case. No question had been raised, either in the court below or in this court, as to any distinction between the recovery to be had in cases for infringment of registered copyright, and those for unfair competition. The inclusion of profits in the ascertainment of damages was an afterthought, so far as this court was concerned.

In view of what has been said, it is unnecessary to discuss at length the counter-petition of the plaintiffs for a mandamus, directing the court below to reform its decretal order so as to provide that the master appointed to take an accounting of the profits made by the defendant and the loss suffered by the plaintiffs, should take such accounting with regard to all cheese of every kind sold by the defendant under labels containing the representation of a cow, in infringement upon the plaintiffs' trade-mark. The petition in this respect is founded upon the contention, that this court has held petitioners entitled to the same relief as though they had established the validity of their technical trade-mark, and are therefore entitled to an accounting with reference to all cheese sold by the defendant under labels containing the representation of a cow. The sufficient answer, as indicated above, is that this court has not so held, and that the decree as affirmed by this court deals entirely with unfair competition as to Neufchatel cheese. The counter-petition of plaintiffs for mandamus is therefore dismissed, and it is ordered that a mandamus as prayed for by the defendant be issued.

VERMONT MARBLE CO. v. NATIONAL SURETY CO. et al.

(Circuit Court of Appeals, Third Circuit. May 1, 1914.)

No. 1818.

UNITED STATES (§ 67*)—PUBLIC IMPROVEMENTS—BOND—NOTICE TO CREDITORS—TIME—STATUTES—CONSTRUCTION.

Act Cong. Feb. 24, 1905, c. 778, 33 Stat. 811 (U. S. Comp. St. Supp. 1911, p. 1071), requires the execution of a bond by contractors for federal improvements, and declares that suit may be brought by the United States thereon at any time within six months after completion of the work, and if no suit is brought by the United States within six months then any person supplying the contractor with labor and materials may sue thereon within one year after the final performance and settlement of the contract, provided that, where suit is so instituted by a creditor, only one action shall be brought, and any creditor may file his claim and become a party within a year from the completion of the contract, provided that in such suits such personal notice to creditors as the court may order shall be given, and in addition notice shall be published in some newspaper of general circulation for at least three successive weeks, the last publication to be at least three months before the "time limited therefor." *Held*, that the provision prescribing the time for publication of such notice is not intended to change the period of limitation within which the claims of subcontractors, etc., may be asserted in a suit on the bond, but that the provision is directory only, so that, where claims of subcontractors were asserted by intervention within the six months specified, it was im-

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

material that the notice was not published three months and three weeks prior to the expiration of the year within which suit might be instituted.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 50; Dec. Dig. § 67.*]

In Error to the District Court of the United States for the Middle District of Pennsylvania; Chas. B. Witmer, Judge.

Action by J. A. Hollinger, in the name of the United States, but to his use, against the National Surety Company and the Illinois Surety Company on the bond of one Stannard, executed to the United States to secure performance of a contract for the construction of a post office, in which the Vermont Marble Company intervened. From a judgment in favor of defendants, said Hollinger and intervener bring error. Reversed.

J. Howard Reber, of Philadelphia, Pa., and Aaron V. Bower and R. W. Archbald, both of Scranton, Pa., for plaintiff in error.

J. A. Strite, of Chambersburg, and John E. Fox and John R. Geyer, both of Harrisburg, for plaintiff in error Hollinger.

A. C. Stamm and W. S. Snyder, both of Harrisburg, for defendants in error.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

GRAY, Circuit Judge. The writ of error in this case brings before us a suit in the court below, brought under an Act of Congress of February 24, 1905. This act provides that any persons entering into contract with the United States for the construction of any public building,

"shall be required, before commencing such work, to execute the usual penal bond, with good and sufficient sureties, with the additional obligation that such contractor or contractors shall promptly make payments to all persons supplying him or them with labor and materials in the prosecution of the work provided for in such contract,"

and that the person or persons who have furnished such labor or materials, payment for which has not been made,

"shall have the right to intervene and be made a party to any action instituted by the United States on the bond of the contractor, and to have their rights and claims adjudicated in such action and judgment rendered thereon, subject, however, to the priority of the claim and judgment of the United States. If the full amount of the liability of the surety on said bond is insufficient to pay the full amount of said claims and demands, then, after paying the full amount due the United States, the remainder shall be distributed pro rata among said interveners. If no suit should be brought by the United States within six months from the completion and final settlement of said contract, then the person or persons supplying the contractor with labor and materials shall, on application therefor, and furnishing affidavit to the Department under the direction of which said work has been prosecuted that labor or materials for the prosecution of such work has been supplied by him or them, and payment for which has not been made, be furnished with a certified copy of said contract and bond, upon which he or they shall have a right of action, and shall be, and are hereby, authorized to bring suit in the name of the United States in the circuit court of the United States in the district in which said contract was to be performed and executed, irrespective of the

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

amount in controversy, * * * and not elsewhere, for his or their use and benefit, against said contractor and his sureties, and to prosecute the same to final judgment and execution: Provided, that where suit is instituted by any of such creditors on the bond of the contractor it shall not be commenced until after the complete performance of said contract and final settlement thereof, and shall be commenced within one year after the performance and final settlement of said contract, and not later: And provided further, that where suit is so instituted by a creditor or by creditors, only one action shall be brought, and any creditor may file his claim in such action and be made party thereto within one year from the completion of the work under said contract, and not later. * * * Provided further, that in all suits instituted under the provisions of this Act such personal notice of the pendency of such suits, informing them of their right to intervene as the court may order, shall be given to all known creditors, and in addition thereto notice of publication in some newspaper of general circulation, published in the state or town where the contract is being performed, for at least three successive weeks, the last publication to be at least three months before the time limited therefor."

The material and undisputed facts, as gathered from the statement of claim of the Vermont Marble Company, plaintiff in error, and from other portions of the record, are as follows:

On November 25, 1910, the defendant, Stannard, entered into a contract with the United States for the construction of a post office building at Chambersburg, Pa., and on November 30, 1910, gave bond in the sum of $30,000, with the other defendants, the National Surety Company and the Illinois Surety Company, as sureties, conditioned inter alia that he would promptly pay all persons supplying labor and materials in the prosecution of the said work. On March 10, 1911, the plaintiff, the Vermont Marble Company, entered into a contract with said Stannard to furnish and set in place in said building, for the sum of $1,900, all the interior marble. It is admitted that, in pursuance of said contract, plaintiff did so furnish and set up the marble contracted for, and that Stannard thereby was justly liable to the said plaintiff for the contract price therefor, and that, though requested, he has hitherto failed to pay the same. On June 14, 1912, Stannard having completely performed his contract with the government, a final settlement therefor was made, and the defendants, the surety companies as well as Stannard, thereupon became liable to the plaintiff to pay for the marble so furnished and set up.

No suit having been brought on the bond by the United States within six months from the date of the said final settlement by the contractor, to wit, June 14, 1912, a certified copy of the contract and bond was obtained, and an action of assumpsit brought thereon by one Hollinger, in the name of the United States, to his use, in the court below, against the defendants, on February 28, 1913, which was within one year from the completion of the said work under the contract. On March 22d, on petition of Hollinger, the court made an order that notice to creditors be given, by publication for three weeks in a newspaper published in said district, and in pursuance of this order publication of such notice was made in such newspaper for three successive weeks, the last publication being on April 9, 1913. On May 22, 1913, 23 days prior to the expiration of the year aforesaid, the plaintiff, the Vermont Marble Company, applied for and was

given leave to intervene and be made a party to the proceedings, and thereupon filed its statement of claim.

To this claim, affidavits of defense were interposed by the defendants, the two surety companies, the defense set up being that, in order to meet the requirements of the statute under which the original suit was brought and the intervention of the marble company was made, the publication of notice to other creditors, of their right to intervene, should have been so made that the last publication would be at least three months before the time limited for the bringing of suit, and therefore, in this case should have been started not later than February 21, 1913, so that the last publication thereof should have been on or before March 14, 1913, three months before June 14, 1913, the time when the right to bring suit expired. That suit not having been brought nor publication made within the time required by the act, the same could not be maintained either by Hollinger, the original use plaintiff, or by the Vermont Marble Company and the other intervening plaintiffs. The court, on exceptions to these affidavits, sustained this contention, and the case having come on for trial, a special verdict embodying the facts was taken, on which judgment was subsequently entered for the defendants, and as to which the present writ of error was issued.

The merits of the plaintiff's claim are not disputed. The only defense is, that the original suit by Hollinger, in which the present plaintiff was intervener, was not brought in time; that is to say, was not brought soon enough after the expiration of the six months allowed to the government, to enable publication of notice to be made three months and three weeks prior to the expiration of the year within which such suit is required by the act to be instituted.

Unquestionably, there is a patent incongruity between the provisions of the act by which, after six months have elapsed from the completion of the contract without suit being brought thereon by the government, any materialman or sub-contractor is authorized to bring a suit in the name of the United States within one year from said completion of the work under the contract, and the last provision, that after such suit is pending, a notice shall be given creditors, by publication three months and three weeks before the expiration of the said period of one year.

The legislative intent to authorize any sub-contractor for labor or material to institute a suit on the bond at any time within six months immediately preceding the expiration of one year from the completion of the contract, and authorizing any other creditor of like kind to intervene in such suit within the same period, is expressed as clearly as it is possible for language to express a legislative intent. Not only is there a clear expression of such legislative intent in the affirmative language of the act, but that intent is emphasized by the negative words "not later." Thus it is made plain beyond all cavil that such a suit or intervention was authorized during the period aforesaid, up to the last day before the expiration of one year from the completion of the contract, to wit, before June 14, 1913. If, as contended by the defendants, the provision directing publication to be made by the court

or the plaintiff (it is not clear which) three months and three weeks before the expiration of this period of one year, is jurisdictional, the right not only of the original plaintiff to institute a suit, but that of all other such creditors to intervene, is defeated, although the original suit was brought nearly three months prior and the intervention of the plaintiff twenty-three days prior to the expiration of the period within which they were authorized to be instituted. The act read as a whole clearly indicates the legislative purpose to protect sub-contractors for material and labor on government work, and this intent, gathered from the various provisions of the act itself, is as clearly confirmed in the title, which reads: "An act for the protection of persons furnishing materials and labor for the construction of public works."

Unquestionably, the limitation incorporated in the right to sue as conferred by the act, upon those furnishing labor and material to the contractor, that such suit or intervention must be instituted within one year from the completion of the contract, and the provision that only one suit can be brought, in which all other creditors may intervene, are limitations upon the right of action as conferred by the statute, and are jurisdictional. They are obviously intended for the benefit of such sureties on the bond as are the defendants in the present case; while the last provision of the statute, requiring notice to known creditors, and publication of notice for three months and three weeks prior to the expiration of the year within which suits are authorized to be brought, was just as obviously for the benefit of the creditors alone.

Under the limitations imposed upon the right of action above referred to, the sureties cannot be harassed after one year from the completion of the contract, by suits of sub-contractors on the bond. No matter how many creditors have failed to avail themselves of their right to sue within the period named, the liability of the surety on the bond cannot be enforced as to them after the expiration of this one year period. Plainly, then, the interest of these defendants was not to bring in other creditors, but, on the contrary, it was their interest to have the year expire without their having intervened Yet, under the contention of defendants, that this provision for notice and publication is mandatory and jurisdictional and not simply directory the anomalous result is reached, that the admittedly meritorious claim of this intervening creditor, asserted within the period prescribed by law and in a suit instituted within that period, must be defeated at the suggestion of the defendants, because a publication has not been made within the time limited therefor, the only object of such publication being to bring in other creditors who had not as yet intervened and whose demands presumably would not otherwise be asserted within the period limited therefor. Whatever may have been the intent of the Legislature as to this provision, it clearly was not to bring about a result so contradictory of the purpose of the act.

The position, however, is taken by the defendants, that this provision was intended to change the period of limitation within which the claims of sub-contractors might be asserted, from six months to about

two months and one week; which is the construction put upon the provision in question by the learned judge of the court below. This, of course, imputes to Congress an intention to abridge a substantive right conferred upon a meritorious class, by indirection, and to conceal the purpose to do so, in a provision which, on its face, purported to be for the further advantage and benefit of that class. It is consistent with our respect for the legislative department, that we should not impute an intent to do indirectly what might better and more easily have been done directly, or by inconsistent provisions in the same statute, to accomplish a result by implication which contradicts the plainly expressed purpose of the act. The long-established principles applicable to the construction and interpretation of statutes, require that we should seek to harmonize and not bring into conflict their various provisions. In this endeavor, we are much aided in the present case by the obvious and clearly expressed purpose of the act itself.

In this respect, we need not repeat what we have above said, except to emphasize the distinction observable in the language and the general character of the three provisions that we have been considering. The first two are necessarily limitations inherent in the right of action created by the act itself; the last, upon which the defendants rely, not only fails to express any such limitation, but on its face was intended for the benefit of the class in whose favor such right of action was created. by assuring, so far as possible, opportunity to the members of that class, to assert their claims against the sureties on the contractor's bond, as provided for in the act.

The general purpose of the act thus clearly recognized, is not to be obstructed or deprived of its efficacy by a subsidiary provision in the same act, which, though presumably intended to increase and not diminish the protection given to the class of persons described, nevertheless, if construed as mandatory and jurisdictional, and not merely directory, seriously impairs the right conferred upon that class, and deprives persons furnishing materials and labor for the construction of public works, of the full measure of protection previously accorded them in the body of the act.

It is to be observed that this provision as to publication of notice, is not an exception out of the general right accorded the persons for whose benefit the act was passed, but is a subsidiary provision, evidently meant to be consistent with the general intent of the act, and only by implication inconsistent therewith. Its main purpose was, that in addition to actual notice given to known creditors, unknown creditors might be reached by publication of notice. Nothing is said therein, directly, which takes away from a creditor the right of bringing his suit or intervention at any time within the period of six months before the expiration of the year from the completion of the contract. If such right is taken away, as is insisted, it is only by implication from the subsidiary requirement of making publication of notice three months and three weeks prior to the completion of the year.

The books are full of instances where such subsidiary provisions have been so interpreted, as not to destroy or derogate from the right which it was the main purpose of the act to create. As said by Mr.

Justice Field in the Circuit Court (Eureka Consolidated Mining Co. v. Richmond Mining Co. of Nevada, Fed Cas. No. 4,548, 4 Sawy. 302, 316):

"Instances without number exist where the meaning of words in a statute has been enlarged or restricted and qualified to carry out the intent of the Legislature. The inquiry, where uncertainty exists, always is as to what the legislature intended, and, when that is ascertained, it controls. In a recent case before the Supreme Court of the United States, singing birds were held not to be live animals, within the meaning of a revenue act of Congress. * * * And in a previous case arising upon the construction of the Oregon donation act of Congress, the term, a single man, was held to include in its meaning an unmarried woman."

The necessity and duty of effectuating in its integrity the legislative intent, as gathered from the statute as a whole, and of preserving, so far as possible, the harmony of its more important provisions, is well illustrated by the judgment of the Supreme Court in the case of Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co., 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas. 1075.

To this conclusion we should be compelled, even if the implication contended for, viz., that the period of six months within which suits could be brought by sub-contractors was shortened to two months and one week, rested upon language less obscure than that of the proviso in question. We again quote the proviso:

"Provided further, that in all suits instituted under the provisions of this act, such personal notice of the pendency of such suits, informing them of their right to intervene as the court shall order, shall be given to all known creditors, and in addition thereto, notice of publication in some newspaper * * * for at least three successive weeks, the last publication to be at least three months before the time limited therefor."

The natural and grammatical antecedent of "therefor" is "the last publication," which of course would be absurd. If, grammatically, it can be referred to "suits instituted under the provisions of this act," then the last publication is required to be at least three months before—not the *expiration* of the time limited therefor, but before—the *time* limited therefor; that is, before the beginning of the period of six months within which the act authorizes a suit to be brought. This, then, would refer to the period of six months after the completion of the contract, within which suits on the bond could be brought only by the United States, but within which interventions could be made by the sub-contract creditors. The words, "before the time limited therefor," strictly construed, then, would mean, before the beginning of the time within which a suit could be brought by a sub-contract creditor; that is, the beginning of the six months prior to the expiration of the year from the completion of the contract.

These patent obscurities in the language of the proviso certainly add to the difficulty of construing the requirement of publication to be in any sense jurisdictional.

Moreover, referring to the legislative history of this proviso, we find that it was added in the committee having the bill in charge, and was reported to the House and adopted, and it is significant that there was no suggestion that the added provision directly or indirectly altered, or

was intended to alter, the important authority given in the original bill to sub-contractors to bring their suits within twelve months from the completion of the contract.

Under such circumstances, it is difficult to impute to Congress that it intended, by the use of such ambiguous language, to take away in large part the protection which it was the avowed purpose of the act to give to this meritorious class of creditors.

Construing these words as directory and not mandatory, or jurisdictional, we think the intent of the Legislature is subserved, and the true purpose of the provision in question maintained, so far as is not inconsistent with such legislative intent. Though the original suit was commenced well within the year subsequent to the completion of the contract, the judgment of the court below deprives them and all other intervening sub-contractors for labor and material furnished (and there were a number of such), of all remedy against the sureties on the bond, and practically relieves the sureties of all liability on their bond, given under the requirement of the act for the protection of that class of persons. We think there was error in such judgment, and that the requirement as to notice and publication was directory and not jurisdictional. Whatever rights were conferred upon creditors by the proviso in question, they are not for present determination. The judgment below would destroy every right of a creditor under the act, so far as this case is concerned, and the defendants are in the anomalous position of asserting the provision of the act intended for the benefit of such creditors, in order to extinguish their own liability to such creditors upon the bond given for their protection.

The judgment below must be reversed, and such judgment be entered upon the special verdict in the court below as is consistent with this opinion.

THE CRASTER HALL.

(Circuit Court of Appeals, Fifth Circuit. April 14, 1914.)

No. 2567.

1. COURTS (§ 89*)—SALVAGE—PRECEDENTS—AMOUNT OF AWARD.

Adjudged cases are of little assistance in determining the amount of a salvage award, which must depend on the special facts and merits of each case.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 311, 312; Dec. Dig. § 89.*]

2. SALVAGE (§ 30*)—AMOUNT OF AWARD—RESCUE OF STRANDED STEAMSHIP.

An award of 5 per cent. of the value of a steamship and her cargo and freight, which aggregated about $500,000, for salvage services affirmed, where she was stranded in quicksand, exposed to the open ocean in January, and the danger and difficulty of moving her was constantly increasing, the weather was cold, and the work dangerous, owing to high winds and rough seas, the salving vessels were five in number, valued at $155,000, some of which were engaged during parts of three days, and the

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

work was so successfully done that there was no loss or injury to either vessel or cargo.

[Ed. Note.—For other cases, see Salvage, Cent. Dig. §§ 72–74; Dec. Dig. § 30.*

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 in admiralty by the Propellor Towboat Company of Savannah, the Pilots Navigation Company, and others, against the steamship Craster Hall. Decree for libelants (203 Fed. 188), and claimant appeals. Affirmed.

Charles R. Hickox and Convers & Kirlin, all of New York City, and Wm. R. Leaken, of Savannah, Ga., for appellants.

Wm. Garrard and A. Minis, both of Savannah, Ga., for appellees.

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

PARDEE, Circuit Judge. The libel alleges, the answer admits, and the proof shows, that the services rendered by the libelants in floating the Craster Hall in January, 1912, when she was aground on Gaskin's Bank to the northward of the Tybee Roads were salvage services, and the contentions here are as to the grade thereof and the amount of award.

The District Court allowed 5 per cent. on the value of the ship, cargo, and freight. On this appeal the appellants demand a reduction, the appellees ask for an increase of the amount allowed.

[1] To determine whether services rendered to a ship in peril are strictly salvage services, and whether salvors are entitled to be rewarded therefor in the admiralty, adjudged cases are of great help in reaching a correct decision, and the same may be said as to many other questions arising in salvage cases; but, where the amount of award is the only vital question, very little assistance is obtained by study and analysis of the facts in other salvage cases.

In The Rita, 62 Fed. 761–763, 10 C. C. A. 629, decided by this court in 1894, we find the definition of salvage and the principles involved in determining the amount of salvage awards as follows:

"'Salvage, in its simple character, is the service which volunteer adventurers spontaneously render to the owners in the recovery of property from loss or damage at sea under the responsibility of making restitution, and with a lien for their reward.' Macl. Shipp. 608. 'Salvage is the compensation due to persons by whose voluntary assistance a ship or its lading has been saved to the owner from impending peril, or recovered after actual loss.' Ben. Adm. § 300. 'Salvage consists of an adequate compensation for the actual outlay of labor and expense used in the enterprise, and of the reward as bounty allowed from motives of public policy as a means of encouraging extraordinary exertions in the saving of life and property in peril at sea.' The Egypt [D. C.] 17 Fed. 359. 'The amount awarded as salvage comprises two elements, viz.: Adequate remuneration, and a bounty given to encourage similar exertions in future cases, the relative amount to depend on the special facts and merits of each case.' The Sandringham [D. C.] 10 Fed. 556. 'The leading consid-

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

erations to be observed in determining the proportion or amount of an award for salvage services are well defined. * * * We are to consider (1) the degree of danger from which the lives or property are rescued; (2) the value of the property saved; (3) the risk incurred by the salvors; (4) the value of the property employed by the salvors in the wrecking enterprise, and the danger to which it is exposed; (5) the skill shown in rendering the service; (6) the time and labor occupied. These are the ingredients which must enter, each to a greater or less degree, as a sine qua non, into every true salvage service.' The Sandringham, supra."

[2] Considering the ingredients which must enter as a sine qua non into every salvage service in the order named, we find that the case shows:

I. The danger from which the Craster Hall was rescued was very great and really imminent. She was so hard and high aground on a sand bank exposed to the open ocean that at high tide she could not be floated with her own engines assisted by a powerful tug. The bottom was of quicksand of the variety that, stirred up with the incoming tide, settles with the ebb tide, forming a hard bottom, so that at every tide a stranded vessel works further in shore, rendering ultimate relief more difficult. Similar sands are described by Judge Hughes in The Sandringham, supra:

"There is some contradiction in the evidence as to whether or not the bed on which the ship lay after she was beached was a *quicksand.* Admiral Smyth, in his Dictionary of Nautical Terms, defines this to be 'a fine-grained, loose sand, into which a ship sinks by her own weight as soon as the water retreats from her bottom.' It is immaterial what name we apply to the sand off Cape Henry. The fact is that there, and all along the coast southward for several hundred miles, the sand is a fine, movable substance, which, when a heavy body is resting upon it, retreats from under it by the action of the currents of the ocean which there constantly prevail, leaving a bed into which the body sinks deeper and deeper the longer it remains in the position. There is no possibility of any substance which, in specific gravity, is too heavy to float upon the surface of the water being lifted out of its bed in this sand and floated upon the shore. All the vessels that are beached upon the sands of this long coast invariably continue to sink, deeper and deeper, until they disappear from sight under the sea into the sand.

"The fate of the United States steamship Huron, wrecked off Kitty Hawk, November 27, 1876, was a notable historical exemplification of this characteristic of the sands of this part of the coast."

Stranded as the Craster Hall was on sands of such character, with a probability that, unless quickly relieved, her position would be made worse, with every tide her peril was increased by the probability, strong at that season, that the winds favorable at the time might change to very unfavorable and come from such a direction and with such force as to be disastrous. The District Judge says on this point (203 Fed. 188), and the weight of the evidence is with him:

"Now, with the long experience the court has had with this coast and the dangers of its navigation, we are very clear that this fine vessel was in a highly hazardous situation. Twenty-four hours, or half of twenty-four hours, two hours even, might have made it impossible to extricate her from that position with all the power which could have been exerted, and hers would have been the fate of the melancholy list of ships which have gone ashore on these treacherous sands, known not as the learned proctors for libelant would term it, 'The Norwegian Graveyard,' but 'The Graveyard of the Atlantic.' * * * She was relieved in the very nick of time. Next day the wind changed to the east, and the Atlantic rollers, with nothing to impede them

between Tybee sands and the coast of Morocco, would have soon made sad work of the Craster Hall. A day later it is quite doubtful that she would have gotten off at all."

II. The value of the property saved is agreed to be:

Ship	$194,660 00
Cargo	276,506 69
Freight	26,228 56
Total	$497,395 25

III. If the weather had been ordinarily mild and pleasant, the risk to the crews of the salving vessels would have been some but not much more than in the ordinary service of towing and piloting; but the witnesses testify that the weather was extremely cold for the latitude, the temperature mostly freezing, ranging from 21 to 40 degrees Fahrenheit, accompanied with snow flurries, ice on the deck and rigging, high winds and rough seas, and thus the services rendered day and night were accompanied with decided risk and peril to the salvors, particularly as they were on numerous tugs maneuvering around the ship.

IV. The value of the property employed in the salvage services was as follows: Cynthia No. 2, $30,000; Cambria, $25,000; McCauley, $35,000: Jacob Paulsen, $25,000; and the pilot boat J. H. Estill, $40,000; making a total of $155,000. And the danger to which these tugs were exposed was, considering the rough sea, the high winds, the necessity of speedy action and co-operation, decidedly hazardous.

"In estimating the degree of danger, regard should be had to the damage sustained by the vessel itself, the nature of the locality from which she was rescued, the season of the year when the services were rendered, and, if the weather at the time was not tempestuous, the probability of its becoming so, and the ignorance or knowledge, as the case may be, of the master or other person on board the vessel." The Sandringham, supra.

V. The salving vessels worked in harmony under the direction of the pilot in charge of the salving operations; the services rendered were skillful, as fully shown by the fact that the Craster Hall was speedily floated and conveyed to safe anchorage without any injury to ship or cargo.

Appellants criticise the skill of the salvors in that they did not from the first put out an anchor from the Craster Hall to hold her from going further on the sand bank and to pull on with the ship's power in working the ship off the bank into deeper water; but the criticism has little merit. There was no suggestion from the master or officers of the Craster Hall that an anchor should be put out. The putting out of a sufficiently heavy anchor would have been under the circumstances as shown by the evidence an extremely difficult matter, and there is evidence tending to show that the ship was not well enough supplied with strong hawsers to have made the anchor useful if put out; and, beside all this, the plan of the salvors to pull the Craster Hall off of the bank produced quicker results, and it was eminently successful.

The claimants' answer raises the contention, and there was evidence offered to show, that the salvage of the Craster Hall might have been

accomplished by lightering the cargo. In regard to this, it is only necessary to say that the weather and seas did not permit at the time of successful lightering, and it could only have been accomplished through a delay, during which the ship would have been in much peril, and at a cost and expense probably exceeding the salvage award. Besides this, the cargo was nitrate of soda in bags which, if taken out and put into barges, would have been very liable to damage by dampness, and, while it ordinarily contains one-half of 1 to 2 per cent. moisture, it is considered damaged if it contains as much as 5 per cent.

The evidence further shows that the Standard Fuel Supply Company, making the offer on Monday, January 15th, to lighter a sufficient cargo to float the steamer, was not supplied with sufficient barges to have accomplished the same at the time and under the circumstances without great delay.

VI. The time covered by the salvage operations was from Sunday night to Tuesday morning for the J. H. Estill, from Monday to Tuesday morning for the Jacob Paulsen, from Monday midnight to Tuesday morning for the Cambria and McCauley, and from Monday to Wednesday 6 a. m. for the Cynthia; this tug having assisted the Craster Hall from anchorage off Tybee to dock in Savannah.

The four last-named boats were powerful tugs, well equipped with salving appliances, and carried crews of seven experienced men. The J. H. Estill was a powerful pilot boat, carried a master, four sailors, two firemen, and twelve pilots, making forty-seven the total number of men employed in the salvage operations.

We have given much consideration to the evidence in this case, and on the facts and circumstances developed, and having in mind the principles which govern courts of admiralty in allowing salvage awards, we reach the conclusion that the amount allowed by the District Court is not excessive to any such degree as would warrant this court to reduce the same.

Whether on this appeal, and in the absence of a cross-appeal, we have jurisdiction to increase the award to salvors should we find the amount inadequate, it is not necessary to decide.

The decree appealed from is

Affirmed.

SCHNUETTGEN v. FRANK.

(Circuit Court of Appeals, Eighth Circuit. March 28, 1914.)

No. 4048.

SPECIFIC PERFORMANCE (§ 106*)—RIGHT TO RELIEF—CONTRACT FOR SALE OF LAND.

Complainant's deceased husband, who by his will made her his sole devisee and legatee, in his lifetime made a parol agreement with defendant and another, who were owners of a farm of about 300 acres, for the purchase of the farm at $100 per acre. Being unable to pay the full amount, it was afterward agreed that he should purchase and pay for the 50 acres on which the buildings were situated at a valuation of $250 per

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

acre, and should have the right to purchase the remainder at any time within five years at $70 per acre, having the use of the same in the meantime at the current rental. He went into possession and received a deed for the 50 acres, and a paper signed by the owners in the form of an offer to sell the remainder at the agreed price. This was written in English, which the purchaser could not speak nor read, but he was told by defendant that it was in accordance with their agreement, as it was, with the exception that it fixed no time within which the offer might be accepted. Twice during his lifetime and within a year or two, complainant's husband went to defendant, who had acquired the interest of his cotenant and desired to pay for and receive a deed for the remaining land, but was told by defendant that the option was good for five years, and finally that defendant was not obliged to make the conveyance until the expiration of that time. *Held*, that defendant was bound by his statements that the option continued for five years, that the offer therein made was accepted within that time, which gave the purchaser the equitable title to the land, and that such title descended to complainant, who was entitled to specific performance of the contract.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 342–351; Dec. Dig. § 106.*]

Appeal from the District Court of the United States for the Southern District of Iowa; Smith McPherson, Judge.

Suit in equity by Mary Frank, individually and as executrix of the will of Earnest Frank, deceased, against John Schnuettgen. Decree for complainant, and defendant appeals. Affirmed.

See, also, 187 Fed. 575.

G. W. Cullison, of Harlan, Iowa (William Gardner and Shelby Cullison, of Harlan, Iowa, on the brief), for appellant.

Charles Hutchinson, of Iowa Falls, Iowa (Jacob Sims, of Denison, Iowa, Byers & Byers, of Harlan, Iowa, and Clark, Byers & Hutchinson, of Des Moines, Iowa, on the brief), for appellee.

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

RINER, District Judge. This is a suit for the specific performance of a contract for the purchase of real estate. The bill alleges in substance that in January, 1903, Earnest Frank, now deceased, the husband of appellee, entered into negotiations with the appellant and one Charlotte Gardner for the purchase and transfer to him of 295 acres of land in Shelby county, Iowa; that, in the negotiations for the sale of the land, the entire tract was figured at a valuation of $100 per acre. As a result of their negotiations, it was finally agreed that 50 acres of land, upon which the buildings and improvements were located, should be conveyed to Frank, he paying at that time the sum of $12,500, or at the rate of $250 per acre for the land conveyed, the payment to be considered as a part payment upon the whole tract; that for the remainder of the tract he was to receive a contract wherein it was to be stipulated and agreed that, if at any time within five years from the date of the contract Frank should pay a sum equal to $70 per acre for the remainder of the tract, the same should be conveyed to him, and, pending such payment, the land was to be used and occupied by Frank,

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

he paying rent therefor. Pursuant to the agreement and understanding of the parties, Frank paid $12,500 and received a deed for the 50 acres and the following option contract:

"To Earnest Frank: We hereby offer to sell you 90 acres, more or less, in the southeast quarter (SE¼) of section thirty-two (32), being all of said quarter section lying northwest of the Chicago, Milwaukee & St. Paul Railway Company's right of way, except 11 acres in the southwest corner thereof, (said 11 acres consisting of a ball ground and [tenants] premises and buildings adjacent thereto) for $70.00 per acre, on the following terms, to wit: You to pay us one-third cash, we to carry the balance of the purchase price for such time as may be agreeable at 4 per cent. per annum, taking first mortgage on the land to secure the same. We offer you a like option to purchase all our remaining land in said section at same price and on same terms. We further agree to lease to you, from year to year, all, or any, of our lands in said section at the prevailing rates of rent. If we place any improvements upon the above described land, after this date, the cost of such improvements shall be added to said price of $70.00 per acre.

"[Signed] John Schnuettgen.
"Charlotte Gardner."

"Dated January 19, 1903."

It is further alleged in the bill, and the proof shows, that in March, 1904, Frank entered into the possession of all of the lands and continued in possession and occupancy thereof up to the time of his death, and that his family have occupied the premises ever since and are now in possession thereof.

It is also alleged in the bill:

"(2) That, at the time your orator's husband paid said Schnuettgen the purchase price of the 50 acres, said Schnuettgen knew that your orator's husband understood and believed that he was purchasing the entire tract containing, as above alleged, about 300 acres of land, and that he was purchasing the land for a farm. That all the buildings and improvements on the entire tract were located on the 50 acres, and that, without the right to purchase the balance of the land in said section, the 50 acres would not have been worth to exceed $150 an acre. That neither your orator's husband nor your orator understood or could speak the English language, which fact was well known to the defendant Schnuettgen. That the contract or bond for a deed above referred to was written in English, and neither your orator, who was present at the time, nor her deceased husband could read said contract, but the said Schnuettgen stated that it contained the agreement as above, and that not until some time after its execution did your orator's husband learn that there was no time fixed in said contract when the option to take conveyance of the remainder of said land would expire, whereupon your orator, with her deceased husband, called upon the defendant Schnuettgen and told him that they were ready to take a conveyance of the remainder of said land and desired to have the transfer made at once. That in response the said Schnuettgen stated that the contract was good for five years, that it was not necessary that it should be stated in the contract, and urged your orator's husband to wait until he had harvested another crop and until money was more plentiful before taking a conveyance of the remainder of said tract, and assured your orator's husband that his contract for a conveyance of said land would be good for five years."

"(4) That on or about the spring of 1905, and within a little over a year subsequent to the execution and delivery of the contract hereinbefore referred to, your orator's husband had made arrangements to procure the money to pay for the land on the terms stated in the contract and so notified the defendant Schnuettgen, whereupon the said Schnuettgen informed your orator's husband that conveyance could not be made at that time because the land had been leased for another year, and urged and persuaded your orator's husband not to insist upon conveyance at that time, said Schnuettgen insist-

ing that, under the contract, he was not bound to accept his money until the five years agreed upon had expired. That your orator's husband, being ignorant and not being able to understand or read the English language, and not informed as to his rights, believed the said Schnuettgen, and, relying upon assurances of the said Schnuettgen that the option was good for five years, he did not further insist upon a conveyance."

It is further alleged that Earnest Frank died November 1, 1905, leaving a will, by the terms of which all his property, both real and personal, was devised and bequeathed to Maria Frank, his wife, the appellee herein, and that she duly qualified as executrix of the estate. It is also alleged that Charlotte Gardner, subsequent to these transactions, conveyed by deed all of her interest in the land to John Schnuettgen, the appellant.

This is the second appearance of this suit in this court. The first appeal was taken from a decree dismissing the bill upon a general demurrer. When the case was first here, Judge Carland, speaking for the court, said:

"In order to clear the case of any complications by reason of the joint ownership of the land in question at the time of the making of the alleged contract, it is proper to say that the defendant, Schnuettgen, could lawfully make a contract to convey land owned by himself and another, and, if subsequently he became the sole owner of the land, he should be compelled to convey the same if the case was otherwise one for specific performance."

It was then argued, as it is now, that Exhibit B, the option contract, was not a contract to convey but a mere offer which Earnest Frank never accepted. In disposing of this contention the court said:

"We think that the allegations of paragraphs Nos. 2 and 4 of the bill clearly show that Frank did accept the offer contained in Exhibit B in his lifetime and within the five-year period. It does not appear that Schnuettgen at any time objected to receiving payment in cash instead of a mortgage, but, on the contrary, it does affirmatively appear from the bill that Schnuettgen claimed that he was not obliged to receive the money for the land until the expiration of the five-year period, which he alleged was the contract whether it appeared in Exhibit B or not. We think that, in view of the allegations of the bill that Frank could not read or understand English, we must take the oral declarations of Schnuettgen as to what Exhibit B did contain as binding upon him. These allegations also render unimportant the time when Schnuettgen told Frank that Exhibit B specified five years as the time within which the offer should be accepted."

These allegations of the bill are supported by the evidence of Mrs. Frank, who testified that, the second spring after they moved on the land, Mr. Frank told Schnuettgen in her presence that he wanted to close the matter up and take the land; that Mr. Schnuettgen said he should wait, as he still had three years. Emile Frank, who was present at the conversation, testified:

"My father told him he was ready to take that land now and pay him the $70 per acre, and he said, 'Oh, you better wait a few years yet; you got three years' time yet.'"

There is other evidence in the record tending to corroborate the testimony of these witnesses; indeed, they are corroborated by appellant himself, as is shown by the following excerpt from his testimony:

"I knew that Mr. Frank was a farmer and had a large family, and that they were all at home and worked on the farm, and that, when I went out to

Nebraska and talked with Mr. Frank, he told me that he had to have a farm large enough to furnish work for the boys, and that he wanted a farm big enough so that they could all work at home. He wrote to me that he wanted about 200 acres plowland and some pasture land. That was about all the plowland there was on this whole farm. When I was there at Mr. Frank's farm and first figured, Mr. Frank's last understanding with me was that he was to take the 50 acres at an estimate of $250 an acre and was to have a contract for the balance of the land at $70 an acre, and that the contract was to run five years, and in the meantime he was to have the use of it at the usual rental that was paid in that neighborhood; that was the preliminary talk. I talked with Mr. Frank and his family in German. Mr. Frank and his wife were together a good deal on their business deals. When Frank said he wanted a chance on this land for five years, he called it an option. He wanted the right. Option means right in German. I don't know that Earnest Frank didn't know the meaning of the word 'option.' I know it in German; it is simply the right to sell. Mr. Frank didn't say not only that he must have the right, the 'recht' as he spoke the word, the 'recht must haben,' but he also said contract, that he 'must a contract haben.' "

He further testifies that he did not know how long he thought the option was to continue, and that he told Mrs. Frank when Frank died the contract died with him.

He further testified that the deed and option were prepared, signed, and delivered to Frank without any further talk as to the five-year term; he simply telling Frank that it was their agreement. Nowhere in his evidence does he dispute the testimony of the various witnesses as to his statements made during Frank's lifetime in regard to the terms of the contract. The evidence, taken altogether, shows beyond doubt that the contract was understood by Schnuettgen and by Frank and his wife to be an option contract for the term of five years, and with that understanding Frank entered into possession of the premises and paid the $12,500. As the evidence shows that Frank accepted the offer to sell during his lifetime and within the five-year period, he became the equitable owner of the land; and as was said when the case was first here:

"This equitable ownership descended to his wife under his will, and she may now invoke the powers of a court of equity to have the contract enforced. Rutherford v. Green, 37 N. C. 121; Dougherty's Adm'rs v. Goggin, 1 J. J. Marsh. (Ky.) 373; Godfrey v. Dwinell, 40 Me. 94; Dawson v. Clay's Heirs, 1 J. J. Marsh. (Ky.) 165; House v. Dexter, 9 Mich. 246; Collins v. Vandever, 1 Iowa, 573; Laverty v. Hall's Adm'rs, 19 Iowa, 526; Putnam v. Tinkler, 83 Mich. 628, 47 N. W. 687."

It is also urged that the contract was void for want of mutuality. The same question was raised at the former hearing, and this court accepted, as a fair statement of the true rule, the language of the Supreme Court of Wisconsin in the case of Peterson v. Chase, 115 Wis. 241, 91 N. W. 688. In that case the Supreme Court of Wisconsin had before it a contract similar to the one now under consideration, and, in disposing of this objection to it, said:

"The principal objection urged by appellant is that the contract was not mutual and will therefore not be specifically enforced. To this conclusion, as a general rule, many authorities can be cited, but the exceptions or apparent exceptions are * * * so numerous, and so important, that the decided cases illustrating them now constitute an almost equal volume of authority. Among these exceptions are optional agreements to sell land at a specified price and terms within a fixed time, especially if supported by a good and

executed consideration. Upon fundamental principles there seems to be no difficulty in supporting the validity of such agreements. In their ultimate analysis they are but offers to sell, and, if accepted before withdrawal, become binding, because thereupon the other party becomes bound, and a complete contract arises, entirely mutual. Nor, on principle, is there any reason why the seller, for a good consideration, may not bind himself that the offer shall not be withdrawn before a specified date. A so-called time option to purchase contains only the above elements, namely, an offer to sell, accompanied by agreement to hold such offer open. Beach, Mod. Cont. par. 886 et seq.; Waterman, Spec. Perf. par. 200; Willard v. Tayloe, 8 Wall. 557, 19 L. Ed. 501; Brown v. Slee. 103 U. S. 828, 26 L. Ed. 618; Guyer v. Warren, 175 Ill. 328, 51 N. E. 580; Cheney v. Cook, 7 Wis. 413; Wall v. M., St. P. & S. S. M. R. Co., 86 Wis. 48, 56 N. W. 367."

Finding no error in the record, the decree is affirmed.

BROOKS v. PULLMAN CO.

(Circuit Court of Appeals, First Circuit. April 30, 1914.)

No. 1049.

1. PLEADING (§ 205*)—DEMURRER—GENERAL DEMURRER TO DECLARATION DEFECTIVE IN FORM.

A general demurrer to a declaration, which consisted of a narrative of facts from which the conclusion was drawn that defendant was liable for injuries to plaintiff's intestate, many of the allegations being matters of evidence and others being conclusions of law, no special demurrer having been filed, as required by Rev. St. § 954 (U. S. Comp. St. 1901, p. 696), to raise questions as to the form of a pleading, cannot be sustained.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 491–493, 495, 496, 498–510; Dec. Dig. § 205.*]

2. PLEADING (§ 214*)—ADMISSIONS BY DEMURRER—CONCLUSIONS OF LAW.

Conclusions of law set forth in a declaration are not admitted by a demurrer thereto.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 525–534; Dec. Dig. § 214.*]

In Error to the District Court of the United States for the District of Maine; Clarence Hale, Judge.

Action by Gerry L. Brooks, administrator, against the Pullman Company. Judgment for defendant upon demurrer to the declaration, and plaintiff brings error. Reversed and remanded, with directions.

The memorandum brief of defendant in error in reply was as follows:

Upon page 8 of his brief counsel for plaintiff in error cites Weed v. United States (D. C.) 65 Fed. 399, Frank v. Forgotstone, 30 Misc. Rep. 816, 61 N. Y. Supp. 1118, and Failey v. Talbee (C. C.) 55 Fed. 892, relative to the law as to overruling a demurrer; and, while he does not state his conclusion, it is evident that he means that in the present case the demurrer should not have been sustained.

Defendant in error claims that the effect of sustaining a demurrer is the same as directing a verdict for the defendant, and that where a verdict would be so directed, it is entirely proper for the court to sustain a demurrer, and that under the allegations in the present suit it was the duty of the court to sustain a demurrer, as it would have been its duty to have directed a verdict for the defendant at the close of the evidence.

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

Thus in Clark et al. v. Zarniko, 106 Fed. 607, 45 C. C. A. 494, it was held:

"If, at the close of the trial of an action for damages for negligence, the evidence conclusively discloses the fact that the plaintiff was guilty of negligence which contributed to his injury, it is the duty of the trial court to instruct the jury to return a verdict for the defendant."

In Christensen v. Metropolitan St. Ry. Co., 137 Fed., at page 708, 70 C. C. A. at page 661, it was held:

"While the questions of negligence and contributory negligence are ordinarily questions of fact to be passed on by a jury, yet if it clearly appears from the undisputed facts, *judged in the light of that common knowledge and experience of which courts are bound to take notice*, that a party has not exercised such care as men of common prudence usually exercise in positions of like exposure and danger, or where the evidence is of such conclusive character that the court would be compelled to set aside a verdict in opposition to it, the case may properly be withdrawn from the jury."

In Chicago, R. I., etc., R. R. Co. v. Baldwin, 164 Fed. 827, 90 C. C. A. 630, it was held:

"Where such a failure to use the senses is established by undisputed or conclusive evidence, it is the duty of the trial court to instruct the jury that there can be no recovery of damages on account of the injury."

In Chicago, etc., R. R. Co. v. Bennett, 181 Fed. 799, 104 C. C. A. 309, it was held:

"One whose negligence contributes to his injury cannot recover damages of another whose negligence concurred to cause it, even though the carelessness of the latter was the more proximate cause of it.

"Where at the close of the trial the evidence so clearly discloses the fact that the plaintiff was guilty of negligence which contributed to his injury that a finding to the contrary cannot be sustained by the court, it is its duty to direct the jury to return a verdict for the defendant."

Gerry L. Brooks, of Portland, Me. (Benjamin Thompson, of Portland, Me., on the brief), for plaintiff in error.

David W. Snow (Josiah H. Drummond, Drummond & Drummond, and Symonds, Snow, Cook & Hutchinson, all of Portland, Me., on the brief), for defendant in error.

Before PUTNAM, DODGE, and BINGHAM, Circuit Judges.

PER CURIAM. [1] A demurrer to the declaration in this case has been sustained by the District Court, without opinion, and the plaintiff seeks to reverse the resulting judgment for the defendant. The declaration consists of a narrative of facts and circumstances framed with little regard for the requirements of good pleading, from which the conclusion sought to be drawn is that negligence of the defendant company, its servants or agents, damaged the plaintiff's intestate, a passenger on one of its cars.

[2] Many of the matters alleged, perhaps admissible as evidence to support the plaintiff's claim, are out of place in such a declaration. Other allegations are of conclusions of law, and of course not admitted by the demurrer. With the above are matters of fact alone and matters of mixed law and fact, all so intermingled as to leave it difficult to disconnect that which is properly from that which is improperly alleged. No special demurrer was filed, which would have been the proper way to raise these objections. Rev. St. § 954 (U. S. Comp. St. 1901, p. 696). The only ground of demurrer is that the declaration is insufficient in law.

It may be that if the plaintiff's evidence at a trial had tended to

prove, without more, such facts as are well pleaded in the declaration, and he were here on exceptions to a directed verdict for the defendant, we should affirm the judgment below. But the case in its present form cannot be satisfactorily dealt with as one in which we have before us all the plaintiff's evidence. So to deal with it would, at least, require us to distinguish clearly that which is well alleged in the declaration from that which is not. In this task the parties, though apparently disagreeing as to what stands admitted by the demurrer, have hardly undertaken to afford us any assistance.

We think the case should be remanded for trial, with opportunity to the defendant to plead over.

The judgment of the District Court is reversed, and the case is remanded to that court, with directions to permit the defendant in that court to plead over within such time as the court may fix; and the plaintiff in error recovers his costs of appeal.

In re SAMUELS et al.

(Circuit Court of Appeals, Second Circuit. March 10, 1914.)

No. 113.

DEPOSITIONS (§ 76*)—STENOGRAPHER'S NOTES—TRANSCRIPT—SIGNING.

Where a bankrupt had been examined and his testimony taken by a stenographer and a transcript made, the witness could not refuse to sign the same because he now claims his answers are incorrect by reason of his misunderstanding of one or more questions, and not being correctly informed when he answered; he being only entitled to insert before his signature and jurat a statement that on reading the record of his testimony he now discovers that certain of his answers, specifying each separately, are incorrect, and that the reason for the inaccuracy was either because he misunderstood the question (in which case he must state what he understood the question to ask), or because at the time he answered he did not have sufficient information to enable him to answer the question accurately.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. §§ 166, 176, 190–196; Dec. Dig. § 76.*]

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 Jacques Samuels and another, doing business as Joseph Samuels & Co. On petition of Jacques Samuels to revise an order of the District Court directing petitioner to sign certain testimony theretofore given by him before the special examiner, which testimony had been taken by a stenographer, who had transcribed his notes in the form of question and answer. Modified and affirmed.

H. H. Oppenheimer, of New York City, for petitioner.

G. Clark, of New York City, for respondent.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

PER CURIAM. It is understood that all alleged errors of the stenographer have now been corrected to the satisfaction of all parties.

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

The only question is as to answers of the witness, which were correctly taken by the stenographer, but which the witness now asserts were incorrect, by reason of his misunderstanding the question or not being correctly informed when he answered. The answers which he gave in response to the questions must of course stand just as he gave them; they constitute his sworn testimony, the affixing of his signature and a renewed oath to what he signs is a mere matter of convenience to avoid the calling of a stenographer to testify every time reference is to be made to his testimony.

He may, however, after the record of question and answer as it now stands and before his signature and jurat, insert a statement that upon reading this record of his testimony he now sees that certain of his answers (specifying each one separately) was incorrect—and that the reason for the inaccuracy was either because he misunderstood the question (in which case he must state what he understood the question to ask), or because at the time he answered he did not have sufficient information to enable him to answer the question accurately.

With this modification the order is affirmed.

PACIFIC MILLS v. FARISH.

(Circuit Court of Appeals, First Circuit. April 24, 1914.)

No. 1055.

COURTS (§ 354*)—PRACTICE—JUDGMENT NOTWITHSTANDING THE VERDICT.

The practice of rendering judgment non obstante veredicto does not prevail in the federal courts. Young v. Central R. Co., 232 U. S. 602, 34 Sup. Ct. 451, 58 L. Ed. —, applied.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 934; Dec. Dig. § 354.*]

In Error to the District Court of the United States for the District of New Hampshire; Edgar Aldrich, Judge.

Action by James A. Farish against the Pacific Mills. Judgment for the plaintiff, and defendant brings error. Affirmed.

Edward C. Stone, of Boston, Mass. (Sawyer, Hardy & Stone, of Boston, Mass., on the brief), for plaintiff in error.

Robert Doe, of Dover, N. H. (George T. Hughes, of Dover, N. H., on the brief), for defendant in error.

Before PUTNAM and BINGHAM, Circuit Judges, and MORTON, District Judge.

PER CURIAM. This is a writ of error bringing up on exceptions a case tried before the court and jury for the district of New Hampshire on issues arising in New Hampshire. The plaintiff in error waives its exceptions and its writ of error unless we have jurisdiction to direct a final judgment in the District Court in its favor if the exceptions, or any of them, are maintained.

The practice of judgment non obstante veredicto does not prevail

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

in the federal courts, as has been decided in several cases, the last of which is Young v. Central R. Co., 232 U. S. 602, 34 Sup. Ct. 451, 58 L. Ed. ——. It might be otherwise under some peculiar state statutes, under which a favorable ruling for either party for direction of a verdict in his favor, if not sustained on appeal, would carry an implied consent to a final judgment the other way; but there is no such statute in New Hampshire.

The judgment of the District Court is affirmed, and the defendant in error recovers his costs of appeal.

KINNEY v. PLYMOUTH ROCK SQUAB CO. et al.

(Circuit Court of Appeals, First Circuit. April 22, 1914.)

No. 1,057.

JUDGES (§ 51*)—DISQUALIFICATION—PROCEEDINGS—AFFIDAVIT OF PREJUDICE—STATUTE.

Judicial Code (Act March 3, 1911, c. 231) § 21, 36 Stat. 1090 (U. S. Comp. St. Supp. 1911, p. 133), permitting any party to an action to file an affidavit of prejudice on the part of the judge and have another judge designated to try the case, does not apply to appellate tribunals.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 224–231; Dec. Dig. § 51.*]

In Error to the District Court of the United States for the District of Massachusetts; Clarence Hale, Judge.

Action by Robert D. Kinney against the Plymouth Rock Squab Company and others. From the judgment, plaintiff brings error. Affidavit of prejudice, filed by the plaintiff in error, dismissed.

Mr. Kinney, for plaintiff in error.

John S. Patton, of Boston, Mass., for defendants in error.

Before PUTNAM and BINGHAM, Circuit Judges.

PER CURIAM. The court, having fully considered the affidavit of prejudice filed by the plaintiff in error on March 10, 1914, and the brief in support thereof, is of the opinion that the statute under which the affidavit is filed, namely, section 21 of the Judicial Code of March 3, 1911, is so framed that evidently it does not apply to an appellate tribunal. Consequently the affidavit must be dismissed.

Ordered that the affidavit filed by the plaintiff in error on March 10, 1914, entitled "An Affidavit of Prejudice under the Statute of March 3, 1911," is dismissed, and the case will stand for trial in the order heretofore assigned to it.

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

CITY OF BIRMINGHAM et al. v. BIRMINGHAM WATERWORKS CO.

(Circuit Court of Appeals, Fifth Circuit. April 18, 1914.)

No. 2492.

WATERS AND WATER COURSES (§ 203*) — WATER COMPANY — REGULATION OF RATES—CONTRACT WITH MUNICIPALITY.

An interlocutory order, enjoining a city from enforcing an ordinance regulating rates to be charged by a water company as in violation of a contract between the parties, affirmed.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 289, 290–299; Dec. Dig. § 203.*]

Appeal from the District Court of the United States for the Southern Division of the Northern District of Alabama; Wm. I. Grubb, Judge.

Suit in equity by the Birmingham Waterworks Company against the City of Birmingham and the Board of Commissioners of the City of Birmingham. From an order granting a preliminary injunction, defendants appeal. Affirmed.

For opinion below, see 211 Fed. 497.

Romaine Boyd and M. M. Ullman, both of Birmingham, Ala., for appellants.

Frank Spurlock, of Chattanooga, Tenn., and John London and Walker Percy, both of Birmingham, Ala., for appellee.

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

PER CURIAM. This is an appeal from an interlocutory order of the District Court (211 Fed. 497) restraining the appellants from enforcing "an ordinance to regulate the terms and rates of furnishing water to private consumers in the city of Birmingham."

The record contains an elaborate opinion of the District Judge, in which he reviews the decisions of the United States and state courts upon the questions involved. We regard the conclusion announced by him as correct, and are therefore of opinion that the order should be affirmed.

Ordered accordingly.

LUDLOW v. PUGH.

In re KEITH-GARA CO.

(Circuit Court of Appeals, Third Circuit. April 2, 1914.)

No. 1785.

BANKRUPTCY (§ 350*)—DEBTS ENTITLED TO PRIORITY—UNACCRUED RENT.

Where a lease to a bankrupt provided that, in case of his bankruptcy, rent for the entire term should become due and payable at once, and should be first paid out of his assets, which provisions were valid under the laws of the state, on the bankruptcy the landlord's claim for unac-

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

crued rent became a debt entitled to priority under the laws of the state, and as such to priority in bankruptcy under Bankr. Act July 1, 1898, c. 541, § 64b (5), 30 Stat. 563 (U. S. Comp. St. 1901, p. 3447).

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 537; Dec. Dig. § 350.*]

Appeal from the District Court of the United States for the Eastern District of Pennsylvania; John B. McPherson, Judge.

In the matter of the Keith-Gara Company, bankrupt. From an order allowing priority to the claim of Job T. Pugh for rent, Benjamin H. Ludlow, trustee, appeals. Affirmed.

For opinion below, see 203 Fed. 585.

Benjamin H. Ludlow, of Philadelphia, Pa., for appellant.

Henry T. Dechert, of Philadelphia, Pa., for appellee.

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

PER CURIAM. This case involves a question of Pennsylvania decisions and of bankruptcy procedure. Both are fully discussed in the opinion below, which was delivered by Judge McPherson, a member of this court, but sitting by special assignment in this case in the District Court. 203 Fed. 585. Regarding that decision as expressive of the views also reached by this court after a full argument of the case and careful subsequent consideration, we avoid needless repetition by adopting such opinion as the opinion of this court, and affirming the decree entered in pursuance thereof.

MORGAN CONST. CO. et al. v. FORTER-MILLER ENGINEERING CO. et al.

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

No. 1775.

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—FURNACE FOR HEATING INGOTS.

The Morgan patent, No. 632,020, for a furnace for heating steel ingots or billets preparatory to rolling covers a device which was novel, useful, and inventive in character, being the first to provide for the discharge from the furnace automatically of a continuous and uniform rapid succession of uniformly heated billets, which are also automatically charged into the furnace; the result being a saving of 25 cents or more per ton in the labor cost of heating the billets besides obviating the necessity for labor under fierce heat conditions; also *held* infringed as to claims 3, 4, 5, 6, and 7.

Appeal from the District Court of the United States for the Western District of Pennsylvania; James S. Young, Judge.

Suit in equity by the Morgan Construction Company and Alexander Laughlin against the Forter-Miller Engineering Company and Dil-

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

worth, Porter & Co., Limited. Decree for defendants, and complainants appeal. Reversed.

For opinion below, see 203 Fed. 496.

Christy & Christy, of Pittsburgh, Pa., and J. Nota McGill, of Washington, D. C. (Frederick P. Fish, of New York City, of counsel), for appellants.

C. M. Clarke, of Pittsburgh, Pa., for appellees.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below the Morgan Construction Company and Alexander Laughlin, the plaintiffs, by a bill in equity charged the Forter-Miller Engineering Company and Dilworth, Porter & Company, Limited, with infringing claims 3, 4, 5, 6, and 7 of a patent of which plaintiffs were respectively owner and licensee, viz., patent No. 632,020, applied for August 3, 1896, and granted August 29, 1896, to Charles H. Morgan for a furnace for heating ingots. On final hearing that court held the patent not infringed. From a decree in accord therewith, the plaintiffs took this appeal.

The art here involved is that of a furnace for heating steel ingots or billets preparatory to rolling. To bring such billets to the semiplastic state necessary, the furnace is raised to a heat of about 2,000° Fahrenheit. This must be done at a minimum cost of labor, fuel, and loss of metal by oxidation. The demand of the rolls on the furnace for such hot billets necessitates rapidity and continuity of supply. The extent, rapidity, and continuity of such billet supply can be measurably appreciated from the proofs which show that, in common practice mills turning out the usual output per turn of 200 tons of rods from 165-pound billets, the furnace must furnish at a bright red heat over four of such billets every minute during the 10½ hours of the turn. In view of the rapidity and unceasing character of the work thus necessary to be done under such high heat conditions, it requires no citation of the abundant proof in the record to show we are here dealing not alone with conditions of most exacting mechanical requirements in the way of rapid and continuous transfer, but such transfer must be made under fierce heat surroundings. It will be obvious therefore that, as said by this court in Mott v. Standard, 159 Fed 135, 86 C. C. A. 325, an invention which gives to an important industry a device, labor-saving, effective, and which obviates labor under such fierce heat conditions, is not only a mechanical contribution but one which rises to the plane of the humane. In that regard the plaintiffs contend, as stated in their brief, that:

"The furnace of the Morgan patent in suit was absolutely the first to provide for the discharge from the furnace automatically of a continuous and uniform rapid succession of uniformly heated billets."

That the Morgan furnace accomplishes these results, that it has gone into rapid and general use, is shown by the proofs. Was the machine the first to do such work? If it was, then the foregoing contention is established, and, if so, this patent should be sustained. To this question of priority we now address ourselves.

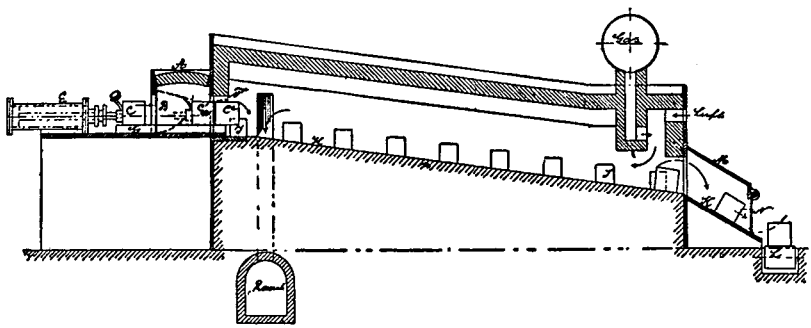
Prior to Morgan's furnace there were two types of billet-heating furnaces in use. One was the furnace with an ordinary, flat hearth and with doors at one side through which the billets were hand-charged and hand-drawn. Heaters who worked at such standard mills as the Oliver Wire Mills, the American Steel & Wire Company, and the Carnegie Steel Company testified to the use of such furnaces at these works. Laughlin, one of the plaintiffs, gives a clear account of the working of these furnaces. He says:

"A. With the old Siemens furnaces it was usually customary to work billets about 3 feet long, and two rows of these billets were charged in the front doors of the furnaces. The first row of billets was pushed towards the back wall far enough to leave room for a second row of billets between the front wall of the furnace and the ends of the first row of billets. It was customary to have about four doors in one of these Siemens furnaces, and the total number of billets put in a furnace at one time was generally about 90 or 100. The usual practice, however, was not to charge all these billets at once, but to charge two doors, or 45 to 50 billets, at one time. All the charging of these furnaces was done by manual labor. That is, a man picked up a billet, laid it on a flat bar known as a 'peel,' and then the heater or his helper took the handle of this peel, the peel being about 10 feet long, and shoved this peel into the furnace, then slipped the peel out from under the billet, and drew the peel back ready for another billet. The drawing of the billets from this furnace was accomplished in the same way; that is, it was done by manual labor entirely. The heater or his helper would reach into the furnace with a hook and would pull out the front row of billets one at a time; that is, he would pull a billet up to the door, where the telegraph man would take hold of it with a pair of tongs, and would then run with it to the mill. This program was continued until the front row of billets had been pulled out, then the heater would have to reach clear back into the furnace to the second row of billets, and would use his hook to pull this second row of billets up to the door one at a time, and the telegraph man would take hold of each billet with his tongs, and run with it to the mill. As a rod-mill would roll about 2,000 billets in 11 hours, this meant that about 3 billets per minute must be delivered to the mill, and it was therefore the practice to draw two furnaces, or rather have the contents of two furnaces simultaneously drawn, so that there would always be a telegraph man on his way to the rolls. This labor was of course very exhausting, and in hot weather particularly it was almost impossible to deliver billets to the mill fast enough to keep the mill going to its maximum capacity. And it was customary and necessary to have spell hands to assist the telegraph man to get the billets to the mill fast enough to keep the mill going to its capacity."

Swinbank, who worked in the Oliver Mills from 1884 to 1902, and for much of the time was boss heater, testified that the labor cost of four furnaces thus operated was 40 cents a ton with a product of 150 tons in a 10½-hour turn. Gorsuch, also an experienced heater, who had worked in the mills of the other two companies, made the labor cost 51 cents per ton with a product of 165 tons per turn. These furnaces were all retained and operated by these up-to-date companies until the Morgan device came into the art. The second type of furnace in use prior to Morgan was used by the Pittsburgh Wire Company. This type originated in the Allen patent of 1880, No. 234,162, and was built by the Morgan Construction Company, one of the plaintiffs. The Allen was rectangular and relatively long. It had a fuel grate at one end and a stack at the other; the flames thus passing the furnace length. Just back of the grate was a flat hearth, and from this the heated billets were hand-drawn through a side wall door just as in the

furnaces of the Oliver, American, and Carnegie Companies. Where it differed from them was that the billets were machine-charged. At the stack end wall of the furnace was a door through which the billets were charged or pushed in broadside by means of a hydraulic cylinder. As the billets successively entered, they moved forward side by side, on a track consisting of a pair of inclined water-cooled pipes, elevated on longitudinal piers, until they reached the end of the track, whence they were pushed off, one by one, onto the hearth first described. The billet, after being thus mechanically fed and dumped on this hearth was hand-shifted to make room for the succeeding billets, and when finally heated was hand-drawn, endwise as above described, and taken to the rolls.

It will be noted that this furnace, which the Morgan Company, one of the plaintiffs, continued to construct for many years, was an improvement over the other type in that, thermally, it made use of the heat from grate to stack; mechanically, in that it substituted mechanical charging for hand-charging. It reduced labor cost to 28 cents per ton, and its product was from 125 to 150 tons per turn, a saving which apparently was not sufficient to lead such progressive companies, as the Carnegie and the other companies named, to adopt it. These two furnaces were the only means the practical art had found to heat and supply billets to rod mills, and these furnaces, as the best net results of practice and inventive effort, that art continued to use, without progress or improvement for the 16 years between Allen's patent of 1880 and Morgan's of 1896. When the practical art for 16 years failed to find anything of value in the paper art, a court, with like practical views, may agree with the estimate of the practical art, which was that such paper art disclosed nothing of practical value. We, however, select from that art the device which, to judge from the file wrapper, most impressed the patent authorities in passing on Morgan's application. This was German patent No. 74,484 of 1893, to Daelen, shown in accompanying draft:



The proofs show Daelen was a German engineer of repute, and we are justified in regarding his patent as in line with the latest developments in German practice. This patent, thirteen years later than Allen, while it shows the long rectangular furnace of the Allen type, with

its thermal advantage of end to end heat, abandons Allen's mechanical end charging. After the usual manner of German furnaces, holes are put in one of the long sides of the furnace, Daelen's draft shows nine of them, and through them workmen roll over the blocks from the stack to the grate end of the furnace. Indeed, this hand-rolling gives the distinctive name of Rollofen or roll-furnace, to Daelen's device. It will thus be seen that Daelen, instead of contributing a step toward automatic furnaces, was really an abandonment of the mechanical charging which Allen had shown. We would not be understood as belittling what Daelen did, although he himself by suffering his patent to lapse a short time after issue would seem to himself have placed a low estimate upon it, but we are of opinion that Daelen's contribution to the art was in showing automatic furnace-exterior doors placed in vestibules formed on the outside of the charging and exit ends of the furnace, in order to conserve its heat. Without entering into minute details, it suffices to say that, instead of the sliding door then in use at the charging end of the furnace, Daelen makes an opening in the wall just sufficient to admit the charged block. "The opening *F* is almost entirely closed by blocks *C'* and *C''* lying in it on rails *G*," are his words. Outside this stack-end furnace wall he builds his vestibule and instead of, as his patent says, "the heavy sliding door which has to be lifted off each time a block is put in, there is provided at *A* an auxiliary chamber which is separated from the hearth and susceptible of being closed by an automatically closing hinged door *B*. The latter is pushed open by the block *C*, when put in, and after the passage of the block drops again on the horn *D* of the pushing device *E* and closes again when the latter moves back. The opening *F* is almost entirely closed by blocks *C'* and *C''* lying in it on rails *G*. By the introduction of C', C'' is pushed forward a certain distance sufficient to cause it to drop down from *G* upon the hearth *H*, where it is rolled on by hand in the usual manner by means of implements introduced through the doors *J*." In the same way, when the block was rolled on the inclined floor to the other end of the furnace, and obviously to do away with a sliding door at that end, Daelen provided an opening in the furnace end, and, as the patent says:

"In order to do away with the sliding door at this end also, another auxiliary chamber *M* is provided above *K*, which is closed by an automatically hinged door *N*."

From this it will be seen that the significance of Daelen's device was these two vestibules or auxiliary chambers, both separated from the furnace. Such exterior furnace devices had nothing in common with a device like Morgan's, which, as we will see, was an interior furnace device. As a part of the prior art, Daelen threw no light on Morgan's problem of an interior furnace device; and as a foreign publication it had no effect on Morgan's patent because as said in Seymour v. Osborne, 11 Wall. 516, 20 L. Ed. 33, in neither description or drawings was it a substantial representation of Morgan s invention in such full, clear, and exact terms as to enable any persons skilled in the art to

practice such invention. In this state of the art, Morgan disclosed the device of his patent of 1896 in the accompanying sketch:

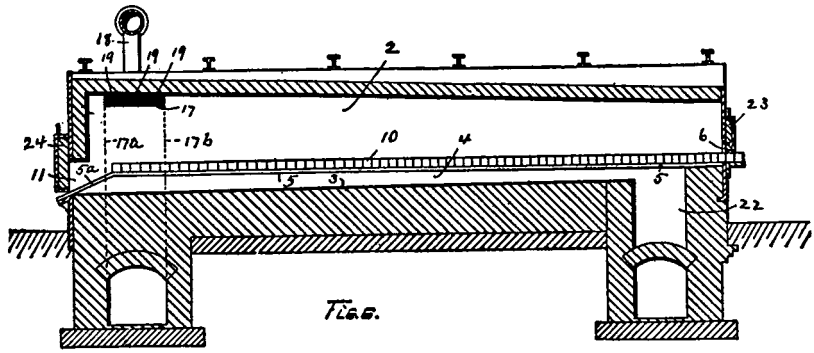


FIG. 6.

This shows an elongated rectangular furnace, in which billets, broadside and in succession, are mechanically fed and pushed forward on elevated, water-cooled, skid pipes, all exactly as the Allen furnace had done for 16 years. Instead, however, of providing, as Allen did, a hearth within the furnace, upon which the billets received their final, sufficient, but not over sufficient, rolling heat, Morgan kept his billets on the skids and pushed them forward through such a zone of heat as they got on the Allen hearth and which is called in his patent the "zone of maximum heat." At this point we then have on the skids a billet, mechanically-charged as was Allen's, but differing from Allen's in that it is, while on the skid track, raised to the desired heat for discharge. In order to automatically discharge such billet without any appreciable loss of heat, Morgan projects upwardly from the discharge door in the front furnace wall, and back into the furnace, an inclined track or chute, the inner apex of which joins the billet-supporting skid pipe in the "zone of maximum heat." When therefore the speed of the pusher and the mixture of air and gas are properly set, the charging of each cold billet at one end of the furnace will automatically, and without manual intervention, deliver to the rolls a properly heated billet at the other. When we consider that we are here dealing with such very high temperatures and such varying and selective stages thereof as are indispensable to the proper heating of the billets for rolling, and that by this device and the proper setting of gas and air supply and of charging speed, this mechanism will automatically both properly heat the 160-odd tons of a 10½ hours' turn, and when so properly heated will mechanically discharge them we can see we have a device that is as wonderful as it is novel. It brought into the art what it had never known, an automatic heating and discharging continuous furnace. The machine has gone into general use; the complainants between them having built some 115 furnaces. As a labor-saving device the proof shows:

It "did away with the men who had to put the billets on the peels with the Siemens furnaces, with the men who had to draw the billets from the hearth of the Siemens furnaces up to the doors of the furnace, and with the tele-

graph men who had to pick up each billet with a pair of tongs and deliver the same to the mill. The result was that, where the average rod-mill with four Siemens furnaces used about 16 or 17 men for the heating furnace crew, we cut this down with our automatic gravity discharge furnaces to not to exceed five men. When I say 'not to exceed five men,' I mean that I have seen mills operated where they only had one heater's helper for two automatic gravity-discharge furnaces, instead of two heater's helpers as most of the mills have for two automatic gravity-discharge furnaces."

As to its money saving, the proof shows that the Oliver Wire Works, in heating wages, saves on a daily product of 350 tons, $105 a day. The proof as to other mills is:

"A. The wages saving would vary with the kind of mill which the furnaces heated billets for. In a rod-mill the cost of heating with the Siemens furnaces was from 40 to 45 cents per ton. When I say 'the cost of heating,' I mean the wages for heating. With our automatic gravity-discharge furnaces the cost of heating for a rod-mill, that is, the wages on these furnaces, is from 12 to 20 cents per ton. I think therefore it is conservative to say that the saving in wages for heating where the furnaces were used for a rod-mill was about 25 cents per ton. In merchant bar mills the saving per ton was somewhat greater, as the wages for heating on these merchant mills was somewhat more than on the rod-mills. I have in mind one plant where they had three Siemens heating furnaces supplying a 12-inch mill with steel, and the wages on these three Siemens furnaces was 68.6 cents per ton. We tore down these three Siemens furnaces and replaced them with one automatic gravity-discharge furnace, the result being that we reduced the wages for heating to about 23 cents per ton, so that in the case of this merchant mill the saving in wages amounted to 45.6 cents per ton. As this merchant mill rolled about 135 tons in 24 hours, this meant a saving of about $60 per day in wages alone, and this saving paid the cost of the installation of the new furnace in about one year's time. I am able to give these figures pretty exactly, as this was the first merchant mill where we induced them to put in the automatic gravity-discharge furnace, and I think this was in about the year 1898."

That the validity of the Morgan patent was recognized in the manufacturing world is shown in the proofs by the large number of the strongest companies that took licenses thereunder. After full consideration, we have reached the conclusion that Morgan's device was novel, useful, and inventive in character, and that the claims here in issue were valid. In that connection we may say that the Laughlin patent No. 582,476, reissue No. 11,666, being subsequent in date of application, in no way affects the scope and validity of Morgan's patent.

We turn next to the question of infringement, and in doing so will take for test Morgan's third claim, which is descriptive generally of his device. That claim is:

"In a furnace for heating ingots or billets, the combination with a heating chamber having openings at opposite ends for the admission and delivery of heated ingots or billets, and an opening for admission of gaseous fuels to said chamber, between its ends, whereby a zone of maximum heat is maintained, of an inclined track extending from said delivery-opening to a point between the charging end of the furnace and a vertical plane passing transversely through said chamber and said fuel-opening, by which a heated ingot or billet is moved by gravity from the zone of maximum heat through said delivery opening, substantially as described."

Study of this patent shows that the gist of the device lies in locating the apex of the discharge incline inside the furnace's zone of maximum heat. Thus the combination of the claim is one "whereby a

zone of maximum heat is maintained," and the apex of the discharge incline is so located that "a heated ingot or billet is moved by gravity from the zone of maximum heat." This is pointedly stated in the specification. After describing the preferred plan of fuel introduction, the patentee says:

"A zone of maximum heat is thereby maintained at the delivery end of the heating chamber and contiguous to the end wall of the chamber with a gradually decreasing temperature toward the entrance end of the chamber."

"Zone" in its ordinary acceptation—temperate, torrid—is a regional word. It implies space, not an imaginary line or point. Indeed, this is shown by the defendant's own proofs. Thus Wellman, an experienced consulting engineer, when asked what was meant by the phrase "zone of maximum heat" in connection with the Morgan type of furnaces, said:

"I should understand that to mean the part of the furnace where the gases in combustion reach their highest temperature."

And in such regional sense is it used in this patent. Thus:

"The billets admitted at the charging end of the furnace are gradually moved along the track *through successive zones of increasing temperature* * * * until the billet reaches the zone of maximum heat, which is either within or approximate to the plane of fuel opening, depending upon the strength and direction of the current of incoming fuel and also upon the strength of the longitudinal current induced by the escape flue at the opposite or charging end of the furnace."

It will likewise be noted that it was also sought to describe it regionally in these words:

"In the furnace shown the gaseous fuel is admitted through the opening *17* and in a plane between the broken lines *17a*, *17b*, Fig. 6, in a current transversely to the heating chamber. As soon as the current is admitted to the heating chamber through the openings *17 17* it is drawn in a longitudinal direction toward the charging end of the furnace, and the zone of maximum heat will be found somewhere between the broken line *17a*, Fig. 6, and the charging end of the furnace, but approximate to the plane of the fuel opening. The space *between* the zone of maximum heat and the delivery opening *forms a zone of greatly reduced heat*, tending to cool the heated billet as it is withdrawn from the furnace and waste the material by oxidation."

It will therefore appear that the zone of maximum heat was a regional furnace space on one side of which were "successive zones of increasing heat" through which the billet came, and on the other side "a zone of greatly reduced heat" through which the billet left. So far therefore as description went, this zone of maximum heat was approximate to the fuel openings plane, and between the "successive zones of increasing heat" and the discharge "zone of greatly reduced heat." It was into this intermediate zone the patentee, and herein lies the gist of his invention, directed the apex of his discharge incline be carried. This is well described by Julian Kennedy, an experienced engineer, who says:

"In heating steel it is very essential that it should not be placed too close to the point where the fuel, especially if it is gas and air, enters the furnace.

"Streams of gas and air introduced into one end of the furnace, at the point where they mingle, do not have a maximum heat, as the gases travel a short

distance before combustion becomes intense, and the highest temperature reached.

"If steel is placed too close to the point where these gases are introduced, not only it does not receive the maximum amount of heat, but the steel itself is liable to be attacked by the oxygen in the air before it has had a chance to thoroughly combine with the carbonaceous fuel in the gas. As is well known, steel at a high heat becomes fuel itself if air comes in contact with it, and is rapidly wasted and burned away.

"This is illustrated very clearly to any one who has seen holes burned through steel by an oxygen blowpipe, or by a pipe conveying highly heated air; and in certain types of furnaces, known as Soaking Pits, it has been found to be very essential that the ports where air and gas mingle, should be kept back at least 24 inches from the sides of the ingot, to avoid burning and wasting away the ingot.

"For this reason, in Continuous Furnaces where the billets have been pushed in from the cold end and fed to the hot end, it has been good practice to withdraw these billets before they reached the other end of the furnace, and in old types of Continuous heating furnaces it has been customary to draw the billets out with tongs through the side of the furnace at some distance from the end where the hot gases are introduced.

"In the patent mentioned in the question, the billets are pushed from the cold end of the furnace toward the hot end of the furnace with a view to discharging them at that end, but to avoid cooling the billet, which would happen if it were pushed clear to the opposite end before being allowed to fall out, the inventor conceived the very happy idea of putting an inclined slope, down which the billets would travel by gravity, at the hot end of the furnace; also carrying the incline back into the furnace to the point where the ingots can be heated without undue waste, and where they will also be in the hot zone of the flame.

"It is manifest on inspection that if these ingots were pushed clear to the end of the furnace, as would be required in a furnace of the prior art, such as that shown in German patent to Daelen, and referred to in the specification of Morgan patent No. 632,020, in order to have it slide out by gravity, the billet would lie for a certain time in a position where the temperature would be considerably below the highest temperature in the furnace, and also where the gases would not have completed combustion; and the oxygen in the incoming air would vigorously attack the billets, causing an extravagant amount of waste.

"In the construction shown in the patent to Morgan, the billets are pushed clear to the point where they can still be in a good hot reducing flame, when a short additional motion causes one billet at a time to slide down the inclined track and out of the door. At the same time, until the billet does start this rapid sliding out from the door, it is back away from the door far enough to protect it from any drafts of air coming through this opening; also, far enough to get it into the hot gases, and far enough away from the end wall of the furnace to protect it from undue radiation. * * *

"The essence of the invention of Morgan is clearly and plainly in arranging a gravity, or automatic, device for quickly taking the billet from the zone of highest heat in the furnace to the outside of the furnace, without allowing it to linger at the end wall, where it would be chilled and possibly oxidized by air accidentally coming in through the crevices around the door left for allowing the bloom to pass out."

The necessity and alleged novelty of thus introducing the apex of the incline within the maximum heat zone is thus set forth in the patent:

"The inclined track *5a* differs from the inclined tracks heretofore used in heating furnaces in that it is placed between the delivery-opening *11*, through which the heated ingots or billets are delivered from the heating chamber and the zone of maximum heat, so that gravity is made to act upon the heated billet at the time when the ingot or billet has become sufficiently heated by its passage through the zone of maximum heat in order to accelerate its motion

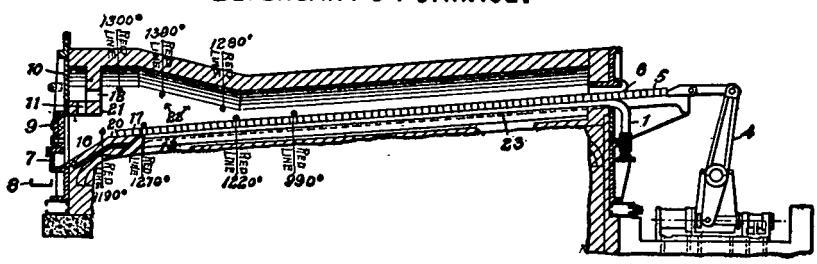
through the space intervening between the zone of maximum heat and the delivery-opening *11* and secure the automatic delivery of the ingot or billet, whereas the inclined section of track in prior furnaces was either placed in front of the zone of maximum heat and served to carry the ingot or billet into the zone of maximum heat and deliver it upon a hearth from which it was withdrawn by an endwise movement by hand, or else it was placed entirely outside the heating chamber and served as an inclined conduit to convey the heated metal from the delivery-opening of the heating chamber to a receptable or a conveyor placed at a considerably lower level than the delivery opening of the heating chamber and leaving a considerable space between the inclined track and the zone of maximum heat through which the heated ingot or billet was moved by the attendant."

It will therefore appear both from the patent, and from the foregoing proof of the heat produced by combining air and gas, that the maximum heat of a chamber, such as Morgan showed, will be produced and in the third claim is aptly described as "a point between the charging end of the furnace and a vertical plane passing transversely through said chamber and said fuel opening." But such language is merely a descriptive aid to relatively localizing the zone of maximum heat and is not a limitation to an admission of the gas from the sides of the furnace. For the patentee says:

"I have described what I consider the most desirable means for maintaining a zone of maximum heat contiguous to the wall of the furnace at the delivery end of the heating chamber, comprising opposing side openings for transverse currents of gaseous fuel and inclined roof surfaces; but I do not wish to confine myself to the specific means described, as the same may be modified and still come within the scope of my claims."

Indeed, a study of the file wrapper shows that the insistence of the office was to find some language to locate relatively the zone when produced. It follows therefore that language inserted for that purpose should be read with that object in view, not as a restriction to the particular form of mechanical path by which the fuel traveled to reach that zone. Thermally the significance of Morgan's device was the maximum heat zone, no matter how created; mechanically it was abstracting the billet from such zone by an inclined, intra-furnace, intra-zone incline. Such being the crux of his invention and such the mode in which he taught the art to practice it, we next inquire whether the defendant has also made use of Morgan's inventive disclosure; in other words, has it a zone of maximum heat and an incline-discharge from within that zone? The accompanying sketch of defendant's furnace shows the elongated, rectangular structure having a stack-end delivery of broad side billets by a mechanical charger:

DEFENDANT'S FURNACE.



In the other end wall is a subfloor, discharge-opening from which an incline *16* reaches to the discharging end of the inclined water-cooled skid pipe path down which the charged billets successively move. It is plain therefore that the defendants' mechanical arrangements are functionally adapted to effect an automatic discharge of a continuous succession of billets such as Morgan showed. Such being its mechanical, billet-handling devices, we next inquire whether the defendants so introduce their fuel as to make it possible to create their zone of maximum heat so as to regionally embrace the junction of the floor track and the incline. That there will of necessity be a zone of maximum heat in a rectangular furnace where the fuel is introduced at one end and a stack is at the other goes without saying. The proofs show that this zone location may be measurably controlled. As already stated in the testimony of Kennedy, the commingling of air and gas to produce the highest heat can only take place at some distance from the openings through which they separately enter the chamber. Consequently such hottest zone must necessarily be located at some appreciable distance from the end wall of the furnace. The testimony of Wellman shows the possibility of manipulation in measurably shifting the zone of maximum heat. In that regard he says:

"The exact point of highest temperature would be very hard to determine, depending altogether on the manipulation of the gas and air, and chimney damper, by the heater in attendance."

Laughlin calls attention to the distinction between the point and the zone of maximum heat thus:

"The point of highest heat would constantly vary in a furnace depending upon the amount of fuel introduced, the amount of draft, and the speed with which the billets were pushed through the furnace, but there is always a zone of maximum heat, and while the temperature in the different parts of the zone may vary 50°, 80°, 100°, or even more, it is a fact that the lowest temperature in this zone is a high enough heat to keep the billets hot enough for rolling."

And the practical inability to precisely and invariably define and locate the highest point of heat was recognized by the patent authorities, for the patent, as heretofore quoted, itself says that it is dependent "upon the strength and direction of the incoming fuel, and also upon the strength of the longitudinal current induced by the escape flue at the opposite or discharging end of the furnace."

Seeing, then, that this furnace of defendants was adapted to and did create a zone of maximum heat, we next inquire: At what point would they, in practical manufacturing, desire to locate and use it? Assuming they could locate it so far toward the stack end that the billet could pass through a cooler zone in its progress beyond, we are pointed to no benefit to be derived from such a reckless fuel waste as needlessly superheating and then injuriously cooling the billets. Common sense suggests that the maximum heat zone would in the nature of things be removed as far as possible from the stack end of the furnace. In moving therefore the zone of maximum heat nearer the other end of the furnace, it is clear that, with its location there, instant discharge must be made for two reasons: First, economically, because it is no advantage to raise the billet to the high heat of 2000°

Fahrenheit unless you plan to instantaneously take advantage of that heat; and, second, metallurgically, because if the billet be allowed to fall in temperature, which it does rapidly, "the oxygen in the incoming air would," as we have seen in the proofs quoted, "vigorously attack the billets, causing an extravagant amount of waste." Moreover, if the defendants did not plan their furnace in order to discharge from the zone of maximum heat they could have avoided all possible charge of infringement by simply carrying its billet track through to the end wall and discharging into an incline without the wall as Daelen did. Their persistence in locating their incline within the furnace, and thus inviting litigation, shows that such intra-wall incline location was with the purpose of obtaining intra-maximum zone discharge. And that the two furnaces and their operation is practically the same is shown by the proofs, wherein Wellman, called by the defendants, with a frankness that is commendable, says:

"As I understand it both of these furnaces have the same method of introducing the billet, and the same method of discharging the same. The main difference that I see is in the method of introducing the fuel. In the Morgan patent the fuel is introduced through the sides of the furnace close to the discharge end, while in the defendants' furnace the fuel is introduced through openings in the end of the furnace."

The end-fuel introduction of defendant here referred to appears by reference to the sketch wherein gas ports *9* are located in the end wall immediately above the discharge door. Above these gas ports the end wall is thickened to form an inwardly jutting lintel *21* which contains a chamber *10,* into this chamber air is introduced under pressure and from it is projected downwardly through ports *11* into the furnace to mingle with the inflowing gas. The testimony varies as to where the most acute combustion occurs. Wellman admits that "the exact point of highest temperature would be very hard to determine," but says in his judgment in the Morgan Case (and we assume this he would apply to defendants' furnace) it "would be at a point between the point of entrance of the gas and the outlet of the same; probably at a point about 25 per cent. of that distance." McMillan, an experienced engineer called by plaintiff, admits the inability of any one to fix the point of complete combustion, that the zone of such combustion might be three or four feet and longer and shorter, depending on the amount of gas that was being fed. His conclusion was that "there is a certain zone at the discharging end of the furnace at which you must obtain or attain a rolling heat," and says that the point in defendants' furnace where complete combustion is affected is about the position occupied by arch *21* and that between *21* and a point he marks at *22* is the zone of maximum heat.

Bearing in mind that this patent is addressed, not to an exact point of maximum heat, but to a zone of maximum heat, we are of opinion the temperatures taken by defendants and shown by red lines on the sketch clearly show the meeting place of the floor track and discharge incline is within the required zone of maximum heat. Beginning near the end of arch *21,* where McMillan says complete combustion takes place, and a point on the incline of the slide, the defendants' heat tests show a heat of 1190° centigrade, or 2170° Fahrenheit. Their next

measurement, which is beyond the junction and toward the stack end, is 1270° centigrade or 2320° Fahrenheit. This difference of 80° centigrade, when these high temperatures are in question, is not proportionately great when the zone is considered horizontally. Indeed, we find substantially the same difference between the bottom and the top of cross-sections of the zone, namely, 1300° and 1380° centigrade at the top as compared with 1270° centigrade below. Without further entering into detail, we have reached the conclusion that by the zone of maximum heat there is meant a regional section of the furnace, and that in both plaintiffs' and defendants' furnaces the billets, while being subjected to such maximum heat in such zones, are discharged by an incline which reaches within such zone. In that regard we agree with defendants' witness, whose testimony was:

"Q. The furnace of the Morgan patent and furnace of the Laughlin and Reuleux patent are intended to operate and do operate in charging, heating, and discharging the billets in substantially the same way, if I understand it correctly; is that so? A. That is right as I understand it. Q. And the defendants' furnace also? A. Yes."

The decree below will therefore be reversed, and the case remanded, with instructions to enter a decree holding claims 3, 4, 5, 6, and 7 valid and infringed.

NATIONAL CASH REGISTER CO. v. GRATIGNY.

GRATIGNY v. NATIONAL CASH REGISTER CO.

(Circuit Court of Appeals, Sixth Circuit. May 5, 1914.)

Nos. 2388, 2435.

1. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—CASH REGISTER.
The Ehrlich patent, No. 560,089, for a cash register, claim 18, *held* void, as too broad, in view of the prior art; also, construed as to claims 1, 2, 19, 24, 25, 36, and 37, *held* not infringed.

2. PATENTS (§ 246*)—INFRINGEMENT—COMBINATION CLAIMS.
A claim for a combination is not infringed, if any one of the elements is omitted without substitution of an equivalent.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 387; Dec. Dig. § 246.*]

3. PATENTS (§ 165*)—CONSTRUCTION—LIMITATION OF CLAIMS.
An element should not be read into a claim for the purpose of narrowing it, as against an objection that it is too broad in view of the prior art.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 241; Dec. Dig. § 165.*]

4. PATENTS (§ 312*)—SUIT FOR INFRINGEMENT—EVIDENCE—UNCERTIFIED COPIES OF PATENTS.
Uncertified copies of patents are not admissible in evidence in an infringement suit, and where introduced in the examination of witnesses may properly be stricken from the record.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 544–549; Dec. Dig. § 312.*]

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

5. PATENTS (§ 325*)—SUIT FOR INFRINGEMENT—COSTS.

In an infringement suit, where a party extends the cross-examination of his adversary's witnesses beyond legitimate limits, the court may properly take such fact into account in taxing the costs.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 607–612; Dec. Dig. § 325.*]

Appeals from the District Court of the United States for the Southern District of Ohio; John E. Sater, Judge.

Suit in equity by the National Cash Register Company against Jerome T. Gratigny. From the decree, both parties appeal. Affirmed.

Edward Rector, of Chicago, Ill., for complainant.

P. A. Staley and Border Bowman, both of Springfield, Ohio, for defendant.

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

KNAPPEN, Circuit Judge. Suit for infringement of Ehrlich patent, No. 560,089, May 12, 1896, for cash register, indicator, and check-printer. Defendant is sued as a user of a Hallwood cash register. The District Court dismissed the bill for lack of infringement, and appeal is taken from that decree. Defendant also appeals from an order hereafter referred to.

[1] The Ehrlich device, broadly speaking (and disregarding the registering and printing mechanism), embraces an oscillatory rotatable horizontal cylinder operated by a "motor" in the form of a coiled spring and connecting shaft. This cylinder operates by means of a bevel-gear, an upright shaft having upon its upper end a sleeve carrying an indicator wheel; the wheel and shaft being capable of turning independently of each other. The cylinder is held in initial position by a detent. The indicator bears numbers on its periphery, each number corresponding to a key in the form of a push-pin upon the face of the lower part of the machine-frame. The depression of any one of this series of keys directly releases the motor-detent and allows the cylinder to turn under the influence of the motor-spring, until arrested by one of a series of stop-pins upon the cylinder surface contacting with the end of the depressed push-pin. The movement of the cylinder also produces a rotation of the indicator sufficient to bring into view, through an opening in the machine case, the number corresponding to the key depressed. The same operation of any one of this series of keys releases the cash drawer, the closing of which rewinds the motor-spring, restores the motor and cylinder to their original position, releases the previously depressed key, and restores it to its normal position for another operation. The claims sued upon are Nos. 1, 2, 18, 19, 24, 25, 36, and 37. Claim 1 is as follows:

"1. The combination of a motor, an oscillatory member actuated thereby, means for holding the motor in check, a series of keys controlling said means and co-operating with the oscillatory member to arrest the latter at different points [whereby upon operating any key in the series the motor will be released and the oscillatory member moved by it until arrested by the operated key] and (means for restoring said member to initial position and winding up the motor)."

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

Claim 2 differs from claim 1 in omitting the bracketed portion above, and in place of the words in parenthesis substituting "a money drawer and connections for restoring the oscillatory member to initial position and winding up the motor." Claims 19, 36, and 37 each include a detent for holding the motor in check, and a series of keys controlling the detent.

Defendant's machine differs from the Ehrlich device in several respects. Instead of one indicator, it has four indicators, each of which is actuated by its own separate mechanism and bears its own series of figures; each number on which is represented by its own separate key, likewise in the form of a push-pin. The actuating mechanism for each indicator embraces a notched or shouldered segment (oscillating) mounted on a horizontal shaft. The motor consists of a weighted frame attached to the shaft and operated by gravity, slightly aided by coiled springs. The depression of any one of a series of push-keys releases a hook from engagement with a projection on the lower part of the segment, and interposes the appropriate pin in the path of one of the shoulders thereon. It has, however, no effect upon releasing the motor and does not advance the segment which actuates the indicator. Such release is effected only by depressing a key entirely separate and independent from the series of keys referred to, whereby a detent which holds the drawer in its closed position is released, the motor being thereby released and advancing the segment until its shoulder contacts with the appropriate push-pin. The closing of the money drawer winds up, or restores, the motor and withdraws the push-key from its depressed position. It will thus be seen that defendant's machine entirely lacks the element of a motor-detent controlled by a series of keys, the depression of any one of which moves the indicator, as the direct result of the releasing of the motor-detent. This feature is one of the prominent elements of the Ehrlich device. The specification says:

"The motive power of the machine is a coiled spring, which is wound up by the closing of the money-drawer. This motor is held in check by a detent which is controlled by a series of keys. When any one of said keys is operated, the motor is released and moves the indicator, register, and type-wheel distances corresponding to the value of such key to indicate and register such value and set the type-wheel to print it."

[2] This method of key control is not given as a preferred form. A claim for combination is not infringed if any one of the elements is omitted without substitution of an equivalent. Cimiotti Unhairing Co. v. Amer. Fur. Ref. Co., 198 U. S. 399, 410, 25 Sup. Ct. 697, 49 L. Ed. 1100; Union Paper Bag Mach. Co. v. Advance Bag Co. (C. C. A. 6th Cir.) 194 Fed. 126, 138, 114 C. C. A. 204. Whether defendant's machine infringes the claims under consideration thus depends on whether the detent-releasing mechanism of defendant's machine is the equivalent of Ehrlich's mechanism; and this question in turn depends upon the state of the art prior to Ehrlich, and the advance made by him. Paper Bag Patent Case, 210 U. S. 405, 415, 28 Sup. Ct. 748, 52 L. Ed. 1122; W. W. Sly Mfg. Co. v. Russell (C. C. A. 6th Cir.) 189 Fed. 61, 67, 110 C. C. A. 625.

In our opinion, Ehrlich's advance was not such as to make defendant's detent-mechanism the equivalent of Ehrlich's. The latter was not a pioneer in the cash-register art. The prior patents introduced by defendant were, by the decree below, stricken from the record because uncertified; but it appears by the testimony of one of complainant's experts that the device of one of the Longacre patents, which preceded Ehrlich's by about 9 years, contains elements severally answering to the names of all the members recited in claims 1, 2, 36, and 37 of the Ehrlich patent, although, the witness says, the Longacre patent "does not contain the same elements throughout, and does not contain the combination of elements" defined in claims 1 and 2 (and inferentially, in claims 36 and 37) of the Ehrlich patent. The witness admits, for example, that in the Longacre patent are found a motor, an oscillatory member actuated thereby, means for holding the motor in check, a series of keys controlling these means and co-operating with the oscillatory member to arrest the latter at definite points, so that upon operating any key in the series the motor is released and the oscillatory member moved until arrested by the operating key, as well as means for returning the member to its initial position and winding up the motor. He also concedes that the Longacre patent has a "duplication or multiplication of indicators, oscillatory members, and series of keys, in which respect it is followed by defendant's machine, while the Ehrlich shows only one set of these general devices and is of more limited capacity." While one of complainant's experts characterizes the Longacre indicator as reciprocating, he properly concedes that a reciprocating and an oscillating indicator are mechanical equivalents.

Claim 24 is as follows:

"24. The combination, in a cash-indicator, of an oscillatory indicator, a main motor-spring for turning it in one direction, a weaker spring for resetting it, which is put under tension when the indicator is moved by the main motor-spring, a series of keys for determining the movements of the indicator under the influence of the motor-spring, and means controlled by the keys for temporarily holding it in position to which it may be moved by the motor-spring, substantially as described."

Claim 25 differs in no respect material for present purposes, except that it includes "a money drawer and connections for winding up the motor-spring."

In Ehrlich's device the indicating mechanism was held in position from the time of a given sale (so as to show the amount thereof) until the next succeeding sale, by means of a pawl engaging the teeth of the ratchet wheel upon the sleeve of the upright shaft before referred to. Upon the operation of any one of the series of keys, to make a different indication, the indicator was released and returned to its zero position, from which it was again moved to a position making the new indication. In defendant's machine the indicator is held in position, following a given sale, by means of a detent which, by the closing of the money drawer, was made to engage the teeth of a rackbar, whose upper end engages a pinion wheel on the indicator shaft. The depressing of one or more of the series of indicator keys, in connection with a new indication, has no effect in releasing the indicator-holding means. Such release is effected only by the op-

eration of the gravity and spring motor operating the segment before mentioned, following the actuating of such motor by the depression of a separate and independent key releasing the money drawer and motor-detent. If, therefore, we are right in the view that claims 1, 2, 19, 36, and 37 are not infringed, because of the lack of direct motor control through the operation of one or more of a series of indicator keys, it is even more clear that defendant's indicator-holding mechanism does not infringe the device disclosed in claims 24 and 25 of the Ehrlich patent.

Claim 18 is as follows:

"18. In a cash-indicator, having a money-drawer, the combination of an oscillatory indicator, a motor for actuating the same, connections with the drawer for winding up the motor, and a series of keys for determining the movements of the indicator when under the influence of the motor, substantially as described."

It will be noted that this claim not only omits the reference to a key-controlled detent, but also (as is true of some of the other claims) is confined to the indicating mechanism. It will also be noted that, unlike some of the other claims we have considered, claim 18 wholly omits provision for holding the indicator in any given position, for its release, or for giving it reverse rotation. So far as concerns Ehrlich's indicating mechanism, its only novelty lies in the feature that the indicator will stay where it is, unaffected by the winding up of the motor, because the indicator is separable from the cylinder actuated by the motor. In other words, in view of the prior art, and especially Longacre, there was no novelty in an indicating mechanism comprising merely an oscillatory indicator, its actuating motor wound up by the money drawer, and keys for determining the movements of the indicator.

[3] Unless, therefore, as complainant contends should be done, the provision referred to can be read into the claim as one of its elements, it is too broad to be valid. We think the case is within the general rule that an element should not be read into a claim for the purpose of narrowing it, and thus making it valid as against an objection that it is too broad in view of the prior art. McCarty v. Railroad Co., 160 U. S. 110, 116, 16 Sup. Ct. 240, 40 L. Ed. 358; Stearns & Co. v. Russell (C. C. A. 6th Cir.) 85 Fed. 218, 224, 29 C. C. A. 121; Scaife v. Falls City Woolen Mills Co. (C. C. A. 6th Cir.) 209 Fed. 210, 213, 126 C. C. A. 304.

It follows from these views that the District Court rightly dismissed the bill of complaint.

Defendant's appeal is from an order made upon final hearing (a) striking from the record, because uncertified, certain copies of letters patent introduced by defendant upon cross-examination of complainant's witness, together with a sketch based upon and relating to two of said patent exhibits; and (b) awarding to complainant one-third of the examiner's fees for taking complainant's depositions and one-third of the cost of printing the record.

[4, 5] The patent copies, being uncertified, were not legally admissible. It would have been entirely proper to give defendant opportunity to replace these copies by others duly authenticated. But such

request was not made, and the motion to strike out was pending for several years. We think the court was warranted, under the circumstances, in excluding the copies; and the same considerations apply to the exclusion of the sketch. Defendant produced no witnesses; his examination of complainant's witnesses went to a considerable extent beyond the legitimate exercise of cross-examination as recognized in the federal courts. It was proper for the court to take this fact into account in the apportionment of the costs of taking testimony; and we cannot say that the award of one-third was excessive.

A rule of court seems to have provided for the printing of the record and the taxation of such expense in the costs, either upon stipulation or by order of the court. The record does not purport to be complete; and in the absence of affirmative evidence to the contrary, we should assume that the printing was authorized. This item is thus governed by the same considerations which apply to the taking of the testimony.

The order in question is accordingly affirmed, with costs, as is the decree dismissing complainant's bill.

STAFFORD CO. v. COLDWELL-GILDARD CO. et al.

(Circuit Court of Appeals, First Circuit. May 1, 1914. Rehearing Denied June 10, 1914.)

No. 1039.

PATENTS (§ 328*)—REISSUE PATENTS—VALIDITY.

Claim 23 of the Coldwell-Gildard reissue patent No. 11,923 for a warp stop motion for looms, *held* valid, and claim 25 invalid, as not for the same invention disclosed in the original patent No. 637,234. See 202 Fed. 744, 121 C. C. A. 110.

Appeal from the District Court of the United States for the District of Massachusetts; Arthur L. Brown, Judge.

Suit by the Coldwell-Gildard Company and others against the Stafford Company, for infringement of reissue patent No. 11,923 (original No. 637,234), granted to Coldwell-Gildard for a warp stop motion for looms. From a decree for complainants (205 Fed. 929), defendant appeals. Affirmed in part, and reversed in part.

Wilmarth H. Thurston, of Providence, R. I., and Benjamin Phillips, of Boston, Mass., for appellant.

William K. Richardson, of Boston, Mass. (J. L. Stackpole, of Boston, Mass., on the brief), for appellees.

Before PUTNAM, DODGE, and BINGHAM, Circuit Judges.

PUTNAM, Circuit Judge. The general circumstances of the case are sufficiently shown in our opinion passed down on January 30, 1913, 202 Fed. 744, 121 C. C. A. 110. The judgment there was as follows:

"The decree of the District Court is reversed, and the case is remanded to that court for proceedings in accordance with our opinion passed down the 30th day of January, 1913; and the appellant recovers its costs of appeal."

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

On the proceedings after the mandate the District Court entered a new interlocutory decree in favor of the complainants on claims 23 and 25, and thereupon the respondent appealed again. The respondent made a full contest in the District Court, one subject of which was that the case was to be completely reopened, and that the parties were to have the right to take further evidence for the purpose of proving invalidity of the claims now in question with others, and of showing that they were not infringed. This proposition was refused by the District Court, in which that court was right, because there was nothing in the opinion of this court, or in the mandate, which provided for the reopening of the record. Two questions were qualifiedly reserved, it is true; one whether the claims in suit, other than claims 19 and 23, were properly brought in by reissue, and were anticipated or infringed, and the other whether claim 23 was anticipated or infringed, although our opinion was that its nature was of such a character that:

"It was almost beyond belief that anticipation could be found on this record."

The parties had full hearing before the entry of the original interlocutory decree. When the decree was entered the bill had been pending from February 9, 1910, to June 27, 1912, and there had been full opportunity for the proofs of both parties; and those proofs had been taken and fully heard, and there was no reason whatever for presuming that the record was not complete. Moreover, no suggestions were made to us that it was not complete; and, if there had been any doubt that the case would not follow the usual course which results from the hypothesis that the record in equity is complete, the words, "on this record," limited the authorized investigations by the District Court to the record as it then stood, all in accordance with the ordinary rule. It follows, of course, that there was the same implied limitation on the investigation of the question of infringement.

In our first opinion we pointed out that the patent was originally for a patented drop-bar, and particularly for a stop-motion combination, while one of the main elements of some of the reissue claims, 19 to the end, was broadly the avoiding of chafing, and that there was nothing in the original patent showing that the matter of chafing broadly was within its scope. At the present hearing, the respondent took up this matter in the following language:

"In the original patent there was no claim directed to the matter of non-chafing, and there was no attempt whatever to claim anything which had to do with the avoidance of chafing. In fact, there was not the slightest indication or suggestion that the patentees had made any invention which had to do in any way with the matter of non-chafing."

The respondent, however, previously observed that:

"The inventive thought, or idea, of the new claims of the reissue consists simply of a certain location or position of the drop-bars with relation to the warp-threads, and the other parts," "whereby chafing of the warp-threads by the drop-bars is supposed to be avoided or reduced."

Our first opinion was based on the supposition that this proposition was true in the main; and we did not find in claim 23 broadly the inventive idea of non-chafing. We did not particularly examine the other claims in the patent; and we left that examination to the District Court, and that court appears to be of the opinion that, in this respect, claim 25, and only 25, stands the same as claim 23.

On this stage of the case the exposition by the respondent is very full and acute, and contains many propositions. It is difficult to meet them all, standing separately from the main purpose of our first opinion. The respondent, however, constantly animadverts upon the proposition that the District Court has not found, or directly stated, that claim 25 is no broader than claim 23. It may be true that the District Court made no express statement to that effect, but the result of what the District Court decided was that it must have found as we directed in our first opinion, although it appears by implication rather than by express statement. There can be no doubt that the District Court so found.

The respondent, however, insists and reiterates that claim 25 should, like claim 19, be held to be an improper reissue; and it closes its arguments with reference to this point, that claim 25 is substantially broader than claim 23. Whether or not it *is* broader depends upon the point of view. The point of view from which we regarded this case related to bringing forward the non-chafing element broadly; and, whether or not a claim is broader than claim 23, has reference to that point of view.

With regard to infringement of claim 23, we refer again to the statement, made in our first opinion, that the parties agreed that claim 23 substantially represented in detail the method of the patentee. Also, the question of infringement seems to be covered by the following admission of the respondent, namely:

"If claim 23 is to be construed exactly as it reads, and is to be given the meaning and scope which appears upon its face, the defendants' arrangement apparently comes within said claim. It would seem, however, from several statements in the opinion, that this court considered that claim 23 was to be so construed, and was to be given such a limited scope, that the defendant's arrangement did not, or at least might not, infringe said claim."

We know of no reason why the claim should not be construed as it reads, nor do we remember anything which justifies any other impression that could be properly gathered from anything we have said.

It is true that the District Court was left free to re-examine claim 23, if it found sufficient cause, both on the question of infringement and on the question of anticipation. But, as the case has come back to us, nothing is presented upon either question concerning this claim which we have not already considered.

As to claim 25, we find ourselves unable to adopt the conclusion reached by the District Court. It does not seem to us satisfactorily shown that claim 25 is fairly capable only of a construction which would not make it "substantially broader" than claim 23, in the sense intended by our former opinion.

The result is that the decree appealed from is affirmed as to claim 23, but not as to claim 25.

The second interlocutory decree of the District Court is modified by affirming it only so far as it concerns claim 23, and reversing it so far as it concerns claim 25, and it is affirmed as modified; and neither party recovers any costs on this appeal.

HORTON MFG. CO. v. WHITE LILY MFG. CO.

(Circuit Court of Appeals, Seventh Circuit. November 19, 1913.)

No. 1995.

1. PATENTS (§ 167*)—SCOPE—FEATURES NOT CLAIMED.
   If the mechanism described in a patent in itself discloses the principal advantageous feature of the invention, it is not necessary that it should be claimed in specific terms.
   [Ed. Note.—For other cases, see Patents, Cent. Dig. § 243; Dec. Dig. § 167.*]

2. PATENTS (§ 64*)—ANTICIPATION—PENDING APPLICATIONS BY PATENTEE.
   For the purposes of anticipation by another patent the date of issue controls, and a claim of the principal feature of the invention covered by a patent by the patentee in prior applications, which were still pending when such patent issued, does not constitute an anticipation.
   [Ed. Note.—For other cases, see Patents, Cent. Dig. § 79; Dec. Dig. § 64.*]

3. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—GEARING FOR WASHING MACHINE.
   The Victor patent, No. 863,120, for gearing for washing machines, the principal feature of which is the relieving of the tub cover of the load of the operating mechanism, and thus reducing its weight when raised to a negligible quantity, was not anticipated, and discloses patentable invention; also *held* infringed by the device of the Van Wormer patent, No. 939,645.

4. PATENTS (§ 167*)—CONSTRUCTION—SCOPE.
   The scope of a patent must be ascertained from the entire instrument, and, although a claim cannot be enlarged by the language of the specification, it may be illustrated thereby.
   [Ed. Note.—For other cases, see Patents, Cent. Dig. § 243; Dec. Dig. § 167.*]

5. PATENTS (§ 324*)—SUIT FOR INFRINGEMENT—MOTION TO STRIKE OUT EVIDENCE.
   A motion in an infringement suit to strike out evidence not pertinent to the issues contested on final hearing, at complainant's costs, is addressed to the discretion of the trial court, and cannot be entertained by an appellate court.
   [Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 600–606; Dec. Dig. § 324.*]

Appeal from the District Court of the United States for the District of Indiana; Albert B. Anderson, Judge.

In Equity. Suit by the White Lily Manufacturing Company against the Horton Manufacturing Company. Decree for complainant, and defendant appeals. Affirmed.

Appellee brought suit for infringement of its patent, No. 863,120, granted to A. F. Victor on August 13, 1907, on application filed May 29, 1907, for im-

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

provements in gearing for washing machines. Validity and infringement were decreed by the District Court.

The device of the patent employs the ordinary well-known means for obtaining oscillatory or rotary and reciprocal movement of the dolly or stirrer shaft. The patentee says: "The object of my invention is to utilize the momentum of a fly-wheel to assist in the operation of the lever by which said stirrer shaft mechanism is actuated." The patent in suit locates the lever, gear wheel, and fly-wheel upon a supporting plate at the side of the tub. On April 6, 1907, the same patentee had filed two applications, and on March 6, 1907, another application, all covering the same idea, wherein the fly and gear wheels were located under the tub. Patents were issued upon these on May 5, August 11, and 25, respectively, 1908. In all of them only the driving and stirrer shafts are carried upon the lid. The several devices thus provide means whereby the lid may be lifted without much effort and without interrupting the impetus of the fly-wheel. At the convenience of the operator the lid may be again lowered into meshing connection with the rack upon the lever, and thereby resume the connection with the fly-wheel's stored up momentum. All the elements of the device are old, even the location on the side of the tub, as in Shaffer patent, No. 657,838, of September 11, 1900, so that whatever of invention exists must be found in the combination and relative location of the parts to each other.

It was old to employ fly-wheels and speeding up gears in connection with the operation of wash tubs. Ruthven in 1900 and 1904, and Christensen in February, 1907, and others, had applied this well-known means of supplying power, to the wash-tub art. While the patentee claims invention in other details of his arrangement of the parts, he rests his claim to invention mainly upon the fact that the lid of the tub is relieved of the heavy load imposed upon it by the prior art devices, and upon the provision for a so-called line of cleavage, brought about by the fact that the meshing of the spur on the outer end of the drive shaft with the segmental-rack upon the lever handle is such that by the mere raising of the lid the two are thrown out of mesh and again brought into mesh by the lowering of the lid. Thus all that the operator has to lift is the lid of the tub, the stirrer shaft and the horizontal driving shaft. By this means the movement and momentum of the rest of the gearing, including that of the fly-wheel, is not suspended or the headway lost.

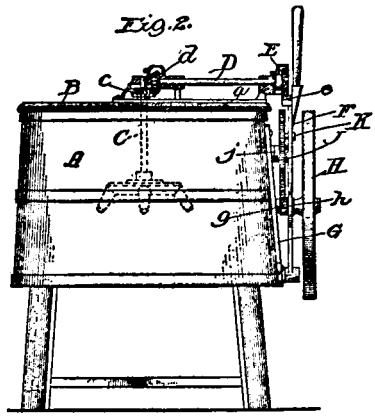
Concerning his device the patentee (lines 26 to 71 inclusive) says:

"In the drawings *A* represents a circular or other suitably shaped tub, supported by legs, and having a cover *B* closing its top, that is hinged to the straight edge of a permanent strip *b*.

"A vertical stirrer shaft *C* is journaled in the center of the cover, having its lower portion, extending into the tub, provided with a suitable stirrer-head (shown in dotted lines in Fig. 2 of the drawings), and the portion above the cover provided with beveled pinion *c*, that is engaged by a beveled gear *d* on the adjacent end of a horizontally disposed drive-shaft *D*, which latter is journaled in standards secured to and arising from the screw-plate of the supporting-frame *a*. Shaft *D* extends beyond the edge of the cover a short distance, and is provided with a spur-gear *E*, the lowest segment of which, when the cover is down, is engaged by a segmental-rack *e*, that is secured to and made integral with a vertically disposed lever *F*. Lever *F* is fulcrumed at its lower end, near the bottom edge of the tub, to a vertically elongated supporting-plate *G*, which latter, preferably, just below its center of height, is provided with an outwardly projecting bearing-stud *g*, on which is journaled a fly-wheel *H* of sufficient diameter, substantially as shown. The inner end of the boss of this fly-wheel is elongated and provided with a pinion *h*, which is, preferably, integral therewith. Between the top of the tub and said stud *g*, supporting-plate *G* is provided with another outwardly projecting bearing-stud *j*, upon which a large gear *J* is journaled. This gear is actuated by the lever *F*, and is adapted to engage the pinion *h* and revolve the fly-wheel at a comparatively high speed. In order to enable said lever to actuate gear *J*, I provide the lever with a vertically elongated slot *k*, and provide gear *J* with a wrist-pin *K*, which projects outwardly from one of its arms, through the said slot *k*. The slot *k* is of a length corresponding to the diameter of the

perimeter of the wrist-pin, and as said lever is moved back and forth it, through the medium of said wrist-pin, revolves the gear *J*. In order to avoid interference with pinion *h*, I provide the lever, below said slot, with a transversely elongated open frame *M*. The longitudinal sides of this frame are, preferably, struck from the center of the fulcrum of the lever, and are sufficiently far apart to clear the said pinion *h* as the lever is moved back and forth."

Figure 2 of the drawings is as follows, viz.:



The four claims of the patent here in suit read as follows:

"1. In a mechanical movement for washing machines, a vertical rotary reciprocal stirrer-shaft, a rotary reciprocal drive-shaft the axis of which is at an angle thereto, and a pinion at the end thereof opposite said stirrer-shaft, in combination with a vertically disposed lever of the second class, a segmental-rack carried thereby and engaging said pinion, a fly-wheel the axle of which is parallel to that of said drive-shaft and means for transmitting the motion of said lever to said fly-wheel.

"2. In a mechanical movement for washing machines, a vertical rotary stirrer-shaft, and a horizontally disposed drive-shaft connected to the same, in combination with a vertically disposed lever of the second class actuating said drive-shaft, a fly-wheel the axis of which is parallel to that of said drive-shaft, and means for transmitting the motion of said lever to said fly-wheel.

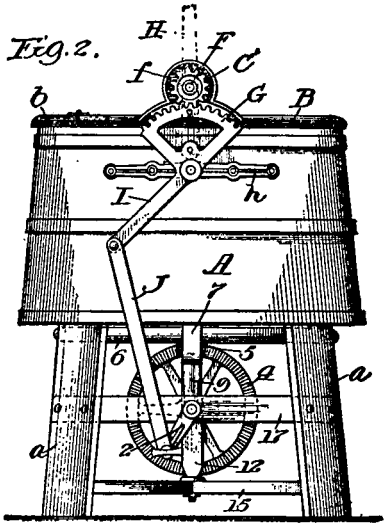
"3. In a mechanical movement for washing machines, a vertical rotary reciprocal stirrer-shaft, a rotary reciprocal drive-shaft, the axis of which is at an angle thereto, and a pinion at the end thereof opposite said stirrer-shaft, in combination with a vertically disposed lever of the second class, a segmental-rack carried thereby and engaging said pinion, a fly-wheel the axis of which is parallel to that of said drive-shaft, and a gear the axis of which is parallel to that of said fly-wheel for transmitting the motion of said lever to said fly-wheel.

"4. In a mechanical movement for washing machines, a vertical rotary stirrer-shaft, and a horizontally disposed drive-shaft connected to the same, in combination with a vertically disposed lever of the second class actuating said drive-shaft, a fly-wheel the axis of which is parallel to that of said drive-shaft, a gear the axis of which is parallel to that of said fly-wheel for transmitting the motion of said lever to said fly-wheel."

It will be noted that the patentee nowhere enumerates the "line of cleavage," so-called, as one of the advantages, and the chief one, which his device in suit presents. He lays particular stress upon the service of the fly-wheel in the specification. It was only in his rebuttal that appellee's expert developed the theory or feature of the line of cleavage. In his patent No. 887,022, granted May 5, 1908, the operation of lifting out of and restoring the driving shaft gear to mesh with the rack or segmental gear upon the lever is described at lines 61 to 62, col. 1, p. 2. In a letter written May 18, 1907, by the patentee to appellee he refers to his device as "the only washing machine in the world that will open or close with the mechanism running at full speed." This was prior to the filing of the application for the patent in suit. Some time during January, 1907, the patentee disclosed the device to the secretary of appellee, who directed him to proceed to manufacture a wash-tub device in accordance with the sketches. The exhibit "white flyer," later termed "white washer," made some time in January or February, 1907, wherein the fly-wheel is located under the tub, was the result.

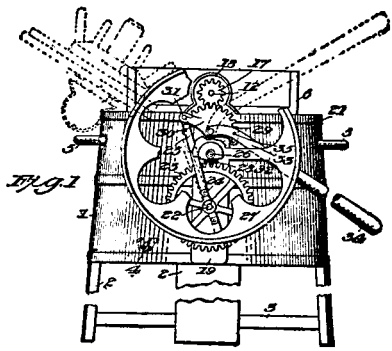
It is appellant's contention that, not having specifically described or claimed this line of cleavage feature in the patent sued on, the patentee may not rely upon the means for effecting that result as a part of his invention. As will be seen from claims 1 and 3 of the patent, the patentee produced a mechanical arrangement which in itself disclosed the line of cleavage. No prior patent for a lever operated device covered it, although patentee had filed an application prior to that for the present patent which did in terms disclose it as above set out.

Appellee made little use of this device of the patent in suit in the exact form shown in the patent. It was found advantageous to substitute a link and crank for the slot and crank pin used by the patentee in driving the fly-wheel. Plagman, appellee's foreman, took out patent No. 895,585 on August 11, 1908, which covered the use of the link and crank, which device was thereafter used by appellee. Counsel for appellee says of this change: "The Victor slot has to be made by a milling operation, and this must be done by skilled mechanics on a milling machine, whereas the link construction of Plagman calls only for a drilling operation, and this can be done by boys." Figure 2 of this patent is here reproduced:



It will be noticed that Plagman locates his fly-wheel under the tub.

Appellant manufactures what it calls its spinner machine, under patent No. 939,645, granted to A. Van Wormer on November 9, 1909, for gearing for washing machines. Its lever is operated by an up and down pumping movement instead of the backward and forward movement of the patent in suit. It employs a somewhat different and less effective arrangement of the lever. Appellant lays stress upon the claim that it does not employ the lever of the second class exclusively, which appellee, so appellant avers, is limited to under the claims in suit, but does employ for the operation of its fly-wheel a lever of the first class, and for its drive-shaft part of the time a lever of the second class and part of the time a lever of the first class. Its fly-wheel and speeding gear are attached to and carried by a plate upon the side of the tub. Figure 1 of the Van Wormer patent is here shown:



Appellant, in its advertising, made much of the line of cleavage idea. This seems to have been done without actual knowledge of appellee's patent. About the time the suit was begun appellant changed its manufacture to a device which it called "Miracle Washer." It was attempted by appellee to draw this device into the case notwithstanding no such washing machine was actually manufactured, sold, or used prior to the filing of its bill. On objection made, appellee withdrew it prior to the entry of the final decree. Appellant made this withdrawal a basis for its motions presented before the entry of the decree, viz.: First, that the court make a finding that said Miracle machines do not in-

fringe the claims as charged; or, second, that the court sustain appellant's motion made at the hearing to strike out all proofs offered with regard to said Miracle machines, at appellee's costs, with respect to said claims 2 and 4 in suit. This objection to the taking of the evidence was made at the time the testimony was taken, on August 31, 1911. No disposition of this motion was made by the court other than what is embraced in the final decree.

Appellant insists that appellee failed to give it any notice of its claim of infringement. It may be gathered from the record that Van Wormer was not advised of the Victor patent when he filed his application, i. e., January 13, 1908, although it had been issued some five months before. The examiner cited it, and Van Wormer thereupon revised his claims. It does not appear from the evidence that the machines were marked. The answer denies the allegations of notice contained in the bill, and no evidence was taken to show direct notice. The appellee relies upon the said citation by the examiner and the further fact that a Mr. Lane, representing the Iowa Washing Machine Company, claimed appellant was infringing some of its patents, and furnished a list thereof by numbers, among which was No. 863,120, the patent in suit. The Iowa company is not shown to have had any connection with appellee. About a month before suit was begun appellant's president wrote appellee's lawyers that the question of infringement had been turned over to appellant's attorneys. This date, i. e., August 25, 1910, is the earliest date we are able to fix positively for the purposes of this hearing.

The errors assigned cover: First, the decree of the court finding the claims in suit to be valid and infringed; and second, the failure of the court to grant said motions. Other facts appear in the opinion.

Taylor E. Brown and Clarence E. Mehlhope, both of Chicago, Ill., for appellant.

Wallace R. Lane and Arba B. Marvin, both of Chicago, Ill., for appellee.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

KOHLSAAT, Circuit Judge (after stating the facts as above). [1] In support of its claims, appellee sets up the end accomplished, viz., the adjustment of the parts of its device in such a manner as to produce a lever operated gear arrangement which relieves the tub cover of the load imposed by the prior art and provides a detachable connection between the lid with its stirrer-shaft and driving arm on the one hand, and the lever with its fly-wheel, speeding gear, and other heavy operating parts on the other hand. In practice it often becomes necessary to lift the tub lid in order to put in or take out articles, and for other purposes. Inasmuch as the operator is generally a woman, it is important that the burden attending that operation be minimized. If appellee's patent was the first to provide a lever operated gear for a wash tub which reduced the weight of the lid to a negligible quantity, he made such an addition to that art as amounted to invention. It was not necessary that he should have claimed it in specific terms if the device itself disclosed it. In Diamond Rubber Co. v. Consolidated Rubber Tire Co., 220 U. S. 428, 31 Sup. Ct. 444, 55 L. Ed. 527, the court says:

"He [the patentee] must not put forth a puzzle for invention or experiment to solve, but the description is sufficient if those skilled in the art can understand it. * * * It is no concern of the world whether the principle upon which the new construction acts be obvious or obscure, so that it inheres in the new construction."

This court said in Kuhlman Electric Co. v. General Electric Co., 147 Fed. 712, 78 C. C. A. 100:

"A patentee is entitled, not only to what he specifically sees, but to what has been brought about by his invention, even though not at the time actually seen."

The rule is well elaborated by the Circuit Court of Appeals for the Eighth Circuit in National Hollow Brake-Beam Co. et al. v. Interchangeable Brake-Beam Co., 106 Fed. 693-709, 45 C. C. A. 544.

[2, 3] The contention of appellant that the same patentee had claimed this feature as a result of other and different arrangements of elements for which he had filed application for patents prior to the filing of the application in the present case is not deemed of weight. The patent in suit was granted prior to the grant upon any one of the prior applications. The patentee, as between applications pending at the same time, was at liberty to choose which should first go to a patent. For the purpose of anticipation, the date of issue controls. Bates v. Coe, 98 U. S. 31, 25 L. Ed. 68; Gray Telephone Pay Station Co. v. Baird Mfg. Co., 174 Fed. 417, 98 C. C. A. 353; Barnes Automatic Sprinkler Co. v. Walworth Mfg. Co., 60 Fed. 605, 9 C. C. A. 154. As between his different applications, the question of prior invention could not arise. Appellant, however, asserts that the above result, which is termed a line of cleavage, is found in the prior art, and cites some 44 patents and 49 public uses. Of these, appellant's expert McElroy mentions particularly three, i. e., Ruthven patent No. 759,554, issued May 10, 1904, Christensen's patent, No. 845,615, issued February 26, 1907, and Mammen's patent, No. 874,095, issued December 17, 1907. The greater part of the other patents cited are too late for the purposes of anticipation. An examination of the three patents above enumerated discloses such difference in arrangement and adjustment as makes them in our judgment unavailable for purposes of anticipation of the claims in suit. Ruthven locates his gearing upon the cover and has no use for the pinion on the end of the drive shaft, nor for its cooperating element, the segmental-rack carried on the lever handle. The whole weight of the operating machinery must be lifted whenever the lid is raised. This is the very feature which the patent in suit seeks to avoid and makes the Ruthven patent unavailable as an anticipation. The same objection applies to the Christensen patent. The lid carries the whole operating means. Mammen's patent also, even if prior to the patent in suit, would not anticipate, for the reason that its lid carries the heavy load of the operating means. In this patent, also, there is no speeding up gear. It is, however, too late for purposes of anticipation, not having been issued until after the date of issue of the patent in suit. Of the prior public uses, we deem none of a character to require discussion.

Appellant insists that claims 2 and 4 in suit do not come within the construction herein given to the patent. Taken in connection with the drawings and specification, all four of the claims in suit call for a device in which the so-called line of cleavage, and the cover freed from

the burden of the operating mechanism, are essential elements. "The object of the patent law," says the Supreme Court in Topliff v. Topliff, 145 U. S. 171, 12 Sup. Ct. 831, 36 L. Ed. 658, "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." While claims 2 and 4 do not in terms call for the pinion at the outer end of the drive-shaft and the segmental-rack on the lever handle, those features may, for the purpose of restricting the claim so that it shall meet the requirements of the inventive idea, be gathered from the specification. "The subject is to be examined in the light of both specifications and of both sets of claims," says the Supreme Court in Klein v. Russell, 19 Wall. 433–466, 22 L. Ed. 116, in speaking of the scope of a claim, and, proceeding, says: "The court should proceed in a liberal spirit, so as to sustain the patent and the construction claimed by the patentee himself, if this can be done consistently with the language which he has employed."

[4] The scope of a patent must be ascertained from the entire instrument. Burke v. Partridge, 58 N. H. 351. Though a claim may be illustrated it cannot be enlarged by the language of the specification. R. R. Co. v. Mellon, 104 U. S. 118, 26 L. Ed. 639; Yale Lock Co. v. Greenleaf, 117 U. S. 554, 6 Sup. Ct. 846, 29 L. Ed. 952; Continental Paper Bag Co. v. Eastern Paper Bag Co., 210 U. S. 414, 28 Sup. Ct. 748, 52 L. Ed. 1122.

"It is allowable," says Judge Lowell in Jones v. Barker (C. C.) 11 Fed. 600, "to construe the claims of a patent with reference to what has gone before, and to give the patentee the benefit of the restricted claim which results from such construction." Thus it is apparent that, as stated by Walker on Patents, § 185, "when it becomes necessary to construe a claim narrowly in order that its novelty may not be negatived by the prior art, or its validity otherwise overthrown, courts will give such a narrow construction, if they can do so consistently with the language of the claim and of the description."

From the whole patent it is clear that, to make the claims 2 and 4 effective, the so-called line of cleavage, in applying the power to the stirrer-shaft, must be preserved and therefore read into those claims.

Thus construed, and in view of the absence in the prior art and use of any device showing a wash tub having a cover freed from the weight of the impelling machinery and the so-called line of cleavage at the point where the power is applied to the drive-shaft, which carries the stirrer-shaft, and in view of the other novel features of the claims, we hold the patent to be valid.

Appellant's device is constructed under the Van Wormer patent, No. 939,645, dated November 9, 1909. In his specification, the patentee says:

"The primary object of my present invention is to provide an improved gearing for washing machines of the type specified adapted to be compactly mounted upon the side of the tub, and having such a geared connection with the driving shaft that the tub lid can be raised and lowered at pleasure to remove or replace the agitator mechanism, without stopping the fly-wheel mech-

anism, and having an improved means for securing the detachable connection between the power shaft and the actuating gear therefor."

In its advertising appellant makes this feature of its device the center of its appeal to the trade and, of course, claims it to be a new invention. It also appears that appellant has appropriated other elements of the patent, as, for instance, the lever of the second class, specifically claimed by the patentee, and has in various ways proceeded to ignore the patent. In so doing appellant has been guilty of infringement, and was properly restrained by the trial court.

[5] With regard to the motions to have the Miracle machine decreed to not infringe the claims in suit, or that, in the alternative, all evidence respecting it be stricken out at appellee's costs, we are of the opinion that there was no basis for the motion to have the court decree noninfringement as to said device. The motion to strike out evidence at appellee's cost cannot be here entertained. While the statutes provide for the taxing of costs against those creating unreasonable and vexatious costs, the motion is addressed to the discretion of the trial court. Du Bois v. Kirk, 158 U. S. 58, 15 Sup. Ct. 729, 39 L. Ed. 895; vol. 13, Cent. Dig. § 21.

Some question is raised in the briefs as to the sufficiency of notice before bringing the suit. We are of the opinion that the notice was adequate for the purposes of the suit.

The decree of the District Court is affirmed.

BLACKLEDGE v. J. M. SHOCK ABSORBER CO. et al.

(District Court, N. D. Illinois, E. D. May 6, 1914.)

1. PATENTS (§ 311*)—SUIT FOR INFRINGEMENT—EVIDENCE—PLEADING.
Where defendant in an infringement suit introduced a prior patent for the purpose of limiting the scope of the patent in suit, it was proper for complainant in rebuttal to introduce the testimony of the prior patentee to show that his invention was not successful because it lacked an element supplied by the patent in suit, and it was not necessary that such evidence should have been pleaded in the bill.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 541, 542; Dec. Dig. § 311.*]

2. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—SHOCK ABSORBER.
The Tilt patent No. 988,229 for a shock absorber for automobiles *held* valid and infringed by the device of the Jacquet patent No. 1,015,682.

In Equity. Suit by John W. Blackledge against the J. M. Shock Absorber Company and Albert J. Dueth and Alexander J. Dueth, doing business as the Alfredal Company. On final hearing. Decree for complainant.

Sheridan, Wilkinson & Scott, of Chicago, Ill., for complainant.

Kerr, Page, Cooper & Hayward, of New York City, and S. E. Hibben, of Chicago, Ill., for defendants.

SANBORN, District Judge. Infringement suit on patent No. 988,229, issued to Charles A. Tilt March 28, 1911, on a shock-absorbing

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

device for automobiles, the latest form of which is called the "Velvet," claiming infringement by a device known as the "J. M." shock absorber, made under patent No. 1,015,682, January 23, 1912, by L. P. C. J. Jacquet, who is also known as Jacquet Maurel. Lack of novelty and noninfringement are pleaded in the answer, but at the hearing defendants' counsel conceded the validity of the first two claims of the Tilt patent sued on, and stated that the only proposition seriously urged by defendants was that they did not infringe. This concession was later conditionally withdrawn.

[1] A question of pleading under the new equity rules came up in the following way: Plaintiff made his prima facie case by calling a patent expert, who explained the device and the claims in suit, and pointed out how, in his opinion, the J. M. device was an infringement. Defendants then offered evidence explaining and comparing the two devices, and certain prior patents and publications for the purpose of limiting the scope of the Tilt invention. Among others a patent to S. Furmidge, No. 807,612, was offered. After defendants had closed their case plaintiff called Mr. Furmidge as a witness. On being requested by counsel for defendants to state the purpose of calling him, plaintiff's counsel said it was to show that the Furmidge devices were made in considerable quantities, but proved to be failures commercially and practically because they lacked the invention of the patent in suit. The proposed evidence was objected to because not pleaded, because defendants do not rely on Furmidge as an anticipation, and as irrelevant. Furmidge testified that he had sold 10,000 sets of absorbers, but they were a failure because they permitted lateral or swaying motions between the body and axle, and that this was remedied by the Tilt patent. Defendants moved to strike out all of Furmidge's testimony on the grounds mentioned in their objection, calling attention to Acme Steel Goods Co. v. American Metal Fastener Co. (D. C.) 206 Fed. 478, in this court, where similar evidence, but covering a much wider field, was not permitted to go in as part of plaintiff's prima facie case, without amendment.

Defendants having shown the Furmidge patent for the purpose of limiting the Tilt invention, it was proper for plaintiff to rebut the prima facie force of Furmidge by proving just what position in the art he occupied, and how Tilt supplied just what Furmidge lacked, in order that the court may be able to see what advance in the art Tilt made. And as this evidence is in reply to proof offered by defendants, tending to explain or answer it, and lessen its presumptive effect, it may be put in without pleading. There was no opportunity to plead it in the bill, nor is it part of plaintiff's case, being merely explanatory of evidence for the defense.

Defendants' counsel having moved to exclude the Furmidge testimony, gave notice that if the motion was denied they would withdraw their admission of validity of the Tilt patent, so far as to claim that the Furmidge testimony shows that patent to be invalid. I think it does not show this, and that it was not irrelevant, but admissible to show the extent of the advance in the art made by Tilt. It enables the court to understand the great importance in the art of the vertical

guides and sleeves, and their function in preventing side-sway; also in giving Tilt his true place in the art, and to what range of equivalents he is entitled.

[2] The two shock absorbers consist of a group of coiled springs between the ends of the elliptical springs of an automobile, in place of the ordinary shackle. As these car springs must be strong enough to sustain the weight of the car body and load they are necessarily made so stiff that they cannot vibrate with the frequency essential to the entire comfort of the passengers. By putting small and comparatively weak auxiliary coiled springs between the ends of the car springs, or under their ends if of the platform type, the vibrations are much increased in number, and the strong shocks, due to the bumps of the road, greatly softened or absorbed.

It is not enough, however, merely to interpose a bunch of coiled springs into the car spring mechanism, because lateral movement or side-sway between the spring ends must also be prevented. Earlier attempts of invention had failed for this very reason, as in the case of Furmidge already referred to, but the problem was solved both by the Tilt and Jacquet inventions, which preserve the essential rigidity of the shackle by providing strong vertical guides in the form of rods inside the coiled springs, with metal sleeves which may slide up and down over the rods, within the range of the spring vibration. Neither Tilt nor Jacquet discovered anything new so far as the coiled springs themselves go, the entire novelty being in a peculiarly ingenious manner of associating the springs, guides and sleeves, and in Jacquet in extending the sleeve the whole length of the device by circular casings with the lower ends of the guides pistoning therein.

The Tilt patent device may be very roughly compared to a very small four-legged stool with a double seat, the tops of the legs solidly fastened to the upper seat and sliding like pistons through holes in the lower seat. Now, suppose the bottom ends of the legs are mounted on a plate, and between this plate and the lower seat spiral springs are placed, one around each leg. These springs may be supposed to be of proper size and strength to hold by their expansion the bottom seat of the stool up against the upper seat. This description is good enough for the Blackledge absorber before it is put on the car, and the elements of the combination are: (1) The upper stool-seat, firmly supported by the tops of the legs; (2) the lower seat sliding up and down on the legs; (3) the legs themselves; (4) the spiral springs inclosing the legs; and (5) the bottom plate attached to the bottom ends of the four legs. If now the shackle be taken out from between the spring-ends of an automobile, and the supposed stool substituted, we have a rough notion of the "Velvet" or Tilt absorber.

To apply terms of the art to the supposed stool, the upper seat is the head, sustaining the upper ends of the rods or stool-legs, the lower seat is the sliding sleeve, and the legs are the guide rods running through the sleeve.

In order that the absorber may be attached to the car, the shackle is removed and replaced by it. The shackle consists of four pieces of steel, two bolts and two links, firmly joined at their ends in the form

of a rectangle. It is used to connect the ends of the elliptical springs of the car, and prevent lateral motion between the spring-ends. Conceive the middle parts of the head and sleeve of the absorber to be cut out, and their places taken by bolts similar to the two shackle bolts, leaving the head and sleeve in the form of dumbells, and it will be clear that the absorber may be put in between the spring-ends, so that the spiral springs will relieve the shocks due to the car passing over a rough road. The upper or body-spring is attached to the lower bolt which passes through the sleeve, and the lower or axle-spring to the upper bolt connecting the absorber-head.

When we come to compare the J. M. device with the "Velvet" absorber, a very different structure is found; the two being unlike in every particular in form or manufacture, but similar in operation and result. The following comparison in parallel columns will serve to indicate how unlike they are in construction:

The "Velvet."	The J. M.
1. A head, fastened to the rods or guides.	1. A head, not attached to the rods, except by the weight of the car-body.
2. A sliding sleeve just below the head, moving upon the guide rods.	2. A sliding sleeve just below the head, to which a cylinder or casing is welded or cast, serving to carry the sliding sleeve to the bottom of the device by inclosing the bottom plate so that the latter, while remaining stationary relatively to the head, changes its position relatively to the sliding sleeve and the casing.
3. Four guide rods, joined to the head and bottom plate.	3. Two guide rods, each in the form of a hairpin, hung loosely over the head, held thereon by the weight of the car-body, and loosely joined to the center of a circular bottom plate.
4. Four spiral springs, each inclosing a single rod, placed between the sliding sleeve and bottom plate, and bearing against each.	4. Two spiral springs, each inclosing the two arms of a hairpin shaped rod, each separately inclosed in a cylinder or casing, and placed between the sliding sleeve and the bottom plate.
5. A bottom plate, fastened to the lower ends of the rods, stationary with respect to the head, but changing position relatively to the sliding sleeve.	5. A bottom plate, fastened to the lower ends of the rods, acting in the bottom of the casing as a piston, so as to extend the sliding sleeve to the lower end of the casing, and stationary relatively to the head, but changing position relatively to the sleeve and casing.

When the car wheels go into a rut or pocket, or over a stone, the weight or momentum of the movement is taken up first by the body-spring, and transmitted in succession to the sleeve-bolt, the springs, the bottom plate, the head bolt, the axle-spring and lastly to the axle itself. The two devices are thus resilient shackles, cushioning either downward or upward movement of the car body, but preventing side-sway like the shackle itself.

Both patents are meritorious, Jacquet the more highly developed of the two. Each has been independently produced, without any copying or borrowing of ideas from each other. Unless Tilt has clearly

pre-empted the field, so as to leave nothing but improvement to Jacquet, defendants' device cannot, of course, be held to infringe.

Only the first of the three claims of the patent in suit is here in question, since the second requires a rigid connection between the guides and the head blocks, and the third provides for two additional pairs of coiled springs between the head blocks and sleeves. Neither of these elements are in the J. M. device.

Such first claim covers the following elements: The combination with the two members of a vehicle elliptical spring of: (1) Two pairs of vertical guides; (2) means for securing the end of the lower member of the spring (that is, the axle-spring) between the pairs of guides; (3) two pairs of sleeves surrounding said guides; (4) means for pivotally supporting the end of the upper member of the spring (the body-spring) between, and directly by, the pairs of sleeves; (5) a plate secured to the lower ends of said guides; (6) coiled springs surrounding said guides; and (7) supported intermediate said plate and said sleeves.

It will be readily seen that this claim does not require a rigid connection between the guide rods and head blocks, nor between the former and the bottom plate. As thus construed the J. M. device has all the elements described, as well as several others, due to the improvement of welding a casing or cylinder to the bottom of each sleeve, which surrounds each coiled spring and each circular bottom plate, and providing that each bottom plate shall move like a piston in the bottom of its own cylinder. The bottom plates do not actually move relatively to the head or upper shackle bolt, but do so relatively to the sleeve and casing. These additional elements are undoubted improvements on Tilt, and produce the additional important function of relieving twisting or tortional strains, thus diminishing friction on the guides and sleeves, and lengthening the life of the device; possibly also improving the shock-absorbing function.

Of course the fact that defendants' device reads on the patent claim is by no means conclusive on the question of infringement, and I felt quite clear on the hearing, up to Mr. Carter's closing testimony, that the structural and functional distinctions between the two forms were enough to avoid infringement, and leave each party the benefit of his own discovery. But the more I have studied the structures and the evidence the more certain I have become that defendants' absorber has the same elements as plaintiff's, and that its distinguishing features are all by way of improvement or addition. The fact is, as I view the case, that each party has a spring sliding on a sleeve, different in details, but alike in means, combination, elements, function, operation, and result. Defendants' casing co-operates with the sleeve block and the bottom plate to extend and improve the sliding sleeve. The loose hairpin loop of the guides over the housings of the upper shackle bolt co-operate with the sliding bottom plates to relieve twist and strain. These are improvements, but without these features, however beneficial, the J. M. device would fully operate, and give substantially the same result. In other words, the J. M. contains everything found in the "Velvet," as well as other good things. Having trespassed on

plaintiff's territory, defendant should be compelled to vacate, since there is no way by which it can make use of its own improvements without also using what belongs to the plaintiff.

D'ARCY v. SHEFFIELD CAR CO.

(Circuit Court of Appeals, Sixth Circuit. May 5, 1914.)

No. 2450.

PATENTS (§ 328*)—INVENTION—SPRING CUSHION.

The D'Arcy patent, No. 726,817, for a spring cushion structure, claims 1 and 2, *held* void for anticipation and lack of patentable invention.

Appeal from the Circuit Court of the United States for the Western District of Michigan; Loyal E. Knappen, Arthur C. Denison, and Clarence W. Sessions, Judges.

Suit in equity by Frank P. D'Arcy against the Sheffield Car Company. Decree for defendant, and complainant appeals. Affirmed.

See, also, 194 Fed. 686, 116 C. C. A. 322.

F. L. Chappell, of Kalamazoo, Mich., for appellant.

F. C. Lowthorp, of Trenton, N. J., for appellee.

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

SANFORD, District Judge. This suit was brought by the appellant, Frank P. D'Arcy, by bill in equity against the appellee, the Sheffield Car Co., for the alleged infringement of letters patent No. 726,817, for improvements in springs, issued to said D'Arcy April 28, 1903. This patent contained three claims. The defenses were that D'Arcy was not the original inventor of the patented structure, that the patent was void for anticipation and want of patentable invention, and that there had been no infringement. After a hearing on pleadings and proof, a decree was entered adjudging and decreeing that D'Arcy's patent was good and valid, and that he was its original inventor; that the defendant had not infringed the first and second claims of the patent, but had infringed the third claim; and accordingly dismissing the bill as to the first and second claims, but as to the third claim ordering a reference for the ascertainment of profits and damages, and perpetually enjoining further infringement. From this interlocutory decree adjudging an infringement of the third claim and ordering an injunction and accounting, the defendant, the Sheffield Car Co. prayed and was granted a broad appeal to this court. On hearing such appeal, this court, being of the opinion, after an extended consideration of the merits, that claim 3 of the D'Arcy patent was void on account of anticipation and want of patentable invention, reversed so much of the decree below as related to the said claim and remanded the cause to the court below with directions to dismiss so much of the complainant's bill as related to the

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

said claim, with costs. Sheffield Co. v. D'Arcy (6th Cir.) 194 Fed. 686, 694, 116 C. C. A. 322.

After receiving the mandate of this court, the court below entered a decree reciting that the bill of complaint had previously been dismissed as to the first and second claims of the patent, and thereupon dismissing the bill also as to the third claim, with costs, in accordance with the mandate.

From this decree the complainant D'Arcy prayed and was granted a broad appeal to this court, and has assigned various errors, all of which, in effect, relate to the action of the court below in dismissing his bill of complaint as to claims 1 and 2 of his patent.

The invention claimed by D'Arcy relates to improvements in spring cushion structures for seats and the like. The structure disclosed in the specifications and drawings of his patent, as fully set forth in our former opinion (pp. 687, 688), consists of a series of cross-strips of flat sheet metal, fixed transversely in a substantially rectangular seat frame, each cross-strip having mounted upon it a row of spiral springs in an upright position, which are held to the cross-strip and supported and retained in position by turning inward the opposite edges of the cross-strip and folding them back so as to embrace the opposite sides of the bottom coil of each of the springs.

On the former appeal it was held, as the ground of decision, that claim 3 of D'Arcy's patent, which is its broad claim, was clearly anticipated by letters patent No. 114,112, issued April 25, 1871, to Delos V. Crandall, on improvements in bed springs, as described on page 691 of our former opinion; our conclusion, after careful consideration, being, as stated on page 693, that even if claim 3 of D'Arcy's patent should be construed so as to include the function of the metal strip as a cross-piece retaining a series of springs in the frame, nevertheless, "as it, in effect, merely extended and enlarged the metal plate of the Crandall device, so as to combine integrally in one device the function of that metal plate as a means of securing the springs attached thereto, and the function of a metallic cross-piece, old in the art, as a means of retaining a series of springs in their place in the frame of a spring structure, giving no new result different from that obtained by a separate metallic cross-piece with the Crandall metal plates riveted thereon, it involved merely mechanical skill, and not invention, and is accordingly void."

The correctness of this holding is not now directly questioned by appellant; and in the argument at bar was, in terms at least, conceded. And even if, in effect, it is somewhat indirectly questioned by inference from the argument in appellant's brief, we find, on careful reconsideration, no substantial reason to doubt the correctness of the conclusion reached. See also, as to the effect of such prior holding, Chesapeake Co. v. McKell (6th Cir.) 209 Fed. 514, 126 C. C. A. 336. Obviously, however, as our former opinion as to the invalidity of claim 3 of the patent was based upon its anticipation by the Crandall device and want of patentable invention, and not upon the question of infringement, it follows, as its necessary consequence, that a like result

must be reached as to claims 1 and 2, unless they disclose elements of patentable invention not appearing in claim 3, and differentiating them from that claim in respect to the matters considered in the former opinion.

We find, however, no such elements of differentiation, either arising from the limited scope of claims 1 and 2 as contrasted with the broad scope of claim 3, or otherwise. Clearly the fact that claim 1 discloses, by letter references, a spring structure in which the bottom coils of the conical springs are "conformed to the cross-strips," shows no element of patentable invention differentiating this claim from claim 3. Conformity of the lower coil of the spring to the metal plate plainly appears in the earlier Crandall device. See Fig. 1 on p. 691 of our former opinion.

We are therefore constrained to conclude, without repeating the reasons stated in our former opinion, that claims 1 and 2 of the D'Arcy patent were, as well as claim 3, completely anticipated, in their essential features, by the Crandall device, and that in their extension and enlargement of the metal plate of that device, so as to combine integrally in one device the functions of a metal plate securing the individual springs, and of a metal cross-piece retaining a series of springs in the frame, they involved merely mechanical skill, and not invention, and are accordingly void.

For this reason, without determining the other questions discussed in the briefs and argument, we conclude that the court below correctly dismissed so much of the bill of complaint as related to claims 1 and 2 of the patent in suit. The decree will accordingly be affirmed, with costs.

MEISSNER v. WESTINGHOUSE MACH. CO.

(District Court, W. D. Pennsylvania. October 9, 1913.)

No. 60.

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—FURNACE GRATE.

The Meissner patent, No. 529,286, for a furnace grate, is of very narrow scope in view of the prior art, and limited to the specific arrangement or combination whereby the two swinging grates used to remove clinkers at the foot of the sloping fire bed are actuated simultaneously. As so construed *held* not infringed.

In Equity. Suit by William F. Meissner, administrator of the estate of Julius H. Meissner, deceased, against the Westinghouse Machine Company. On final hearing. Decree for defendant.

Fred. W. Winter, of Pittsburgh, Pa., for complainant.

Synnestvedt & Bradley, of Philadelphia, Pa., for defendant.

ORR, District Judge. This patent suit is before the court for final hearing upon bill, answer, replication, and proofs. Plaintiff, as owner of United States patent No. 529,286, issued to Julius H. Meissner on November 13, 1894, for a furnace-grate, complains that defendant has

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

infringed his rights under the patent. The defenses are numerous, including allegations that the patent is invalid, that, if valid at all, it is of extremely narrow scope, and that there has been no infringement by defendant. Because of the expiration of the patent after suit brought, there can be no injunction granted in any event. Plaintiff seeks damages only.

The specification of the patent states:

"The object of my invention, broadly stated, is to produce a furnace in which the fire may be cleaned or stoked, without danger of extinguishing it. A further object of my invention is to make a furnace that can be ordinarily fired by hand, or can be stoked mechanically, if desired, and which can use successfully any kind of coal as fuel. My invention consists in such features, details and combinations of parts as will first be described in connection with the accompanying drawings and then particularly pointed out in the claims."

The patent may be classed with those (of which there are many) which provide a sloping fire-bed upon which burning fuel furnishes heat to boilers. The slope cannot be too steep to hold the fuel in place while burning, and yet must be steep enough to assist clinkers to move to the bottom as fresh fuel is applied at the top of the slope. The grate of the patent consists of a series of flat plates or bars arranged in steps. At the bottom of the slope there is provided a means of holding back the sloping fuel and of permitting the removal of clinkers which have reached the bottom. While there are several claims in the patent, there is but one in dispute, which is as follows:

"5. In a furnace, the combination, with a sloping fire-bed, of an upward-swinging grate and a downward-swinging grate, the upward-swinging grate being pivoted at the foot of the fire-bed and normally projecting toward the downward-swinging grate, the latter grate being pivoted at its rear end, and means for operating both grates, substantially as set forth."

The elements of this claim are: (1) A sloping fire-bed; (2) an upward-swinging grate pivoted at the foot of the fire-bed and normally projecting toward the downward-swinging grate; (3) a downward-swinging grate pivoted at its rear end; and (4) means for operating both grates substantially as set forth. There is nothing new in any of these elements. A sloping fire-bed and a downward-swinging grate pivoted at its rear end and means of operating it are all found in United States patent to Swindell, No. 181,221, dated August 15, 1876. An upward-swinging, or hold-back, grate and means of operating it are disclosed by United States patent to Savage, No. 66,743, dated July 16, 1867. Other patents might be referred to disclosing the different elements of the claims. If anything saves the patent, it is the "means for operating both grates substantially as set forth" in the specifications. Without regard to the use of the word "both," as indicating "collectively" or "together," the conclusion must be reached from a careful study of the specification, in view of the prior art, that the disclosure of the patent is a means for simultaneously actuating the grates. After describing the connection between the two grates *O* and *R* and another grate *I*, the patentee states:

"By which arrangement the grates *I*, *O* and *R*, may be operated simultaneously, or the grate, *I*, may be operated independent of the other two."

Clearly, if *I* be operated independent of the other two, then *O* and *R* are operated together in a mutually dependent relation.

Again the patentee states:

"The clinker grates, *O* and *R*, are simultaneously actuated from the front, by means of the links and levers previously described, the grate, *R*, swinging downward to permit the ashes and clinkers to fall into the ash-pit while the grate, *O*, swings upward, thereby retaining the incandescent fuel on the fire-bed *I*."

That the patentee did not rely upon the broad combination of the sloping fire-bed and the two swinging grates only without regard to the means of operating both grates is seen in the file wrapper of the patent in suit, where it appears that he consented to the rejection of the following claim:

"15. In a furnace, the combination with a sloping fire-bed, of an upward-swinging grate, and a downward-swinging grate at the foot of the sloping grate, substantially as set forth."

The patent therefore, so far as the claim in issue is concerned, must be deemed of a very narrow compass and limited to the specific arrangement and combination whereby the two grates *O* and *R* are to be operated as shown in the specification. To that extent only is the claim valid.

The defense that the defendant has not infringed the plaintiff's device must be sustained. The defendant uses an upward-swinging grate and a downward-swinging grate. The downward-swinging grate is not pivoted at its rear end, but some inches from its rear end, so as to allow the part which projects from the point of pivoting to the rear end to move upward and scrape the rear wall of the furnace. The swinging grates of the defendant are not operated together, but are operated separately. There is no means used by the defendant for the operation of the grates simultaneously. It is clear, from a consideration of the testimony and a careful examination of the exhibits, that the device of the defendant is superior in operation to the device of the patent in suit. The removal of clinkers through an opening between grates which have a fixed connection with and relation to each other cannot be as successfully accomplished as by the use of two grates which are independent of each other in their movement. The operation to remove clinkers which fail to fall as the opening is caused is by a movement of the grates which may be termed "wigwagging," and this may be done more effectively by a separate movement of the grates than by a connected movement.

It was strongly urged by defendant that plaintiff was not entitled to recover because notice had not been given as required by the statute. From the evidence, the court is satisfied that the statute was complied with in this respect. This, however, does not affect the decision of this case. The defendant, not being guilty of infringement, is entitled to a dismissal of the bill, with costs.

Let a decree be drawn.

GIBSON v. BELLINGHAM & N. RY. CO.

(District Court, W. D. Washington, N. D. April 20, 1914.)

No. 2708.

1. CONSTITUTIONAL LAW (§ 45*)—DETERMINATION OF CONSTITUTIONAL QUESTION—JURISDICTION OF DISTRICT COURTS.

Courts of the United States inferior to the Supreme Court are created by acts of Congress, and their jurisdiction is dependent upon the same source; hence such a court cannot hold unconstitutional a provision of a congressional act limiting the right to remove causes from a state court.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 42; Dec. Dig. § 45.*]

2. JURY (§ 11*)—APPLICATION OF PROVISIONS OF FEDERAL CONSTITUTION TO STATE COURTS.

The seventh constitutional amendment, providing that "in suits at common law, where the value in controversy shall exceed $20, the right of trial by jury shall be preserved," does not apply to the states, but to the federal and territorial courts only.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 19–24; Dec. Dig. § 11.*]

3. REMOVAL OF CAUSES (§ 3*)—LIMITATION OF RIGHT—SUITS BROUGHT UNDER EMPLOYERS' LIABILITY ACT—"COURT OF COMPETENT JURISDICTION."

A state is not inhibited by the federal Constitution from providing for a jury in its courts of less than 12 men, nor for a verdict which is not unanimous, and, notwithstanding such a provision, a state court, if otherwise so, is a "court of competent jurisdiction" within the meaning of the provision of Judicial Code, § 28 (Act March 3, 1911, c. 231, 36 Stat. 1094 [U. S. Comp. St. Supp. 1911, p. 140]), that no case arising under the federal Employers' Liability Act and brought in any state court of competent jurisdiction shall be removable.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 4, 5; Dec. Dig. § 3.*

For other definitions, see Words and Phrases, vol. 2, p. 1685.]

4. COURTS (§ 157½ New, vol. 19 Key-No. Series)—JURISDICTION—SUIT IN STATE COURT BASED ON FEDERAL STATUTE.

A superior court of Washington is a court of competent jurisdiction to entertain an action brought under the federal Employers' Liability Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp. 1911, p. 1322).

At Law. Action by William Gibson against the Bellingham & Northern Railway Company. On motion to remand to state court. Motion granted.

Romaine & Abrams, of Bellingham, Wash., for plaintiff.

George W. Korte, of Seattle, Wash., and Newman & Kindall, of Bellingham, Wash., for defendant.

NETERER, District Judge. Plaintiff brought action against the defendant in the superior court of Washington for personal injuries sustained under the Employers' Liability Act. Thereafter, on motion of the defendant, the action was removed to this court. A motion has been made to remand the cause.

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

Section 28, Judicial Code, provides:

"That no case arising under an act entitled 'An act relating to the liability of common carriers by railroad to their employés in certain cases,' approved April twenty-second, nineteen hundred and eight, or any amendment thereto, and brought in any state court of competent jurisdiction shall be removed to any court of the United States."

The Constitution and laws of Washington provide for a verdict in civil actions when 10 of a jury of 12 consent thereto. It is contended that the provision of the Judicial Code denying the right of removal is in contravention of the seventh amendment to the Constitution of the United States, unless it be held that the Washington state court is not a court of "competent jurisdiction" within the meaning of the provision.

[1] The constitutionality of the provision denying the right of removal must be sustained in any event. Courts inferior to the Supreme Court are created by acts of Congress, and their jurisdiction is dependent upon the same source. Congress may confer or withhold from them power to hear and determine any of the cases to which the judicial power of the United States extends; and it therefore follows that it may prescribe when the right of removal from a state court shall exist. Turney v. Bank of North America, 4 Dall. 10, 1 L. Ed. 718; Gaines v. Fuentes, 92 U. S. 17, 18, 23 L. Ed. 524; Lewis Publishing Co. v. Wyman (C. C.) 152 Fed. 200; Anaconda Copper Min. Co. v. Butte-Balaklava (D. C.) 200 Fed. 808.

Defendant further contends that the Washington state court is not a court of "competent jurisdiction" within the meaning of the provision denying the right of removal, for the reason that the seventh amendment to the Constitution provides for a trial by jury, which has been held to mean 12 men unanimously consenting, and the Constitution and laws of Washington provide for a verdict by the consent of a less number than 12.

The seventh amendment provides:

"In suits at common law, where the value in controversy shall exceed $20, the right of trial by jury shall be preserved."

[2] It has frequently been held that this provision contemplated a jury as constituted at common law of which the unanimous verdict of 12 men was an essential feature. Thompson v. Utah, 170 U. S. 343, 18 Sup. Ct. 620, 42 L. Ed. 1061; American Pub. Co. v. Fisher, 166 U. S. 464, 17 Sup. Ct. 618, 41 L. Ed. 1079; Rasmussen v. United States, 197 U. S. 516, 25 Sup. Ct. 514, 49 L. Ed. 862; Black v. Jackson, 177 U. S. 349, 20 Sup. Ct. 648, 44 L. Ed. 801. Those were cases, however, arising in the United States District or Circuit Courts, or in the territories, the courts of which were created by congressional act. It has been held by a long line of decisions that the seventh amendment does not apply to the states, and that a state is not inhibited by the federal Constitution from providing for a jury of less than 12 men, or for a verdict that is not unanimous. Edwards v. Elliott, 21 Wall. 532, 557, 22 L. Ed. 487; Barron v. Baltimore, 7 Pet. 243, 8 L. Ed. 672; Twitchell v. Pennsylvania, 7 Wall. 321, 19 L. Ed. 223; Walker v.

Sauvinet, 92 U. S. 90, 23 L. Ed. 678; Maxwell v. Dow, 176 U. S. 581, 20 Sup. Ct. 448, 494, 44 L. Ed. 597.

Nor is a trial under a state statute abridging the number of jurors, or dispensing with the feature of unanimity, a denial of "due process" within the inhibition of the fourteenth amendment, which does not apply to the states. Hurtado v. California, 110 U. S. 517, 4 Sup. Ct. 111, 292, 28 L. Ed. 232; Kennard v. Louisiana, 92 U. S. 480, 23 L. Ed. 478; Davidson v. New Orleans, 96 U. S. 97, 24 L. Ed. 616. Congress cannot enlarge the jurisdiction of a state court, nor has it power to prescribe rules of procedure or methods of trial to be followed in a state tribunal. Claflin v. Houseman, 93 U. S. 141, 23 L. Ed. 833.

[3] A state may constitute its tribunals for the enforcement of rights and redress of wrongs, and so long as it does not infringe the "due process of law" clause of the fourteenth amendment, and comes within the classic words of Mr. Webster, "The general law, a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial," it is in conflict with no provision of the federal Constitution. Within that sphere the power which the state court may wield is necessarily determined by the authority which calls it into being. Its power to take cognizance of and redress a wrong is the primary question to be considered in determining its "competency"; the particular method of trial adopted is a secondary matter, and becomes important only when it is such as to come in conflict with the fourteenth amendment, and amount to a deprivation of rights there guaranteed, without due process of law. Then and only then could its method of procedure affect its power or jurisdiction. When its method of procedure satisfies this test, we must look to the authority creating it, and defining its powers and jurisdiction, to determine whether it is "competent," whether it has the power to hear and determine the particular controversy and afford the appropriate relief.

[4] Article 4, § 6, of the Constitution of Washington, provides:

"The superior court shall have original jurisdiction in all cases in equity and in all cases at law which involve the title or possession of real property, or the legality of any tax, impost, assessment, toll, or municipal fine, and in all other cases in which the demand or the value of the property in controversy amounts to one hundred dollars. * * * The superior court shall also have original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court."

"The superior courts of this state are courts of general jurisdiction." State ex rel. Reed v. Jones, 2 Wash. 662, 665, 27 Pac. 452, 26 Am. St. Rep. 897.

It conclusively appears from this section that the superior court of the state has power to hear and determine a controversy similar to the one involved in this suit. It appears from the decisions of the Washington Supreme Court that the superior courts may take cognizance of actions for personal injuries, and that actions for such injuries are brought and tried, not only when the injury occurred within the state, but where the right of action arose outside of the state. In the latter event, the right of the plaintiff to recover is determined by the laws of the state where his injury was sustained, but the rules of procedure and methods of trial employed are those of the tribunal whose aid is invoked. Bank of U. S. v. Donnally, 8 Pet. 361, 8 L. Ed.

974; Wilcox v. Hunt, 13 Pet. 378, 10 L. Ed. 209; Willard v. Wood, 135 U. S. 312–313, 10 Sup. Ct. 831, 34 L. Ed. 210; Northern Pac. R. Co. v. Babcock, 154 U. S. 190, 197, 14 Sup. Ct. 978, 38 L. Ed. 958; Evey v. Mexican Central R., 26 C. C. A. 407, 81 Fed. 294, 38 L. R. A. 387; La Selle v. Woolery, 14 Wash. 70, 44 Pac. 115, 53 Am. St. Rep. 855; 31 Cyc. 45; 22 Am. & Eng. Enc. of Law, 1383.

There is no sound reason why the principle should be different when a right of action created by a federal statute is sought to be enforced in a state court. The right of trial by a jury of 12, where the assent of all is necessary to a verdict, is but a method of trial prevailing in the federal courts. The fact that it is prescribed by the federal Constitution does not change its essential character. It was intended to regulate the procedure of trials in the federal courts, not to be annexed as a condition to the enforcement of a right of action. A state court of general jurisdiction may enforce a right created by federal laws where exclusive jurisdiction is not vested in the federal courts. Not only is this true, but it is the duty of the state court to observe and enforce rights created by federal laws.

"When Congress, in the exertion of the power confided to it by the Constitution, adopted that act, it spoke for all the people and all the states, and thereby established a policy for all. That policy is as much the policy of Connecticut as if the act had emanated from its own Legislature, and should be respected accordingly in the courts of the state." Second Employers' Liability Cases, 223 U. S. 1, 57, 32 Sup. Ct. 169, 178 (56 L. Ed. 327, 38 L. R. A. [N. S.] 44).

The suggestion that the Industrial Insurance Act of Washington (Laws of Washington 1911, c. 74, p. 345) has abolished all causes of action for personal injuries has no merit. Section 18 of the act provides that the provisions of the act shall not apply except under conditions set out in this section, which do not appear in the record.

Jurisdiction is defined by Bouvier as follows:

"The authority by which judicial officers take cognizance of and decide causes. Power to hear and determine a cause."

The word "competent" as used in the statute is descriptive of the nature and extent of such power, not to the means by which it is exercised. Congress, having no right to create state courts or to provide rules for their procedure, must have contemplated that the competency of their jurisdiction should be determined by the principles prevailing in the state creating them. Congress knew that the jurisdiction of such a court was not affected by its rules of procedure so long as the fourteenth amendment was not violated. Congress was also aware that its rules of procedure were not limited by the seventh amendment, and Congress will be charged with knowledge that certain states provided for a verdict without the unanimous consent of 12 men. If Congress had intended that a rule of procedure or method of trial should be invoked to test the competency of the state court's jurisdiction, it would have expressly so provided.

It is manifest, if the contention of defendant is correct, that a large number of litigants would be absolutely remediless. If the seventh amendment is attached as a condition to the enforcement of every right created by federal laws, a party in those cases where a specific excep-

tion is not made as to the jurisdictional amount could bring no action in a state where a verdict could be rendered by less than 12 jurors, if the amount in controversy did not exceed $3,000. Section 28, Judicial Code. The federal court would have no jurisdiction, for its jurisdiction is dependent upon the act of Congress, and the state court would not be competent to afford relief. Courts may well hesitate before adopting a construction certain to be followed by such serious consequences.

An order may be entered remanding the cause to the state court.

INVESTMENT REGISTRY, Limited, v. CHICAGO & M. ELECTRIC R. CO. et al.

WESTERN TRUST & SAVINGS BANK et al. v. SAME.

(District Court, E. D. Wisconsin. February 27, 1914.)

No. 80.

1. RAILROADS (§ 192*) — DEED OF TRUST — FORECLOSURE — CONFIRMATION OF SALE—APPLICATION—WITHDRAWAL.

Where objections to a sale of a portion of a railway located in another state on foreclosure of a trust deed had been sustained and the sale set aside, and the same objections were applicable to a sale of the portion of the road located in Wisconsin under proceedings had in the federal court of that state, a motion by the trustees under the deed and the purchasers to withdraw their application for confirmation of the sale of the Wisconsin portion of the line would be granted without terms.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 391, 634–642; Dec. Dig. § 192.*]

2. RAILROADS (§ 186*)—TRUST DEED—FORECLOSURE—BONDHOLDERS—PETITION TO INTERVENE—RIGHT TO FILE—DETERMINATION OF MERITS.

Where a holder of bonds of an electric railway applied for leave to intervene in proceedings to foreclose a deed of trust on the property solely to displace the trustee under the deed on the ground that it and its officers had become disqualified by acting adversely to the interests of the bondholders, the practice or procedure by which the court should ascertain the fact was wholly discretionary; and hence it was not bound to determine the bondholder's right to file the petition separately from the merits thereof, but was entitled to consider, not only the matters appearing on the face of the petition, but the facts relating to the trustee as offered in response to a rule to show cause, to determine whether there was any reasonable ground to believe that the bondholders were not being properly represented.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 615, 616; Dec. Dig. § 186.*]

3. RAILROADS (§ 169*)—MORTGAGES—FORECLOSURE—TRUSTEES—DISQUALIFICATION.

Where a corporate trustee under a deed of trust, executed to secure bonds of an electric railway, acquired certain of the bonds under a "collateral trust indenture" executed by the railway, to wit, to secure certain collateral gold notes, and such trust indenture was exhibited, from which no conflict with the trust mortgage under foreclosure existed or was possible, save only in the contingency of the trustee obtaining an absolute title to the bonds so pledged in trust, and so far as the possession of the bonds enabled the trustee to participate in a reorganization plan,

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

it had given its assent subject to "securing a proper order of court authorizing the same," and the trustee also offered to and did resign its trust under the trust indenture, its interest therein did not disqualify it to perform its office as trustee under the deed.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 536–548; Dec. Dig. § 169.*]

4. RAILROADS (§ 169*)—MORTGAGES—TRUSTEES—ACTS OF OFFICERS—DISQUALIFICATION.

An electric railway extending through Illinois and Wisconsin was covered by two deeds of trust—one in Illinois covering the part of the property located in that state, and the other in Wisconsin covering the Wisconsin portion. Proceedings having been instituted in both states to foreclose the deeds, it was objected in the Wisconsin proceedings that the corporate trustee was disqualified. It appeared that another corporation, of whose 600 shares the president of the corporate trustee owned 100, owned 135 bonds of the railway, which had been deposited under a reorganization agreement. It also appeared that, connected with and operated by the receiver of the Illinois company, was a mile of railroad owned by the W. F. & W. Company, the stock and bonds of which were owned and controlled by the president of the corporate trustee, who had agreed to sell such stock and bonds to the reorganization committee of the railway, to be paid when reorganization was consummated, conditioned, however, on approval by the Illinois court or its receiver. *Held* that such facts did not warrant a finding that the corporate trustee was so adversely interested to the bondholders of the Wisconsin company as to disqualify it to represent them in the foreclosure proceedings.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 536–548; Dec. Dig. § 169.*]

5. RAILROADS (§ 169*)—DEED OF TRUST—FORECLOSURE—ACTS OF TRUSTEES—DISQUALIFICATION.

Where proceedings were simultaneously instituted in Illinois and Wisconsin to foreclose a deed of trust covering the property of an electric railway located in those states, the fact that the trustees under the deed applied in Illinois for a confirmation of the sale of the Illinois property, which was denied, and that they thereafter applied for confirmation of the sale of the Wisconsin property, which was subject to the same objections, merely because in so doing they believed in good faith that they represented the desires of 90 per cent. of the beneficiaries under the deed, but after denial of confirmation in Illinois they withdrew their application therefor in Wisconsin, did not warrant a finding that they were disqualified to act for the bondholders, so as to authorize the court to permit a dissenting bondholder to intervene to protect the bondholders' interests.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 536–548; Dec. Dig. § 169.*]

6. CORPORATIONS (§ 482*)—DEED OF TRUST—FORECLOSURE—REORGANIZATION PLAN.

Though the court, in proceedings to foreclose a corporate deed of trust, especially in connection with the price bid at the sale, may take cognizance of a pending reorganization plan to ascertain whether the bondholders are obtaining a fair return for the property sold, it is not the court's province to shift its function to foreclose and sell the property to an affirmative duty to pass on the quality of the reorganization plan, or to settle collateral controversies between the bondholders.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1870, 1877–1888; Dec. Dig. § 482.*]

7. CORPORATIONS (§ 482*)—DEED OF TRUST—FORECLOSURE—REORGANIZATION PLAN—DISSENTING BONDHOLDER.

Where, in proceedings to foreclose a deed of trust on a corporation's property, a reorganization committee has offered what, in the light of a

bondholder's rights, is not a fair plan, the bondholder's refusal to accept it is not an equity chargeable against him when he seeks to object to the sale of the property, but the court will accord him a hearing to ascertain whether there has been a fair sale, and, if not, a resale will be ordered.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1870, 1877–1888; Dec. Dig. § 482.*]

8. CORPORATIONS (§ 482*)—DEED OF TRUST—FORECLOSURE—SALE—RESALE—DISSENTING BONDHOLDER.

Where a sale of a corporation's property under a deed of trust had been set aside and a resale ordered, and there was nothing to show that the trustee under the deed representing the bondholders was disqualified, a dissenting bondholder, who was also a proposed bidder at the resale, would not be permitted to intervene to restrain a reorganization committee from carrying out the proposed reorganization agreement, and also to restrain the committee and certain persons who bid on its behalf at the former sale from bidding at the resale.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1870, 1877–1888; Dec. Dig. § 482.*]

In Equity. Suit by the Investment Registry, Limited, against the Chicago & Milwaukee Electric Railroad Company and others, in which the Western Trust & Savings Bank and Willoughby G. Walling, as trustees under a deed of trust made by the defendant company, filed a cross-bill against the defendant company and others. Motions by cross-complainants and by Smith and Ford, purchasers, and a reorganization committee represented by them, to withdraw applications for confirmation of sale and for a new sale, and motion by John Griffiths, a bondholder, for leave to intervene. Motions by cross-complainants, etc., granted, and application for intervention denied.

Motions by the cross-complainants, Western Trust & Savings Bank and Willoughby G. Walling, the trustees under the mortgage of the Chicago & Milwaukee Electric Railroad Company (a Wisconsin corporation) foreclosed herein, and by Smith and Ford, the purchasers, and the reorganization committee they represent, to withdraw their applications for the confirmation of the sale had on September 25, 1912, pursuant to the decree of foreclosure and sale entered by this court on August 7, 1912; motion by John Griffiths, a bondholder, for leave to file his intervening petition herein.

"There are two Chicago & Milwaukee Electric Railroad companies organized under the laws of the states of Illinois and Wisconsin, respectively. Each company constructed an electric interurban railroad in the state of its organization. These two railroads were in reality one continuous line of track, extending from Evanston, Ill., to Milwaukee, Wis., with a branch in Illinois. In 1902, the Illinois company executed a mortgage covering all of its property to secure the payment of $5,000,000 of bonds, of which $4,000,000 were issued and are now outstanding. In 1905, the Wisconsin company executed a mortgage covering all of its property, to secure the payment of an issue of $10,000,000 of bonds, all of which were issued and remain unpaid.

"In January, 1908, proceedings by creditor's bill were started in the Circuit Court here and at Milwaukee, in the Eastern District of Wisconsin. In these proceedings receivers were appointed here and there. Subsequently bills were filed in the two jurisdictions to foreclose the mortgages mentioned, and these proceedings were consolidated with the original proceedings; the receivership having been continued to the present time. During the year 1912, decrees of sale were rendered here and at Milwaukee covering the property, respectively, of the two companies. The sales took place at Waukegan, Ill., and Racine, Wis., on September 25th, last. For the Illinois property $1,650,000 was offered, and for the Wisconsin property $1,600,000. These bids were made by agents representing a reorganization committee, with which committee

there had been deposited approximately 95 per cent. of each issue of bonds under foreclosure. There being no other bids, the master has recommended their acceptance. The objection comes from a holder of 12 Illinois bonds, which the owner refused to deposit under the proposed plan of reorganization, and, of course, attacks here only the Illinois sale."

This statement, taken from the opinion of the trial judge in Investment Registry, Limited, v. Chicago & Milwaukee Electric Railroad Company [D. C. North Dist., Ill.] 206 Fed. 488, 490, gives briefly the situation out of which the matters now before the court grow. In the opinion referred to, the conclusion was reached that the sale of the Illinois property be set aside; and a resale was ordered. From such order an appeal was taken. Pending such hearing in the District Court for Illinois, and the appeal, no further steps were taken in the Wisconsin proceedings, except the filing of a petition for the confirmation of the sale herein had and the presentation of the petition of Griffiths next referred to.

On February 15, 1913, John Griffiths presented to the court his petition, averring among other things, his ownership of 200 of the bonds, secured by the mortgage which was the subject of foreclosure, and asked leave to file it as an intervening petition, seeking through the same to be made a party to the consolidated cause, to object to the confirmation of the sale, and for affirmative relief as hereinafter stated.

On June 6, 1913, the Court of Appeals affirmed the ruling of the District Court for the Northern District of Illinois, 212 Fed. 594, 129 C. C. A. 130, and thereafter the trustees herein assuming that in obedience to such judgment of affirmance this court would likewise order a resale, made a motion, in which the purchasers at the sale under the decree of this court joined, to withdraw their previous applications for confirmation and to direct a resale of the property. At the same time the application of Griffiths to intervene was heard.

Moses, Rosenthal & Kennedy, of Chicago, Ill., Theodore Kronshage, Jr., John W. McMillan, and Hugh Ryan, all of Milwaukee, Wis., for intervener.

Rosenthal & Hamill, of Chicago, Ill., for cross-complainants.

Mayer, Meyer, Austrian & Platt, of Chicago, Ill., for purchasers and reorganization committee.

GEIGER, District Judge (after stating the facts as above). [1] The motion of the trustees and the purchasers to withdraw the application for confirmation of the sale must be granted, it seems to me, almost as a matter of course. The objections which were urged in the trial court and Court of Appeals in respect to the Illinois sale, it was conceded, were, or might be made, available here; and if, upon the prompting of the appellate court ruling and without contest here, the purchasers are content to relinquish any right which their bid may have given them, no reason is perceived for refusing to accept their offer, without the imposition of terms of any kind, as suggested by the proposed intervener.

The application for leave to file the intervening petition presents two grounds: (1) The partiality and consequent disqualification of the trustees, necessitating the admission of the bondholding petitioner Griffiths as a party, to enable him to protect his interests. (2) That on February 25, 1908, a committee known as the "Wisconsin Committee" was constituted by an agreement between the members thereof, named in the petition, and such Wisconsin bondholders (holding bonds secured by the mortgage now being foreclosed) who should deposit their bonds as in the agreement specified; that on October 10, 1908, a new agree-

ment was entered into between the same persons; that such committee agreed "to do or cause to be done whatever the committee in its sole discretion may deem expedient, necessary, or proper to preserve, protect, guard, secure or enforce the rights and interests of the depositors"; that petitioner, in reliance upon such agreement, deposited his bonds, thereby becoming a party to the new agreement, as in the petition alleged. Upon this is predicated petitioner's claim, in effect, that in the organization of such committee and the deposit of bonds therewith by petitioner, the committeemen became trustees, charged with the function of acting in behalf of the petitioner and other depositors as specified in the agreement; that notwithstanding such trust, and in violation thereof, the members subsequently joined in the formation of a "reorganization committee" of 10 members, 5 of whom were the individuals then and theretofore comprising the Wisconsin committee. The other members of the reorganization committee are alleged to have been, and were interested in part at least, in the organization of committees in the interest of the holders of bonds outstanding against the Illinois corporation. The reorganization committee thus constituted, prepared a plan of reorganization of both companies, which plan, dated January 26, 1912, contemplated the purchase of each of the properties in the interest of the respective bondholders who, by the deposit of their bonds with the committee, should become parties to the reorganization plan.

At the sales in each of the jurisdictions, this reorganization committee was the sole bidder and its bids came before each of the courts for acceptance and confirmation. The voluminous petition sets out in detail the various steps alleged to have been taken by bondholders of the respective corporations prior and leading up to the adoption of the plan of reorganization, the alleged conflict of interest and duty between the Wisconsin and Illinois interests in the perfection of such plan, the dual relation alleged to attend the membership of the five individuals named, in each of said committees, and hence their breach of trust in acting as members of the general reorganization committee and assenting to its plan, which is averred to be iniquitous and in effect to subordinate the interests of the Wisconsin to the interests of the Illinois bondholders.

The prayer is that the petition stand as presenting objections to the confirmation of the sale; that the acts of the Wisconsin committee be adjudged a breach of trust toward the petitioner; that such committee, and the reorganization committee, and their respective members, "be perpetually restrained and enjoined from further carrying into effect, * * * in whole or in part, said plan and agreement of reorganization; * * *" that the Wisconsin committee and its members be restrained and enjoined from further acting as members of the reorganization committee, etc.; that, if a new sale be ordered, then Smith and Ford (who bid on behalf of the reorganization committee) and the *reorganization committee* and its members, be *restrained* and *enjoined* "from bidding upon the properties, rights and franchises of said Wisconsin corporation and said West line in the name, or on behalf of, said reorganization committee, under and by

virtue and in pursuance of said agreement of January 26, 1912" (the reorganization agreement); and that the Wisconsin committee and its members be restrained and enjoined "from doing any acts or things contrary to the rights and interests of" petitioner, under the agreement of October 10, 1908 (the Wisconsin committee agreement), in furtherance of the reorganization plan.

In support of the first of the grounds mentioned—the disqualification of the trustees—these facts are urged:

(a) That one of the trustees, for some time prior to January 26, 1912 (the date of the general reorganization agreement), and at the date of the sale, was the "holder of 202 Wisconsin bonds secured by the mortgage," which is the subject of foreclosure, and that since the sales, such trustee "has consented and agreed in writing to deposit, subject to procuring the order of this court giving it leave so to do, its said 202 Wisconsin bonds under said plan and agreement" of reorganization.

(b) That Joseph E. Otis, the president of the corporation trustee was, during the times mentioned, the "owner or in control of and interested in 25 of the Wisconsin bonds," which bonds are said to have been deposited by him under the general reorganization plan.

(c) That Walling, one of the trustees, was at the date last above mentioned "head trust officer" of the corporation cotrustee, and a salaried officer thereof; and as such was not "acting independently of" the corporation cotrustee, but under its "directions and influenced by" its wishes.

(d) That both of the trustees appeared in the District Court in Illinois after the sales, and supported the motion in the proceedings therein, for confirmation of the sales (the facts concerning which sales are set forth in the petition, and are found in the reported case, 206 Fed. 488), and—

"actively participated, through their counsel, upon the hearing of certain objections to the confirmation of said sales, and continued to urge such confirmation, notwithstanding * * * such trustees, knew, or should have known, of the grossly inadequate prices bid by said proposed purchasers."

In this connection it is further urged that the trustees likewise joined the purchasers in an application to confirm the sale in this court (Eastern District of Wisconsin).

(e) That connected with, and operated by, the receiver of the Illinois corporation railroad is a mile of railroad owned by the Waukegan, Fox Lake & Western Railway Company. Its capital stock is $100,000, and its properties are subject to an outstanding mortgage bond issue of $50,000. Such stock and bonds are averred to be owned and controlled by Otis, president and director of the corporation trustee herein. It is claimed that Otis made an agreement, on August 1, 1912, to sell to the reorganization committee the stock and bonds specified at a price of $56,000, to be paid, as stated, when the reorganization was consummated; that such agreement was in force on September 25, 1912, when the sale herein was had.

[2] When the petition thus filed was heard pursuant to a rule to show cause served upon the various parties interested, there arose, and

throughout protracted argument was debated, this question, namely, the proper practice and procedure upon the presentation of petitions of this character; whether the court, in determining the *right to file* the petition, was or was not obliged to assume its allegations to be true, or whether it could proceed, by summary or other method, to inquire into their truth. It arose in this way: The petitioner attacked the trustees, the sale, and also the reorganization plan, asserting, in connection with the last, the breach of trust referred to. The trustees, as well as the purchasers, presented voluminous affidavits to rebut the petition in its various aspects.

The application for confirmation of the sale being now withdrawn, that feature of the petition, and any response thereto, is eliminated because another sale will be ordered. With respect to the attack upon the reorganization plan and the prayer for injunctive relief against future bidding by the reorganization committee—which is pressed as an independent ground for intervention—the question is eliminated because, as will appear, that portion of the petition will be disposed of on other grounds. Therefore it is necessary now to consider only whether the trustees should be heard upon the merits of the attack made by the petitioner in seeking to disqualify them from continuing in the sole control of the foreclosure proceedings.

[3] Now the petitioner, it will be recalled, charges that the corporation trustee herein is the owner of 202 bonds of the Wisconsin corporation. It is variously stated to be the "holder," to be "interested" in, to have a "dual capacity" concerning the bonds in question; and they are referred to as "its bonds." In short, the plain purpose is to charge a personal proprietary interest in bonds of the mortgage relative to which it is one of the trustees. Whether a trustee so circumstanced is to be disqualified from conducting as sole party, to the exclusion of other security holders, proceedings for foreclosure, whether the "rule of convenience" is to be put aside when once such fact appears, may be debatable. It is not doubted, however, that the allegations in question were intended to advise the court of the existence of that fact as disclosing the trustee's disqualification, from which as a necessary consequence, petitioner should be admitted as a party. But the trustee offers to show that, instead of having any personal interest therein, the 202 bonds are held by it as trustee under a "collateral trust indenture," dated March 1, 1907, executed by the defendant corporation to it to secure sundry "collateral gold notes"; the "collateral trust indenture" is exhibited, from which no conflict with the trust mortgage under foreclosure exists or is possible, save only in the contingency of obtaining an absolute title to the bonds so pledged in trust; that in so far as the possession of such 202 bonds enabled the trustee to participate in the reorganization plan, it had given its assent subject to "securing a proper order of court authorizing the same," this last noted fact also appearing expressly from the allegations of the proposed intervening petition; and finally, pending the hearing, and to avoid possible embarrassment, such trustee offered to and did resign its trust under the collateral trust indenture. It is not seriously contended that the facts are, or were, otherwise than as thus shown by the trustee.

[4] So, too, the allegation of the petition charging the ownership by Otis, the president of the corporation trustee herein, of 25 bonds, is met by his unequivocal denial and the counter allegation that a corporation, the General Liquidation Company. of whose 600 shares of stock he owns 100, does own 135 bonds which have been deposited under the reorganization agreement. This, too, seems to be conceded as the fact.

Respecting the contract alleged to have been made by Otis for the sale of the securities of the Waukegan, Fox Lake & Western Railway, the trustee offers to show that the proposition was conditioned upon approval by the Illinois court or its receiver.

It may be that where a person not already interested or represented in a suit seeks to intervene—where intervention proper is sought—the court should not first determine the cause of action set out in the bill or petition in order to determine the right to intervene. Thus where one seeks by intervention to lay claim to the subject-matter of a suit and obtain a decree which, in his absence, would go to another, the court cannot do otherwise than consider whether his petition, if proven, would entitle him to relief if a party. But, as suggested to counsel upon the argument, is this true where one, having an interest in the suit, excluded as a party under a rule of convenience and because represented by a trustee, seeks to displace his trustee, or to join him in active participation in the suit? He does not seek to assert any interest, or to obtain any relief, not already assertable or grantable on his behalf, if the *trustee will but attend* to it. His attack is directed at his own representative to whom his interests in the suit have been committed, and who is the sole party under the rule adopted to enable the court to discharge its functions in this class of cases. The court, in this situation, is not concerned with the question whether a bondholder has any interest in the suit, or any right which is entitled to protection. That is conceded. The only question is, Shall the rule be relaxed because the representative has become disqualified any longer to discharge his duty toward the several interests in the suit? and the question is to be determined, not merely upon charges which may be made, but upon the facts as they really exist at the time when the court is asked to admit the beneficiary into active participation in the suit. In this situation, the practice or procedure by which the court shall ascertain the fact is wholly discretionary. Undoubtedly the trustee could be required to take formal issue by answer to the petition, and a trial thereon had; so, too, a reference to a master might be made to inquire into the merits of the petition without answer thereto; and no reason is perceived why the court should not proceed directly to ascertain the facts in any manner deemed convenient or adequate in the particular situation presented. Inasmuch as the petition is presented for no purpose save that of displacing the trustee, or admitting the bondholder, the *right to file* the petition need not be determined separately or apart from its merits; and the conclusion is reached that in the present case the court can, in its discretion, consider not only the matters appearing on the face of the petition, but also the facts relating

to the trustee, as they are offered (and, as noted, not seriously controverted) to be shown in response to the rule to show cause.

The question is therefore, Do the facts respecting the corporation trustee's relation to the railway corporation under the "collateral trust indenture," Otis' ownership of stock in another corporation, which owns certain of the bonds secured by the mortgage under foreclosure (and which bonds have been deposited under the reorganization plan), Otis' alleged contract respecting the Waukegan, Fox Lake & Western Railway, put such trustee in such a position that its impartiality can be challenged? Certainly under the collateral trust indenture, it acquired no junior or other conflicting interest in the property conveyed to it by the deed under foreclosure. It assumed no duty whose performance was at variance with any imposed upon it by the latter. The most that can be said is that by the collateral trust indenture it obtained possession of certain of the bonds which might ripen into ownership, or, in certain contingencies, enable it to assert a control thereover—as, for example, to influence their use, in the present case, in assent to the reorganization plan. It is my judgment that a trustee ought not to so place itself. The efficient discharge of duty is likely to be endangered whether the trustee is upon debatable or upon forbidden ground. The trustee herein doubtless realized this when it gave assent to the deposit of the collateral trust bonds, subject to the approval of the court. That reservation, however, is quite persuasive in establishing its good faith and its design to subordinate every other obligation to its primary duty as trustee under the foreclosure proceedings; and the act of resigning the collateral trusteeship, even after the attack was made by the bondholder, ought to be accepted as in furtherance of its primary duty to be impartial and to avoid possible embarrassment, rather than as a confession of wrong consequent upon which such trustee must be deemed unfit any longer to be in sole control of the litigation. The facts, therefore, as shown by the petition and by the trustee respecting the latter's relation to these 202 bonds do not support the claim of disqualification.

The ownership of stock in a corporation which owns certain of the bonds does, in a certain sense, give Otis, the president of the corporation trustee herein, an interest in the bonds, but he is in no sense the owner or possessed of any legal interest, and for that matter has no legal control thereover; and, until it appears that he has done some act which in fact commits the trustee herein to some policy or situation at variance, actually or potentially, with its duty as trustee, his remote and indirect interest thus held certainly cannot disqualify the trustee. So long as such corporation trustee appears free from any conflict of interest, the possible conflicting position of one of its officials, unaccompanied by any act of hostility which is chargeable to the corporation itself, will not justify a want of confidence in such trustee.

With respect to the Waukegan, Fox Lake & Western Railway contract, charged to have been entered into by Otis, the contention is also made that by virtue thereof he has an interest in the success of the reorganization plan, which is, or may be, in conflict with his duty as the chief executive of the corporation trustee. This, if true, discloses a

more direct interest than that last above considered; but the question again arises whether it must, without regard to other considerations, prove a disqualification of the trustee. In this connection, as well as in the matter next to be considered, it is a fact of controlling importance that no dereliction whatever is charged against the trustee in the enforcement of the rights committed to it, down to and including the decree of foreclosure and the bringing of the property to a sale. No attack has been, or can be, made against the decree, and no claim is made that the property must not come to a sale by virtue thereof, except the claim now advanced that the reorganization committee should not be permitted to bid. No suggestion is made that the decree does not conform with decrees usual in cases of this kind, or that it fails to afford to all bondholders a full measure of equality and protection. In this situation, and until there has been another sale, the trustee can only stand by and await the further execution of the decree by the master; and the existence of Otis' contract, which appears to be entered into subject to the approval of the Illinois court, is not a disqualification.

[5] It is charged that in the Illinois proceeding the trustees joined in a motion for confirmation of the sale; that they joined here in the Wisconsin proceeding, in a motion for confirmation, which motion was pending when the confirmation of the sale in Illinois was denied, and also when the ruling of the Illinois court was affirmed; that the trustees then knew, "or should have known," of the invalidity of the sale because of the facts upon which confirmation was refused. Of course, a trustee may, if he chooses, and if the matter of confirmation is moved in court by the bidders or purchasers, stand aloof and merely await the result. But he may also, and, broadly speaking, he must, take whatever steps are necessary to fully discharge his duty in reaping the benefits of the proceeding to the end that his trust obligations may be terminated and the beneficiaries satisfied; and it would seem that some duty, either to ask for or oppose confirmation, rests upon the trustee, primarily, as the party plaintiff. Obviously, in determining whether he shall act, and if so, how, he must exercise, in good faith, his best judgment. In the Illinois proceeding, objections to the sale were interposed and successfully prosecuted by the holder of three-tenths of 1 per cent. of the outstanding bonds; and in the proceedings here the objector and proposed intervener has substantially 2 per cent. of the Wisconsin bonds. Now, it may be assumed that, in determining whether they should take any attitude upon confirmation, in either of these proceedings, the trustees here justifiably took cognizance of the wishes of those of their beneficiaries who favored it, in each case at least 95 per cent. Having moved for such confirmation (not only in discharge of the independent right and duty of the trustees, but also in reliance upon such wishes), is such act available to a dissenting bondholder when a resale is ordered, as a permanent badge of bad faith and partiality on the part of the trustees in the conduct of all future proceedings? If so, then a trustee exercises his undoubted right at his peril, and must be ready thereafter, no matter how long the proceeding continue to divide his control with the dissenting bondholder, whether the

latter prevail upon his objections, or not. The ultimate correctness of their respective views cannot be the test. In the matter before us, the motion for confirmation being now withdrawn, there is nothing to be done but to proceed with a resale. This must go pursuant to the terms of the original decree and the order which will be entered, and involves the doing of no act by the trustees which will imperil the interest of any bondholder; and the act of the trustees in joining in the proceedings for the confirmation of the Illinois sale, though it failed to meet the sanction of the court, does not, in view of the withdrawal here of the motion of the trustees, conflict with good faith, nor at this time necessitate dividing the control of the suit.

[6] There remains for consideration the question whether petitioner should be allowed to intervene to obtain the affirmative relief by way of restraining the Wisconsin and the general reorganization committees from again bidding because of the former's breach of an alleged trust obligation which it owed to the petitioner. If it be conceded, as certainly it must be, that under the decree herein any reorganization committee may become a bidder, and, upon a sufficient bid, the purchaser, then the intervention by the petitioner for the purpose stated must obviously, and until the merits of the controversy tendered by the petition can be finally determined, suspend further proceedings under such decree. A sale could not be had until it is decided whether the reorganization committee must be eliminated as a bidder. To this it is replied that, if necessary in order to prevent the breach of the trust claimed to exist, it should be stayed. The difficulty with this contention is that, although in foreclosure proceedings, and especially in connection with the price bid at the sale, the court may take cognizance of a pending reorganization plan to ascertain whether the security holder is obtaining a just and fair return out of the property sold, it is not its province to shift its function to foreclose and sell the property to any affirmative duty to pass upon the quality of the reorganization plan—much less to endeavor to settle collateral controversies arising between security holders.

The District Court in Illinois (206 Fed. 488), in denying the motion to confirm the sale, passed upon the single question whether the bid was inadequate as a result of chilling or suppression, whether the facts charged showed a suppression of competition. The Court of Appeals (212 Fed. 594, 129 C. C. A. 130) had before it these same questions. Whatever is contained in its opinion in reference to reorganization plans and the necessity of fair treatment of all security holders bears solely and directly upon the main proposition that courts must, to protect to the fullest extent nondepositing bondholders, clearly recognize the control over bidding situations which reorganization committees usually possess.

Judge Baker said:

"When a nondepositing bondholder objects to confirmation solely on the ground that the reorganization committee's bid, though not grossly inadequate, was substantially short of the fair value, the answer is that his co-owners of the common mortgage and the common decree offered him the opportunity to deposit his bonds and to share equally with them the benefits of the purchase. But, in sales of this class, we never have observed or heard of a

case where the minority were turned away without having been given by the majority a fair opportunity to share equally with them the benefits of the purchase—where for example, 95 per cent. of the bondholders of a vast railroad or industrial enterprise have combined and then shut the door upon the scattered 5 per cent. And no just distinction can be drawn, we believe, whether the door be shut or unconscionable conditions of entrance be imposed.

"A reorganization plan is somewhat like an insurance policy or a bill of lading, against which there is no protection except through legislative control of the insurance and railroad companies' offerings. The solitary and distant bondholders must accept the reorganization plan or let it alone, as it is written. When the unitary property of a single company of the kind in question is to be reorganized, the persons who assume or accept the committeeship, realizing the equality of all bondholders and recognizing that no bondholder has any right to preferential treatment, usually offer a plan that will give the common owners of the mortgage equal benefits through the foreclosure, usually become nothing but the agency through which the bondholders act for their mutual protection. In such a reorganization, if the bondholder does not come through the foreclosure as well off as any other bondholder, it is his own fault. In the case at bar, the reorganization committee was not a mere agency for appellee and her fellow Illinois bondholders; under sweeping powers, to be exercised 'at its sole discretion,' it could buy bonds, take up claims of subordinate right, allow compensation to pre-existing committees and assume their contracts, and do anything and everything it saw fit to do, whether specified or not. Preferential treatment of Illinois bondholders who were acting in the primary interest of their Wisconsin bonds, was accorded in many ways. * * * Thus the Illinois property, which in equity belonged to the Illinois bondholders in equal right under the mortgage and under the foreclosure decree, would, in the hands of appellant, be loaded down with premiums, bonuses, services, expenses, etc., with which neither appellee nor any other Illinois bondholder as such had any concern. Therefore no inequity was chargeable to appellee in asking the court to open a door of fair opportunity.

"No matter what the plan, it does not matter whether the committee bids much or little if all the bondholders are in. Here, some $160,000 of bonds were outstanding. And the temptation to use the monopoly of bidding for the purpose of recouping partially the outside expenses and losses of the majority at the expense of the minority seems to have been too strong."

[7] This language, as is clearly seen, is used in response to the contention, in effect, that a bondholder who stays out of a reorganization plan does so at the peril of being obliged to accept the reorganization committee's bid for the property, and, having been offered the opportunity to join the plan, cannot complain, no matter how low the bid. But, as indicated, this would leave the reorganization committee the power to oppress the bondholder in any or all of three ways; by denying admission, by imposing unconscionable conditions, or by purchasing without regard to value. In other words, when a reorganization committee has offered what in the light of the security holder's rights under the mortgage is not a *fair plan,* the refusal of a bondholder to accept it, is not an equity chargeable against him when he seeks to object to the judicial sale; but the court will accord such bondholder a hearing to ascertain whether there has been a *fair sale.* If there has not been such, then, by way of "opening a door of fair opportunity" to such bondholder, a resale should be ordered. In a sense, it may be true that foreclosures of the character before us are frequently instituted by parties as a means of, or incidental to, reorganization; but the court does not undertake to carry out the reorganization and by its

decree declare it to be satisfactory to all parties in interest. Its only ultimate function can be to see that the security holder's interest in the property is converted to his use through a sale at a fair price.

[8] The petitioner appears, not only as a dissenting bondholder, but also as a proposed bidder at the resale. It is hard to understand why any other bidder should, under these conditions, be eliminated. If the reorganization committee has a commanding position, its ejection from the bidding field certainly would not tend to increase the amount which petitioner would bid. Very likely it would result in a rather efficient transfer of the command. I do not think that the court at this time is concerned with anything other than obtaining an adequate price at a resale.

An order may be entered denying the petition for intervention, also an order directing a resale.

SILVAS v. ARIZONA COPPER CO., Limited.

(District Court, D. Arizona. April 10, 1914.)

1. COURTS (§ 357*)—PROCEDURE OF STATE COURTS—COSTS.

Act Cong. July 20, 1892, c. 209, 27 Stat. 252 (U. S. Comp. St. 1901, p. 706), providing for waiver of security for costs and the right to sue in forma pauperis, covered the whole subject, and was exclusively applicable to the federal courts, to which Act Ariz. April 1, 1913, § 257, providing that no guardian appointed under the laws of the state should be required in any case to give security for costs, did not apply by virtue of the Conformity Act (Rev. St. § 914 [U. S. Comp. St. 1901, p. 684]).

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 938; Dec. Dig. § 357.*]

2. COSTS (§ 132*)—SECURITY FOR COSTS—FEDERAL COURTS—STATUTES.

Act Cong. July 20, 1892, c. 209, § 1, 27 Stat. 252 (U. S. Comp. St. 1901, p. 706), provides that any citizen entitled to sue in any federal court may commence and prosecute to conclusion any such suit or action, without being required to prepay fines or costs, or give security therefor, or after bringing suit or action, and filing in the court a statement under oath in writing that because of his poverty he is unable to pay the costs, or to give security, and believes that he is entitled to the redress he seeks by such suit or action, setting forth briefly the nature thereof. *Held*, that where plaintiff, desiring to sue in forma pauperis in the federal court, has contracted to pay his counsel a sum equal to 50 per cent. of the recovery as a fee for their services, they thereby become parties in interest, and an order cannot be granted authorizing plaintiff to sue in forma pauperis, or relieving him from executing a bond for costs, unless it appears that such counsel are also unable to pay costs.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 504–513, 516; Dec. Dig. § 132.*]

3. LIMITATION OF ACTIONS (§ 70*)—STATUTES—REPEAL—EXCEPTIONS.

Laws Ariz. 1903, No. 16, providing that certain actions, including those based on fraud, shall be barred in one year, and repealing Civ. Code Ariz. 1901, par. 2949, and all other acts and parts of acts in conflict therewith, did not repeal paragraph 2970, providing that if a person is an infant, of unsound mind, or imprisoned at the time of disability, the time of such disability shall not be deemed a portion of the time limited for the commencement of the action, but such person shall have the same time after the removal of his disability that is allowed to others by the provisions of

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

the title; there being no necessary conflict between the act of 1903 and such section.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 382–386; Dec. Dig. § 70.*]

At Law. Action by Richard Silvas, an infant, by Ramon Silvas, his guardian ad litem, against the Arizona Copper Company, Limited. On motions to compel plaintiff to give security for costs and to make his complaint more definite and certain, and on demurrer raising the statute of limitations. Motions granted, and demurrer overruled.

L. Kearney, of Clifton, Ariz., and Wm. M. Seabury, of Phœnix, Ariz., for plaintiff.

W. C. McFarland, of Clifton, Ariz., for defendant.

SAWTELLE, District Judge. The defendant in this cause has made and filed its motion that plaintiff be required to give security for costs before proceeding further with the trial, and in support of said motion filed an affidavit of its cashier, alleging that neither the said Richard Silvas nor the said Ramon Silvas, guardian ad litem of plaintiff, has property out of which the costs of this action could be made by execution. Thereupon the affidavits of plaintiff and his guardian ad litem were filed. These affidavits show the poverty of these parties, but do not contain an averment that no person interested in the cause was able to secure the costs.

It was stated in open court by counsel for defendant, and not denied by plaintiff or his counsel, that a notice had been served on defendant that counsel for plaintiff had a contract with him, by the terms of which they were to be paid a sum equal to 50 per cent. of the recovery as a fee for their services.

[1] There was filed by plaintiff an objection to the motion to require security, in which it is contended that plaintiff "ought not by right to be required to give security for costs, because under the provisions of a statute of Arizona, entitled 'An act to prescribe the procedure in civil actions,' approved April 1, 1913, being Senate Bill No. 90, and by section 257 of said statute, it is provided that 'no guardian shall be required in any case to give security for costs,' and there is no statute of Congress on the subject." That statute is as follows:

"Sec. 257. Neither the state, nor any county thereof, nor any state board or commission or state officer in his official capacity nor any executor, administrator or guardian, appointed under the laws of this state, nor any trustee in bankruptcy, shall be required in any case to give security for costs."

The defendant contends that such statute has no binding force on this court, for the reason that Congress has legislated on the subject, and this court must look to the act of Congress and disregard the act of the state Legislature.

By Act of Congress of July 20, 1892 (27 Statutes at Large, 252, c. 209, Fed. Stat. Anno. vol. 2, p. 294), it is provided:

"Section 1. That any citizen of the United States, entitled to commence any suit or action in any court of the United States, may commence and prosecute to conclusion any such suit or action without being required to

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

prepay fees or costs, or give security therefor or after bringing suit or action, upon filing in said court a statement under oath, in writing, that, because of his poverty, he is unable to pay the costs of said suit or action which he is about to commence, or to give security for the same, and that he believes he is entitled to the redress he seeks by such suit or action, and setting forth briefly the nature of his alleged cause of action.

"Sec. 2. That after any such suit or action shall have been brought, or that is now pending, the plaintiff may answer and avoid a demand for fees or security for costs by filing a like affidavit, and willful false swearing in any affidavit provided for in this or the previous section, shall be punishable as perjury is in other cases.

"Sec. 3. That the officers of court shall issue, serve all process, and perform all duties in such cases, and witnesses shall attend as in other cases, and the plaintiff shall have the same remedies as are provided by law in other cases.

"Sec. 4. That the court may request any attorney of the court to represent such poor person, if it deems the cause worthy of a trial, and may dismiss any such cause so brought under this act if it be made to appear that the allegation of poverty is untrue, or if said court be satisfied that the alleged cause of action is frivolous or malicious.

"Sec. 5. That judgment may be rendered for costs at the conclusion of the suit as in other cases: Provided, that the United States shall not be liable for any of the costs thus incurred.

The question here presented is: Under which of these statutes must the court proceed?

It is insisted by the plaintiff that section 914, Revised Statutes of the United States (U. S. Comp. St. 1901, p. 684), commonly called the "Conformity Statute," which provides that the Circuit and District Courts of the United States, in matters of practice, pleading and forms, and modes of proceeding in actions at law, shall conform as near as may be to the state practice, makes the state statute obligatory on this court, and the contention of the defendant is that the act of Congress of July 20, 1892, alone can be followed.

We think the latter contention must prevail. The congressional act referred to is in general and broad terms, and covers the whole subject. In Lange v. Union Pacific R. R. Co., 126 Fed. 338, 62 C. C. A. 48, the Circuit Court of Appeals of the Eighth Circuit in discussing this question use this language:

"Moreover, where Congress has legislated generally upon any such subject, the rules of the state practice in respect thereof are superseded, and the extent and limitations of the power of the courts of the United States are to be found in the congressional enactments, and are not in the laws of the states."

The conformity statute has received repeated construction by the Supreme Court of the United States. In Railroad Co. v. Horst, 93 U. S. 291, 23 L. Ed. 898, the court says, in speaking of the effect of that statute:

"This direction that the proceedings in the Circuit Court of the United States shall 'conform as nearly as may be to the practice in the courts of the state' must, of course, like the corresponding direction as to practice, pleadings, and procedure in section 914 of the Revised Statutes, give way whenever to adopt the state practice would be inconsistent with the terms, defeat the purpose, or impair the effect, of any legislation of Congress. Luxton v. North River Bridge Co., 147 U. S. 337, 13 Sup. Ct. 356, 37 L. Ed. 194; Indianapolis & St. Louis Railroad v. Horst, 93 U. S. 291, 23 L. Ed. 898; Chateaugay Co., Petitioner, 128 U. S. 544, 9 Sup. Ct. 150, 32 L. Ed. 508; Southern Pacific Co. v. Denton, 146 U. S. 202, 13 Sup. Ct. 44, 36 L. Ed. 942."

See, also, Chappell v. United States, 160 U. S. 512, 16 Sup. Ct. 397, 40 L. Ed. 510.

In Shepard v. Adams, 168 U. S. 618, 18 Sup. Ct. 214, 42 L. Ed. 602, the court said that uniformity of practice was left by the act of Congress (section 914, Revised Statutes) to be attained largely through the discretion of the national courts.

[2] It being thus evident that the law of Congress must furnish the standard by which this motion must be weighed, it becomes material to decide what is required by that act. There is now on file in this case no affidavit from the plaintiff such as is required by the statute, and as the record now stands the order requiring security must be granted; but, as the plaintiff may again make application, we will consider what is required under this statute to authorize the court to excuse him from giving security.

The requisites of the affidavit under this act were considered in the case of Boyle v. Great Northern Ry. Co. (C. C.) 63 Fed. 539. In that case and in the case at bar the motion and proof disclose that the plaintiff's counsel had undertaken to conduct the case on a contingent fee. The court says:

"There is no question but what a poor person can prosecute his cause and obtain a full hearing, but at the same time litigation is not to be fostered and encouraged by allowing the plaintiff to evade any expense which he makes. That is a duty of any party having sufficient means, and is not to be evaded. If he is not able to pay costs or give security for them, he can have justice without it. But a person who acquires by contract an interest in any litigation, and a right to share in the fruits of a recovery, and who is not entitled to sue in forma pauperis, cannot be permitted, under cover of the name of a party who is a poor person, to use judicial process and litigate at the expense of other people. I think it does make a difference whether the plaintiff has made a contract with his counsel for their compensation. It makes this difference: That, after a contract has been made with counsel for a pecuniary interest in a lawsuit, the case is carried on partially for their benefit; and, if they are able to pay the expenses of the litigation, it is unjust for the court to allow the litigation to go on for their benefit, without expense, on the pretense that the plaintiff is unable to pay. I shall require a showing that the plaintiff is unable to pay or secure the costs, and that there is no person interested, by contract or otherwise, in the cause of action, or entitled to share in the recovery, who is able to pay or secure the costs. I think that such a rule is in keeping with the meaning and spirit of this law, and it is founded in reason."

In Feil v. Wabash R. Co. (C. C.) 119 Fed. 490, it was disclosed that the case was being prosecuted by the plaintiff's attorney on contingent fee. Speaking of the effect of such contract or contingent fees on the right of the plaintiff to be relieved of costs under the act of July 20, 1892, the court held that in such cases the plaintiff represents, not only her own interest, but also that of the attorneys in the case, and she sues for herself and as trustee for others, and, standing in this position, she could not be held to be poor within the meaning of the law, unless the beneficiaries are poor also. The court concludes:

"No petition to sue as a poor person can avail, unless it discloses that all the beneficiaries, as well as the nominal plaintiff, come within the purview of the act."

In Reed v. Pennsylvania Co., 111 Fed. 714, 49 C. C. A. 572, the Circuit Court of Appeals, speaking through Justice Lurton, now of

the Supreme Court, uses this language as to what an affidavit under this law must disclose:

"The affidavit in this case is defective in this: The suit is that of the widow and administratrix of Frank Reed, who sues for damages consequent upon the tortious killing of her intestate and husband. Under the Ohio statute authorizing such an action, the damages recoverable are for the benefit of the widow and children of the deceased, and they are the real parties in interest. Bates' Ann. St. Ohio, § 6135. The beneficiaries and real parties in interest are therefore the widow and the children of the deceased. The affidavit shows sufficiently the poverty of the widow, but is defective in not making a like showing in behalf of the children of the deceased. Boyle v. Railroad Co. (C. C.) 63 Fed. 539. It may be that the estate of the deceased is able to prepay the costs of the writ of error, or secure the same. If so, the act would have no application. The affidavit makes no showing as to the value of the estate of which the plaintiff is administratrix. The application is for these reasons denied but without prejudice to its renewal upon an affidavit showing that the estate of the deceased, as well as the beneficiaries, is unable to pay the costs or give security."

In the case of Phillips v. Louisville & N. R. Co. (C. C.) 153 Fed. 795, is a full and able discussion of the objects to be attained by this statute, the following extracts from which will be of interest as a clear statement of the law:

"This statute is of a charitable and beneficent nature. Its sole purpose is to enable persons, who in good faith are unable, on account of poverty, to prosecute any suit or action in the courts of the United States, to obtain a fair chance to have the rights adjudicated. It is not intended that the statute should be used directly or indirectly to benefit those who are able to prosecute their suits. The citizen seeking the benefit of the statute, and making the affidavit of poverty required thereby, must of necessity be the only person benefited by his cause of action. It surely was never intended by the statute that two or more persons should be interested financially in the result of a suit or action brought, and that, if one of them happens to be without means, this one can be permitted to make an affidavit of poverty and secure the benefits of the statute for the other parties to the suit, who are able to prosecute same, even though they may not appear by name as parties. The admission by the attorneys for the plaintiff that they were interested to the extent of one-third of any amount that might be recovered made them financially interested in the result of the lawsuit, and, unless they, too, could make and file an affidavit as to their poverty, the plaintiff in this cause could not obtain the benefit of the statute."

The showing here made not being sufficient to authorize the court to relieve the plaintiff from securing the costs, it is ordered that the plaintiff give security for costs in the sum of $200, to be approved by the clerk of the court, within 30 days from this date.

The defendant has also filed a plea of the pendency of another action in the superior court in and for the county of Greenlee, state of Arizona, between the same parties to this action, and for the same cause of action as that set forth in plaintiff's complaint herein. No answer has been filed to this plea. On the hearing, counsel for the defendant did not call the case to the attention of the court, or ask any action or ruling thereon. The court under such circumstances considers the plea abandoned, and no further action of the court is necessary to dispose of it.

Defendant also filed a motion to require the plaintiff to make his complaint more definite and certain. The plaintiff insists that the

motion has been abandoned by failure to have it heard and decided within the time for answer, and cites paragraph 475, Rev. St. Ariz. 1913.

The complaint in this case was filed October 3, 1913, and the motion to make more definite and certain on October 25th of the same year. Said motion was filed within the time required by said statute; but since its filing, and up to the date of the hearing of said motion, the entire time of the court has been taken up in the trial of a heavy criminal calendar, and on account of the pressure of this business it has been impossible for the court to devote any considerable amount of time to the hearing of preliminary matters, which under ordinary conditions would have been reached and decided. Under these conditions, for which neither the defendant nor the court was responsible, it is deemed fair to hear the motion on its merits.

The complaint was rather loosely drawn, and contains some repetitions, and some of its averments would appear to be surplusage, and in view of the extreme difficulty, if not the impossibility of formulating the issues under the complaint as drawn, and the fact that many of these allegations as to what caused the accident might be more clearly and distinctly set forth, the motion to make more definite and certain will be granted.

[3] The court having determined that the plaintiff must give security for costs and amend his complaint, it is not necessary to decide some of the demurrers filed. Demurrers which raise the statute of limitation will apply to any complaint, on the facts disclosed, and it is deemed best to decide the contention thus raised.

The demurrer to the complaint is based on the idea that Act No. 16, Session of 1903, was an independent enactment on the subject-matter embraced by it, and that section 2 of that act repeals section 2949 of the Revised Statutes. It is insisted that there is no saving clause in this act, and that section 2970 of the Revised Statutes has no application to the limitation enacted by this statute, and that consequently the minority of the plaintiff will not prevent the bar of the statute.

It is a rule of construction that the whole act must be looked to in arriving at its meaning. The act under question is peculiarly drawn. The same number (2949, section 15), as it appeared in the Revised Statutes, is at the commencement of section 1 of the act. These figures would be meaningless, if they did not indicate the legislative intent to have the act constitute a part of the Revised Statutes, in place of the section thus marked which was contained in them before. The evident intent of the Legislature was to amend and complete a system of limitations for personal actions by the addition of the matters wherein this act differs from section 2949 as it then stood, which are included in subdivisions 4 and 5 of the act. There is nothing in the act which shows any intent to repeal the exceptions declared by section 2970 of the Revised Statutes, and there is no necessary conflict between the provisions of the act and that section. It was only laws which are inconflict with the act and section 2949 as it then stood which were repealed.

We think, in view of the fact that it would apply a rule of personal actions which is in conflict with the declared policy of the state as to limitations of actions, except those relating to land, and the further fact that, while repealing 2949 as it then stood, the repealing clause contains no specific mention of section 2970, a field of operation for all of these sections is afforded by holding that the act was in effect an amendment of section 2949 as it then stood. The Supreme Court of Arizona had this question before them in the case of Fleming v. Black Warrior Copper Co., Amalgamated, et al., 136 Pac. 273, and it was there held that this legislation amended section 2949 of the Revised Statutes of 1901, and section 2970 is expressly referred to as in force and as controlling.

This decision, in the opinion of this court, asserts the law correctly, and the said demurrer is overruled.

TANQUERAY, GORDON & CO., Limited, v. GORDON DISTILLING & DISTRIBUTING CO.

(District Court, D. New Jersey. May 2, 1914.)

TRADE-MARKS AND TRADE-NAMES (§ 70*) — UNLAWFUL COMPETITION — GIN PACKAGE.

Complainant and its predecessors, since 1769, had put out a gin manufactured in England, under the trade-name "Gordon & Co.'s Dry Gin," in oblong bottles bearing a boar's head, with the words "Gordon's Dry Gin," with "London" and "England" blown in the glass, respectively, above and below the first-mentioned words. Defendant, a New Jersey corporation, in 1909, put out a compound containing gin in similar bottles, bearing labels and displaying a trade-mark consisting of the head of an elderly man in a white circle. Blown in the glass of defendant's bottle were the words "Gordon's Dry Gin," and above them in the glass, but in small letters, were the letters "U. S. A. Father." The words "Gordon's Dry Gin" on defendant's bottles were of the same size and style as the words printed in red, "Gordon & Co.'s Dry Gin," on complainant's bottles, and on each of the two front corners was a representation of juniper berries, from which gin is manufactured. *Held*, that defendant was guilty of unlawful competition, in endeavoring to palm off its goods for complainant's product, and that complainant was entitled to an injunction permanently restraining defendant's use of the word "Gordon" or "Gordon's," except so as to clearly indicate that the contents of the bottle were not manufactured by complainant.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 81; Dec. Dig. § 70.*]

In Equity. Bill by Tanqueray, Gordon & Co., Limited, against the Gordon Distilling & Distributing Company. Decree for complainant.

Geo. W. Tucker, Jr., of New York City, for complainant.
George J. Stillman, of Jersey City, N. J., for defendant.

BRADFORD, District Judge. The bill in this case has been brought by Tanqueray, Gordon & Co., Limited, a corporation of Great Britain and Ireland, against the Gordon Distilling & Distributing Company, a corporation of New Jersey, alleging the violation of trade-marks

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

and labels, and unfair competition in trade, and praying for an injunction and an accounting of profits and damages. The complainant was incorporated in 1898 and manufactures and sells gin known as "Gordon Gin." It is alleged in the bill as follows:

"That heretofore and about the year 1769 one Alexander Gordon began the business of gin distilling under the firm name of 'Gordon & Co.,' in London, England, and put upon the market a certain gin under the name and trade-mark 'Gordon & Co.'s Dry Gin.' The business thus established by him was thereafter carried on by himself until his death when he was succeeded by his son, Charles Gordon, who in turn was succeeded by his son Charles Gordon, Jr., and a Mr. Knight; later Mr. Knight retired, and Mr. Charles Gordon, Jr., after carrying on the business as sole owner duly assigned all his right, title and interest therein including the name of 'Gordon & Co.' to J. P. Currie, E. H. Currie, E. Farquhar and R. C. W. Currie, and the said E. H. Currie, E. Farquhar and J. P. Currie duly assigned, transferred and set over all their right, title and interest in and to the said business and firm name 'Gordon & Co.' to the said R. C. W. Currie. That thereafter and about the year 1898 the said R. C. W. Currie who was then continuing the business and trading under the firm name of 'Gordon & Co.' together with Charles W. Tanqueray, William Tanqueray, Jr., and George Dimoke Green, who were then trading under the firm name of Charles Tanqueray & Co., consolidated and were duly organized into a corporation under the laws of Great Britain and Ireland, the complainant herein, which thereafter and down to the present day has continued the manufacture and sale of the gin heretofore produced by 'Gordon & Co.' and that said gin has been known throughout the markets of the world since the year 1769 to and including the present time as 'Gordon & Co.'s Dry Gin,' which said name has been a trade-mark therefor since the year 1769."

The answer admits that Alexander Gordon began the business of gin distilling under the firm name of Gordon & Co. in London, England, and put upon the market gin under the name and trade-mark of "Gordon & Co.'s Dry Gin"; that he carried on that business until his death, and that thereafter the business was carried on in succession as stated in the bill of complaint. The complainant and its predecessors in connection with the sale of gin have for a number of years last past used sundry trade-marks or trade-names with certain accessories printed on body labels used in connection with the oblong bottles in which the gin is sold. Among them is a trade-mark representing the head of a boar, registered in the United States patent office September 13, 1892. The defendant was incorporated in 1909, and, while not manufacturing gin, puts it or a compound containing it up and sells it in packages and bottles bearing labels and displaying a trade-mark consisting of a representation of the head of an elderly man in a white circle. This trade-mark was registered by the Gordon Bitters Company, the predecessor of the defendant, in the United States patent office June 14, 1910. So far as the last mentioned two trade-marks of the complainant and the defendant are concerned I am unable to perceive that the defendant has been guilty of any infringement. It is unnecessary at this point to consider how far the complainant has an exclusive right as against the defendant, under its trade-name "Gordon & Co." to use the name "Gordon" in connection with the sale of gin; for the discussion of the charge of unfair competition in business will necessarily involve a consideration of the use by the defendant, among other things, of the name

"Gordon." While the trade-marks, namely, the boar's head and the head of an elderly man, present such marked dissimilarity as to exclude the idea of that of the defendant being mistaken for that of the complainant, that of the defendant is accompanied with such words, of such size, style of lettering and color, and such words blown in the glass of the bottles containing the gin or compound as to show a studied attempt on the part of the defendant to palm off its goods as those of the complainant. The bottles used by the defendant are similar in shape and of the same size as those of the complainant. Blown in the glass of complainant's bottles are the words "Gordon's Dry Gin" with the words "London" and "England" also blown in the glass respectively above and below the first mentioned words. Blown in the glass of the defendant's bottles are the words "Gordon's Dry Gin" and above them and also blown in the glass, but in small letters, are the letters and word "U. S. A. Father." The complainant's label as shown in complainant's exhibit No. 1, and defendant's exhibit No. 21, displays the complainant's trade-mark of a boar's head with the words in large printed red letters "Gordon & Co.'s" above the trade-mark, and in equally large and prominent red letters "Dry Gin" below the trade-mark. The defendant's label, as shown in complainant's Exhibits Nos. 2, 3, 5, and 7, displays defendant's trade-mark of an elderly man's head in a circle of white, with the word in large printed red letters "Gordon's" above the trade-mark, and the words in letters of the same character, color and size "Dry Gin" below the trade-mark. Further, the words "Gordon's Dry Gin" on the label of the defendant's bottles are of the same size and style as the words in red "Gordon & Co.'s Dry Gin" on the label of the complainant's bottles. Further, the bottles of the defendant and of the complainant are similarly beveled at the four corners, and in each case, on each of the two front corners there is a representation of juniper berries from which gin is manufactured. One of the devices that have convinced me of an unfair and fraudulent design on the part of the defendant to palm off its goods as those of the complainant is found in the fact that the defendant has printed on its labels immediately above the large red letter word "Gordon's" the word "Father" in black ink and in letters of an insignificant size. If the defendant had an intention to distinguish its label from that of the complainant in such manner as to avoid deception of the public the most obvious course would have been to print on its label the word "Father" in letters quite as conspicuous as the word "Gordon's." I cannot reconcile this circumstance with an intent to carry on business fairly. It is true that while at the bottom of the complainant's label occur the words in comparatively large and distinct type "Distillery London," there are at the bottom of the defendant's label the words in small and insignificant letters not discernible unless the bottle is comparatively close to the eye, the words "Gordon Bitters Co., Jersey City, N. J. U. S. A." or "Gordon Distillery & Distributing Co., Jersey City, N. J. U. S. A." The differences between the defendant's bottle and that of the complainant, while distinguishable upon a comparison of the two together, are calculated to deceive the public into mistaking the one for the other. The circuit court of

appeals for the third circuit in Gulden v. Chance, 182 Fed. 303, 105 C. C. A. 16, used language strikingly appropriate to the present case. It was there said with respect to bottles of olives:

"The defendants' bottles with their labels, complainant's exhibits Nos. 7, 8 and 9, particularly complained of, while differing somewhat in details from those of the complainant, exhibits Nos. 4, 5 and 6, are in their general appearance strikingly similar. They are confusing, deceptive and misleading and, as already stated, intended by the defendants so to be. When the bottles of the defendants with their labels are viewed side by side with the bottles of the complainant with their labels, differences may be perceived which might prevent confusion on the part of purchasers who have both before them at the same time. But purchasers may not and do not as a rule have both simultaneously before them for comparison. If they have come to associate the complainant's bottles and labels with olives packed and sold by him and thereafter see the olive bottles and labels of the defendants, the complainant's bottles and labels not being at the time before their eyes, it is highly probable that purchasers in the exercise of only such degree of care as is usually observed by and reasonably to be expected from them under varying conditions of knowledge, intelligence and nationality, will be misled or deceived into the belief that in buying olives packed and dressed by the defendants, they are getting those of the complainant. The fact that salesmen or middlemen are in a position to distinguish the olives packed by the defendants from those packed by the complainant by reason of differences in bottles or labels is unimportant. The material point here is the liability of ordinary consuming purchasers to be confused and misled on the subject."

The defendant has put in the hands of retail dealers in gin an instrument of fraud intended and calculated to mislead and deceive consuming purchasers, and the evidence shows that retail dealers have in a number of instances availed themselves of the opportunity of palming off the gin or gin compound of the defendant for the gin of the complainant by so handling bottles containing the liquor of the defendant as to disclose to persons inquiring for Gordon gin the words "Gordon's Dry Gin" blown in large and prominent letters in the glass of the back of the bottles, which conspicuous words are surmounted by the small and inconspicuous letters and word "U. S. A. Father."

The complainant should receive protection against an unfair use by the defendant of words on its bottles tending to create an impression or belief on the part of ordinary purchasers that in buying gin or its compound bottled by the defendant they are buying gin manufactured by the complainant. The latter is entitled to a decree against the defendant for profits and damages, and an injunction permanently restraining the defendant from using on any labels affixed or annexed to any bottle or other package containing gin or cognate liquor other than that manufactured by the complainant either the word "Gordon" or "Gordon's" unless in letters substantially different in style and size and color from those appearing on the labels affixed to the complainant's bottles in the words "Gordon & Co.'s," and unless the word "Gordon" or "Gordon's" is immediately accompanied with words of the same style, size and color, clearly indicating that the gin or cognate liquor contained in such bottle or package is not the gin manufactured by the complainant; and also permanently enjoining the defendant from using in connection with the sale of gin or cognate liquor any bottle having blown in the glass thereof, or otherwise ap-

pearing in or on the glass thereof, either the word "Gordon" or "Gordon's" unless substantially different in size and style from the words "Gordon's Dry Gin" blown in the glass of the complainant's bottle; and also, that the defendant be permanently enjoined from selling any liquor other than the complainant's gin as and for "Gordon & Co.'s Dry Gin" or from using in connection therewith any imitation of the complainant's trade-marks and labels, or from in any manner simulating the complainant's said trade-name of "Gordon & Co." A decree in accordance with this opinion may be prepared and submitted.

In re SCHOW.

(District Court, D. Connecticut. April 14, 1914.)

No. 3298.

1. BANKRUPTCY (§ 194*)—LIENS BY LEGAL PROCEEDINGS.

The time and manner in which a lien attaches to property through legal proceedings begun before bankruptcy depends wholly upon the law of the state in which the property is located.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 287, 289; Dec. Dig. § 194.*]

2. ATTACHMENT (§ 322*)—RETURN—DESCRIPTION OF PROPERTY—SUFFICIENCY.

Under Gen. St. Conn. 1902, § 827, requiring an officer to leave with an attachment defendant a copy of his return describing any estate attached, a return which described certain specific articles of a stock of furniture "and a lot of miscellaneous furniture" was not good as to any articles not specifically enumerated.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 1153–1159; Dec. Dig. § 322.*]

3. ATTACHMENT (§ 188*)—CUSTODY OF PROPERTY—DELIVERY TO RECEIPTOR.

Where a sheriff, instead of retaining possession of attached property, took the receipt of the attachment defendants therefor, he released the attachment lien upon the property, and any other creditor could then have attached it and secured the property free from the lien of the prior attaching creditor.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. § 608; Dec. Dig. § 188.*]

4. SHERIFFS AND CONSTABLES (§ 119*) — LIABILITY — RELEASE OF ATTACHED PROPERTY.

Where a sheriff released an attachment lien by taking the defendants' receipt for the property, he assumed the risk of answering to the attaching creditor in case the property was not forthcoming upon the judgment execution, unless the property was lost by such casualties as ought legally to excuse the officer, and the officer in his turn had a right of action against the defendants who receipted for the goods.

[Ed. Note.—For other cases, see Sheriffs and Constables, Cent. Dig. §§ 195, 199–204; Dec. Dig. § 119.*]

5. BANKRUPTCY (§ 195*)—ATTACHMENT LIEN—EFFECT OF RELEASE.

While Bankr. Act July 1, 1898, c. 541, § 67f, 30 Stat. 564 (U. S. Comp. St. 1901, p. 3449), making void attachments levied within four months prior to the filing of a petition in bankruptcy against the property of an owner, does not affect a valid attachment levied more than four months before the bankruptcy petition was filed, the release of such lien by the

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

taking of the debtors' receipt for the property defeats the right of the attaching creditor to a prior lien thereon in the bankruptcy proceeding.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 296–305; Dec. Dig. § 195.*]

6. BANKRUPTCY (§ 196*)—EXECUTION LIEN—LEVY AFTER FILING OF BANKRUPTCY PETITION.

Bankr. Act July 1, 1898, c. 541, § 67f, 30 Stat. 564 (U. S. Comp. St. 1901, p. 3449), making void liens secured by legal proceedings during four months prior to the filing of a bankruptcy petition, does not apply to an execution levied after the filing of the petition, but such levy is ineffectual to create a lien, since upon the filing of the petition jurisdiction over all the property of the bankrupt vests in the bankruptcy court, although the title thereto is not divested until after the adjudication of bankruptcy, and the jurisdiction of the bankruptcy court cannot be ousted by an act under the authority of a state court.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 306–316; Dec. Dig. § 196.*]

7. BANKRUPTCY (§ 104*)—CUSTODY OF PROPERTY—RESTRAINING INTERFERENCE.

The bankruptcy court has power to restrain the commission of any act that will interfere with or prevent the due administration of the bankruptcy act to preserve the statu quo pending adjudication of bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 156–162; Dec. Dig. § 104.*]

8. BANKRUPTCY (§ 85*)—PETITION—EFFECT OF FILING—NOTICE.

The filing of a petition in bankruptcy is a caveat to all the world and in effect an attachment and injunction.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 85.*]

In Bankruptcy. Petition in involuntary bankruptcy proceedings against Andrew Schow by the temporary receiver to compel Andrew Schlechtweg, Deputy Sheriff, to surrender to the receiver certain property of the alleged bankrupt in his possession. Petition granted, and decree entered accordingly.

David Garfinkel, of Yonkers, N. Y., for petitioning creditors and receiver.

Milton Fessenden, of Stamford, Conn., for trustee and sheriff.

THOMAS, District Judge. This matter comes before the court on the petition of Maurice Berkowitz, the temporary receiver, duly appointed by this court, and empowered to take immediate possession of all property assets and effects whatsoever belonging to the alleged bankrupt, wheresoever located, and in whomsoever's custody or possession the same might be. The receiver was appointed on December 17, 1913, and his petition is dated December 24, 1913.

Bankruptcy proceedings against the alleged bankrupt were commenced by the filing in court, on December 17, 1913, of an involuntary petition, dated December 16, 1913, brought in behalf of three of Schow's creditors, claiming that he be adjudicated a bankrupt, and also the appointment of a temporary receiver to take charge of the alleged bankrupt's property in the interim.

In his petition now before the court, the receiver prays that one Andrew Schlechtweg, a deputy sheriff of Fairfield county, Conn., be ordered to surrender to the receiver certain property of the alleged

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

bankrupt now in his possession, and claimed to be held by him (Schlechtweg), by virtue of a claimed attachment made on February 8, 1913, and also by virtue of his having made levy thereon to satisfy the amount named in an execution which issued out of the city court of Stamford, on December 19, 1913, upon a judgment that day rendered in favor of E. B. Colby & Co., a New Jersey corporation, doing business in the city of Stamford, Conn., in an action at law brought by that corporation against Schow, a debtor, by process dated and served, by Schlechtweg, on February 8, 1913, and made returnable to the said city court of Stamford, on the fourth Monday of February, 1913.

It would appear from the admissions of all the parties that on February 8, 1913, and also on the date of the involuntary petition, Schow, the alleged bankrupt, was the proprietor of a general retail furniture business, with his store on Main street in the city of Stamford, and that he had, as the stock in trade of his business, considerable merchandise such as is usually carried by persons engaged in that line of business; that, Schow being indebted to E. B. Colby & Co., that corporation, on February 8, 1913, brought against him the action above named, claiming damages to the amount of $250 (the complaint in the action being the usual common counts complaint in vogue in Connecticut), the mandate in the writ commanding the sheriff to attach goods and estate of the said Schow to the value of $250; that Sheriff Schlechtweg went to Schow's store where he claimed to have attached, by virtue of the said process, certain personal property belonging to said Schow, then in his said store, and forming his stock in trade, and afterwards took an officer's receipt therefor, the sheriff's statement in relation to his acts as written by him, on the back of the copy of the writ which he then left with Schow, reading as follows:

"Fairfield County, ss., Stamford, February 8th, A. D. 1913. Then and there by virtue of the original writ, and by the special direction of Charles Milton Fessenden, the plaintiff's attorney, I attached the property of the within named defendant, the following goods and chattels, to wit: 3-9 x 12 rugs; 5 parlor suits; 10 stoves; 5 bedsteads complete; and a lot of miscellaneous furniture; and took the same into my possession and keeping, and on said day I took an officer's receipt for the same. The above and within is a true and attested copy of the original writ and of the accompanying complaint, together with my doings above stated, thereon indorsed. Attest,

"Andrew Schlechtweg, Deputy Sheriff of Fairfield County."

The original process was returned to the city court of Stamford, where the case remained until the 19th day of December, 1913, when a judgment therein was rendered in favor of E. B. Colby & Co., against Schow, and execution thereon issued which was handed to Schlechtweg, who immediately proceeded to levy upon all of the property and assets of said Schow then in his said store. Schlechtweg, on the same day advertised that a sheriff's sale of the goods thus levied on would take place on the 2d day of January, 1914, at 11 o'clock in the forenoon, in the city of Stamford, and refused to honor the demand made on him by the receiver, to turn over said property. Schlechtweg still retains possession of the same as a deputy sheriff.

The decision to be rendered herein must first dispose of those questions which were raised by counsel in argument, viz.: (1) Was a valid attachment made of any part of Schow's stock in trade, by Sheriff

Schlechtweg on February 8, 1913? (2) If there was, was that attachment released by the sheriff taking the officer's receipt? Or (3) did the lien of attachment continue thereafter in favor of Colby & Co., so as to avoid the provisions of section 67 (c and f) of the Bankruptcy Act? (4) Could the sheriff make a valid levy of the execution on any part of the goods belonging to Schow to satisfy the judgment obtained by Colby & Co., on December 19, 1913, which was two days subsequent to the filing of the involuntary petition in bankruptcy?

[1] A proper determination of the first two of these questions necessarily requires us to ascertain what would be the law of Connecticut in like instances, for the time and manner in which a lien attaches to property, by or through legal proceedings, begun before bankruptcy, depends wholly upon the law of the particular state wherein the property is located. In re Blair (D. C.) 108 Fed. 509; In re Darwin, 117 Fed. 407, 54 C. C. A. 581.

[2] If we assume, without deciding, that Sheriff Schlechtweg did make a valid attachment of some part of Schow's stock in trade, by virtue of his serving the writ in the Colby & Co. action, surely the statement of return which he had made upon the copy of process would now prevent him from claiming attachment on anything more than the three rugs, the stoves, the parlor suits, and the bedsteads, which articles he especially enumerated therein. Any attempted attachment by him of more than these was wholly ineffectual in view of the provision contained in section 827 of the General Statutes of Connecticut, Revision of 1902, with which it was his duty to strictly comply. This he did not do, and whether he did make a valid attachment of anything is questionable. Ahearn v. Purnell, 62 Conn. 21, 25 Atl. 393; State v. Hartley, 75 Conn. 107, 52 Atl. 615.

It is not, however, necessary to now decide that question, for the court's decision in this matter may well rest on other grounds.

[3] When the sheriff, instead of retaining possession of the property which he claims to have attached, took a receipt for the same, signed by Schow and Kweskin, he thereby released any attachment lien which may have theretofore been placed upon the property by reason of his claimed attachment, and the creditor, Colby & Co., whose agent he was, thereby lost its right of lien on the property. Parks v. Sheldon, 36 Conn. 466, 4 Am. Rep. 95.

The property having again gone back into the possession of Schow, other creditors of his could thereafter have made attachment of the same property, and hold the same free from the incumbrance of Colby & Co.'s attachment lien. Peters v. Stewart, 45 Conn. 109, 29 Am. Rep. 663; Alsop v. White, 45 Conn. 503; Enscoe v. Dunn, 44 Conn. 98, 26 Am. Rep. 430.

[4] An attaching creditor's rights, however, are not affected by the officer's taking a receipt for the property, as the latter is always presumed to have the property in his custody as long as the attachment lien exists, and he assumes the risk of answering to the creditor in case the property is not forthcoming on his judgment execution, unless it be lost by such casualties as ought legally to excuse the officer. Jordon v. Gallup, 16 Conn. 536, 545. And the officer in turn has his

right of action over, against the receiptor in case of the latter's refusal to surrender the property receipted for, upon demand being made therefor by the officer. Jones v. Gilbert, 13 Conn. 522; Stevens v. Stevens, 39 Conn. 480, 481; Staples v. Fillmore, 43 Conn. 511; Sanford v. Pond, 37 Conn. 588; Parks v. Sheldon, supra; Doolin v. Wilson, 73 Conn. 446, 47 Atl. 653.

[5] The provisions contained in the Bankruptcy Law, now in force, must decide the remaining questions. Though section 67f thereof does not apply to or affect attachments or other valid liens on property obtained through legal proceedings more than four months before bankruptcy is begun, and where a lien exists upon the property, and the same is sold by order of the bankruptcy court, free from such lien, the attaching judgment creditor can claim before the court the benefit of a subrogation as respects the proceeds of sale. Wakeman v. Throckmorton, 74 Conn. 616, 51 Atl. 554; Schunack v. Art Metal Novelty Co., 84 Conn. 331, 80 Atl. 290; Metcalf v. Baker, 187 U. S. 165, 23 Sup. Ct. 67, 47 L. Ed. 122; Pickens v. Ray, 187 U. S. 177, 23 Sup. Ct. 78, 47 L. Ed. 128; Cameron v. U. S., 231 U. S. 710, 34 Sup. Ct. 244, 58 L. Ed. ——.

The case of Metcalf v. Baker, 187 U. S. 165, 23 Sup. Ct. 67, 47 L. Ed. 122, hereinabove mentioned and which was cited by counsel for Schlechtweg, has no application to a matter like the one now before the court, as that decision, aside from construing the intent and purpose of section 67f, of the Bankruptcy Act, takes cognizance only of the law of New York state, only in so far as upholding the validity of an attachment lien which originated by legal proceedings brought in that state and more than one year old at the time the bankruptcy petition referred to in that case was filed. The practice in Connecticut is, however, quite unlike that in the state of New York, in regard to attachment liens, and the decision in that case therefore can have no bearing on the matter here in point. Colby & Co.'s attachment lien having been released by the taking of the officer's receipt, on February 8, 1913, there was no attachment lien more than four months old existing on any part of Schow's said stock in trade in favor of that corporation, on December 17, 1913.

[6] The attempted levy of Sheriff Schlechtweg, by virtue of the execution issued on Colby & Co.'s judgment, having been made subsequent to the filing of the involuntary bankruptcy petition, must needs be ineffectual, for, although section 67f does not apply to a case of this kind, because the sheriff's act did not occur within the four months' period provided for in that section (In re Engel [D. C.] 105 Fed. 893), still no lien could be created by his act in relation to the property after the matter had passed into the jurisdiction of the bankruptcy court. St. Cyr v. Daignault (D. C.) 103 Fed. 854; Kinmouth v. Braeutigan, 63 N. J. Eq. 103, 52 Atl. 226; State Bank v. Cox, 143 Fed. 91, 74 C. C. A. 285.

While a bankrupt may not be divested of his title to nonexempt property until after his adjudication and the appointment and qualification of his trustee, still the jurisdiction of the bankruptcy court attaches to all his property immediately upon the filing of the petition, and that

court cannot be ousted of its jurisdiction by any officer seeking to make a levy upon the property by virtue of process issuing out of a state court.

[7] When a petition is filed, whether involuntary or voluntary, the court has power by injunction to restrain the commission of any act that will interfere with or prevent the due administration of the Bankruptcy Act, for the purpose of preserving the statu quo of the property until it may be ascertained whether or not an adjudication should be decreed. In re Hornstein (D. C.) 122 Fed. 266; In re Smith (D. C.) 113 Fed. 993; In re Goldberg (D. C.) 117 Fed. 692; In re Hines (D. C.) 144 Fed. 147.

[8] The filing of a petition in bankruptcy is a caveat to all the world, and in effect an attachment and injunction. Mueller v. Nugent, 184 U. S. 1, 14, 22 Sup. Ct. 269, 46 L. Ed. 405.

It is the purpose of the Bankruptcy Law to place the property of the bankrupt in the control of the court, wherever it is found, with a view to its equal distribution among the creditors. The filing of the petition is an assertion of jurisdiction with a view to determining the status of the bankrupt and a settlement and distribution of his property. The exclusive jurisdiction of the bankruptcy court is so far in rem that the estate is regarded as in custodia legis from the time of filing the petition. Acme Harvester Co. v. Beekman Lumber Co., 222 U. S. 300, 32 Sup. Ct. 96, 56 L. Ed. 208.

Therefore let the receiver's petition as prayed for be granted and a decree entered accordingly.

UNITED STATES v. TWO CASES OF SULPHO-NAPTHOL.

(District Court, D. Maryland. March 28, 1914.)

1. DRUGGISTS (§ 11*)—"MISBRANDING"—INSECTICIDE.
   Insecticide labeled "Sulpho-Napthol," while containing less than four-tenths of 1 per cent. of sulphur, the presence of which was due to chemical or accidental impurities in the materials employed, without affecting either for good or ill the usefulness of the article, was misbranded within the Insecticide Act (Act April 26, 1910, c. 191, 36 Stat. 331 [U. S. Comp. St. Supp. 1911, p. 1368]), and under section 10 of the act must be condemned.

   [Ed. Note.—For other cases, see Druggists, Cent. Dig. § 10; Dec. Dig. § 11.*]

2. DRUGGISTS (§ 11*)—"MISBRANDING"—INSECTICIDE.
   Insecticide labeled "Inert Substance Water 7%, Insecticide 93%," while containing as much as 10.5 per cent. of water, was misbranded, within the Insecticide Act (Act April 26, 1910, c. 1911, 36 Stat. 331 [U. S. Comp. St. Supp. 1911, p. 1368]), and under section 10 of the act must be condemned.

   [Ed. Note.—For other cases, see Druggists, Cent. Dig. § 10; Dec. Dig. § 11.*]

Proceedings by the United States for the condemnation of two cases of sulpho-napthol by the Sulpho-Napthol Company. Decree of condemnation.

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

John Philip Hill, U. S. Atty., and J. Craig McLanahan, Asst. U. S. Atty., both of Baltimore, Md.

William C. Coleman, of Baltimore, Md., Matthew Gault, and James L. Putnam, of Boston, Mass., for claimants.

ROSE, District Judge. In this case the government asks the condemnation of two cases of insecticide. They were seized under section 10 of the Insecticide Act of April 26, 1910 (36 Stat. 334, c. 191 [U. S. Comp. St. Supp. 1911, p. 1373]). Their contents were labeled "Sulpho-Napthol," "Inert Substance Water 7%, Insecticide 93%." The government charges misbranding in two particulars. First. Sulpho-napthol, as applied to an insecticide, means that the article so named is essentially either a composition of sulphur and napthol or a sulphur derivative of napthol. The product seized was neither. Second. It contained over 10 per cent. of water instead of the 7 per cent. stated on its label.

The Sulpho-Napthol Company is the claimant. It says the product called sulpho-napthol was invented by Samuel Cabot as early as 1884. It was then put on the market under that name and has continuously since been sold thereunder. The name was registered as a trademark as early as 1890 and again re-registered in 1907. Letters patent No. 305,423, September 23, 1884, were issued to Cabot for the article as a composition of matter and for the method of making it as a process. In the patent the article is said to consist of rosin dissolved in a solution of an alkaline sulphide holding in solution crude napthaline. The specifications show that, by napthaline, napthaline oils were intended. The process described consisted in dissolving rosin in a solution of alkaline sulphide and in adding thereto crude napthaline or the distillate obtained by heating the heavy products of distillation of coal tar between 200 and 225 degrees centigrade.

As early as 1868 or 1869, German chemical publications began to use the term "napthol sulphonic acid" to indicate a definite chemical compound. It does not appear that Mr. Cabot knew of such use or was likely to have known it. His insecticide was not that chemical compound. The two had no important quality in common, except that both could be used as insecticides. It is not shown that prior to 1884 the chemical compound ever was used for that purpose, nor does it appear probable that it was. The name "sulpho-napthol" was suggested to Mr. Cabot by the fact that he used a solution of alkaline sulphide to dissolve the rosin in his composition, and that important constituent was napthaline oil. After the patent had been issued and the name adopted, he discontinued the use of alkaline sulphide to dissolve the rosin. He employed in its place an alkaline hydrate, or, in common speech, caustic soda. Soda costs more than the sulphide. It does the work better. Sulphur was never an important part of the composition. There is language in the patent specifications which indicates that Mr. Cabot supposed that there would be some sulphur left in his product. Whether he was right in this is now immaterial. Under the changed process of manufacture, no sulphur is intentionally introduced into it. It usually in fact

contains something less than four-tenths of 1 per cent. of sulphur The presence of this quantity is, however, due entirely to what may be called chemical or accidental impurities in the raw materials employed. The quantity of sulphur thus introduced does not in any appreciable way affect either for good or ill the usefulness of the article for the purposes for which it is sold. The chemical compound to which the Germans in the later '60's gave the name of naptho sulphonic acid has been since much more generally studied. The term has now a definite meaning to chemists and to many other persons who have connection with chemical industries. It is a matter of common knowledge that sulphur has time out of mind been supposed to be an insecticide. In many countries and at many times it has been and now is in various ways used as such.

Upon this state of the evidence the claimant expressed itself as being willing to consent to a decree of condemnation. It recognized that such a decree would cost it much in money and money's worth. The necessary relabeling and rehandling of its product would involve it in many practical difficulties. It believed and thought it knew that it had a valuable article, the usefulness of which had been demonstrated by some 30 years of trade popularity. It did not wish to put out its product under a name which could lead any reasonable person to believe that he was getting something other than he was. It frankly stated that it felt that every honest manufacturer had a vital interest in placing a broad and liberal construction upon the misbranding provisions of the Insecticide Act. It said it was willing to adopt another name. In so doing it will state that the product by the new name is the same which has been heretofore called sulpho-napthol. If it does, it will in some way convey the information that the article does not contain any appreciable quantities of sulphur or of any sulphur derivative.

A manufacturer may not give to his product a name which indicates the presence in it in substantial quantities of a constituent when such is not the fact. Libby, McNeill & Libby v. United States, 210 Fed. 148, 127 C. C. A. 14.

It follows that the decree for which the government asks and to which the claimant consents should be entered.

[2] During the progress of the case, the contention of the government that the article was also misbranded in that it contained a larger proportion of the inert substance water than was stated on the label became relatively unimportant. Water is used in making the article. As a practical matter it would not be possible to manufacture it commercially without adding some water to the caustic soda. The claimant had thought that the amount of water which it was necessary to add for this purpose became an integral part of the active constituents of the insecticide and was therefore not an inert substance. The quantity of water absolutely required for such purpose varied somewhat. It was not always easy to be certain that no more than the strictly necessary quantity was added. The claimant admitted that any water which exceeded the amount absolutely required was in the meaning of the law an inert substance. It was possible that such

water might sometimes amount to as much as 7 per cent. in weight or volume of the product as put on the market. It was for this purpose and with this meaning that it stated on its label that the product contained 7 per cent. of an inert substance, viz., water.

Since the seizure in this case, the claimant has had many tests and analyses made of its finished products. These show that in them the total amount of water, no matter from whence it comes, as a rule does not exceed 7 or 8 per cent. By some mischance the particular lot seized by the government, or some bottles of it at all events, happened to contain as much as 10.5 per cent. of water. These facts illustrate how difficult it would be in practice to enforce the law if it were to be construed as the claimant at first contended it should be.

In most cases it will be easy to ascertain by analysis the quantity of water or of other substances which in themselves have no insecticidal properties present in any particular product put upon the market. To determine by how much that quantity did or did not exceed what in the usual course of careful manufactures must necessarily be introduced into it would often be a very complex problem indeed. It is easy to state the approximate quantity of all actually inert constituents in the product. If the law makes everybody state it, no conceivable harm can happen to anybody. Under any other construction an honest manufacturer will find it difficult to compete with one not so scrupulous.

During the course of the trial, claimant came to recognize the force of the considerations just stated. If they are sound, the product was misbranded in that there was a material under statement of the quantity of water in it. The claimant has therefore consented to a decree against it on that ground also.

The question of what did or did not constitute an inert substance has been heretofore considered in this court in the case of United States v. Thirty Dozen Packages Roach Food (D. C.) 202 Fed. 271. The conclusions there reached would seem to require the decree for which the government asks and to which the claimant consents. The packages seized will therefore be condemned beacuse they were misbranded in both the respects alleged in the libel.

In view of the candid, enlightened, and public-spirited action which the claimant has taken, the decree of condemnation will be without costs to either side.

UNITED STATES v. DWIGHT MFG. CO.

(District Court, D. Massachusetts. May 4, 1914.)

No. 254.

1. ABATEMENT AND REVIVAL (§ 5*) — PENALTIES (§ 38*) — ANOTHER ACTION PENDING—ACTIONS FOR PENALTIES.

Under Immigration Act Feb. 20, 1907, c. 1134, § 5, 34 Stat. 900 (U. S. Comp. St. Supp. 1911, p. 503), allowing a penalty for the importation of a contract laborer to be recovered by the United States or by any person who should first bring an action therefor, a suit by an individual, while it was pending, would prevent an action by any other person, including

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

the United States, for the same violation, and a judgment in such suit on the merits would finally bar every suit by any other party.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 27–30, 99–104; Dec. Dig. § 5;* Penalties, Cent. Dig. § 40; Dec. Dig. § 38.*]

2. ABATEMENT AND REVIVAL (§ 15*)—ACTION TO ENFORCE PENALTY—PENDENCY OF ANOTHER ACTION.

Where a demurrer to the declaration by an individual to recover such penalty was sustained without leave to amend, but the individual never instituted another suit to recover the penalty, as he might have done, the statute does not prevent another suit by the United States or by any other person, the first suit not being an action for the penalty in the sense contemplated by the statute, since the declaration did not clearly allege any violation thereof.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 111–117; Dec. Dig. § 15.*]

3. PENALTIES (§ 38*)—CONCLUSIVENESS—JUDGMENT ON DEMURRER.

Nor was such judgment res judicata as to the defendant's liability to the United States for the amount of such penalty.

[Ed. Note.—For other cases, see Penalties, Cent. Dig. § 40; Dec. Dig. § 38.*]

4. LIMITATION OF ACTIONS (§ 35*)—ACTIONS FOR PENALTIES UNDER IMMIGRATION LAW.

Neither Rev. St. § 1044 (U. S. Comp. St. 1901, p. 725), limiting prosecutions for the commission of offenses not capital, nor Rev. Laws Mass. c. 202, § 5, limiting actions for the enforcement of penalties, applies to suits for the penalty for importing an alien contract laborer under Immigration Act Feb. 20, 1907, c. 1134, § 5, 34 Stat. 900 (U. S. Comp. St. Supp. 1911, p. 503).

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 109, 158–167; Dec. Dig. § 35.*]

Action for penalty by the United States against the Dwight Manufacturing Company. On demurrer to the defendant's answer. Demurrer sustained.

See, also, 210 Fed. 85.

Asa P. French, U. S. Atty., of Boston, Mass., and Wm. H. Garland, Sp. Asst. Atty. Gen., of Boston, Mass., for the United States.

Charles F. Choate, Jr., of Boston, Mass., for defendant.

DODGE, Circuit Judge. Since the opinion herein dated November 19, 1913, permitting amendment of the declaration and overruling the defendant's demurrer to it as amended, the defendant has answered the declaration, and the government has demurred to certain portions of this answer.

1. The defendant has pleaded in bar the judgments of this court in its favor in two suits brought against it in 1910 by one Uppercu. These suits were, like the present suit, brought under section 5 of the Immigration Act, and the alleged violations of that act, for which penalties were claimed, were alleged to have been committed with regard to alleged contract laborers and upon dates identical with some of those specified in the present declaration.

In order to hold that those judgments constitute a bar to the present suit, so far as it claims penalties for the same violations of the act as were relied on by Uppercu, it is necessary to hold that during

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

the entire period, beginning with the entry of the judgments referred to and continuing until every right to sue for and recover such penalties should have expired by limitation, Uppercu, and Uppercu alone, possessed the right to sue for and recover them, so that no action for them by the United States or by any other person would lie.

[1] Uppercu was the first person to sue for them, and the bringing of his suit no doubt made him, under section 5, the sole person then entitled to recover, so that there remained no right of action for them in any one else during the pendency of his suits. No doubt, also, had his suits, after trial upon the merits, resulted in final judgment for the defendant, such judgments would have finally barred every suit to recover them by any other party.

[2] Those suits, however, were never heard upon their merits. It was held upon demurrer that neither declaration stated a cause of action under the act, leave to amend was denied, and Uppercu has never brought any other suit. The judgment was not, in its scope and character, such as would necessarily have barred a subsequent suit by him upon a sufficient declaration, nor such as would have barred a subsequent suit by any one else. It established, at most, as to any other party, only the fact that Uppercu had been the first person to bring an action.

I am unable to adopt that construction of section 5 which obliges me to hold impossible the maintenance of any suit subsequent to this judgment by any party other than Uppercu. The defendant's argument to that effect is undeniably forcible, and it is founded upon a careful research into the history and nature of popular actions which deserves high praise. Notwithstanding it, the conclusion that the mere bringing of an action by the first person to sue under section 5 must permanently divest all other parties of any possible title to the chose in action, so as to leave the recovery of all penalties to which his suit may have had reference subject to his sole control, without regard to the nature or outcome of his suit, does not seem to me established with that degree of certainty which such a conclusion demands.

If, as here, it turns out that the first action brought was not such an action as could accomplish recovery of the penalties claimed, even though they had been incurred, I see no conclusive reason why its final determination by a judgment to that effect should not open the field for the application of section 5 as if no recovery had ever been attempted under it.

I agree with the defendant, and assume that the statute contemplates but one recovery of one penalty for each violation of its provisions, and that the United States stands, for its purposes, just as does "any person" referred to in section 5.

If, after the United States had brought this suit, Uppercu had brought a second suit to recover penalties from this defendant, appearing to be for the same violations of the act as those which he attempted to charge in his first suit, it does not seem to me that he could compel the court, by means of what appeared from the record in his first suit, to regard him, for the purposes of his second suit,

as the "person who shall first bring his action therefor" in the sense intended by the statute. The first suit, not having really alleged any violation of the statute, ought not to be regarded as an "action therefor" such as the statute contemplates.

If this construction of the statute is right, the defendant could not be placed in the position of having to pay two penalties for the same violation.

[3, 4] 2. The remaining defenses asserted in the portions of the answer demurred to are: (1) That the defendant's liability for these penalties is res adjudicata as against the United States because of the judgments in the Uppercu suits; and (2) that the present suit is barred either by the limitations prescribed in Rev. St. U. S. § 1044 (U. S. Comp. St. 1901, p. 725) or in Rev. Laws Mass. c. 202, § 5. Neither of these defenses is, in my opinion, maintainable. I am unable to consider the government's right to sue as affected by the judgments referred to otherwise than as above. The statutory limitations relied on I consider inapplicable to suits under section 5 of the Immigration Act.

The demurrer is sustained as to those portions of the answer to which it applies.

RAYMOND v. WILLISTON.

(District Court, E. D. New York. April 23, 1914.)

1. DIVORCE (§ 76*)—NOTICE TO CORESPONDENTS—PURPOSE OF STATUTE.
The purposes of the New York statute, permitting notice in divorce actions to be given to the person named as corespondent, and permitting him to seek to defeat the divorce or to clear his own name, are to prevent injustice by making it possible to have a full representation in the case of the persons concerned, or to obtain such evidence as should be heard, and to give the corespondent a standing in court to defend himself, if he so wishes.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 247–250, 255; Dec. Dig. § 76.*]

2. DIVORCE (§ 172*)—JUDGMENT—CONCLUSIVENESS—PARTIES CONCLUDED.
Notwithstanding the New York statute, authorizing notice in divorce suits to corespondent, and authorizing the corespondent to defend, where, though the pleadings were served on the corespondent, he did not appear or defend, the judgment was not an adjudication as between the plaintiff and the corespondent.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 559–561; Dec. Dig. § 172.*]

At Law. Action by Arthur J. Raymond against James R. Williston. On motion to strike. Granted in part.

See, also, 213 Fed. 527.

Jones, McKinny & Steinbrink, of New York City, for plaintiff.

Royall Victor, of New York City, for defendant.

CHATFIELD, District Judge. Application has been made to strike out paragraph 3 of the complaint, as shown by the record upon removal.

It appears that, in an action for divorce brought by Arthur J. Ray-

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

mond (the plaintiff here) against his wife, the defendant in this action (James R. Williston) was named as corespondent and was served with the pleadings in the divorce action. He did not appear or defend, and judgment on the merits against the wife was entered granting divorce. According to the papers, this judgment was based upon acts alleged to have been committed with the said Williston.

The paragraph sought to be stricken out recites this interlocutory decree of divorce, based upon the service of process above referred to, and in effect is equivalent to the pleading of a judgment on default in an action in which the rights of the same parties as those in this present suit had been determined.

[1, 2] The provisions of the New York law, by which notice may be given to a person named as corespondent in an action for divorce, and under which that corespondent may seek to defeat the divorce or to clear his own name, may be said to have two purposes: (1) To prevent injustice by making it possible to have a full representation in the case of the persons concerned or to obtain such evidence as should be heard; and (2) to give a corespondent standing in court to defend himself, if he so wishes.

A decree, however, relates only to the parties who are before the court, and the party bringing the suit cannot compel the corespondent to submit himself to the jurisdiction of the court in any way.

It would seem, therefore, that the determination of an action for divorce should be held as an adjudication as between the plaintiff in the divorce action and some one named as corespondent, only with respect to any issue upon which the corespondent has been heard or had his day in court. Billings v. Billings, 73 App. Div. 69, 76 N. Y. Supp. 628.

A long discussion of this question would seem to be unnecessary. In the case of Hendrick v. Biggar, 209 N. Y. 440, 103 N. E. 763, the proof presented by the judgment roll, in an action for divorce, was held inadmissible as evidence against the corespondent, unless the corespondent has appeared in the action and the decree has been entered against the corespondent upon the issue of fact contested by him.

The question presented upon this motion is really one of admissibility of evidence upon the trial, and there is no need of a ruling at the present time, aside from the situation created by the interposition of a demurrer to the complaint and by the necessity of an answer if this demurrer be overruled.

In order to simplify the pleading and to dispose of the question in advance of the hearing upon demurrer, it will be held, therefore, that paragraph 3 should be stricken out to such an extent, as it charges the defendant Williston with being a party to the suit or decree for divorce, and no attempt will be made to rule upon the admissibility as to the decree of divorce or the record of the divorce action itself, but that question will be reserved for consideration of any objection to the receipt of evidence upon the trial.

WILLISTON v. RAYMOND.

(District Court, E. D. New York. April 23, 1914.)

1. COURTS (§ 508*) -- FEDERAL COURTS — ENJOINING PROCEEDINGS IN STATE COURT—STATUTORY PROVISIONS.

Where a cause has been removed from a state court, an injunction or restraining order against further proceedings therein will lie, notwithstanding Rev. St. § 720 (U. S. Comp. St. 1901, p. 581); providing that the writ of injunction shall not be granted by any court of the United States to stay proceedings in any state court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1418–1423, 1425–1430; Dec. Dig. § 508.*]

2. REMOVAL OF CAUSES (§ 95*)—EFFECT OF COMPLIANCE WITH STATUTE.

Compliance with Judicial Code, § 29 (Act March 3, 1911, c. 231, 36 Stat. 1095 [U. S. Comp. St. Supp. 1911, p. 142]), prescribing the procedure for the removal of causes from the state courts, accomplishes an entire removal, and ousts the state court of jurisdiction, unless the case be remanded.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 204, 205; Dec. Dig. § 95.*]

3. APPEARANCE (§ 12*)—EFFECT—STATUTORY PROVISIONS.

Under Code Civ. Proc. N. Y. § 424, providing that a voluntary general appearance of the defendant is equivalent to personal service of the summons upon him, such voluntary appearance not only binds the defendant but gives him the same standing as if he had been served.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. §§ 55–64, 66; Dec. Dig. § 12.*]

4. REMOVAL OF CAUSES (§ 15*)—CAUSES REMOVABLE—PENDING CAUSES.

Under Code Civ. Proc. N. Y. § 416, providing that a civil action is commenced by the service of a summons, but that, from the time of the granting of a provisional remedy, the court acquires jurisdiction and has control of all the subsequent proceedings, but that the jurisdiction so acquired is conditional and liable to be divested if dependent by any special provision of law upon some act to be done after the granting of the provisional remedy, where summons was issued but not served upon the nonresident defendant, and an order of civil arrest was issued and held for the sheriff for service, and defendant thereafter attempted to enter a general appearance, the cause was pending within the provision of the Judicial Code, authorizing the removal of causes "now pending or which may hereafter be brought," since the cause must have been pending to give the state court the right to issue process, and the provision that an action shall be commenced by the service of a summons is not exclusive of other means of commencing the action, if defendant be properly brought into court and plaintiff be proceeding with the action.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 25; Dec. Dig. § 15.*]

In Equity. Suit by James R. Williston against Arthur J. Raymond. On motion for a temporary stay. Motion granted.

See, also, 213 Fed. 525.

Royall Victor, of New York City, for plaintiff.

Jones, McKinny & Steinbrink, of New York City, for defendant.

CHATFIELD, District Judge. This is a motion by plaintiff for a temporary stay pending trial on bill for permanent injunction against further proceedings in the case of Arthur J. Raymond v.

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

James R. Williston, removed to this court under section 29 of the Judicial Code.

No objection is raised because of any failure to comply with the provisions of the removal statute, but it is claimed that the action was not one "now pending" or "which may hereafter be brought in any state court." In other words, that no "suit" was pending at the time of removal.

Although no application for remand has been made, the preliminary objection to consideration, either of an application for temporary stay or to the exercise of any jurisdiction over the cause of action, which was removed from the jurisdiction of the Supreme Court of the state, raises precisely the same issues as if a motion to remand had been made.

[1] If removal has been had, an injunction or restraining order of the sort desired will lie, in spite of the provisions of section 720, R. S. (U. S. Comp. St. 1901, p. 581). Madisonville Traction Co. v. St. Bernard Mining Co., 196 U. S. 239, 25 Sup. Ct. 251, 49 L. Ed. 462; Chesapeake & Ohio Ry. Co. v. McCabe, 213 U. S. 207, 29 Sup. Ct. 430, 53 L. Ed. 765; Same v. Cockrell, 232 U. S. 146, 34 Sup. Ct. 278, 58 L. Ed. —.

[2] Compliance with the provisions of the Judicial Code accomplishes an entire removal and ousts the state court of jurisdiction, unless the case be remanded. The only point to be considered is whether the facts shown constitute a suit pending, which could be the subject of removal.

[3] Williston, the present plaintiff (defendant in the state court), is a nonresident. Summons and complaint, having been prepared but not served, filed, or delivered for service, were used upon an application for an order of civil arrest on the ground of his nonresidence. This order was granted, and the writ held for the sheriff to serve. Williston attempted to enter a general appearance by filing his note of appearance and serving same upon the attorney for the plaintiff, under section 424 of the New York Code, by which a voluntary general appearance of a defendant is equivalent to personal service of the summons.

It is evident that such voluntary general appearance can be entered in any action then pending of record, or, if served upon the attorney for the plaintiff, would be equivalent to personal service of the summons upon the defendant, if accepted or received by the plaintiff's attorney. The effect of such voluntary appearance is to bind the defendant, but it necessarily gives the defendant the same standing as if he had been served.

[4] Section 416 of the New York Code provides that "a civil action is commenced by the service of a summons." But, from the time of the granting of a "provisional remedy," the court acquires jurisdiction and has "control of all the subsequent proceedings." Such jurisdiction is conditional, but evidently, while exercised, the cause of action is within the control of the court, so far as exercising jurisdiction over the parties is concerned.

In the present case an order of arrest had been issued, upon a cause

of action which must have been presumed to be pending in order to give the state court the right to issue process. Any failure to treat the action as pending would be equivalent to discontinuance, and the state court cannot be presumed to have ordered an arrest in a civil action for any other reason than to support the exercise of its jurisdiction in determining some litigation then considered pending, or in enforcing its own orders therein.

The provision that an action shall be commenced by the service of a summons is negative in effect. An action is started when and if a summons is served, but this is not exclusive of other means. It is a requirement that the defendant may rely upon this pleading or its equivalent for the purpose of having notice of the suit, and for fixing definitely the plaintiff's status, if he attempts to proceed against the defendant. But there is nothing in the provisions of the Code making the use or service of a summons compulsory, if the defendant be properly brought into court, and if the plaintiff be proceeding with the action. In fact, an order of arrest would be vacated if it should appear that the plaintiff was not proceeding or had discontinued the action and was seeking to invoke the authority of the court to keep some one under arrest, when no action was pending in which the court could issue or have the right to carry out the warrant.

The preliminary objection, therefore, to the exercise of jurisdiction by this court will be overruled, and the motion for a preliminary injunction against further proceedings in the state court, in the action of Raymond v. Williston, which is now pending in the United States District Court, will be granted.

This order will, however, not be considered as a prohibition against any application to this court for any relief to which the plaintiff Raymond may be entitled in the United States Court, even if based upon the state law, and even if it be the performance of some act by the same officers who will be restrained from those acts by further exercise of the jurisdiction of the state court in the said action of Raymond v. Williston.

WALCOTT v. UNION FERRY CO. OF NEW YORK & BROOKLYN.

(District Court, E. D. New York. April 4, 1914.)

COLLISION (§ 96*)—FERRYBOAT COMING FROM SLIP—FAILURE TO WAIT PASSING OF LIGHTER.

A ferryboat *held* solely in fault for a collision off the Battery as she came out of her slip with a passing lighter which had stopped in front of the slip to avoid other vessels and was in plain sight when the ferryboat started out.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 203-205; Dec. Dig. § 96.*]

In Admiralty. Suit for collision by Mary C. Walcott, as owner of the lighter Alice, against the Union Ferry Company of New York & Brooklyn. Decree for libelant.

Foley & Martin, of New York City, for libelant.

James J. Macklin, of New York City, for respondent.

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

CHATFIELD, District Judge. On the evening of March 4, 1913, the lighter Alice was returning from delivering a deck load of coal to a steamer near Bedloes Island. Some of the men who had been working in delivering the coal and the superintendent of the business were on board, and this superintendent was anxious to catch the municipal ferry boat to Staten Island, leaving approximately at 9 o'clock.

As the Alice rounded the Battery above Governors Island, she headed toward her pier (No. 6 on the New York side of the East River), and upon reaching a point opposite the Barge Office, and about midway toward Governors Island, it become apparent that the ferryboats leaving the Battery were making ready to start out.

The chart put in evidence shows that the Staten Island Ferry boats used two slips immediately to the east of the government slip at the Barge Office. The racks of the Staten Island Ferry extend further out in the river than those of the ferries to the east. Next in order are the two slips of Hamilton Avenue and the Atlantic Avenue (or South Ferry) boats, respectively. Next to these upon the east are the slips of the Thirty-Ninth Street (or South Brooklyn) Ferry, and beyond these comes pier 5 of the regular numbered piers in the East River.

A boat was in the eastern slip of the Staten Island Ferry, and this was the one which the superintendent upon the Alice was desiring to catch. The Alice was proceeding with speed up to this point. The Thirty-Ninth Street Ferry boat, which was the farthest to the east, but which had the shortest distance to go to get out in the channel between the Battery and Governors Island, blew her slip whistle and began to move from the slip, just as the Atlantic Avenue (or South Ferry) boat got under way. This also blew a slip whistle when leaving her slip and headed across the course of the Thirty-Ninth Street boat, so that the latter, being slower in speed, allowed the South Ferry boat to cross her bow and remained substantially stationary just outside of her ferry rack, but carried by the ebb tide toward the Hudson or North River. Right after the South Ferry boat, the Montauk (of the Hamilton avenue line) gave her slip whistle and started from the slip. Everything, so far as her departure was concerned, was conducted in the usual way, and she did not begin to move ahead until the captain had blown the slip whistle and given the signal to start. Her gangwayman, having helped cast the boat loose, walked across her stern, climbed the ladder and up onto the deck going to the bow pilothouse, to act as second man therein. From a position a little forward of amidships, in his walk over the length of the vessel, he observed the Alice then just coming into view from under the bow of the Staten Island Ferry boat, which in the meantime had blown her slip whistle and started out. The Alice was seen by the Staten Island Ferry boat, which waited for her to pass, and then, observing her danger of collision with the Montauk, stopped and started to lower a boat. The Staten Island Ferry boat therefore, at the time of the collision, occupied the water immediately to the south and out from her own slip, which was just alongside that of the Montauk, but was carried away from further danger by the ebb tide. The Montauk started ahead un-

der a jinglebell, but the captain, observing the Alice, sounded an alarm and had the engines of the Montauk reversed. The engineer testifies that about seven turns were taken, which would substantially bring the Montauk to a standstill, and the Alice, with her own engines reversed. just before the collision, began to move astern and swung her stern tc port, bringing up just under the counter or starboard bow of the ferryboat near the entrance to the cabin. The contact was extremely slight. The captain in charge of the Montauk had been used to a slightly smaller and different vessel, and the testimony would indicate that he observed the Alice and intended to stop his own boat in order to give the Alice room to pass. The Montauk blew the slip whistle, which would indicate that she was coming out, but does not constitute a course signal, and does not require reply from a boat in plain sight, blocking the slip, unless an alarm be given by the latter. On the other hand, the Alice accepted the direction from the Thirty-Ninth Street and South Ferry boats which were then proceeding toward the East river, to pass astern of those boats, and stopped her own progress when it was evident that the Thirty-Ninth Street boat (which blew a two-whistle signal to the Alice) was going to lie still across the course in order to let the South Ferry boat pass out of the way. The Alice was then in plain sight of the Montauk, and the Montauk could observe the other ferryboats and knew of their positions and movements.

It does not seem that any fault can be charged to the Alice for having indicated to the Montauk that, after crossing the slip, she was going to proceed ahead by blowing a one-whistle signal and then reversing when the collision became imminent. As she was not going ahead, she could not hold any course and speed except as she could gather speed when the path was clear. She let the Montauk know that she was in a position immediately in front of the slip, and was expecting to pass on to the east as fast as possible. This the Montauk saw for herself, and the only fault which is substantially charged against the Alice was that she was too close to the ferry slips, and that she did not get out of the way.

In view of the fact that the ferryboat had not yet come out, and that the Alice was compelled to assume this position in order to pass behind the other ferryboats, and as there was room enough to maneuver, the Montauk cannot excuse her failure to remain in the slip or to stop her motion in time to avoid even the slight collision which happened. The testimony would indicate that the failure of the Montauk to respond as quickly as the boat to which the captain had been accustomed was the real cause which made the boats come together.

Some testimony was introduced to indicate that the men upon the Alice were laughing and were all assembled in the pilot house, suggesting an inference that they were not keeping watch; but their anxiety to make the Staten Island boat, and their appreciation of the exact position and movements of the boats all around them, negative any finding of carelessness in that regard. The case is not one where a boat is passing around close to a ferry slip or pierhead and suddenly emerges in the path of a ferryboat which does not have time to observe her. Unless some rule should be adopted regarding a boat ap-

proaching, from the west, a slip upon the New York side at the Battery, requiring her to make a turn to port and to run into the shore along her starboard side, it is impossible to charge negligence for running in toward the pier at which a landing is to be made, if the ordinary rules of navigation are observed in so doing.

In the present instance, the Alice seems to have been observing the proper rules, and the fault was in some way with the ferryboat, which retained its momentum until it came in contact with the Alice, which, when it saw that collision was imminent, attempted to back out of the way and almost succeeded in so doing.

The libelant may have a decree.

M. WITMARK & SONS v. STANDARD MUSIC ROLL CO.

(District Court, D. New Jersey. April 27, 1914.)

1. COPYRIGHTS (§ 66*)—EXTENT OF RIGHT—COMPONENT PARTS OF WORK.
Where a copyright for a musical composition, consisting of words and music, was obtained, but the words and the music were not copyrighted separately, as might have been done, the copyright did not protect the words alone, and was not infringed, under the law in force prior to Copyright Act March 4, 1909, c. 320, 35 Stat. 1075 (U. S. Comp. St. Supp. 1911, p. 1472), by the inclusion, with perforated rolls for the mechanical reproduction of the music, of the printed words.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 63; Dec. Dig. § 66.*]

2. COPYRIGHTS (§ 66*)—INFRINGEMENT—MECHANICAL REPRODUCTION.
Copyrighted musical notations, in writing or printing, are not infringed by the mechanical reproduction of the music.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 63; Dec. Dig. § 66.*]

3. COPYRIGHTS (§ 66*)—EXTENT OF RIGHTS—COMPONENT PARTS OF THE WORK.
Under Copyright Act March 4, 1909, c. 320, § 3, 35 Stat. 1076 (U. S. Comp. St. Supp. 1911, p. 1473), which provided that the copyright for work shall protect all copyrightable component parts of the work, a copyright of a musical composition includes a copyright of the words thereof, and is infringed by a reproduction of them.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 63; Dec. Dig. § 66.*]

In Equity. Bill by M. Witmark & Sons against the Standard Music Roll Company for infringement of a copyright. On demurrer. Bill dismissed in part, and sustained in part.

Nathan Burkan, of New York City, for complainant.
Louis M. Sanders, of Orange, N. J., for defendant.

BRADFORD, District Judge. The bill in this case is brought by M. Witmark & Sons, an incorporated company, against the Standard Music Roll Company, also incorporated, and charges infringement by the defendant of two copyrights owned by the complainant, and prays for an accounting, etc. It appears, among other things, from a stipulation filed in the case by the counsel for the parties that the complainant is engaged in the business of publishing and dealing in musi-

cal works; that the defendant is engaged in the business of manufacturing and vending perforated rolls or parts of musical instruments serving to reproduce mechanically musical compositions; that George L. Graff, Jr., prior to December 30, 1910, "originated, devised, created and wrote the words or lyrics of a new and original musical composition entitled 'Till the Sands of the Desert Grow Cold' "; that thereafter and prior to December 30, 1910, new and original music was composed for said words by Ernest R. Ball; that December 30, 1910, Graff and Ball duly assigned, transferred and sold all their right, title and interest in and to the above mentioned musical composition and the words and music thereof, and the right to secure copyright therefor, to the complainant; that the complainant duly secured copyright for the above mentioned musical composition January 31, 1911, and procured the registry of the same according to law; that September 23, 1912, the complainant entered into a certain agreement with the defendant for the mechanical production of the music of "Till the Sands of the Desert Grow Cold"; that Caro Roma prior to August 10, 1908, "originated, devised, created and wrote the words or lyrics of a new and original musical composition entitled 'In the Garden of My Heart' "; that prior to the tenth day of August, 1908, new and original music was composed for said words by Ernest R. Ball; that August 10, 1908, Roma and Ball duly assigned, transferred and sold all their right, title and interest in and to the last mentioned musical composition and the words and music thereof, and the right to secure copyright therefor, to the complainant; that the complainant duly secured copyright for the above mentioned musical composition October 17, 1908. The agreement of September 23, 1912, between the complainant and defendant referred to in the stipulation is evidenced by two letters, of which the portions material to the case are as follows:

"Orange, N. J., September 20, 1912.

"M. Witmark & Sons, N. Y. City—Gentlemen: Would request that you kindly grant us your permission to use the complete music of 'Till the Sands of the Desert Grow Cold,' at the two cent rate. * * *

"Thanking you in advance we remain,

"Yours very truly, Standard Music Roll Co.
"Per M. P."

"New York, Sept. 23, 1912.

"Standard Music Roll Co., Orange, N. J.—Gentlemen: As requested in your favor of the 20th inst. we hereby grant you permission to mechanically reproduce 'Till the Sands of the Desert Grow Cold' according to the terms and conditions of the copyright law. * * *

"Very truly yours, M. Witmark & Sons."

[1-3] It appears from the evidence that the defendant not only mechanically reproduced the music of the above mentioned two musical compositions, but without the permission or license of the complainant inclosed with the perforated rolls for the mechanical reproduction of the music the words of the two musical compositions. The musical composition "In the Garden of My Heart" was copyrighted prior to the copyright act of March 4, 1909. Copyright was obtained only for the musical composition, consisting of music and words. No copyright was obtained for the words in contradistinction to the music,

or for the music in contradistinction to the words. The words could have been separately copyrighted; the music could have been separately copyrighted; and the words and the music could be copyrighted as a musical composition, which was done. It is true that the copyright of a composition of words or of musical notation extends to all parts of the musical notation or of the words. In this case, however, what was copyrighted was the music in conjunction with the words, constituting a musical composition. Under what I understand to be the underlying principle of the case of White-Smith Music Co. v. Apollo Co., 209 U. S. 1, 28 Sup. Ct. 319, 52 L. Ed. 655, 14 Ann. Cas. 628, copyrighted musical notation in writing or print was not infringed and could not have been infringed by the mere mechanical reproduction of the music. Hence, the inclosing of the words of the musical composition with the perforated rolls could not infringe the copyrighted musical composition "In the Garden of My Heart." I have reached the conclusion that with respect to the charge of infringement of "In the Garden of My Heart" the bill must be dismissed. On the other hand, from the examination I have been able to give the subject, I think the bill must be sustained with respect to the charge of infringement of "Till the Sands of the Desert Grow Cold." That musical composition was copyrighted, as above stated, under the act of March 4, 1909, c. 320, 35 Stat. 1076 (U. S. Comp. St. Supp. 1911, p. 1472), which, unlike the prior legislation on copyright, contains the following provision:

"Sec. 3. That the copyright provided by this act shall protect all the copyrightable component parts of the work copyrighted, and all matters therein in which copyright is already subsisting, but without extending the duration or scope of such copyright. The copyright upon composite works or periodicals shall give to the proprietor thereof all the rights with respect thereto which he would have if each part were individually copyrighted under this act."

The words were copyrightable, the music was copyrightable, and the composite work, namely, the musical composition, was copyrighted; and, under the above provision, the complainant, under his copyright for the musical composition, was as clearly entitled to prevent the unauthorized use of the words entering into and constituting a component part of the musical composition as if the words had been separately copyrighted. While the defendant might under the provisions of the act have mechanically reproduced the words as well as the music of the musical composition, it had no right, without the leave or license of the complainant to supply, not by mechanical means, but simply by printing or writing, the words of that composition.

The bill must, therefore, be dismissed in so far as it complains of infringement of "In the Garden of My Heart" and sustained in so far as it charges infringement of "Till the Sands of the Desert Grow Cold." Let a decree in accordance with this opinion be prepared and submitted.

UNITED LACE & BRAID MFG. CO. v. BARTHELS MFG. CO.

(District Court, E. D. New York. April 27, 1914.)

1. PLEADING (§ 320*)—TRADE-MARKS AND TRADE-NAMES—SUIT FOR INFRINGEMENT—BILL OF PARTICULARS.

A motion by the defendant, in a suit for infringement of trade-mark and unfair competition, for a further bill of particulars denied, where the information sought related to defendant's business and was peculiarly within its own knowledge.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 972; Dec. Dig. § 320.*]

2. TRADE-MARKS AND TRADE-NAMES (§ 92*)—SUIT FOR INFRINGEMENT—BILL OF PARTICULARS.

The complainant in a suit for unfair competition will not be compelled to disclose in advance of the hearing the names of persons alleged to have been deceived into buying defendant's goods.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 102, 103; Dec. Dig. § 92.*]

In Equity. Suit by the United Lace & Braid Manufacturing Company against the Barthels Manufacturing Company. On motion by defendant for further bill of particulars. Denied.

Littlefield & Littlefield, of New York City (Eugene A. Kingman, of Providence, R. I., of counsel), for plaintiff.

Wingate & Cullen, of New York City (Conrad Saxe Keyes, of New York City, of counsel), for defendant.

CHATFIELD, District Judge. Suit has been brought upon a trade-mark, and also upon claims of established property rights in a recognized trade-name. The defendant is charged with infringement of the trade-mark, and with intentional sale of articles palpably imitating in appearance and labels the goods of the parties owning the trade-mark.

A motion for judgment upon the face of the complaint in this action was denied, without memorandum discussion of the points raised, which included a claim that the word filed as a trade-mark was merely descriptive and could not be made the subject of a valid trade-mark, and also that the name given to the defendant's goods, and the form in which they were placed on the market, with the labels affixed thereto, were not in themselves sufficiently like those of the plaintiff to constitute infringement, or to be the basis for a charge of unfair competition by substitution or deception through similarity alone. The determination of this motion might be merely a holding that the questions should be reserved for final hearing, or the court may have considered the objections raised to be insufficient as defenses.

[1] Immediately after the decision of the previous motion, the defendant moved for a bill of particulars showing (1) the names and addresses of those persons who were said to be selling the defendant's product at a wholesale price less than that of the plaintiff, in transactions where substitution and deception were alleged to have been practiced; and (2) the names and addresses of the persons who were

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

alleged in the complaint to have been actually deceived in making such purchases. The plaintiff thereupon served a bill of particulars, specifying that the persons making deceptive and substituted sales were the defendant and its agents and jobbers, that the places where this was done were peculiarly within the defendant's knowledge, and that at least 18 jobbers and dealers located in Boston, Mass., and New York City, were known to have substituted and palmed off the defendant's product upon orders calling for the plaintiff's goods.

This bill of particulars also stated that 5 persons, dealers in the plaintiff's goods, had been induced to believe that the label used by the defendant was a new spelling for the plaintiff's label. Whereupon this application was made to the court for a further bill of particulars containing the names of these 18 jobbers, the 5 persons who had been deceived in their purchases, the places and addresses where wholesale sales were made for less than the plaintiff's prices, and where persons had been deceived, with the alternative provision that, for failure to furnish the information, the plaintiff be precluded from introducing evidence upon those matters.

In so far as the motion is merely an attempt to secure the names of witnesses or the details of the plaintiff's evidence, it should be denied. But, apart from this, the knowledge of where, to whom, and under what conditions, sales have been made by the defendant at wholesale prices, are matters known to the defendant much better than to the plaintiff. In the trial of a suit in equity, even under the present rules, no hardship would seem to be involved in refusing to give to the defendant information of just when, where, and how it has dealt with its own customers. The opportunity for fair hearing and cross-examination can be amply protected. Curtis v. Phelps (D. C.) 209 Fed. 261.

It is further doubtful how the plaintiff could introduce independent acts of third parties in palming off cheaper goods, instead of those asked for, unless the sale was effected merely by the resemblance of the articles. If actual deception and fraud is committed by the willful misrepresentation of a tradesman, that would not be the act of the defendant. In so far as the sales complained of are wholesale transactions, made possible by a salability or public demand for the plaintiff's goods, or in so far as the purchases were by customers who supposed they were buying the goods known to them as the plaintiff's the case will turn upon the similarity of appearance and capability for substitution of the one article for the other, united with a comparison of prices, or upon the similarity of wrapping and labels, including the trade-mark and questions concerning the validity thereof. These questions will involve the same propositions that have already been considered in the previous motion. There is no allegation that the defendant has, through its servants or agents, substituted or palmed off any article for that of the plaintiff, except as the articles would supply the same demand and as the casual purchaser might be deceived.

No allegation of damage for the loss of any particular sale is pleaded; nor is there any claim of breach of warranty or damage to any

customer set up as a cause of action. It will undoubtedly be better to consider the questions raised upon the previous motion at final hearing, even though the testimony, in so far as it is other than that within the defendant's reach or control, may be substantially nothing more than was shown or indicated by the allegations of the pleadings.

[2] As to the 5 persons whom it is claimed were deceived, and purchased the defendant's goods thinking they were the plaintiff's, the court fails to see why their names should be disclosed in advance of trial. If their testimony has to do merely with the alleged deceptive or imitative qualities of the defendant's goods, then cross-examination and testimony to the contrary is all that the defendant can interpose. If investigation of and interviews with the witnesses themselves is what is desired, it would be unsafe generally to grant such a bill of particulars. The occurrence itself—that is, the making of the sale—would not be the point under investigation. To subject such witnesses to conflicting interviews by both sides, in advance of trial, opens the way to more difficulty than it ordinarily accomplishes good.

Motion for further bill of particulars denied.

YURKONIS v. DELAWARE, L. & W. R. CO.

(District Court, E. D. New York. April 27, 1914.)

NEW TRIAL (§ 162*)—EXCESSIVE VERDICT FOR UNLIQUIDATED DAMAGES—CONDITIONS TO REFUSING NEW TRIAL—REMISSION OF EXCESS.

Where the verdict in an action for damages for a permanent injury is for a sum clearly larger than is warranted by the evidence, it is within the power of the trial court, in the exercise of its discretion to grant a new trial, to require the plaintiff to consent to a reduction as a condition to allowing the verdict to stand.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 324–329; Dec. Dig. § 162.*]

At Law. Action by Matt. Yurkonis against the Delaware, Lackawanna & Western Railroad Company. On motion by defendant for new trial. Denied on conditions.

Baltrus S. Yankaus, of New York City (Thomas J. O'Neill, of New York City, of counsel), for plaintiff.

F. W. Thomson and W. S. Jenney, both of New York City, for defendant.

CHATFIELD, District Judge. The trial court has the right to set aside a verdict where passion or prejudice has plainly influenced the jury, or where feeling of some nature has improperly entered into the verdict. This power is plainly based upon the proposition that a verdict which is not according to the testimony, and therefore erroneous as a matter of law, in that it is not based upon the record, should be set aside by the trial court. The Circuit Court of Appeals has no power to reduce or increase a verdict. Southern Railway v. Hattie E. Bennett, Administratrix, 233 U. S. 80, 34 Sup. Ct. 566, 58 L. Ed. —— (United States Supreme Court, April 6, 1914). Nor is a motion grant-

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

ing or denying a new trial reviewable, inasmuch as it is within the discretion of the trial court. Addington v. U. S., 165 U. S. 184, 17 Sup. Ct. 288, 41 L. Ed. 679; Copper River & N. W. Ry. Co. v. Reeder, 211 Fed. 280, 127 C. C. A. 648.

It has been frequently held that the amount of the verdict, being an estimate from the testimony of the money value of the loss sustained, is not within the control of the trial court, if the court's opinion happens to differ from the result reached by the jury. Southern Railway v. Bennett, supra; Occidental Consolidated Min. Co. v. Comstock Tunnel Co. (C. C.) 125 Fed. 244. This proposition is undoubtedly sound and wise. If the question of fact is left to the jury, the only consideration the trial court may give to the jury's action is to determine whether or not the verdict is *contrary to the evidence,* or to the weight of the evidence, or is invalid in some respect as a matter of law.

Yet in the case of Southern Railway v. Bennett, supra, the Supreme Court has taken as a matter of course the reduction of a verdict from $25,000 to $20,000, where the court ordered that the verdict be set aside and a new trial granted to the defendant, unless the plaintiff allowed judgment to be entered for the smaller amount. In cases where passion or feeling has affected the result, or where the testimony proves a certain limit as a maximum for the verdict, then it would seem to be a matter of law that the balance of the verdict was not sustained by testimony. A determination that a new trial would have to be granted, unless the verdict were entered at the greatest amount which the testimony would support, is but another way of exercising the discretion which the trial court undoubtedly has. To merely compel the plaintiff to grant something in the defendant's favor, in the way of stipulation, so as to avoid a new trial, is but a means of carrying out the actual determination of the court that a divisible or separable part of the verdict is supported by the evidence.

In the present case the plaintiff earned a maximum average of $900 a year. He was and is married, and if he supports his family and the home as well as he could have if working, it is impossible to consider that he will be compelled in addition to hire care and attendance to the same extent which he would if he had no family or home. He is entitled to compensation for the trouble to his own family, but not at trained nurse's wages. He is 50 years of age, and according to the testimony does and will suffer no pain. His previous occupation as a coal miner furnishes less contrast with his present situation, with eyesight gone, than would be experienced by one whose enjoyment of living depends upon ordinary use of eyesight in a more visually effective locality than in the depth of a coal mine.

The amount which the plaintiff must pay to attorneys for the conduct of this suit should not, in the case of such a large recovery, increase out of all proportion to the services rendered; nor can the court assume that the plaintiff should have an extravagant verdict upon the theory that his counsel will be allowed to keep so much that the plaintiff himself will not get the benefit of much more than if the verdict had been considerably reduced. The plaintiff testified that he came to New York, because he had here a better chance to make a living in

his present condition, than in a rural or mining district. This takes out of the question any increased expenditure to which he may be put while living in the place where he can earn more.

Upon the whole testimony it would seem that the court must decide that the record of the case has not presented any facts which would support a verdict exceeding $36,000, and that the verdict over that amount should be set aside as contrary to the testimony. This necessarily involves a new trial and the granting of defendant's motion, if the plaintiff joins upon that basis in the defendant's request. If the plaintiff desires judgment entered for the reduced amount named, that is, $36,000, then in other respects and upon all other grounds the motion for a new trial will be denied.

UNITED STATES v. NORTHERN PAC. R. CO.

(District Court, E. D. Washington, N. D. April 21, 1914.)

No. 1483.

MASTER AND SERVANT (§ 13*)—STATUTORY REGULATIONS—HOURS OF SERVICE. Under Act March 4, 1907, c. 2939, 34 Stat. 1415 (U. S. Comp. St. Supp. 1911, p. 1321), making it unlawful for any common carrier by railroad to require or permit any employé engaged in or connected with the movement of any train to remain on duty for longer than 16 consecutive hours, where the crew of a train were on duty for 17½ hours, except for a period of 1½ hours, during which the train, held to permit superior trains to meet and pass, was placed in charge of an engine foreman or switchman, and the crew was laid off or released from duty, this lay-off did not break the continuity of the service.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 14; Dec. Dig. § 13.*]

Action for penalties by the United States against the Northern Pacific Railway Company. Judgment for plaintiff.

Francis A. Garrecht, U. S. Atty., of Spokane, Wash., and Otis B. Kent, Sp. Asst. U. S. Atty., of Washington, D. C.

Edward J. Cannon, of Spokane, Wash., for defendant.

RUDKIN, District Judge. This is an action to recover penalties for violation of the Act of Congress of March 4, 1907, entitled "An act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon" (34 Stat. 1415), commonly known as the "Hours of Service Act." The complaint contains six counts or causes of action in all, based upon excessive hours of service by the several members of the same train crew. The case has been submitted to the court upon an agreed statement of facts from which the following appears:

The defendant is a common carrier by railroad engaged in interstate commerce, and the several employés named in the different counts or causes of action were in the employ of the defendant, engaged in or in connection with the movement of its trains. On the 10th day of January, 1912, the engineer and fireman of engine No.

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

1507, hauling an east-bound extra freight train from Tacoma, Wash., to Cle Elum, Wash., went on duty at the hour of 5:30 a. m. and remained on duty until 11 p. m. of the same day. The conductor and the remaining members of the crew went on duty at the hour of 5 o'clock a. m. and remained on duty until the hour of 10:30 o'clock p. m. The schedule time out of Tacoma was 6 o'clock a. m.; but the departure of the train was delayed for 45 minutes by reason of a derailment in the yards. The train arrived at Auburn, 18 miles east of Tacoma, at 8:25 a. m., and was there held for a period of 1 hour and 30 minutes to permit superior trains to meet and pass. During this period of 1 hour and 30 minutes the train was placed in charge of an engine foreman or watchman at Auburn, and the train crew laid off or released from duty. If the lay-off of 1 hour and 30 minutes at Auburn be included in the hours of service of the crew, the law has been transgressed; but, if excluded, the time of actual service falls within the 16-hour period limited by law.

The sole question presented for decision is, therefore: Does a definite lay-off or release from duty for a period of 1 hour and 30 minutes, under the circumstances stated, break the continuity of the service within the meaning of the law? I am of the opinion that it does not. In the case of United States v. Chicago, Milwaukee & P. S. Ry. Co. (D. C.) 197 Fed. 624, I held that a lay-off of from 30 to 45 minutes for breakfast and of about 1 hour each for the midday and evening meals did not break the continuity of the service. I further held in the same case that an indefinite lay-off of 3 hours while the train crew was awaiting the arrival of a helper engine at a small way station did not break the continuity of the service. This decision was cited with apparent approval in the case of M., K. & T. Ry. Co. v. U. S., 231 U. S. 112, 34 Sup. Ct. 26, 58 L. Ed. ——. That case, it seems to me, is controlling here. The purpose of the statute is plain, and it must be so construed as to promote its policy. The hours of service of railway trainmen are long at best, leaving only 8 hours for rest and recreation, and if this brief period can be broken into fragments the purpose and policy of the law will be entirely frustrated. If a train crew may be laid off for an hour and a half at one point to suit the convenience or necessities of the company, it may be laid off for a like period at another, and the members of the crew thus wholly deprived of any substantial period for either sleep or rest. If this crew had not been released from duty at Auburn, the members would have been compelled to remain idle until the time of departure arrived, and the release for the brief period allowed by the company permitted them to do little else. The release was of no benefit to the crew, and could subserve no substantial purpose, except to obviate the penalty imposed by law. Perhaps it cannot be said as a matter of law in all cases whether a release from duty for a fixed period of time will or will not be sufficient to break the continuity of the service. No doubt in extreme cases the court may declare as a matter of law that a given period is so short as not to break the continuity of the service, or that another period is so long as to break the continuity of the service; but between these extremes there is a

twilight zone, where the question becomes a mixed one of law and fact.

This case, however, has been submitted to the court for decision, and whatever inferences are to be drawn from the admitted facts must be drawn by the court, and under the admitted facts I am of the opinion that the plain spirit and policy of the law has been violated. I therefore adjudge the defendant guilty on each count or cause of action, and impose a penalty of $100 and costs for each violation.

Let judgment be entered accordingly.

In re PETERS.

(District Court, W. D. Washington, N. D. May 4, 1914.)

ALIENS (§ 68*)—NATURALIZATION—CONSTRUCTION OF STATUTE.

The provision of Act June 29, 1906, c. 3592, § 4 (2), 34 Stat. 596, as amended by Act June 25, 1910, c. 401, § 3, 36 Stat. 830 (U. S. Comp. St. Supp. 1911, p. 530), authorizing the naturalization without a previous declaration of intention of an alien who has resided constantly in the United States during a period of 5 years next preceding May 1, 1910, and who, because of misinformation in regard to his citizenship or the requirements of the law, has in good faith exercised the duties of a citizen, etc., if in the judgment of the court he "has been for a period of more than 5 years entitled upon proper proceedings to be naturalized," does not apply to one who, although he has resided in the United States for the required length of time, was not 21 years old on May 1, 1905.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 138–145; Dec. Dig. § 68.*]

In the matter of the application of Percy Herbert Peters for citizenship. Petition denied.

John Speed Smith, of Seattle, Wash., for the United States.

NETERER, District Judge. Application was filed November 3, 1913, under the act of June 25, 1910, amendatory of section 4, Act June 29, 1906, the material portion of which reads as follows:

"That any person belonging to the class of persons authorized and qualified under existing law to become a citizen of the United States who has resided constantly in the United States during a period of five years next preceding May first, nineteen hundred and ten, who, because of misinformation in regard to his citizenship or the requirements of the law governing the naturalization of citizens has labored and acted under the impression that he was or could become a citizen of the United States and has in good faith exercised the rights or duties of a citizen or intended citizen of the United States because of such wrongful information and belief may, upon making a showing of such facts satisfactory to a court having jurisdiction to issue papers of naturalization to an alien, and the court in its judgment believes that such person has been for a period of more than five years entitled upon proper proceedings to be naturalized as a citizen of the United States, receive from the said court a final certificate of naturalization, and said court may issue such certificate without requiring proof of former declaration by or on the part of such person of their intention to become a citizen of the United States, but such applicant for naturalization shall comply in all other respects with the law relative to the issuance of final papers of naturalization to aliens."

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

It is manifest from this act that the applicant must have labored and acted under the impression that he was or could become a citizen of the United States, and exercised the rights or duties of a citizen or intended citizen of the United States because of such wrongful information or belief. The act provides as a further prerequisite to admission that applicant must prove residence in the United States for five years immediately preceding May 1, 1905, and that he was a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed towards the same, and in other respects qualified to become a citizen of the United States, save in the one respect of the declaration of intention.

The application shows that applicant was born May 20, 1885, in England and came to the United States on September 30th of the same year. A computation from the date of birth to May 1, 1905, establishes the fact that the applicant did not possess the qualification for citizenship upon the date named because of age. He was not 21 years of age, and hence not within the provisions of the act.

The application will be dismissed.

In re GREEN.

(District Court, E. D. New York. April 14, 1914.)

BANKRUPTCY (§ 138*)—PROPERTY PASSING TO TRUSTEE—SALARY EARNED AFTER ADJUDICATION.

Salary earned by a bankrupt after adjudication and pending discharge does not belong to his estate, unless affected by a garnishee levy, and prior assignments of such salary to creditors are ineffective.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 193–204, 206–209; Dec. Dig. § 138.*]

In Bankruptcy. In the matter of Frederick W. Green, bankrupt. On question of release of salary earned by bankrupt since adjudication. Order in favor of bankrupt.

Phelan Beale, of New York City, for bankrupt.
Joseph Scheller, of New York City, for creditors.

CHATFIELD, District Judge. The creditors have all defaulted with the exception of two who contest the right of the court to order release of any salary earned by the bankrupt since adjudication and pending discharge.

This question has previously been decided. In re O'Gillespie (D. C.) 209 Fed. 1003. The adjudication fixed the status of all claims to subsequently earned salary (except when affected by a garnishee levy pending discharge). Powers of attorney such as were used in this case are invalid for such a purpose, and, after an adjudication in bankruptcy, this court must exercise jurisdiction. As to the claim that the salary should be apportioned, it appears that the petition was filed on March 14th and that salary for those 14 days less the department charges and the garnishee levy is now payable. The order should provide that the net amount for those 14 days be paid to the trustee or the clerk of the court by the bankrupt.

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

In re COLLINS.

(District Court, E. D. New York. April 14, 1914.)

1. BANKRUPTCY (§ 399*)—EXEMPTIONS—SALARY.
That a bankrupt did not show in his schedules the sum of $80 which he had handed to his wife for household expenses, or show her possession thereof assuming that some part should have been treated as assets and stated in the schedules, did not furnish grounds for denying an order permitting the payment to him of his salary against which a garnishee execution had been issued.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 657, 669; Dec. Dig. § 399.*]

2. BANKRUPTCY (§ 399*)—EXEMPTIONS—SALARY.
That a bankrupt, who in purchasing jewelry signed a memorandum in the form of a conditional bill of sale in which he agreed not to part with possession thereof, immediately pawned it, was not ground for denying an order to permit him to receive his salary against which a garnishee execution was filed, where the seller received a price large enough to make the delay in payment an inducement, and investigated the bankrupt's employment in the fire department and the possibility of protecting himself from the bankrupt's salary without intending to rely upon the language of the memorandum.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 657, 669; Dec. Dig. § 399.*]

In Bankruptcy. In the matter of John J. Collins, bankrupt. On motion by the bankrupt for an order permitting payment to him of his salary. Motion granted in part.

Furst & Furst, of Brooklyn, for Meyer.

Joseph W. Gottlieb, of Brooklyn, for Eagle Diamond & Watch Co. and Ralph Greenberg.

CHATFIELD, District Judge. [1, 2] Upon the general proposition the memorandum in the Green Case, 213 Fed. 542, and the O'Gillespie Case, 209 Fed. 1003, covers the situation. The adjudication in bankruptcy has given this court jurisdiction and the claims against the fund are invalid except possibly under the garnishee execution. The creditor Meyer urges especially that the bankrupt is not entitled to equitable relief in that he signed a memorandum in form that of a conditional bill of sale and in which he agreed not to part with possession of the property.

There is some evidence which would indicate that neither party considered it a transaction of that sort. The paper was not in fact used by the creditor as a conditional bill of sale, but, on the contrary, he is the creditor who first obtained judgment and filed a garnishee execution.

The garnishee execution will not be affected unless the bankrupt obtains his discharge. Any objection on the part of the creditor to the effects of a discharge is an objection to the enforcement of the general bankruptcy law rather than to the granting of the present motion.

But this creditor also contends that the bankrupt has concealed assets and made false statements in his schedules, in that he has re-

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

ported the full amount of a debt for furniture upon which the greater part of the indebtedness has been paid, and in that he did not show in his schedules the amount of about $80 which he had handed to his wife for household expenses. It appears that a payment was made from this sum of money on account of a furniture bill. The furniture was bought by the wife, but has been scheduled by the bankrupt, and he apparently considered himself liable for the balance due.

As the furniture is claimed by the wife and would be exempt in the hands of the bankrupt, a claim for the balance due may not be provable against the estate. The only objections raised are that giving this $80 to the wife for household expenses in advance of bankruptcy was a fraud upon his creditors, and that the bankrupt falsified his schedules in failing to state her possession of this amount.

Even if some part of this $80 should have been treated as assets of the bankrupt and stated in his schedules, that question would seem to have no effect upon whether his subsequent salary should be paid to him. Nor does it seem that the bankrupt should be denied the order for which he is making the present application, because he did not retain possession of the article of jewelry sold by the creditor Meyer, and which was apparently pawned immediately.

The evidence tends to show a sale on the installment plan, at a price large enough to make the delay in payment an inducement to the vendor, and his investigation as to the employment of the bankrupt in the fire department and as to the possibility of protecting himself from the bankrupt's salary would indicate that there was no intention to rely upon the language of the paper which purported to make the sale a conditional one, in which title did not pass.

It is impossible to hold that the bankrupt may obtain the discharge of the debt for property purchased, and at the same time hold that the bankrupt must give up the property or retain it in his possession so as to show his compliance with the terms of some so-called agreement which neither he nor the party selling the goods intended to enter into nor to carry out. The creditor has relinquished any right to treat the sale as one in which title remained in him (if he ever did have that right), and the time when the bankrupt first treated the property as his own seems to make no difference in considering whether the debt will be wiped out by bankruptcy.

Motion will be granted except as to salary earned before March 7th, which, less deductions and garnishee levy, will be ordered paid to the trustee or clerk.

PINELAND CLUB et al. v. ROBERT et al.

(Circuit Court of Appeals, Fourth Circuit. February 27, 1914.)

No. 1178.

1. EJECTMENT (§ 95*)—EVIDENCE—PROOF OF TITLE.
In ejectment plaintiffs, who neither proved a record title back to the grant, the presumption of a grant by 20 years' possession, nor a statutory title by 10 years' consecutive possession, could not recover without proving that defendants claimed under the party from whom they showed a chain of title as a common source of title.
[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 280–295; Dec. Dig. § 95.*]

2. EJECTMENT (§ 95*)—EVIDENCE—SUFFICIENCY.
In ejectment by persons claiming under an alleged will of R., who died in 1835, a certificate by an ordinary under the seal of the ordinary's court that a person named had regularly qualified as executrix of the last will of R., releases to her as executrix, for all claims and demands bearing indorsements showing that they were recorded, the sealed acknowledgment from the husband of a daughter of the testator of the receipt of the chattels to which she was entitled, all of which were over 30 years old and self-proving, and a copy of a similar release certified under the hand and official seal of the ordinary as having been recorded, sufficiently showed that such testator left a will which had been duly probated.
[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 280–295; Dec. Dig. § 95.*]

3. EVIDENCE (§ 372*)—DOCUMENTS—AUTHENTICATION—SUFFICIENCY.
In ejectment by persons claiming under an alleged will of R., who died in 1835, evidence *held* sufficient to show that a paper purporting to be a copy of such will was a copy thereof.
[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1613–1627; Dec. Dig. § 372.*]

4. WILLS (§ 433*)—ADMISSIBILITY AS EVIDENCE—CERTIFIED COPIES.
Though a certificate of the ordinary, dated December, 1852, to a copy of a will, not being under the official seal, did not make it admissible in evidence without further proof, where the existence of the will was established by other evidence, it was admissible as an office copy from the hands of the official custodian of the original to prove the contents of the will.
[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 924–936; Dec. Dig. § 433.*]

5. COURTS (§ 367*)—UNITED STATES COURTS—STATE LAWS AS RULES OF DECISION.
The decisions of the Supreme Court of a state as to the construction of devises and dispositions of land in the state contained in a will constitute rules of property to be followed by the United States courts.
[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 958, 959; Dec. Dig. § 367.*]

6. EJECTMENT (§ 95*)—SUFFICIENCY OF EVIDENCE—COMMON SOURCE OF TITLE.
In ejectment by remaindermen under the will of a testator who died in 1835, evidence *held* sufficient to show that defendant's title was derived through such testator as a common source of title.
[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 280–295; Dec. Dig. § 95.*]

7. EJECTMENT (§ 90*)—SUFFICIENCY OF EVIDENCE—COMMON SOURCE OF TITLE.
That the defendant in ejectment claims through a common source of title with plaintiff may, in South Carolina, be shown by parol, and need not

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

be shown by a connected chain of deeds or original documents from the common source to defendant.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 254–277; Dec. Dig. § 90.*]

8. EVIDENCE (§ 354*)—DOCUMENTARY EVIDENCE—ACCOUNT BOOKS.

In ejectment by remaindermen under the will of a testator, who died in 1835, an account book, purporting to have been kept by the testator's widow as executrix and as guardian of a daughter, and to have been produced by her before the ordinary in settlement of her accounts and vouched by him, in which was a charge against the daughter for the purchase of the land in question, was admissible against the defendants in corroboration of parol testimony that the life tenant conveyed to such daughter, who in turn conveyed to defendant's remote grantor, in view of the destruction of records and papers during the war, making resort to secondary testimony necessary, since the entries were made by one whose duty it was to make them, and who had no interest in making them adverse to defendants.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1432–1483; Dec. Dig. § 354.*]

9. LIFE ESTATES (§ 23*)—CONVEYANCE WITH LIVERY OF SEISIN.

Where the son under the will of his father took neither a fee simple absolute, a fee defeasible, nor even a fee conditional, but only an estate for life, with vested remainder to such children as he might leave, such remainder could not be barred by a conveyance by him by feoffment and livery of seisin, under the rule in South Carolina that a contingent remainder might be so barred.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. §§ 21, 42–45; Dec. Dig. § 23.*]

10. LIFE ESTATES (§ 28*)—SALE BY LIFE TENANT—PRESUMPTIONS AS TO ORDER OF COURT.

It could not be presumed, in favor of a party claiming under a purchaser from a life tenant who with his predecessors in title had been in possession for nearly 40 years prior to the life tenant's death under deeds purporting to convey a fee, that a court of equity, under its power to do so for the purpose of changing the investment, ordered a sale of the property free from the remainders, where there was no evidence whatever to warrant such presumption, especially where it appeared that the parties interested under the will acted on the assumption that the life tenant took an estate in fee.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. §§ 16, 21, 54–56; Dec. Dig. § 28.*]

11. REMAINDERS (§ 17*)—BAR BY ADVERSE POSSESSION.

Limitations, including the 40 years' possession which under the Code confers title, do not run against remaindermen until the falling in of the life estate.

[Ed. Note.—For other cases, see Remainders, Cent. Dig. §§ 12–17; Dec. Dig. § 17.*]

12. REMAINDERS (§ 17*)—BAR BY ESTOPPEL OR LACHES.

The will of a testator, who died in 1835, gave land to a son with remainder to his surviving children. The son conveyed the land, assuming that it gave him a fee. He died in 1897. The records of the register's office and of the court of ordinary were destroyed during the war, and when defendant purchased, the first deed then on record purported to convey a fee and there was nothing to show that the property passed under such will, but inquiry in the neighborhood would have disclosed that the land came from such testator, as well as the terms of the will. The remaindermen took no steps to restore the records, as they might have done under Acts S. C. Dec. 21, 1865, Sept. 20, 1866 (13 St. at Large, pp. 354, 384),

and Feb. 11, 1871 (14 St. at Large, p. 537), and gave no actual notice of their claim, but it did not appear that they had actual knowledge that the deeds on record purported to convey a fee, or that those claiming under such deeds believed they had an absolute title. *Held*, that the remaindermen were not estopped or barred by laches from asserting their rights, as, in the absence of proof to the contrary, it would be presumed that they supposed that the occupants of the land held under the life tenant, and for his life only, and the statutes mentioned imposed no duty on them to restore the record so as to give notice of the existence of the will and their claims thereunder.

[Ed. Note.—For other cases, see Remainders, Cent. Dig. §§ 12–17; Dec. Dig. § 17.*]

13. LIFE ESTATES (§ 28*)—ACTIONS—CONVEYANCE WITH LIVERY OF SEISIN—PRESUMPTION.

Though parties claiming under a purchaser from a life tenant had been in possession for nearly 40 years under deeds purporting to convey a fee prior to the life tenant's death, it could not be presumed that the life tenant conveyed by feoffment, with livery of seisin thereby destroying the remainders, assuming that they were contingent remainders and could be so destroyed, since a tortious and unlawful act would not be presumed.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. §§ 16, 21, 54–56; Dec. Dig. § 28.*]

14. COURTS (§ 367*)—UNITED STATES COURTS—STATE LAWS AS RULES OF DECISION.

A single decision of the higher court of a state upon the construction of a particular devise is not conclusive evidence of the law of the state in a case in a United States court between other parties, involving the construction of the same will, but where any other construction would be at least very doubtful, the court would lean, for the sake of harmony, to an agreement with the state court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 958, 959; Dec. Dig. § 367.*

State laws as rules of decision in federal courts, see notes to Wilson v. Perrin, 11 C. C. A. 71; Hill v. Hite, 29 C. C. A. 553.]

In Error to the District Court of the United States for the Eastern District of South Carolina, at Charleston; Henry A. M. Smith, Judge.

Two actions, by Edward Robert and another and by Pauline Sanders and others, respectively, against the Pineland Club and others. Judgment for plaintiffs in each action, and defendants bring error. Affirmed.

See, also, 139 Fed. 1001; 171 Fed. 341, 96 C. C. A. 233.

The opinions of District Judge Smith on the original hearing and on the motion for a new trial were as follows:

On Original Hearing.

By stipulation of counsel these two causes were tried together as depending upon exactly the same state of facts, and a jury trial was waived by all parties in both cases, and by written agreement the cases were tried before the court without a jury. The plaintiffs claim title under the will of John H. Robert, Sr., who died on July 4, 1835, and who, the plaintiffs allege, left a will dated December 21, 1833. The will devised both tracts of land in question to the testator's son, Lucius C. Robert. The plaintiffs claim that under the will Lucius took only a life estate with remainder to his children.

Lucius C. Robert, the alleged life tenant, died in 1897, and the present plaintiffs are his children and grandchildren. The defendants' documentary title

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

to the lands involved in the cases commences with a deed from William M. Bostick, trustee, to Joseph W. Maner, executed in the year 1860, which was lost or destroyed, and the record of which was burned in the war between the states. Thereafter, on June 1, 1867, Bostick, trustee, executed a confirmatory deed, which recites the earlier deed, and which first deed, it recites, was executed in pursuance of a court proceeding in the year 1859, and authorized Bostick, trustee, to sell and convey the land to Joseph W. Maner. The said Maner sold a part of these lands to Maj. William J. Lawton by deed dated January 14, 1874, and the remainder he sold to Warren R. Lawton by deed dated December 5, 1880. The two Lawtons sold and conveyed to John K. Garnett, and Garnett sold and conveyed to the trustees of the Pineland Club. The defendants deny the plaintiffs' title, and allege that they and those under whom they claim have been in continuous, open, notorious, and adverse possession of the land ever since the deed of 1860 from Bostick, trustee, to Maner.

[1] The plaintiffs put in as evidence of their chain of title the will of John H. Robert, Sr., and then prove their descent from Lucius C. Robert, the devisee under that will, under the theory that the will of John H. Robert conveyed a life estate in the property in question to the testator's son, Lucius, with remainder to the children of Lucius, on whose death in 1897 the right to possession accrued to the remaindermen by whom these proceedings were begun as the parties entitled to the estate in fee in remainder after his death. Thus the plaintiffs' chain of title rests on the facts that it is shown that John H. Robert, Sr., was at the time of his death possessed of the lands in question, and therefore was presumptively the owner; that they are the lands referred to in his will as devised to his son Lucius; that his son Lucius took possession and died in 1897; and that the plaintiffs are or represent the remaindermen entitled under the will after the expiration of the life estate of Lucius. Inasmuch, however, as this would only carry the title back to John H. Robert, it would not be sufficient to establish the title of plaintiffs in this case, unless they can prove the defendants also claim from John H. Robert as a common source of title. If the defendants claim through a wholly independent source of title, then the plaintiffs having neither proved a record title, back to the grant, nor the presumption of the grant by 20 years' possession, nor a statutory title by 10 years' consecutive possession, could not recover in this case, but if they have proved that the defendants claim from John H. Robert as the common source of title, and, claiming from that common source of title, hold the lands subject to the provision in the will of John H. Robert, then they would, for the purposes of this case, by their testimony, have established a good prima facie title in themselves (assuming that their construction of the will of John H. Robert is correct), which would entitle them to judgment unless the title so established has been defeated by evidence on behalf of the defendants disproving any derivation from a common source or showing that defendants' possession is based on an independent sufficient title.

To sustain the plaintiffs' title and right to possession in this case it is absolutely necessary that they should establish the will of John H. Robert upon which their whole case depends. This cause on the question of the proof of that will has already been considered by the Circuit Court of Appeals of this circuit in the case of Pineland Club v. Robert, 171 Fed. 341, 96 C. C. A. 233. In the prior trial of this case the defendants sought to establish the will of John H. Robert by proving a certified copy of the will, holding that the mere production of this certified copy was sufficient proof of the will. The Court of Appeals, however, held that the mere production of a certified copy of a will as then produced was not a sufficient proof of the execution and probate of the will, inasmuch as the copy of the will which is made evidence by the statute of the state of South Carolina must be an exemplified copy of the will, and that the copy produced which was unaccompanied by a certificate signed and sealed by the probate judge was not an exemplification. That court held additionally that the act of the state of South Carolina of December, 1865, providing for the recording or registering of instruments where the original record of register has been destroyed, intended that there must be some order of the court recognizing the copy offered to be re-registered and author-

izing its recording, and, in the lack of that, a certified copy of the will which had been recorded or re-registered from a copy which was not an exemplification, as not having the seal of the probate judge, was an insufficient register, as it was the registration of a paper not authorized by law to be registered. That court, therefore, held that the simple production of this certified copy from the register of an unexemplified copy not entitled to be registered was an insufficient establishment of the will. It stated, however, and further held that if the plaintiffs had offered legal proof of the execution of the will in the first instance, and also as to its contents, together with evidence of its loss or destruction, then the copy in question, after being identified as a copy of the original will, would have been competent as secondary evidence. But that court held that on the former trial there was a total lack of proof as to the execution or existence of the original will, and that there seemed to have been no effort on the part of the plaintiffs to lay the foundation for the production of this paper as secondary evidence. A new trial was accordingly ordered.

[2] In the present trial the plaintiffs have endeavored to supplement their proof and produce the evidence of the execution and existence of the will, in the first place, and also as to its contents. They have produced as a witness Pierre Robert, who was a son of John H. Robert, one of the sons of John H. Robert, the testator, and a brother of Lucius C. Robert. Pierre Robert is thus a grandson of Mrs. Ann M. Robert, the widow of John H. Robert, the original testator, and named as executrix in the paper produced as a copy of his will. Pierre Robert testifies that on the death of his father he came into possession of the books and papers of his grandmother, Mrs. Ann M. Robert, which included the following:

(1) A certificate under the hand of W. R. Buckner, ordinary of Beaufort district, duly sealed with the official seal of the ordinary's court for Beaufort district and dated 4th April, 1836, to the effect that Mrs. Ann M. Robert had regularly qualified as executrix of the last will and testament of John H. Robert, late of St. Peter's parish, in the district of Beaufort.

(2) A release dated April 5, 1836, from W. E. Bailey, trustee of Cornelia E. Riley, to Mrs. Ann M. Robert as executrix of the last will and testament of John H. Robert, for all claims and demands. This release from the official indorsement thereon was recorded in the register's office on 6th of June, 1836.

(3 A similar release dated August 9, 1845, from John H. Robert, recorded October 27, 1845.

(4) A similar release dated 19th of February, 1840, from Wm. F. Robert, recorded 25th of May, 1840.

(5) A similar release dated February 19, 1840, from Lucius C. Robert, recorded May 30, 1840.

(6) A sealed acknowledgment from Edward Riley, husband of Cornelia E. Riley (a daughter of the testator), that he had received from Mrs. Ann M. Robert, executrix of John H. Robert, the slaves and other chattels to which his wife was entitled dated January 26, 1836, and recorded February 8, 1836.

All these releases are deeds over 30 years old and prove themselves.

(7) The certified copy of a similar release from Nicholas Cruger and E. A. Cruger, his wife (a daughter of the testator), and Edward Riley, her trustee, dated the 1st of January, 1850; the copy being certified under the hand and official seal of the ordinary for Beaufort district as having been recorded April 12, 1850.

These documents taken together, the certificate of qualification, and the deeds of release showing contemporaneous record, in the opinion of the court, conclusively establish as a conclusion of fact that John H. Robert, of St. Peter's parish in the district of South Carolina, had departed this life about 1836, leaving a last will and testament which had been duly probated in the office of the ordinary for Beaufort district, and on which letters testamentary had been issued to Mrs. Ann M. Robert as executrix.

[3, 4] The next question is as to the contents of the will, viz.: Is the paper produced by the plaintiff purporting to be a copy really such? The paper purporting to be the will of John H. Robert is dated the 21st day of December, 1833. According to the testimony of Pierre Robert this paper was also found

among the papers of Mrs. Ann M. Robert. To it is appended a certificate of Edward F. Morelle, ordinary for Beaufort district, that the paper contains a true copy of the last will and testament of John H. Robert, the certificate being dated the 31st day of December, 1852. The plaintiffs have also proved that Edward F. Morelle was the ordinary of Beaufort district at that date, and that the signature to this certificate is in his handwriting. The official seal is not appended to this certificate, and for that reason it has been held an insufficient certificate by the Court of Appeals for this circuit in the case referred to, from the fact it was not under the seal of the court. As stated before, however, this ruling was only to the effect that the mere production of a paper, not duly signed and sealed as required by the statute, is not sufficient to admit it as testimony as permitted by the statute. In the opinion of this court, however, the existence of the will having been already established by a certificate under the hand of the probate judge, and the official seal of the court as well as the other documents already referred to, this copy under the hand of the ordinary is admissible as an office copy from the hands of the official custodian of the original to prove what were the contents of the will. This copy as produced purports to be a copy of the will of John H. Robert of St. Peter's parish, Beaufort district, and constitutes his wife, Ann M. Robert, the executrix of his will, in so far entirely agreeing with the statements contained in the contemporaneous certificate and old deeds above alluded to. In addition, however, the plaintiffs have produced transcripts of record from the court of common pleas for Charleston county, being transcripts of record now in that court, but formerly in the old court of equity for Charleston district when the distinction between the courts of equity and courts of law existed. One of these transcripts is in the case of a petition ex parte Ann M. Robert, Nicholas Cruger and Elizabeth A. Cruger, his wife, for the appointment of Edward Riley as trustee under the marriage settlement of Mr. and Mrs. Cruger, and to invest the fortune of Mrs. Cruger in Georgia. The entire record in those matters is no longer extant, but the question went up to the Court of Appeals in Equity, and is reported 2 Strob. Eq. (S. C.) 86. The printed statement of the case states that John Robert left a will dated the 21st of December, 1833, which was probated by Mrs. Ann M. Robert. It also gives an extract from the will which agrees with the copy now produced, and states other facts corroborative of the matters stated in the copy produced.

The court, therefore, finds that these ancient records, together with the certificate signed but unsealed of Morelle, establish that the paper purporting to be a copy of the will of John H. Robert is a copy of that will, and so holds as a conclusion of fact, and that the plaintiffs in this case have by the best evidence available established the execution, the existence, and the probate of the will of John H. Robert, and that the copy produced in evidence is a copy of that will.

[5, 6] The clause of that will relied upon by the plaintiffs to establish that Lucius C. Robert took only a life estate under the will of John H. Robert has been construed by the Supreme Court of South Carolina in the case of Robert v. Ellis, 59 S. C. 137, 37 S. E. 250. The decisions of the Supreme Court of the state in the construction of wills as to the law governing devises and dispositions of land in the state constitute rules of property law to be followed by this court. Whilst a distinction has been drawn between a general rule established by such decisions and the interpretation given to a particular will in a particular case as depending on the special wording of the document in question, yet the generality of the application of the construction given by the Supreme Court to this will brings it within the class of decisions to be followed by this court. To hold otherwise would present the spectacle of one set of claimants in possession of a part of the lands of John H. Robert under the construction given his will by the Supreme Court of the state, and a wholly different set in possession of another part under a different construction of the same words given by this court. Following the conclusions and principles adjudicated by that court in that case, this court holds as a conclusion of law that under the will of John H. Robert his son Lucius C. Robert took only a life estate in the property in dispute in this case. This would establish the claim of the plaintiffs, provided they can establish that the defendants also

claim under John H. Robert, and not through an independent source. It is admitted that the original documentary source of title produced by defendants in this case is the deed from W. M. Bostick, trustee, to Joseph W. Maner, dated the 1st of January, 1867. This deed recites that Wm. B. Villard and Harriet E. Villard, his wife, in the year 1859 instituted proceedings in the court of equity for Beaufort district against the said W. M. Bostick, as trustee, requiring that he be directed to sell and convey to Joseph W. Maner the Cotton Hill and Pineland tracts, and thereafter that the court, by final decree, directed the said trustee, W. M. Bostick, to sell and convey to Joseph W. Maner the Cotton Hill, and Pineland tracts, and thereupon W. M. Bostick, trustee, in the year 1860, did actually sell and convey to the said Joseph W. Maner the said tracts of land, but that the deed was, with the record thereof, destroyed in the late war, so that said Joseph W. Maner was unable to show title to the estates, and in consideration thereof the said W. M. Bostick, as trustee, by way of re-execution of the original deed of conveyance, executed that deed to convey them to Joseph W. Maner.

[7] It is admitted that the tracts of land conveyed therein are the same as the tracts of land in dispute in this case. This runs the possession of the lands back to W. M. Bostick, trustee of Wm. B. Villard and Harriet E. Villard. It appears to be settled by the law of South Carolina that the fact that the defendant claims through a common source of title with the plaintiff may be shown by parol, and it is not necessary to show a connected chain of deeds or written documents from the common source to the defendant. To carry the title back from Bostick, trustee, to John H. Robert, the plaintiffs have produced the testimony of several old residents of the vicinity, and especially of Maj. W. J. Lawton, an old gentleman in his eighty-third year, who had lived all his life in the neighborhood of these lands, and of their owners, and who subsequently himself had purchased part of this land and sold it to Garnett. He was only five years younger than Lucius C. Robert. Mr. Lawton testified that Bostick, as trustee for Villard, purchased from Mrs. Cruger, a sister of Lucius C. Robert. He testified that after the death of John H. Robert, the testator, the Cotton Hill and Pineland tracts went into the possession of Lucius C. Robert, the devisee named in the will, and that Lucius C. Robert, after having been in possession of these properties, they next went to his sister, Mrs. Cruger, and from Mrs. Cruger they were sold to and went into the possession of W. M. Bostick, trustee for Villard. He testified that the Miss Robert who married Cruger was Miss Elizabeth A. or Elizabeth Ann Robert. The testimony of the other parol witnesses is substantially to the same effect.

To corroborate this testimony the plaintiffs have produced the transcripts above referred to, and another from the same court in the case of Nicholas Cruger v. Elizabeth Ann Cruger et al. The transcript in the earlier case of Ex parte Ann M. Robert contains the decree of the chancellor made the 1st of March, 1845, expressly authorizing the purchase of Cotton Hill for Miss Elizabeth A. Robert.

In the transcript in the case of Ex parte Cruger and Wife, the report of the master, dated May 9, 1848, states that the estate of Mrs. Cruger (who was Miss Elizabeth A. Robert) consisted inter alia of a plantation called Cotton Hill and the statement of her guardian and trustee, Mrs. Ann M. Robert, annexed to the report, is that this plantation Cotton Hill had been purchased for $3,000 out of the income of her daughter's estate. The later transcript in Cruger v. Cruger is only pertinent as apparently showing that Mrs. Cruger's property had been invested in Georgia, and therefore the Cotton Hill place must have been sold by her subsequently to her marriage.

[8] In addition to these transcripts the defendants have produced an old account book, also found by Pierre Robert among the papers of Mrs. Robert, purporting to be the account book of Mrs. Ann M. Robert as executrix of the estate of John H. Robert in account with that estate, and also her account as guardian of Miss E. A. Robert, which bears the attestation at different periods of the ordinary of Beaufort county, but not under seal of court. This book shows charged against Miss E. A. Robert, afterwards Mrs. Nicholas Cruger, the sum of $3,000, for the purchase of Cotton Hill planta-

tion on the 24th day of March, 1845. The book carries every appearance of authenticity as the account book kept by Mrs. Ann M. Robert, and produced by her before the ordinary in settlement of her accounts and vouched by him.

This book would not be admissible as original testimony of the facts stated in it as against the defendants. In view of the destruction of records and papers during the war in the part of the state in which the property in dispute is situated, which has made it impossible in most cases to prove titles by original records or deeds, resort must necessarily be had to secondary testimony, the best available in each case according to the circumstance of the particular case. The entries in the book were made at the time by one whose duty it was to make them, and who had no interest to subserve in making them adverse to the defendants. I think under the circumstances the entries in this book would be admissible as secondary evidence in corroboration of the statements in the transcripts and the testimony of Mr. W. J. Lawton and the other witnesses. The only remaining link that would rest solely on the parol testimony of Mr. Lawton and the other old residents is the conveyance from Mrs. Cruger to W. M. Bostick, trustee. The evidence would appear to sustain the inference that Mrs. Cruger, or rather her trustee on her behalf, had, prior to the proceedings in the court of equity in Charleston in 1855, disposed of all the property she had in South Carolina, except that derived from her mother's estate. The inference follows that Cotton Hill had been sold, and according to the testimony of W. J. Lawton and others, it was sold to Bostick as trustee for the Villards. When Bostick as trustee sold to Maner, it followed that Maner held, and the defendants under him held by a title derived from John H. Robert.

[9] The defendant claims, however, that this claim from a common source may still exist and yet not be incompatible with a perfect title in fee in the defendants. That it is possible that Lucius C. Robert when he sold to his sister sold by feoffment and livery of seisin, which by the law of South Carolina then existing, as claimed by defendants, would be sufficient to bar contingent remainders, and that the defendants, upon the theory that parties are presumed to have followed the right course in executing the conveyance so as to execute a sufficient conveyance to carry the interest intended to be conveyed, are entitled to the inference that in this case a good and sufficient conveyance by feoffment and livery of seisin to bar the contingent remainder was executed by Lucius C. Robert. Whether or not this presumption could be indulged in, however, would depend upon whether the estate in remainder decided by the Supreme Court to exist under the will of John H. Robert was a vested remainder or contingent remainder. After a careful study of the case of Robert v. Ellis, 59 S. C. 137, 37 S. E. 250, it would seem that the only construction to be placed upon the decision of the Supreme Court is that it was a vested remainder. That is, that the children of John H. Robert upon birth took a vested estate in remainder defeasible only upon the death of the child anterior to the death of the father. The Supreme Court expressly decides that under the terms of the will John H. Robert, Jr., took neither a fee simple absolute nor a fee defeasible, nor even a fee conditional, but took an estate for life only, with remainder to any child or children whom he might leave, which, under the terms of that decision, constituted a vested remainder in the surviving children such as the life tenant could not destroy by alienation in his lifetime.

[10] The defendants further urge that they have a right to the presumption that, even if this was a vested remainder, yet that the court of equity having the power for purposes of change of investment to order the sale of property free of remainders by a decree in a cause to which the remaindermen are parties; in this case the sale from Lucius C. Robert was duly authorized by such a decree. This would be simply a presumption of an affirmative defensive character without the slightest evidence to warrant it, and against the probabilities as disclosed by the testimony. On the contrary, the parties interested under the will seem to have acted on the presumption that Lucius C. Robert took an estate in fee, and that no proceedings were necessary to bar the remaindermen.

[11] The plea of the statute of limitations in this case made by defendant is disposed of by the case of Mitchell v. Cleveland, 76 S. C. 432, where on page 448, 57 S. E. 33, the Supreme Court of South Carolina decided that the statute of limitations, including the statute of 40 years' possession mentioned in the Code as conferring title, does not begin to run against remaindermen until the falling in of the life estate.

[12] The last question in the case, and the one which presents much difficulty, is the question as to how far the defendants in this case should not be entitled to stand in the position of purchasers for value without notice. All the records of Beaufort county, both of the register's office for the record of conveyances and the records of the court of ordinary, had been completely destroyed during the war. The first deed that appeared on record was the deed from W. M. Bostick, trustee, to Joseph W. Maner, made in 1867. That purported to convey the land in fee. And from Joseph W. Maner in 1867 the defendants have a clear succession of conveyances in fee to their possession. When the defendants came, therefore, to examine the record to see what was the title of the property they proposed to purchase, all that they could ascertain from the record was that there was on record the deed of Bostick in 1867 as trustee conveying the land in fee. There was nothing to show (that is; nothing on the *existing record*) that the land had been the property of John H. Robert, and passed under his will.

There was nothing so far as the existing record was concerned, to put the defendants on guard or advise them that Bostick was not authorized to convey an estate in fee to the property. At the same time the destruction of all of the records that would have given this notice was in no wise the fault of the plaintiffs; nor the subject of correction by them. They were not entitled to the possession of the property at that time. Lucius C. Robert had a perfect right to sell to his sister or to any one his life estate in the property, and the plaintiffs in this case were not authorized to interfere. The destruction of all records was a common casualty, proceeding from the disastrous consequences of the war, and the question here is who is to bear the burden of that destruction. The plaintiffs were wholly guiltless of any wrong conduct touching this destruction, and the defendants were equally guiltless. It would appear to be a hard case upon the defendants, at the same time it is an equally hard case upon the plaintiffs, who had an estate in remainder in this property which they were not authorized to proceed to get the benefit of until the death of the life tenant in 1897, and who are in no wise chargeable with any conduct to the defendants incompatible with their claim.

Treating the case in the most favorable aspect for defendants, it would be as if the defendants had filed a bill in equity to enjoin the plaintiffs from the further prosecution of their action at law, and to sustain the bill had invoked the equitable principles of laches or estoppel in pais against the plaintiffs. The defendants would then claim that plaintiffs knew the records had been destroyed, knew their own title, were chargeable with constructive knowledge of the deeds on the record purporting to convey title in fee to defendants and defendants' prior grantors, and knew also that defendants and such grantors were occupying and using the lands in the belief that they had acquired an absolute title to the same, and, notwithstanding all this, never took any steps to reconstitute the records so as to warn intending purchasers, nor gave any actual notice of their claim. Would this have sustained a permanent injunction? There is nothing in the record to show any actual knowledge by the plaintiffs of these facts. They are no doubt chargeable with knowledge of their own title and with the knowledge of the general destruction of the records; but, in the absence of proof to the contrary irrespective of the existence of deeds on the records, they are entitled to the legal presumption that, knowing that a life estate existed between them and any right of possession, they supposed that the occupants of the land held under the life tenant and for the term only of his life. There is no such actual notice to or misleading conduct by, shown on the part of, the plaintiffs that would justify, under the equitable principles either of laches or estoppel, an injunction against the plaintiffs in the assertion of any legal rights they may have. The due probating of the will of John H. Robert in 1835 was notice to all the

world, including the defendants, of its contents. The destruction of that record did not impose on the plaintiffs any duty to restore it. The Acts of December 21, 1865 (Stats. at Large, vol. 13, p. 345), of December 20, 1866 (Id., p. 384), and of 11th February, 1871 (Id., vol. 14, p. 537), conferred a privilege, but did not impose a duty punishable with the loss of right as a penalty if their provisions were not availed of. The plaintiffs had the right legally to rest on the assumption that the will of John H. Robert, as probated and recorded in 1835, was still on record and noticed by all.

The court finds as a conclusion of law that there was no legal duty under the law of South Carolina incumbent upon the plaintiffs in this case to restore the record so as to advise the defendants of the existence of the will of John H. Robert and their claims thereunder. It further holds as a conclusion of law that the plaintiffs were not either entitled or bound to take any action anterior to the death of the life tenant. It would follow from this that the plaintiffs are not in any wise to be held responsible for the insufficiency of the existing records. It was, if not incumbent upon, at least reasonable prudence for, the defendants, knowing the records to have been destroyed prior to 1865, to have made such inquiries in the neighborhood as the nature of the case permitted. Had they so done, it is evident from the testimony of Mr. W. J. Lawton that they could have ascertained that this land came from John H. Robert, and it was then within their power to have made further inquiry to find out the terms of the will of John H. Robert. It may be that had they done so, they would have still taken the view that Lucius C. Robert took a fee, and not a life estate under his father's will. This seems to have been the view taken by all the parties, including Mrs. Ann M. Robert herself, when she purchased Cotton Hill for her daughter Mrs. Cruger. This evidently was the view of Joseph W. Maner when he took the deed from Bostick, trustee. The decision of the Supreme Court of South Carolina was contrary to this view, and determines the rights of the parties, and the defendants must undergo the same consequences that befall any purchaser of land who buys under a mistaken view of the estate held by his vendor. Indeed the underlying grievance of the defendants is that the Supreme Court of South Carolina in 1900, some 65 years after the death of the testator, and 10 years after the defendant had acquired the property, placed a construction on testator's will which was at variance with the construction placed upon it by the individual purchasers and vendors of the property. This court, however, sits in such cases to follow, not to correct, that court. The construction placed by that court on the will is presumptively that which it would have placed on it in 1835.

This court therefore finds as a conclusion of law that the defendants are not entitled to the position of purchasers without notice for valuable consideration, and that plaintiffs have not been guilty of any acts to estop them, and judgment must be accordingly for the plaintiffs, and a formal judgment for the plaintiffs for the lands in dispute and costs of these actions will be entered.

On Motion for New Trial.

An application has been made for a new trial in these cases upon the ground that the court erred in its judgment heretofore rendered upon certain conclusions of law. These may be briefly stated as follows:

1. That the court erred in holding that the remainder to the children of Lucius C. Robert under the terms of the will of John H. Robert as construed by the Supreme Court of South Carolina, was not a contingent remainder.

2. That the court should have held that such contingent remainder was barred by the presumption of the due execution of a deed of feoffment with actual livery of seisin from Lucius C. Robert to his sister, Elizabeth.

3. That this court is not bound by the decision of the Supreme Court of South Carolina, in the case of Robert v. Ellis, but must construe the will of John H. Robert for itself, and under such independent construction must hold that under a correct construction of that will Lucius C. Robert took an estate in fee under the fourth paragraph of the will, and not a life estate only.

Taking up these alleged errors in their order:

1. On the first question, it appears unavoidable to escape the conclusion that the Supreme Court of South Carolina intended to hold that the children of John H. Robert, Jr., took a vested remainder in the lands devised. The Supreme Court in the case of Robert v. Ellis holds that the "cardinal rule to be observed in the construction of a will is to ascertain, if possible, what was the real intention of the testator." Thus following the rule laid down by Chief Justice Marshall in Smith v. Bell, 6 Pet. 68, 8 L. Ed. 322. The court then goes on to say that the plain expression of the intention of the testator, under the will taken as a whole and giving its due effect to the fourteenth clause, was that in the absence of words of perpetuity or inheritance in the fifth clause, the will could not be construed as conferring anything more than a life estate upon John H. Robert. It also proceeds to say that "if he took a fee simple absolute," or a "fee defeasible, or even a fee conditional, that would entirely defeat the provision made for his surviving children by the terms of the fourteenth clause of the will. If he took a fee either absolute or defeasible, he would, by devise or alienation, absolutely destroy the interests intended to be secured to his children by the fourteenth clause; and if he took a fee conditional, he having married and had issue born, he could likewise destroy such interests by alienation in his life time." The Supreme Court thus distinctly holds that the real intention of John H. Robert in this will was to provide for his grandchildren, and he could not be presumed to have given any estate which would be capable of destruction by the life tenant. This presumption would equally well apply against the creation of a contingent remainder, for if the estate given to John H. Robert, Jr., was an estate for life, with contingent remainder over to his children, then John H. Robert, Jr., could have destroyed the interest intended to be secured to his children in the very way in which the applicant for a new trial now contends that the law must presume Lucius C. Robert did destroy it, viz., by feoffment accompanied by actual livery of seizin.

The court, therefore, must adhere to its construction of the case of Robert v. Ellis, as being intended to find that the children of John H. Robert, Jr., took a vested interest in remainder in the property devised to him for life; and the same construction would apply to the children of Lucius C. Robert, as the devise to him is in the same language.

[13] 2. Assuming, however, that it was a contingent remainder for the purposes of the argument on this application for a new trial, would this court be in a position to presume, from lapse of time or running of possession, the making of a deed of feoffment with actual livery of seisin? Presumptions in law are never against misconduct. A presumption will be indulged in where the action presumed is one which is compatible with the honest conduct of the party against whom the presumption is made, but no presumption of dishonesty will be made. Garner v. New Orleans, 6 Wall. 642, 18 L. Ed. 950; Moses v. U. S., 166 U. S. 571, 17 Sup. Ct. 682, 41 L. Ed. 1119. Now a conveyance in fee by feoffment, with livery of seisin by a life tenant, is a tortious and unlawful act in the destruction of the contingent remainder. Archer's Case, 1 Coke, 66; Chudleight's Case, 1 Coke, 135; McElwee v. Wheeler, 10 S. C. 392. A presumption would not be indulged in to the effect that a tortious and unlawful act had been committed, and the court would not presume that a life tenant had made a deed of feoffment with livery of seisin to accomplish the tortious and unlawful destruction of the contingent remainder. This very point is substantially adjudicated in the case of Habersham v. Hopkins, 4 Strob. 238, 53 Am. Dec. 676, where the Court of Appeals of South Carolina refused to presume the execution of a deed of feoffment which would have defeated a contingent remainder, on the ground that a court was not to presume that the life tenant did what he was forbidden to do, and that "nothing dishonest or base is to be presumed in law; all presumptions are innocent and rightful; a deed will not be presumed if it could only be made in fraud and injury."

It would follow that even if the remainders under the will of John H. Robert were contingent remainders, yet this court would not presume that the life tenant had, by a tortious or unlawful act, attempted to bar them and thus

destroy the interests of the persons for whom the testator attempted by his will to provide.

[14] 3. With regard to the rules controlling the construction of a will in the federal courts, it is unnecessary to do more than to refer to them as set forth by the Supreme Court of the United States in Kuhn v. Fairmont Coal Co., 215 U. S. 349, 30 Sup. Ct. 140, 54 L. Ed. 228, in which it is laid down that this court is at liberty to come to its own conclusions on the construction of a written document such as a will, viz., that where the construction of certain words in wills of real estate had become a settled rule of property in a state that construction is to be followed by the courts of the United States, but that a single decision of a higher court of the state upon the construction of the words of a particular devise is not conclusive evidence of the law of the state in a case in a court of the United States involving the construction of the same words as between other parties than those to the case in the state court, but that the federal court is bound to lean, for the sake of harmony, to an agreement with the state court; and, where the question of law involved is deemed to be doubtful, there should not be introduced into the jurisprudence of a state the discordant elements of a substantial right which is protected in one set of courts and denied in the other, with no superior to decide which is right.

Were this court to come to its independent conclusion whether any remainder given under the will of John H. Robert was vested or contingent, it might well be to the effect that it was vested. The general rule as determined by the Supreme Court of the United States would seem to be to the effect that a devise to A. for life, with remainder to such of his children as shall be living at his death, creates a vested interest in remainder in the children subject to be divested by the death of any who may predecease the testator. Croxall v. Shererd, 5 Wall. 268, 18 L. Ed. 572; Poor v. Considine, 6 Wall. 458, 18 L. Ed. 869; Daniel v. Whartenby, 17 Wall. 639, 21 L. Ed. 661; Cropley v. Cooper, 19 Wall. 167, 22 L. Ed. 109; McAuthur v. Scott, 113 U. S. 340, 5 Sup. Ct. 652, 28 L. Ed. 1015; Thaw v. Ritchie, 136 U. S. 545, 10 Sup. Ct. 1037, 34 L. Ed. 531.

The court of errors of South Carolina in the case of Redfern v. Middleton, Rice, 459, would seem to have arrived at a different conclusion as to what was the rule, and held that under such language in a will the remainder was contingent. This conclusion the Supreme Court of South Carolina has adhered to in the cases of Faber v. Police, 10 S. C. 376; Roundtree v. Roundtree, 26 S. C. 470, 2 S. E. 474, and other cases. These last cases are long posterior to the date of the death of John H. Robert, Sr., and the accrual of the rights in remainder given by that will. The case of Dehon v. Redfern, in the Court of Chancery (Dud. Eq. 115), in which the South Carolina doctrine was first laid down, was decided in June, 1837, two years after the death of John H. Robert, Sr., and, giving to his will the construction of its language called for by the general rule as existing at the date of the death of John H. Robert, Sr., as laid down by the Supreme Court of the United States, the remainders given would be vested remainders.

Furthermore, it would seem that under the terms of the decision of the South Carolina Court of Appeals in Rivers v. Fripp, 4 Rich. Eq. 276, and of the Supreme Court in Seabrook v. Gregg, 2 S. C. 68, the construction of the language in a will which would create under such circumstances a contingent remainder was limited to the words "surviving" children, whereas in this case the language is not "surviving," but that if the life tenant shall "leave" a child or children. It may be said that the practical effect of the words used are synonymous, but it would be impossible otherwise to reconcile the decision of Seabrook v. Gregg with the other decisions of the court. This court now prefers to rest its opinion upon the assumption that the Supreme Court of South Carolina in its conclusion that the remainder given in the will of John H. Robert was vested, reached that conclusion upon the real intention of the testator as ascertained from his language under the settled rule of construction in the adjudicated cases, beginning with Redfern v. Dehon as limited in the cases of Rivers v. Fripp and Seabrook v. Gregg.

Lastly, it is contended that under the rule applicable to the construction of

this will as established by the Supreme Court of the United States, this court should hold that Lucius C. Robert took a fee under the will, and that the construction given to the will by the Supreme Court of South Carolina in Robert v. Ellis was erroneous, and is not binding upon this court. The will may be said to be subject to different constructions as to the effect of clause 4 in connection with clause 14 and the language or characteristic expressions used in the rest of the will. By the terms of clause 4 Lucius C. Robert was not given an absolute fee upon the death of the testator. On the contrary, the lands therein devised to him are limited over by way of executory devise to others upon the happening of the two contingencies mentioned therein. Then comes the question of how far the estate given is also limited by the language of clause 14. The Supreme Court of South Carolina has given the will one construction. Any other construction suggested by the applicants for a new trial would be at the least very doubtful, and under such circumstances, it would be the duty of this court, in coming to its independent conclusion, to lean for the sake of harmony to an agreement with the State Supreme Court, and not import into the law by the construction of this will the discordant element of a substantial right which is protected in the same state in one set of courts and denied in the other.

It is accordingly ordered that the applications for new trials be refused.

Frank R. Frost, of Charleston, S. C., and Joseph S. Clark, of Philadelphia, Pa., for plaintiffs in error.

Benj. H. Rutledge, of Charleston, S. C., for defendants in error.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

PER CURIAM. After careful consideration of the elaborate argument of the plaintiff in error, we have no doubt that the two opinions of the District Judge, one on the original hearing and the other in denying the motion for a new trial, conclusively show that the plaintiff is entitled to recover the land in controversy; and we deem it unnecessary to restate the reasons.

Affirmed.

CLINCHFIELD COAL CORPORATION v. STEINMAN.

(Circuit Court of Appeals, Fourth Circuit. November 11, 1913. On Rehearing, March 6, 1914.)

No. 1173.

1. VENDOR AND PURCHASER (§ 243*)—BONA FIDE PURCHASER—ADMISSIBILITY OF EVIDENCE—CONSIDERATION PAID.

   In an action of ejectment, where plaintiff claimed the land as a purchaser for a valuable consideration without notice of a prior conveyance, evidence that the price he paid was grossly inadequate was admissible on the question of his bona fides and want of notice.

   [Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 606-608; Dec. Dig. § 243.*]

2. VENDOR AND PURCHASER (§ 231*)—BONA FIDE PURCHASER—NOTICE—RECORD INDEX.

   Where a plaintiff in ejectment testified that when he purchased the land in suit he knew that titles in the locality were generally defective, and for that reason employed an attorney to examine the records, entries in the index to the deed records of the county, referring to the record of a decree establishing the validity of a lost deed to the land made by plaintiff's grantor, which decree was entered for record more than a year be-

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

fore plaintiff's purchase, were admissible in evidence to charge plaintiff with notice of the prior conveyance.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 43, 55, 487, 513–539; Dec. Dig. § 231.*]

On Rehearing.

3. JUDGMENT (§ 292*)—CONSTRUCTION AND OPERATION—"DECREE FOR RECOVERY OF LAND."

Code Va. 1904, § 2510, requires the clerk of a court wherein any judgment or decree is entered for the recovery of land to transmit a copy of such judgment or decree to the clerk of the court of each county in which the land is situated, and requires the latter to record the same in his deed book. A judgment creditor brought a suit in equity against his debtor and another to establish a lost deed by which land had been conveyed to the debtor by his codefendant and to enforce his judgment against the land, which in Virginia cannot be done in any case except by suit in equity. The result was a decree establishing such lost deed as a valid conveyance of the land which was therein described. *Held*, that such decree was one for the recovery of land, within the meaning of the statute, and was properly recorded thereunder as a muniment of the debtor's title.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 572; Dec. Dig. § 292.*]

4. WORDS AND PHRASES—"RECOVERY."

"Recovery," as a legal term, does not necessarily or usually mean the act by which the title or right of possession is acquired; but its more common signification is the final adjudication that the title or right of possession was before acquired, and of right belongs by virtue of the previous acquisition to the party in whose favor the decree is made.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 7, pp. 6019, 6020.]

5. VENDOR AND PURCHASER (§ 231*)—BONA FIDE PURCHASER—NOTICE—INDEX TO DEED RECORD.

Entries appeared in the index to a deed record as follows:

"Fleming, Phillip and wife v. (Decree) Jas. A. Collier, page 19."

"Collier Jas. A. deed from P. Fleming, page 19."

Held, that such entries were sufficient to put a subsequent purchaser on inquiry and to charge him with notice of the contents of the instrument recorded on page 19.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 43, 55, 487, 513–539; Dec. Dig. § 231.*]

6. RECORDS (§ 8*)—RECORD OF TITLES TO LAND—INDEX.

The index to a deed record is as much a part of such record as the record of the instruments themselves.

[Ed. Note.—For other cases, see Records, Cent. Dig. § 4; Dec. Dig. § 8.*]

Waddill, District Judge, dissenting.

In Error to the District Court of the United States for the Western District of Virginia, at Big Stone Gap; Henry Clay McDowell, Judge.

At Law. Action by A. J. Steinman against the Clinchfield Coal Corporation. Judgment for plaintiff, and defendant brings error. Reversed.

This is an action of ejectment instituted by the defendant in error, A. J. Steinman, in the District Court of the United States for the Western District of Virginia, against the plaintiff in error, the Clinchfield Coal Corporation, to recover all the bituminous and other mineral, iron ore, and all other minerals, except manganeses, and all the fire clay, in, under and upon a cer-

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

tain parcel of land in Dickenson county, Va., together with exclusive rights of mining, shafting, tunneling, erecting buildings, for mining and manufacturing, of constructing wagon roads, railways, depots, and houses, of cutting timber, of using stone and water for all purposes, and of depositing dirt and refuse matter, as fully set out in the declaration.

The plaintiff in error will be referred to as defendant, and the defendant in error will be referred to as plaintiff, such being the respective positions they occupied in the court below.

The plaintiff offered in evidence the following chain of title: Deed from Phillip Fleming to A. J. Steinman and J. D. Price, dated December 18, 1874, and recorded on December 21, 1874. Deed from J. D. Price to A. J. Steinman, dated December 31, 1874, and recorded November 4, 1875.

The plaintiff, in order to avoid the necessity of tracing his title back to the commonwealth, relied upon Phillip Fleming as being the common origin or source of title of both the plaintiff and the defendant, and claimed that, although the rights of the defendant appear to have originated first from the alleged common source, he was entitled to recover as an innocent purchaser for value without notice of such prior rights. And in order to show that plaintiff and defendant claimed title from a common source, plaintiff offered in evidence the following papers as links in the chain of defendant's title:

"(a) Three decrees in the chancery cause of Lipps v. Collier, Phillip Fleming, and others, dated, respectively, October 23, 1872; May 22, 1873, and April 5, 1874, the second of which decrees, admitted to record in the Deed Books of Wise county on June 3, 1873, finds that a deed executed by Phillip Fleming to James A. Collier properly acknowledged, conveying the land in controversy, had been lost, and decrees that Collier shall hold the land free from all claims of Fleming, and orders that this decree shall be recorded and indexed in the deed book of the county, which was accordingly done more than a year prior to the conveyance from Fleming to A. J. Steinman and Price.

"(b) Deed from James A. Collier to John Riner, dated May 3, 1869, and recorded September 30, 1869 (three years prior to the first decree in case of Lipps v. Collier and five years prior to conveyance to Steinman), purporting to convey only 'all of the right and title which he had in and unto all the real estate which he (Collier) owns or in which he had any interest in Wise county.

"(c) Deed from John Riner, trustee, to Patrick Hagan, dated October 10, 1886, purporting to convey the land by its bounds, and referring to it as the same mentioned in a decree 'in a chancery cause lately determined wherein the said Collier was plaintiff and said Fleming defendant.'

"(d) Deed from Patrick Hagan to Bond & Bruce, dated March 1, 1905, purporting to convey the coal, certain mining and timber rights, and all his interest in the tract described by its bounds, containing 417.45 acres, and mentioned as 'being the same tract which was conveyed to Patrick Hagan by T. G. Wells by deed recorded in Deed Book 6, p. 269.'

"(e) Deed from Bond & Bruce to Clinchfield Coal Company dated March 11, 1905, conveying only the coal and such rights and privileges as the grantors own under a tract described by bounds, containing 417.45 acres, and referring again to it as being the same conveyed to Hagan by Wells.

"(f) Deed from Clinchfield Coal Company to Clinchfield Coal Corporation [plaintiff in error], dated June 4, 1906, conveying such interest and rights as acquired by the last-mentioned deed from Bond & Bruce.

"(g) Deed from T. G. Wells to Elias Rose and from Rose to Patrick Hagan, conveying surface of 72 acres, about one-fifth of the area the coal under which is involved."

At the conclusion of the evidence on motion of counsel for plaintiff, the court directed the jury to return a verdict in favor of plaintiff for all the minerals, and each and every mining interest in the lands claimed by the defendants, as appears in the verdict and judgment; to the entry of such judgment defendant excepted, and the case now comes here on writ of error.

J. Norment Powell, of Johnson City, Tenn., and W. H. Rouse, of Clintwood, Va. (Powell, Price & Shelton, of Johnson City, Tenn., on the brief), for plaintiff in error.

R. T. Irvine, of Big Stone Gap, Va. (Irvine & Morison and J. F. Bullitt, all of Big Stone Gap, Va., on the brief), for defendant in error.

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

PRITCHARD, Circuit Judge. In the case of Lipps v. Collier, Phillip Fleming, and others, it was alleged by the plaintiff, who brought the action as a judgment creditor and was seeking to subject the land to the payment of his judgment, that prior to that date Fleming had conveyed these lands to Collier, but that the deed had been lost or misplaced; the purpose of the action being to set up the lost deed in order that the plaintiff might subject the lands as the lands of Collier for the payment of his debt. Collier and Fleming answered, and, among other things, admitted that Collier was the true owner of the premises.

As we have heretofore stated, three decrees were entered in this suit, dated, respectively, October 23, 1874, May 22, 1873, and April 6, 1874, the second of which decrees recites that Phillip Fleming executed a deed to James A. Collier, which was properly acknowledged, conveying the land in controversy, and that the same had been lost, and decrees that Collier hold the land free from all claims of Fleming, and further provides that the same should be recorded and indexed in the deed book of the county. This decree was recorded and indexed on June 3, 1873, more than a year prior to the conveyance of Fleming to Price.

Notwithstanding the entry of this decree, Fleming executed a deed to A. J. Steinman and Price on the 18th day of December, 1874, purporting to convey the land in controversy.

However, plaintiff insists that at the time he took this deed from Fleming, he had no knowledge of the suit of Lipps against Collier et al., and that he did not have notice that Collier claimed to be the owner of the lands in controversy, and that therefore he is an innocent purchaser for value.

Defendant insists that the proceedings in the suit of Lipps v. Collier were duly entered upon record of the court, and that, in addition thereto, a copy of the decree, declaring Collier to be the owner of the lands now in dispute, was recorded in the clerk's office in pursuance of section 2510, Code 1904, which is in the following language:

"The clerk of the court wherein there is any partition of, or assignment of dower in, land under any order, or any recovery of land under judgment or decree, shall transmit to the clerk of the court of each county or corporation wherein such land is, or if the land lies within the corporate limits of the city of Richmond, to the clerk of the chancery court of the said city, a copy of such order, judgment, or decree, and of such partition or assignment, and of the order confirming the same, and along therewith such description of the land as may appear in the papers of the cause. And the clerk of the court of such county or corporation, or of the said chancery court, as the case may be, shall record the same in his deed book, and index it in the name

of the person who had the land before, and also in the name of the person who became entitled under such partition, assignment, or recovery."

The defendant further insists that a copy of this decree was registered and properly indexed; that if this was not sufficient to have put plaintiff upon notice as to defendant's rights, it was sufficient to put plaintiff upon inquiry as to the true facts, and if he had availed himself of the information thus afforded, as it was his duty to do, he could have ascertained that these lands did not belong to Fleming, but had been conveyed to Collier and those under whom defendant now claims.

There are numerous assignments of error, but we do not deem it necessary to refer to the first, second, third, and fourth, inasmuch as we are of the opinion that they are without merit.

[1] The plaintiff, Steinman, was introduced as a witness in his own behalf for the purpose of showing that he was an innocent purchaser for value from Phillip Fleming. Upon cross-examination he was asked:

"Q. Mr. Steinman, when you bought this and other tracts of coal in this country, did you or not know as a rule titles were defective? A. Yes, sir; and for that reason I was very careful to employ attorneys to examine all the titles. * * *"

Witness was then asked the following question:

"Q. Did your knowledge that the titles were generally defective and dangerous affect the price that you would pay for property?"

The plaintiff objected to this question. Counsel for defendant insisted that the question was relevant, and, among other things, stated that they expected to prove that titles in that section were generally defective and dangerous, which caused plaintiff to pay only small prices and to hazard only small amounts. The court sustained plaintiff's objection and the fifth assignment of error relates to the ruling of the court as respects this point.

While it is true that there is no direct evidence as to the value of this land in 1874, at the time plaintiff purchased it, yet it is alleged and admitted that at this time it is worth more than $2,000, and it was admitted by plaintiff that he only paid the sum of $125 when he purchased it. The fact that 1,000 acres were conveyed for $125 is, in our opinion, relevant upon the question as to whether plaintiff was a purchaser for value. This, taken in connection with the fact that the titles in that country were generally defective, would be some evidence for the consideration of the jury. According to plaintiff's admission, he was well aware of the fact that the titles to property in that section were more or less defective, and the further fact that he was only willing to pay the sum of $125 for 1,000 acres of land tends strongly to show that he realized, at the time he made the purchase, that he was taking a speculative risk, as to the validity of the title to the property which he was purchasing. Having testified that he had knowledge of the fact that titles were defective, it was competent for defendant to inquire as to whether the defective condition of titles did or did not affect the price that he paid for this property.

In order that the plea that the plaintiff was a purchaser for value without notice should avail him, it was incumbent upon the plaintiff to show that he paid a fair value for the land and purchased the same without notice.

While it is difficult to lay down any fixed rule by which the term "bona fide purchaser for value" is to be tested, we think that there is evidence in this record which, if true, excludes the plaintiff from that status. In Worthy v. Caddell, 76 N. C. 82, Pearson, C. J., says:

"The leading case (in N. C.) upon the subject 'what is a valuable consideration' (Fullenwider v. Roberts, 20 N. C. 420), covered only the meaning of the words, 'a purchaser for valuable consideration,' in the statute of 27th Eliz., as to subsequent purchasers, but the discussion, in the opinion, is extended to 13th Eliz., as to creditors. From that fountain we may drink. By it we learn that in order to protect himself against the claim of a prior donee, or of a creditor, the party assuming to be a purchaser for valuable consideration, * * * not up to the full value, but to a price paid which would not cause surprise, or make any one exclaim, 'he got the land for nothing, there must have been some fraud or contrivance about it.'" Harris v. De Graffenreid, 33 N. C. 89.

In determining as to whether a purchaser had had notice of any defect of title, inadequacy of price is a potent factor. In some instances, it has been held that gross inadequacy of price is, within itself, sufficient to put the purchaser on notice that the title is defective, and thus charge him with constructive notice. In any event, gross inadequacy of price should be considered, together with other facts, as tending to prove that the purchaser took title with notice of diverse rights or of defects of title. Webber v. Taylor, 55 N. C. 9; Fullenwider v. Roberts, 20 N. C. 420; Harris v. De Graffenreid, 33 N. C. 89.

The Supreme Court of North Carolina in the case of Cox v. Wall, 132 N. C. 730, 44 S. E. 635, quotes with approval from the case of Weber v. Rothchild, 15 Or. 390, 15 Pac. 650, 3 Am. St. Rep. 162, as follows:

"Here the defendant Rothchild has alleged facts in one part of his answer tending to show that he is a bona fide purchaser for value without notice of this property, but he has offered no evidence whatever on those issues. The plea of a bona fide purchaser for value, as here alleged, is an affirmative defense interposed by the defendant, and in this connection it is not perceived that it differs from other affirmative defenses. The party having the affirmative of the issue must offer evidence to support it. Another rule of law equally elementary which is frequently applied in such cases, is that when a fact is peculiarly within the knowledge of a party, he must furnish the necessary evidence of such fact."

Also in the case of Bugg v. Seay (1908) 107 Va. 648, 60 S. E. 89, 122 Am. St. Rep. 877, the court said:

"If a party claiming to be a purchaser of land for a valuable consideration without notice of a prior unrecorded conveyance can maintain an action of ejectment against the grantee therein, he can only do so by showing that he received his conveyance and actually paid the purchase money before he had notice of the prior unrecorded deed. Such proof is necessary in a court of equity, where the protection of a bona fide purchaser for value without notice is usually set up as a defense (Lamar v. Hale, 79 Va. 147, and cases cited; Wasserman v. Metzger, 105 Va. 744, 54 S. E. 893, 7 L. R. A. [N. S.] 1019, and cases cited; 2 Min. Inst. [4th Ed.] 767, etc.; 1 Perry on Trusts [5th Ed.] § 219); and, a fortiori, less proof would not be required of the plaintiff

in an action of ejectment seeking to recover the land in the possession of the grantee in the prior unrecorded conveyance."

Plaintiff relies upon the defense that he was a bona fide purchaser for value without notice, and the burden is upon him to disclose such information as he may possess touching the facts upon which he relies to sustain his contention.

For the reasons stated, we are of the opinion that the court below erred, in refusing to submit this testimony to the jury.

[2] The sixth assignment of error is directed to bill of exceptions numbered 7 (bill of exceptions numbered 6, being abandoned). As we have stated, plaintiff testified that before purchasing the land in controversy, he employed Judge G. W. Kilgore, an attorney, to examine the title and report upon it. The defendant offered Judge Kilgore as a witness and proved by him that if he did examine the title, as to which he had no recollection, he looked in the index of deed books concerning the title, and that this was his invariable custom, and that the title could not have been examined without doing so. This evidence was offered for the purpose of showing that Steinman's attorney, while engaged in the examination of the titles, saw the index, if indeed he did not see the record itself, and that this was sufficient to put him upon inquiry, and that therefore Steinman was charged with notice of all that equity which it would have availed, and that he could not now claim to be an innocent purchaser.

The defendant then offered certified copies from index of Deed Book No. 3, from the county records of Wise county, in which the decree recited in the deed from Fleming to Collier was recorded; the copies in question are as follows:

"Fleming, Phillip and wife v. (Decree) James A. Collier, page No. 19."
"Collier, James A. from deed P. Fleming, page No. 19."

Plaintiff objected to the introduction of these copies from the index upon the ground that the decrees in question were entered in the suit of Morgan T. Lipps v. James A. Collier, and not a suit of Phillip Fleming against James A. Collier, and that it is not shown when this index and decree was put on the book, and the index is not a record, but merely a notation pointing to the record.

The defendant insists that the court erred in sustaining the objection to the introduction of this evidence, in that the attorney, who was employed by the plaintiff to examine and report upon the title, saw these entries in the book where deeds and records were recorded, and that they informed him that there had been a decree concerning the land in a suit between Fleming and Collier, to be found on page 19, and that if he looked at page 19, he found the decree entered fully, and that it cannot be presumed that he did not look, and that therefore plaintiff is charged with notice of all the decree shows, and is not therefore an innocent purchaser.

As we have stated, Judge Kilgore says that he has no recollection of having made an examination of the title of Phillip Fleming for the plaintiff, but was not willing to testify positively that he had not made such an examination. He admits that he examined titles for

the plaintiff and Price, and says that he supposed he kept a memorandum of the same, but it was destroyed at the time his house was burned. He also testified that in 1874, the deeds in Wise county were not kept up and indexed as now, but that he is not prepared to say that this deed was not indexed at the time the examination was made. The evidence of Judge Kilgore, owing to the lapse of time, is not very clear, and we can appreciate how an attorney actively engaged in the practice is liable to forget many of the transactions incident to the work in which he is engaged, but it seems highly improbable that attorneys representing purchasers and examining titles in this country would not have known of the existence of the pendency of a suit of this character. The plaintiff testified that Kilgore was his attorney, and that he made an examination of these titles while acting as attorney. For this purpose Kilgore stood in the shoes of the plaintiff, and the plaintiff is bound by anything that he discovered, or by the exercise of ordinary diligence could have discovered, as respects the ownership of these lands, and it is a significant fact in this connection that Mr. Irvine, an attorney for plaintiff in this action, when he came to examine the records of the county where this land is situated, had no difficulty in finding this decree from the index, copies of which are now offered in evidence.

The second paragraph of the copies offered is in the following language:

"Collier, James A. from deed P. Fleming, page 19."

It was from this entry that Mr. Irvine readily found the decree entered in the suit of Lipps against Collier, Fleming and others.

We think that upon the admitted facts and the record evidence which was excluded in this case the purchaser was put upon notice, that is, that the record showed a condition which should have caused a reasonably prudent man to have examined the same in full. This opinion is based upon the manner in which the judgment was indexed, and the further fact that the purchaser knew that titles in that section were defective, and purchased the land at a nominal sum when compared to its value. The evidence excluded should have been admitted, and its exclusion requires that the cause be remanded for a new trial.

For the reasons stated the judgment of the lower court is reversed, and the cause is remanded for further proceedings in accordance with the views herein expressed.

Reversed.

WADDILL, District Judge, dissents.

On Rehearing.

PRITCHARD, Circuit Judge. The above-entitled case was decided at the last term of this court. A petition for rehearing was filed on the 13th day of December, 1913, and granted. The petition for rehearing is based upon several grounds.

It was insisted in this petition, and in the argument, that the court

had overlooked the decisions of the Court of Appeals of Virginia bearing upon the question of the burden of proof as to notice to Steinman in respect to the condition of the title at the time he purchased and took his conveyance. This question was not clearly presented, nor was it referred to in the briefs, nor upon the argument, in the first hearing. The court, following a line of decisions in other states (the Virginia cases not having been called to its attention), adopted the view expressed in the opinion. It was not, however, material nor in any way determinative of the decision of the assignments of error upon which the decision was based; they relating to the question as to the admissibility of evidence. Upon a reargument, counsel for defendant in error cited and called to our attention a line of decisions of the Court of Appeals of Virginia, which are of controlling authority in this case, to the effect that the burden of proof is upon Steinman personally to show that he was a purchaser for value, as defined by the court in Lamar v. Hale, 79 Va. 147, in which it is said:

"To maintain the first-named defense it is essential that the alienees aver and that it appear that they are: (1) Purchasers for a valuable consideration; (2) that the consideration has been actually paid; (3) that they have received, or are best entitled to receive, a conveyance of the property; and, lastly, that these three essentials have all occurred prior to their having had notice of G. B. Lamar's claims upon the property in question. The burden of establishing the first three is on the alienees. The onus of affecting them with notice of his claims is on Lamar."

Thus it appears that if Steinman shall by competent evidence satisfy the jury that he is a purchaser for value, as defined by the court, the burden shifts to the plaintiff in error to show that at the time Steinman became the purchaser for value he had notice of the condition of the title to the land.

This court, in its former opinion, held that the lower court was in error as respects the question raised by the fifth assignment of error which relate to the ruling of that court in excluding the testimony of the witness, Steinman, as to the knowledge which he had, bearing upon the question as to the defects in this and other titles in that section. We are still of the opinion that this evidence was competent and should have been submitted to the jury.

It is further insisted in the petition for rehearing that this court is in error in holding that the certified copy of index from Deed Book No. 3 of the records of Wise county should have been admitted as evidence by the court below. After a careful consideration of the petition and argument of counsel we are disinclined to interfere with our former ruling upon this point.

It is also insisted that this court was in error in reversing the lower court on the question presented by the fifth and sixth assignments of error. While we have considered the cases relied upon to sustain the same, nevertheless we are of opinion that the evidence, rejected by the lower court, upon which these assignments are based, was competent and should have been submitted to the jury.

It is contended by counsel for plaintiff in error that the rights of "Collier and those claiming under him, as against Fleming and those claiming under him, rest upon the decree and not upon the deed," and

that the deed and all other grounds upon which Collier claimed this land against Fleming had merged in the decree prior to the time when any rights of Steinman had attached. Counsel quotes Beazely v. Sims, 81 Va. 648, in which it is said that "the deed is drowned in the judgment and must henceforth be regarded as functus officio." It is further insisted that the parties and their privies could assert no claim against each other founded upon the existence or nonexistence of the deed, and that whatever right they had was based upon the decree. Counsel in support of its contention cites the case of Sheridan v. Andrews, 49 N. Y. 478, 482, in which the Supreme Court of that state said:

"It never was pretended that any notice was necessary to render the judgment effectual as against parties claiming under the defendant by transfer subsequent to the judgment. Campbell v. Hall, 16 N. Y. 579, 580. The judgment disposes of the rights of the parties and is a matter of public record. Its effect cannot be impaired by any subsequent transfer by the defendant. He is concluded by it, and his grantee cannot be in any better situation than the party from whom he obtained his right. Bacon's Ab. Evidence, 'f.' The recording acts have no relation to the subject."

However, we do not deem it necessary to pass upon this point, inasmuch as section 2510 of the Code of Virginia of 1904, among other things, provides for the recordation of judgments and decrees for the recovery of land. This section being quoted in the opinion of this court heretofore filed, we do not consider it necessary to incumber this opinion by quoting it again.

[3] It is contended by counsel for plaintiff in error that the decree in the case of Lipps against Collier and Fleming, to which we have referred, is a decree for the recovery of land, and that it was registered and properly recorded in pursuance of the provisions of this statute.

It is, on the contary, insisted by counsel for defendant in error that this is not a decree for the recovery of land, and therefore not entitled to be recorded by virtue of the provisions of this act. It is not denied that at the time the suit of Lipps against Collier and Fleming was instituted that the deed which had been made to Collier was lost, and that Collier had no existing paper title of any kind whatsoever for the lands in controversy. At the time of the institution of that suit Lipps, the judgment creditor, was confronted with the fact that Collier, against whom he had a judgment, had lost the deed for the land which he owned, and, for reasons that are obvious, took no steps to compel Fleming, his grantor, to execute another deed in lieu of the one that was lost, or to secure a decree establishing the fact that he was the true owner.

Under the laws of Virginia a judgment creditor cannot subject the land of the judgment debtor to the payment of his debt without invoking the aid of a court of equity, and in this instance this would have been true, even if Collier had had a deed for this land. However, in this instance there are two reasons why the judgment creditor was compelled to seek relief in a court of equity. In the first place, it was necessary in order to set up the lost deed, and thereby vest the legal title in Collier, and to establish the boundary lines of the tract in ques-

tion. Second, as we have stated, he could not subject the land to the payment of his debt by securing a sale of the same under judgment without first obtaining authority for such sale from a court of equity.

The judgment debtor having failed to institute suit for the purpose of setting up the lost deed, the judgment creditor had a right to go into a court of equity, for and on behalf of the judgment debtor, to secure a decree establishing his right to hold these lands. In other words, in so far as the suit pertaining to the setting up of the lost deed was concerned, the judgment creditor, when he entered a court of equity, stood in the shoes of the judgment debtor and asserted a right which the judgment debtor could have enforced if he had so desired, to wit, the establishment of the fact by decree that he was the true owner of the lands described in the lost deed.

What is the effect of the decree thus entered in favor of Collier? If this is not a decree for the recovery of land, and therefore not entitled to be registered in the deed book, then Collier would be precluded from putting on record the only evidence of title he had to the land in controversy. We are loath to believe that under the laws of Virginia he would be denied this right. The court decreed that he was the true owner, and further decreed that these lands be sold for the payment of the judgment in favor of Lipps. In the pleadings in that cause it was alleged and admitted that Collier was the true owner; therefore it seems to us that the decree in question was eminently proper. Fleming having admitted that he had already executed to Collier a deed, at most, Collier could only ask the court to decree (in view of the fact that the deed was lost) that he was the true owner, and thereby enable him, in perfecting his title, to use the same as a muniment thereof. It is certainly the only paper title upon which he and those claiming under him can rely as against Fleming and those claiming under him.

As we have already stated, section 2510 of the Code of 1904 provides, among other things, that the clerk of the court wherein there is any partition of or assignment of dower in land, under any order or any recovery of land under judgment or decree, shall transmit a copy of the same to the clerk of the court of such county or corporation or of the chancery court, as the case may be, and the clerk of such court shall record the same in the deed book, etc.

[4] Does the decree in his instance fall within the provisions of this statute? To hold that an adjudication in favor of A. in a suit between A. and B. to test either title or right of possession is not a recovery of real estate would be to mistake form for substance. The statute is sufficiently broad in its language to cover the purpose in view, namely, to require judgment settling the title or right of possession to real estate to be recorded. "Recovery," as a legal term, does not necessarily or usually mean the *act* by which the title or right of possession is acquired; but, on the contrary, its more common signification is the final adjudication that the title or right of possession was before acquired, and of right belongs, by virtue of the previous acquisition, to the party in whose favor the decree is made. One of the definitions in 34 Cyc. 764, is:

"The obtaining of right to something by verdict and judgment of a court from an opposing party in a suit."

Webster's definition is the same. Thus it is apparent that the term used in the statute should be given the comprehensive meaning of the establishment by judgment of the right to land, and not the act of acquiring or regaining possession or acquiring title.

But even if the word "recovery" could be limited in meaning to the act of regaining possession or the acquisition of title by a judgment of the court, the judgment rendered, that one of the parties had parted with his title and that the other had acquired it, necessarily implied the recovery of possession. This well-known principle is thus stated in Root v. Woolworth, 150 U. S. 401, 14 Sup. Ct. 136, 37 L. Ed. 1123:

"It is said, however, on behalf of the appellant, that the original decree only undertook to remove the cloud upon the title, and did not deal with the subject of possession of the premises, and that the present bill, in seeking to have possession delivered up, purposes to deal with what was not concluded by the former decree. This is manifestly a misconception of the force of the original decree, which established and concluded Morton's title as against any claim of the appellant, and thereby necessarily included and carried with it the right of possession to the premises as effectually as if the defendant had himself conveyed the same. The decree in its legal effect and operation entitled Morton to the possession of the property, and that right passed to appellee as privy in estate."

[5] It is further insisted by counsel for defendant in error that, even if this be a decree for the recovery of land, it was not properly indexed, and therefore is not constructive notice to subsequent purchasers. The decree was indexed as follows:

"Fleming, Phillip and wife v. (Decree) Jas. A. Collier, page 19."
"Collier Jas. A. deed from P. Fleming, page 19."

It will be observed that in the first instance the reference is to a decree, and in the second instance to a deed. Under these circumstances, one searching the records could have had no other impression than that there was a decree or deed on record from Phillip Fleming to Collier. In the case of Coles v. Withers, 33 Grat. 186, the Supreme Court of Virginia said:

"It is the duty of the party to examine the records; * * * but, whether he does so or not, he will be affected with notice of every fact the knowledge of which might there have been obtained."

Black on Judgments (2d Ed.) vol. 1, § 406, in reference to this subject, says:

"A subsequent purchaser is affected with such notice as the index entries afford; and if they are of such character as would induce a cautious and prudent man to make an examination, he must make such investigation, or the failure to do so will be at his peril. * * * The principal object of an index is to afford information concerning judgment debtors and the liens on their property; it is generally held that subsequent purchasers and incumbrances will be charged with notice of a judgment which is correctly indexed under the name of the defendant, although the plaintiff's name may be placed under the wrong letter, or not indexed at all. But the entry of the judgment must be placed under the letter which begins the defendant's surname, not under the initial of his first name. It is not necessary to specify the character in which the parties sued or defended; the law is sufficiently complied with by placing the defendant's name in its proper alphabetical position, followed by the plaintiff's name, though neither party is designated as defendant or plaintiff, and though neither the word 'versus' or 'against,' nor any abbreviation thereof, is placed after their name."

[6] While it may be that the indexing of this deed is not strictly in conformity with the provisions of the statute, yet we are of opinion that the manner in which it was indexed was sufficient to notify even a casual observer that there was a decree on page 19 entered in a suit to which Phillip Fleming and wife on the one hand and Collier on the other were parties, and that a decree had been entered therein, and, being an index to the deed book, it was but natural to infer that it related to lands. In the second index it appears that there was a deed on page 19 of the record (the same page referred to in the first instance) in which P. Fleming was the grantor and Collier the grantee Thus we have two entries in the index, both of which point unerringly to page 19 of the record, where the decree in question was recorded. Not only is this true, but we have the further fact, as stated in the former opinion of this court, that Mr. Irvine, who made an examination of the records after this suit was instituted, had no difficulty in discovering the decree in question. This identical decree was introduced in the court below for the purpose of showing that plaintiff and defendant claimed under a common source. How the attorneys managed to introduce the record, without also introducing the index, we are unable to say, unless it was due to the fact that counsel for defendant in the court below failed to enter an objection to the introduction of the decree alone. The index is as much a part of the record as the decree itself.

After considering the argument of counsel upon this point, we have reached the conclusion that this was a decree for the recovery of lands, and as such was properly recorded, and that it stood on the same footing as a deed properly recorded under the section in question. Therefore in this case it serves two purposes, the first of which was disposed of in the former opinion of this court, wherein we held that the index was sufficient to put the defendant in error upon inquiry as to the existence of this decree. Second, we think the lower court was in error in holding that this was not a decree for the recovery of land, entitled to be registered under the provisions of this section, and therefore constructive notice to subsequent purchasers.

For the reasons stated it follows that the judgment entered by this court on November 15, 1913, reversing the judgment of the lower court and remanding the cause for a new trial, is hereby reaffirmed.

WADDILL, District Judge, dissents.

SANDALS et al. v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. May 5, 1914.)

No. 2396.

1. POST OFFICE (§ 48*)—OFFENSES—INDICTMENT—USE OF MAILS TO DEFRAUD.
The offense denounced by Criminal Code (Act March 4, 1909, c. 321) § 215, 35 Stat. 1130 (U. S. Comp. St. Supp. 1911, p. 1653), is the use of the mails in execution of a fraudulent scheme, not the devising of the scheme, although the defendants are entitled to be advised of the particulars of the scheme to enable them to prepare their defense; and therefore an indictment under that section, which alleges the devising of the scheme on

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

one date and the use of the mails on another, is not objectionable as charging the commission of the offense on two separate dates.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 67–80; Dec. Dig. § 48.*]

2. POST OFFICE (§ 48*)—OFFENSES—INDICTMENT—USE OF MAILS TO DEFRAUD.

An indictment which would be sufficient to charge an offense under Rev. St. § 5480 (U. S. Comp. St. 1901, p. 3696), which made punishable any person who, having devised any scheme to defraud, to be executed by opening correspondence with any other person through the United States mails, for the purpose of executing such scheme, mailed any letter, etc., is more than sufficient to charge the offense under Criminal Code (Act March 4, 1909, c. 321) § 215, 35 Stat. 1130 (U. S. Comp. St. Supp. 1911, p. 1653), making punishable any person who, having devised a scheme for obtaining money by false pretenses, etc., mailed any letter in execution of such scheme, but not requiring the intent to use the mails to be shown as part of the scheme.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 67–80; Dec. Dig. § 48.*]

3. POST OFFICE (§ 35*)—OFFENSES—USE OF MAILS TO DEFRAUD—STATUTES.

Under Criminal Code (Act March 4, 1909, c. 321) § 215, 35 Stat. 1130 (U. S. Comp. St. Supp. 1911, p. 1653), providing that whoever, having devised any scheme to defraud, shall, for the purpose of executing such scheme, mail a letter in a United States post office, which section became effective in January, 1910, and section 343, authorizing the prosecution of offenses committed prior to the enactment of the Code in the same manner as if it had not been passed, one indicted for using the mails to defraud subsequent to January, 1910, may be prosecuted under section 215, although the indictment charges that the scheme was devised in 1909.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. § 55; Dec. Dig. § 35.*]

4. CRIMINAL LAW (§ 901*)—MOTION FOR DIRECTED VERDICT—WAIVER.

A motion for a directed verdict of not guilty in a criminal prosecution, made at the close of the government's evidence, is waived by the introduction of evidence for the defendant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2124; Dec. Dig. § 901.*]

5. POST OFFICE (§ 35*)—OFFENSES—USE OF MAILS TO DEFRAUD—GOOD FAITH.

The fact that a scheme is visionary does not make it fraudulent, if the promoter thereof actually in good faith believed in it himself.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. § 55; Dec. Dig. § 35.*]

6. POST OFFICE (§ 50*)—OFFENSES—INSTRUCTIONS—USE OF MAILS TO DEFRAUD.

In a prosecution for using the mails in the execution of a fraudulent scheme for the sale of corporate stock, where the defense was a denial by the promoter of the scheme of an intent to defraud, a charge that the scheme was bound to fail, and that there was no use in the jury spending much time on that issue, since, looking back on it in the clear light that time afforded, it was easy to see that whoever bought the stock at the price it was sold by the defendants was bound to lose his money, was erroneous, as tending to eliminate from the case the question of the defendant's good faith, which was to be determined in the light of the circumstances as they appeared at the inception and during the execution of the scheme, and not as it eventually resulted.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 87–89; Dec. Dig. § 50.*]

7. POST OFFICE (§ 50*)—INSTRUCTIONS—USE OF MAILS TO DEFRAUD.

A subsequent portion of the charge, which severely criticised the directors of the company, who were not on trial, for permitting the promoters

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

to declare dividends which were in excess of those warranted by the condition of the corporation, and indicated that the directors would be punishable for their acts, and then stated that the defendants could not hide behind the skirts of such directors, was also erroneous as a further restriction upon the exercise by the jury of their judgment on the issue of defendant's good faith.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 87–89; Dec. Dig. § 50.*

Nonmailable matter, see notes to Timmons v. United States, 30 C. C. A. 79; McCarthy v. United States, 110 C. C. A. 548.]

8. CRIMINAL LAW (§ 823*)—TRIAL—COMMENTS OF JUDGE ON EVIDENCE.

The error in such charge was not cured by a disclaimer by the judge of a purpose to control the jury by such remarks, or by a qualification thereof, in directing the attention of the jury to the essential issues, since the effect of such positive and emphatic statements could not thereby be removed from the minds of the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1992–1995, 3158; Dec. Dig. § 823.*]

In Error to the District Court of the United States for the Eastern Division of the Northern District of Ohio; John M. Killits, Judge.

Charles A. Sandals and another were convicted of using the United States mails in execution of a scheme to defraud, and they bring error. Reversed, and new trial awarded.

Plaintiffs in error were convicted on charges of using the United States mails in execution of a scheme to defraud. The scheme is set out in the first count of the indictment, and is incorporated into the subsequent (seven) counts by specific reference; and its execution as far as alleged is shown in the ordinary manner in each of the counts. The scheme as devised and intended by defendants was, in substance, to defraud numerous persons, some of whom are named and still others unknown, and to obtain from them money by means of false and fraudulent pretenses, representations, and promises; and to effect these ends letters, circulars, and communications were to be sent through the post office establishment of the United States. The scheme also involved the formation of a partnership and a corporation, the former under the name of Sandals, Griffin & Co., and the latter under that of the Sterling Oil Company, to be incorporated under the laws of Arizona in March, 1909; and, under the partnership name, the defendants were to engage in business as fiscal agents of the corporation to sell its capital stock. A contract for this purpose was to be made between defendants and the corporation, providing that they should turn over to it (in trust, subject to conditions that need not here be mentioned) certain oil properties located in Illinois and Oklahoma, for which the corporation should issue to them a large number of shares of its paid-up capital stock; that they should apply 60 per cent. of the proceeds of sales toward the discharge of certain obligations they had incurred upon the acquisition of the properties and their equipment for the production of oil. It was further designed as part of the scheme that defendants should then, through letters, circulars, and communications, represent that the company was operating a number of large and productive oil properties and marketing the oil at great profit, was sinking and planning to sink numerous wells, and was possessed of the best oil properties in the land; that large parts of the purchase prices of the properties had been paid, and from time to time further payments would be made until the obligations were discharged; that out of its net proceeds the company was paying a monthly dividend of 2 per cent. and an additional quarterly dividend of 3 per cent. upon the purchase price of each share of stock.

Further, it was alleged that these representations were made, but that defendants knew they were not true; that the prices at which the stock was sold were arbitrarily fixed by defendants; that the dividends were wholly

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

fictitious and false; and that the purpose was to sell the stock and convert large portions of the proceeds to defendants' own use.

Copies of some of these letters, circulars, and communications are set out in the portions of the several counts which allege execution of the scheme. There does not seem to be any dispute as to the authenticity of the originals, nor as to the fact that they were at the dates alleged (beginning in May and ending in October, 1910), addressed and mailed, with proper postage prepaid, in the post office of the United States in the city of Cleveland, Ohio, where the offices of the defendants and of the corporation were maintained.

At the beginning of the trial defendants' counsel objected to the introduction of evidence, because the indictment did not charge an offense punishable by law. At the close of plaintiff's evidence defendants moved the court to direct a verdict in their favor on the grounds of insufficiency of the indictment and of the evidence; and at the close of all the evidence defendants moved that they be discharged and the case against them dismissed for like reasons. These matters were overruled, and exceptions allowed. Assignments of error touching these and other rulings are presented here, and are disposed of in the opinion, so far as they are regarded as of present importance.

T. F. Turner, of Canton, Ohio, and John J. Sullivan and Jerome F. Patterson, both of Cleveland, Ohio, for plaintiffs in error.

U. G. Denman, of Toledo, Ohio, for the United States.

Before WARRINGTON and DENISON, Circuit Judges, and SATER, District Judge.

WARRINGTON, Circuit Judge (after stating the facts as above). We are convinced that the judgment below will have to be reversed and a new trial awarded for error in the charge; but in the first place we shall dispose of several initial questions which might otherwise recur at the next hearing.

[1] It is urged that two distinct dates are laid in each count of the indictment as the time of the offense. This is a mistake. Counsel seem to be in doubt whether the offense charged was committed when the scheme was devised or when it was carried into execution. While defendants were entitled to be so advised of the particulars of the scheme as to enable them to prepare their defense (Foster v. United States, 178 Fed. 166, 171, 101 C. C. A. 485 [C. C. A. 6th Cir.]), yet devising the scheme was not the offense. The offense denounced by the statute was the alleged use of the post office establishment in execution of the scheme. Milby v. United States, 120 Fed. 1, 4, 57 C. C. A. 21 (C. C. A. 6th Cir.); O'Hara v. United States, 129 Fed. 551, 554, 64 C. C. A. 81 (C. C. A. 6th Cir.); Gould v. United States, 209 Fed. 730, 734, 126 C. C. A. 454 (C. C. A. 8th Cir.); Stockton v. United States, 205 Fed. 462, 466, 123 C. C. A. 530, 46 L. R. A. (N. S.) 936 (C. C. A. 7th Cir.); Lemon v. United States, 164 Fed. 953, 957, 90 C. C. A. 617 (C. C. A. 8th Cir.); Brooks v. United States, 146 Fed. 223, 226, 76 C. C. A. 581 (C. C. A. 8th Cir.).

[2] The indictment appears to have been drawn in accordance with old section 5480, Revised Statutes (U. S. Comp. St. 1901, p. 3696), and consequently was more than adequate in its allegations under section 215 as construed in United States v. Young, 232 U. S. 156, 161, 34 Sup. Ct. 303, 58 L. Ed. ——.

[3] It is further claimed that defendants could not be prosecuted because the scheme is laid as of January, 1909, and section 215 of the federal Penal Code was not enacted until January, 1910. This ignores

alike the statutory inhibition existing in 1909 (section 5480), the time shown to have been consumed in developing the scheme, and the allegations charging defendants with having intended to execute it at the times they used the mails after the passage of the law. Besides, section 215 seems to contemplate, among others, a situation like this; for it provides:

"Whoever, having devised * * * any scheme * * * to defraud * * * shall, for the purpose of executing such scheme * * * place, or cause to be placed, any letter * * * in any post-office, * * * to be sent or delivered by the post-office of the United States, * * * shall be fined," etc. 35 Stat. p. 1130.

And, moreover, section 343 expressly authorizes the prosecution and punishment of offenses committed prior to enactment of the Penal Code "in the same manner and with the same effect as if this act had not been passed." 35 Stat. p. 1159; Smith v. United States, 208 Fed. 131, 132, 125 C. C. A. 353 (C. C. A. 8th Cir.). It cannot be, then, that where only the devising of the scheme occurred before the passage of the act, its execution thereafter is any the less an offense.

Enough has been said to dispose of the objection made at the opening of the trial to the introduction of any evidence, and also of the motion made at the close of plaintiff's evidence to direct a verdict in favor of defendants, on the ground of insufficiency of the indictment.

[4] The claim of insufficiency of evidence, also offered in support of this motion, was waived by the introduction of evidence for defendants. Gould v. United States, supra, 209 Fed. 735, 126 C. C. A. 454; Simpson v. United States, 184 Fed. 817, 820, 107 C. C. A. 89 (C. C. A. 8th Cir.); Leyer v. United States, 183 Fed. 102, 104, 105 C. C. A. 394 (C. C. A. 2d Cir.); Burton v. United States, 142 Fed. 57, 59, 73 C. C. A. 243 (C. C. A. 8th Cir.). The motion made at the close of all the evidence, that the defendants be discharged and the case dismissed for insufficiency of evidence, was rightly denied. And, since the evidence to be adduced at the next hearing may differ from that offered at the last trial, we content ourselves with saying that the present record required submission of the case to the jury.

[5] We are thus brought to a consideration of the charge of the court. The complaint of counsel for defendants is in effect that portions of the instructions respecting some of the facts, and also the conduct of persons not on trial, were such as to prevent the jury from exercising a free and independent judgment. This may be better understood in connection with a brief statement of the position taken by defendants at the trial and some portions of the charge to which the complaint relates. The defense and the claim of defendants, as well as the tendency of proofs they offered through their own testimony and that of others, including correspondence, contracts, and the like, were in substance a denial of fraudulent intent, and, on the contrary, an insistence of good faith, in every transaction alleged in the indictment and shown in the evidence; that prior to the date of the alleged scheme to defraud they had arranged to secure certain oil property, first by option and later by lease, which they had good reason to believe was productive and profitable; that, while they had been the

victims of fraudulent representation in the beginning, they were successful in rectifying the mistake through leases of other properties of oil-bearing qualities, parts of which had been and were producing oil in large quantities; that the Sterling Oil Company was organized with a directory comprising men of good repute, who, with knowledge of the situation, concurred in the views and opinions of defendants; that the company issued stock in large quantities, and defendants, as its financial agents, sold shares at varying prices and aggregating a sum of several hundred thousand dollars; that this was applied toward the payment of purchase prices of property, drilling of wells, and equipment for producing oil, and necessary operating expenses, including expenses of defendants; that the total dividends paid were less than the net earnings; and that if defendants had been permitted to continue the business the persons to whom they had sold the stock would have made large profits.

It is not intended to intimate what weight in the end should have been accorded to the evidence offered either by the government in support of the indictment or by the defendants to sustain the position taken by them. It is neither proper nor necessary to do so in considering the present question. The ultimate issue of fact was whether defendants were actuated by an intent to defraud when using the mails (Harrison v. United States, 200 Fed. 662, 665, 666, 119 C. C. A. 78 [C. C. A. 6th Cir.]); and this was to be resolved by the jury through an unfettered consideration of all the admissible facts and circumstances, under appropriate instructions of the court. Since the charge of an intent to defraud was met by a claim of good faith, the question is whether, in practical effect, any of the portions of the charge complained of operated to prevent the jury, even when considering the charge as a whole, from exercising a free and independent judgment touching the element of good faith. We quote the following portions:

"Now, gentlemen, this fact stands out in this case beyond all question, that the business in which they [defendants] were engaged did operate as a fraud upon those who bought oil stock. There can be no gainsaying that. There is no use for the jury to spend very much time upon that proposition, because as we look back on it, and in the clear light that time and reflection affords us, we can see that whoever bought this oil stock at the prices [at which] they were obtaining it, and upon which it was sold generally in the market, was bound to lose his money. * * *

"* * * Now, I have said that this scheme was bound to work a loss. There is no question about that. It was bound to fail."

After describing by illustration what would and what would not justify the payment of dividends, it was said:

"* * * These dividends, declared monthly, were, under the most favorable circumstances, more than twice what anything justified under any sort of business consideration should be declared."

Later it was said:

"Gentlemen of the jury, I do not know, if I had my choice, whether I would prefer to be the defendants in this case, or some of those so-called directors of the Sterling Oil Company. Dividends could only lawfully be declared by the directors of the Sterling Oil Company. Sandals and Griffin had no right to say what the dividends should be, and I only wish that I had some of these smug directors here in such a shape as that they might understand and the

public might understand the contemptible position in which they stand. I can't see, for my part, any great difference between a man who accepts a bribe directly and a man who takes a bunch of stock in a corporation like this for a few cents on the dollar—one-tenth or one-twentieth of what his neighbors are paying for it—and permits his neighbors to buy it at an exaggerated price on the strength of his standing in the community; a man who then sits back and permits a thing like this to go on year in and year out, and accepts dividends on such a basis and on such an arbitrary declaration as dividends were provided here. But, gentlemen of the jury, those smug gentlemen are not on trial, and Sandals and Griffin cannot hide themselves in this case behind their skirts. They must stand or fall by what they did, and because the directors or the president of this corporation failed to get together for 13 or 14 months, and permitted Sandals and Griffin to manage these affairs under the name of the Sterling Oil Company, is no defense at all, and does not make the declaration of these dividends a formal declaration by the corporation known as the Sterling Oil Company."

We cannot repress the feeling that these portions of the charge operated to eliminate the question of good faith. The solution of that question was not to be found in retrospection; most men are wise after the fact. Expressions coming from the court to the effect that, looking back at the transactions, "this scheme was bound to work a loss, * * * was bound to fail," were calculated to charge defendants with a degree of foresight, when entering upon and carrying out their enterprise, which was inconsistent with an honest belief in either its merits or success, even though such belief might in truth have existed.

[6] A man may be visionary in his plans and believe that they will succeed, and yet, in spite of their ultimate failure, be incapable of committing conscious fraud. Human credulity may include among its victims even the supposed impostor. If the men accused in the instant case really entertained the conviction throughout that the oil properties and the stock in dispute possessed merits corresponding with their representations, they did not commit the offense charged. As Mr. Justice Brewer said in Durland v. United States, 161 U. S. 306, 313, 16 Sup. Ct. 508, 511 (40 L. Ed. 709):

"The significant fact is the intent and purpose. The question presented by this indictment to the jury was not, as counsel insist, whether the business scheme suggested in this bond was practicable or not. If the testimony had shown that this Provident Company, and the defendant, as its president, had entered in good faith upon that business, believing that out of the moneys received they could by investment or otherwise make enough to justify the promised returns, no conviction could be sustained, no matter how visionary might seem the scheme."

In Rudd v. United States, 173 Fed. 912, 913, 97 C. C. A. 462, 463 (C. C. A. 8th Cir.), the scheme to defraud and the circulars sent through the mails to promote it concerned a machine designed as an attachment to a pump for lifting water, which was shown to be "contrary to well-known fundamental physical laws." In respect of the defense of honest belief in the efficiency of the machine, Judge Hook said:

"The main defense was that, though the machine may have been impracticable, the accused honestly believed in its efficiency, and that what he did was without intent to defraud. Of course, if this was so, there was no violation of the law which was designed to prevent the use of the post office in intentional efforts to despoil."

See, also, Horn v. United States, 182 Fed. 721, 105 C. C. A. 163 (C. C. A. 8th Cir.) page 737 of majority opinion, and page 740 of Judge Sanborn's dissenting opinion.

[7] We also think the defense of good faith was further restricted by the statement that the monthly dividends were "more than twice what anything justified under any sort of business consideration should be declared"; and when there is added to this the statement, above quoted, respecting the directors of the Sterling Oil Company, the error assigned becomes manifest. The directors were not on trial; we do not recall any suggestion that they had even been indicted; and still the clear tendency of the language employed in respect of their conduct is that under an appropriate charge they would have been defenseless. True, this statement appears to have been made in regard to an effort of the accused to aid their defense through the showing made as to the conduct and character of the directors; but, after discrediting the directors as shown, the inevitable effect of the statement that the defendants could not "hide themselves in this case behind their [the directors'] skirts" was to restrain and embarrass the jury in the exercise of its own judgment. What remained either to be said or considered touching the question of defendants' good faith?

[8] It should be observed that the learned judge in substance disclaimed any purpose to control the jury by the remarks complained of, and measurably qualified them by explaining and directing attention to the essential issues; but we cannot believe that the influence of positive and emphatic statements like these can be effectively removed by explanation. Rudd v. United States, supra, 173 Fed. 914, 97 C. C. A. 462. The jury is naturally sensitive to the court's expressions of opinion concerning the issues of fact in any case (Starr v. United States, 153 U. S. 614, 625, 626, 14 Sup. Ct. 919, 923 [38 L. Ed. 841]; and while it is true that ordinarily in the federal courts a trial judge's "expression of opinion upon the facts is not reviewable upon error," yet, as Mr. Chief Justice Fuller said in that case when reversing the judgment for error in the charge:

"But he should take care to separate the law from the facts, and to leave the latter in unequivocal terms to the judgment of the jury as their true and peculiar province."

See, also, Hickory v. United States, 160 U. S. 408, 424, 425, 16 Sup. Ct. 327, 40 L. Ed. 474 (opinion by the present Mr. Chief Justice White); Mullen v. United States, 106 Fed. 892, 895, 46 C. C. A. 22 (C. C. A. 6th Cir., opinion by the present Mr. Justice Day); Rudd v. United States, supra; Foster v. United States, 188 Fed. 305, 308, 310, 110 C. C. A. 283 (C. C. A. 4th Cir.).

The following language of Judge Hook in the Rudd Case, supra, 173 Fed. 914, 97 C. C. A. 464, has our approval:

"We do not mean to impair in any degree the right of a trial court in both civil and criminal cases to comment upon the facts, to express its opinion upon them, and to sum up the evidence, for that is one of the most valuable features of the practice in the courts of the United States. A judge should not be a mere automatic oracle of the law, but a living participant in the trial, and so far as the limitations of his position permit should see that justice is done. But his comments upon the facts should be judicial and dispassion-

ate, and so carefully guarded that the jurors, who are the triers of them, may be left free to exercise their independent judgment."

It should be stated that, if the scheme here involved was not in fact devised and executed in good faith, the defense should fail; but the true remedy for the error found is a new trial.

The judgment is accordingly reversed, with direction that retrial be awarded.

NORTHERN PAC. RY. CO. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. May 4, 1914.)

No. 2343.

1. MASTER AND SERVANT (§ 13*)—INTERSTATE RAILROAD—HOURS OF SERVICE LAW—CONSTRUCTION.

The Hours of Service Law (Act Cong. March 4, 1907, c. 2939, § 1, 34 Stat. 1415 [U. S. Comp. St. Supp. 1911, p. 1321]), defines the term "employés," as used in the act, to mean persons actually "engaged in or connected with the movement of any train," and section 2 makes it unlawful for any carrier to permit any employé subject to the act to remain on duty for a longer period than 16 consecutive hours, and declares that if any such employé shall have been continuously on duty for 16 hours, he shall be relieved and not required or permitted again to go ón duty, until he has had at least 10 consecutive hours off duty. *Held*, that the intent of the act is to compel rest for each member of a train crew at the termination of each 16-hour period, to the end that his next and succeeding hours of service may be efficient, and where, prior to the termination of a 16-hour period in the operation of a freight train, it was placed on a side track and all the members of the crew relieved from duty except the fireman, who was required to remain as engine watchman and to keep up the fires and steam, the fact that he then had no duties to perform with reference to the "operation" of the train did not prevent his continued service as a watchman from constituting a violation of the act.

[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 & Terminal Ry. Co., 125 C. C. A. 485.]

2. MASTER AND SERVANT (§ 13*)—RAILROADS—REGULATION—HOURS OF SERVICE LAW—DEFENSES—ACT OF GOD.

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 common carrier engaged in interstate commerce to permit any employé connected with the movement of any train to remain on duty longer than 16 consecutive hours, but declares that the act shall not apply when the continued service is caused by a casualty, unavoidable accident, or act of God. *Held*, that where defendant carrier, subject to the act, prior to the expiration of the 16-hour period, side-tracked a train and relieved the crew, with the exception of the fireman, because of an unprecedented storm, making it unsafe to continue the operation of the train, it was no defense to its liability for violation of the act in requiring such fireman to remain on duty as engine watchman that the train was stopped, and the continued service required, by an act of God.

[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 District of Montana; Geo. M. Bourquin, Judge.

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

Action by the United States against the Northern Pacific Railway Company. From the judgment, defendant brings error. Affirmed.

Gunn, Rasch & Hall, of Helena, Mont., for plaintiff in error.

B. K. Wheeler, U. S. Atty., of Butte, Mont., and Philip J. Doherty and Walter N. Brown, Sp. Asst. U. S. Attys., both of Washington, D. C.

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

ROSS, Circuit Judge. The government brought this action against the plaintiff in error railway company as defendant in the court below for alleged violations of the act of Congress, entitled "An act to promote the safety of employés and travelers upon railroads by limiting the hours of service of employés thereon," approved March 4, 1907 (34 Stat. p. 1415), the complaint containing two counts, the first alleging, in substance, that the defendant, in violation of the act, required and permitted one of its firemen, named Drew, "upon its line of railroad at and between the stations of Missoula in the state of Montana, and Avon in said state," to be and remain on duty as such for a longer period than 16 consecutive hours, to wit, from 10 p. m. of May 1, 1912, to 10:30 p. m. of May 2, 1912, the said fireman at the time being "engaged in and connected with the movement of said defendant's train No. Extra, drawn by its own locomotive engine No. 1654, said train being then and there engaged in the movement of interstate traffic"; and the second count alleging, in substance, a similar violation of the act by the defendant company in requiring and permitting one of its firemen named Jenson "upon its line of railroad at and between the stations of Missoula in the state of Montana, and Elliston in said state," to be and remain on duty as such for a longer period than 16 consecutive hours, to wit, from 3:40 o'clock p. m. of May 1, 1912, to 4 o'clock p. m. of May 2, 1912, being at the time "engaged in and connected with the movement of said defendant's train No. Extra, drawn by its own locomotive engine No. 1633, said train being then and there engaged in the movement of interstate traffic." By its answer the defendant, in addition to the denial of the alleged violations of the act of Congress, set up in respect to the first count that Missoula is a district terminal on the company's line of road, and Helena, Mont., is a divisional terminal thereof, and that after extra train 1654 had left Missoula for Helena with Drew as fireman, it encountered storm and snowfall of such unusual and unprecedented violence that when it arrived at the station of Avon, the telegraph and telephone lines of the company were down in both directions, destroying all means of communication with the operators and dispatchers of the company along the portion of its line here in question; that in consequence of the impossibility of proceeding with the train in such circumstances that train was left at Avon and the crew thereof, including the fireman Drew, having been then on duty 15 hours and 30 minutes, was released from duty in connection with the movement of the train, and Drew placed to watch and guard the engine on a side track. Sim-

ilar circumstances were pleaded in the answer to the second count of the complaint in respect to the service of the fireman, Jenson, on extra train 1633; that train being tied up at Elliston, Mont. Both trains proceeded east from Missoula, the stations in their order being Bearmouth, Drummond, Garrison, Avon, Elliston, and Blossberg, the last-named point being on the Rocky Mountain Divide which extends between Elliston and Helena. The answer further alleged that the delay in the movement of the trains in question and the necessity of watching and guarding their engines by the said firemen were occasioned by and due to the act of God and the result of causes which were not known to the defendant company, its officers or agents, at the time the trains left Missoula, and which could not have been foreseen.

The act in question in its first section specifies the common carriers to which its provisions are made applicable, and also declares that "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"; sections 2 and 3 are as follows:

"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 or 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: 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 on not exceeding three days in any week: Provided further, the Interstate Commerce Commission may after full hearing in a particular case and for good cause shown extend the period within which a common carrier shall comply with the provisions of this proviso as to such case.

"Sec. 3. That any such common carrier, or any officer or agent thereof, requiring or permitting any employé to go, be, or remain on duty in violation of the second section hereof, shall be liable to a penalty of not to exceed five hundred dollars for each and every violation, to be recovered in a suit or suits to be brought by the United States district attorney in the district court of the United States having jurisdiction in the locality where such violation shall have been committed; and it shall be the duty of such district attorney to bring such suits upon satisfactory information being lodged with him; but no such suit shall be brought after the expiration of one year from the date of such violation; and it shall also be the duty of the Interstate Commerce Commission to lodge with the proper district attorneys information of any such violations as may come to its knowledge. In all prosecutions under this act the common carrier shall be deemed to have had knowledge of all acts of all its officers and agents: Provided, that the provisions of this act shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employé at the time said employé left a terminal, and which could not have been foreseen: Provided fur-

ther, that the provisions of this act shall not apply to the crews of wrecking or relief trains."
34 Stat. p. 1415.

[1] The contention of the plaintiff in error is that, as in each of the present instances the train and engine were side-tracked within 16 hours and their crews laid off for rest, and that thereafter the respective firemen were placed in charge of their respective engines only for the purpose of keeping up the fires and steam and otherwise watching the engines, they were not during such time actually engaged in or actually connected with the movement of a train, and therefore were not permitted or required by the railroad company to be or remain on duty for a longer period than 16 hours within the meaning of the act of Congress; and the decision of the Supreme Court in the case of Baltimore & Ohio R. R. Co. v. Interstate Commerce Commission, 221 U. S. 612, 31 Sup. Ct. 621, 55 L. Ed. 878 is cited by counsel as sustaining that contention. We cannot take that view of that case. In so far as it bears upon the question we have here, we think the proper conclusion to be drawn from it is quite the reverse, and sustains our conclusion that the intent of the act was and is to compel rest for each member of the train's crew at the termination of the 16-hour period, to the end that his next and succeeding hours of service may be efficient. For in the case cited the court, at page 619 of 221 U. S., at page 625 of 31 Sup. Ct. (55 L. Ed. 878) distinctly says:

"The length of hours of service has direct relation to the efficiency of the human agencies upon which protection of life and property necessarily depends. This has been repeatedly emphasized in official reports of the Interstate Commerce Commission, and is a matter so plain as to require no elaboration. In its power suitably to provide for the safety of employés and travelers, Congress was not limited to the enactment of laws relating to mechanical appliances, but it was also competent to consider, and to endeavor to reduce, the dangers incident to the strain of excessive hours of duty on the part of engineers, conductors, train dispatchers, telegraphers, and other persons embraced within the class defined by the act. And in imposing restrictions having reasonable relation to this end there is no interference with liberty of contract as guaranteed by the Constitution. Chicago, Burlington & Quincy Railroad Co. v. McGuire, 219 U. S. 549 [31 Sup. Ct. 259, 55 L. Ed. 328]. If then it be assumed, as it must be, that in the furtherance of its purpose Congress can limit the hours of labor of employés engaged in interstate transportation, it follows that this power cannot be defeated either by prolonging the period of service through other requirements of the carriers or by the commingling of duties relating to interstate and intrastate operations."

See, also, United States v. Great Northern Railway Co. (D. C.) 206 Fed. 838; United States v. Missouri-Pacific Railway Co. (D. C.) Id. 847.

[2] That the present case does not come within either of the provisions of the act, declaring that it "shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employé at the time said employé left a terminal, and which could not have been foreseen," is obvious, if for no other reason, because the uncontradicted evidence, as well as the answer of the defendant company itself, shows that each of the trains in question was stopped by direction of the railroad company, side-

tracked, and their respective crews laid off for rest within 16 hours from the time they left Missoula, for the very purpose of complying with the said statute, excepting only the two named firemen, who were continued at a duty which the company claims was not within the inhibition of the law; the mistake made was its own mistake in continuing one of each of the crews, the fireman, at the duty of watching the engines.

The judgment is affirmed.

BETTS v. BISHER.

(Circuit Court of Appeals, Ninth Circuit. May 4, 1914.)

No. 2359.

1. COURTS (§ 295*)—FEDERAL COURTS—JURISDICTION—ACTIONS AGAINST RECEIVERS.

   Where a receiver of a corporation was appointed by a federal court, an action against the receiver for injuries to an employé was maintainable in such court, though there was no federal question involved nor diversity of citizenship.

   [Ed. Note.—For other cases, see Courts, Cent. Dig. § 837; Dec. Dig. § 295.*

   Actions by and against receivers of federal courts, see note to J. I. Case Plowworks v. Finks, 26 C. C. A. 49.]

2. RECEIVERS (§ 185*)—ACTIONS AGAINST RECEIVERS—INSTRUCTIONS.

   Where a lessee of certain mining properties was appointed receiver thereof in mortgage foreclosure proceedings, after which he operated the property as receiver, accounted for the rents, and made expenditures which he was not authorized to make under the lease, and it also appeared that he accepted the appointment as receiver in lieu of his rights as lessee, and the foreclosure decree contained no recognition of the lease, but provided that the receiver should execute a conveyance of all the property of the corporation and let the purchaser into possession, the court properly refused to charge that, after his appointment as receiver, he operated the mine as lessee.

   [Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 371–373; Dec. Dig. § 185.*]

3. MASTER AND SERVANT (§ 286*)—INJURIES TO SERVANT—NEGLIGENCE—DANGEROUS WORK—QUESTION FOR JURY.

   In an action for injuries to a boy 18 years of age, without training or experience, by receiving a shock from a high-voltage wire, evidence that he was placed under an electrician who was employed on the line, and by him permitted to ascend the poles and engage in tying high-voltage wires there, was sufficient to justify submission to the jury of defendant's negligence in permitting plaintiff to engage in such hazardous employment, the lineman being regarded as a vice principal under Employers' Liability Act, Or. (Sess. Laws 1911, p. 16) § 2, providing that the manager, superintendent, foreman, or other person in charge or control of the construction or works or operation or any part thereof shall be held to be the agent of the employer in all suits for damages for death or injury to an employé, etc.

   [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.*]

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

In Error to the District Court of the United States for the District of Oregon; Chas. E. Wolverton, Judge.

Action by John L. Bisher, Jr., by John L. Bisher, as guardian, against Robert M. Betts, receiver of the Cornucopia Mines Company of Oregon. Judgment for plaintiff, and defendant brings error. Affirmed.

Emmett Callahan and Littlefield & Smith, all of Portland, Or., for plaintiff in error.

Boothe & Richardson and Charles A. Johns, all of Portland, Or., for defendant in error.

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

GILBERT, Circuit Judge. On July 29, 1912, the defendant in error, while engaged in insulating certain electric wires of the electric power plant of the Cornucopia Mines Company, a corporation, sustained serious personal injuries, for which he recovered damages in the court below, against the receiver of such corporation. The parties to the action will be designated herein plaintiff and defendant, as in the court below.

[1] The objection is made that the trial court had no jurisdiction of the action; that the fact that the cause of action was against a receiver appointed by the court below, and was based upon the alleged negligence of the receiver in managing the property of the receivership, was not sufficient to confer jurisdiction where there was no diversity of citizenship and no federal question involved. In White v. Ewing, 159 U. S. 36, 39, 15 Sup. Ct. 1019 (40 L. Ed. 67), the court said that a suit against a receiver—

"in the course of the winding up of such corporation, whether for the collection of its assets or for the defense of its property rights, must be regarded as ancillary to the main suit, and as cognizable in the Circuit Court, regardless either of the citizenship of the parties, or of the amount in controversy."

By this, it was not meant that the jurisdiction of actions against the receiver in the court in which he was appointed is confined to actions for the recovery of debts which existed at the time when he was appointed, and as incidental to the distribution of the property in the hands of the receiver, for in McNulta v. Lochridge, 141 U. S. 327, 332, 12 Sup. Ct. 13 (35 L. Ed. 796), the court said:

"Actions against the receiver are in law actions against the receivership, or the funds in the hands of the receiver, and his contracts, misfeasances, negligences, and liabilities are official and not personal, and judgments against him as receiver are payable only from the funds in his hands."

The doctrine of these decisions was applied in Gray v. Grand Trunk Western Ry. Co., 156 Fed. 736, 84 C. C. A. 392; Hanlon v. Smith (C. C.) 175 Fed. 192, and Smith v. Jones Lumber & Mercantile Co. (D. C.) 200 Fed. 647. The rule established by those and other decisions is that, while actions against receivers may be brought in the state courts, they may also be brought in the court in which the receiver was appointed, and that, notwithstanding that no federal question is involved, and there is no diversity of citizenship, those courts have

jurisdiction upon the ground that the actions are ancillary to the original suit, and that the judgments recoverable therein are payable from the property or funds in the course of administration. Gableman v. Peoria, etc., Ry. Co., 179 U. S. 335–342, 21 Sup. Ct. 171, 45 L. Ed. 220.

[2] One of the defenses pleaded in the answer was that at the time of the accident the property upon which the plaintiff was working when he was injured was operated by the defendant, not as receiver, but as lessee, and that it was as a lessee that he employed the plaintiff. On November 9, 1911, the Cornucopia Mines Company executed to Betts a lease of all its mining properties, including the electric power plant upon which the plaintiff was working when he was injured. The term of the lease was one year, and the lessor was to receive as rental 90 per cent. of the net returns of all ore extracted from the mining property. On December 5, 1911, while Betts was in possession under the lease, a suit was brought by the Hamilton Trust Company to foreclose a mortgage on the mining property. In that suit Betts was, on January 2, 1912, appointed receiver, and in the order under which he qualified he was directed to take immediate possession of the property of the mining company—

"and to continue the operation of said mining property, and every part and portion thereof, as heretofore operated, and to preserve the said property in proper condition and keep the same in repair and to employ such persons and make such payments and disbursements as may be needful and proper in doing so."

Betts was not made a party defendant to the suit, nor was the fact of his lease mentioned in the bill, but in the affidavit upon which the receiver was appointed, the lease was referred to, and it was stated that Betts was in possession and was operating and developing the mining properties under that lease. The electric power plant was a part of the property covered by the lease and by the mortgage, and it was being used in the operation of the mining property at the time when the plaintiff was injured. The defendant testified that at that time he was operating the mine and the power plant as lessee and not as receiver. But there was evidence tending to indicate that he was operating the property as receiver. In his monthly reports as receiver he made return of all moneys received by him in the operation of the mine during the time of his receivership, the total amount of which was $71,681.27, which was less than his total disbursements by $781.-81. His reports showed that during that period, as part of the expenses, he paid himself a salary of $350 a month as receiver; that he paid for legal services $100 a month, and that out of the sums received he expended $12,714.26 for betterments and improvements of the property, one item of which was a cyanide plant, costing $3,000. The lease gave him no authority to make those expenditures.

The defendant assigns as error the refusal of the court to instruct the jury that upon the evidence the defendant was operating the mine as lessee, and to the denial of the defendant's motion for an instructed verdict in its favor, upon the ground, among other grounds stated, that the defendant as lessee was operating the mine at the time of the acci-

dent. In view of the evidence, we think the court committed no error in refusing the requested instruction, and in submitting to the jury, as it did, the question whether the defendant was operating the mining property as receiver or as lessee. The court instructed the jury that the defendant might have been the receiver and the lessee at the same time; that he could act as lessee and also as receiver without one duty being inconsistent with the other; that if appointed receiver, he could take charge of the mine as receiver, the same to be operated subject to the leasehold interest in the premises. Certain features of the record tend to show that Betts accepted the appointment of receiver in lieu of his rights as lessee, and that the lease was, by all parties, deemed set aside during the receivership. One of his attorneys, who appears in this action, made the affidavit for the complainant in the bill on which the receiver was appointed, and therein set forth that it was necessary that the mines should continue in operation; that if they were closed down, great injury and loss would result, and the stamp mill and electric power plant and other machinery would deteriorate in value. The order appointing the receiver and directing his action as such is in its terms inconsistent with the continuation of the lease. The order directed him to pay the necessary expenses incident to the operation of said property out of the moneys that should come into his hands as receiver, from the operation thereof, and to hold the remainder, if any there should be, subject to the order of the court. And the decree of foreclosure of April 30, 1912, contained no recognition of the lease, for it provided that in addition to the master's deed, Betts as receiver should execute a good and sufficient deed of conveyance "of any and all property of the said company," and that upon the execution and delivery of such conveyances, the purchaser should be let into possession of all the said property.

[3] It is contended that the court erred in refusing to instruct the jury to return a verdict for the defendant on the ground that there was no evidence of his negligence; that the testimony showed that the injury was caused solely by the plaintiff's negligence; that he was a volunteer in doing the work in which he was engaged when injured; and that the defendant owed him no duty. To this it is to be said that there was evidence that the plaintiff, a boy of 18 years of age, was working as a common laborer for the defendant, and that he was instructed by the defendant's general foreman to report to Buxton, the chief electrician, who wanted him to work on the line; that Buxton told him to help Harbert, who was a lineman and electrician and was engaged in removing glass insulators from three wires which were carried on crosspieces on poles 25 feet from the ground, and in substituting porcelain insulators for the glass insulators so as to permit an increase of the voltage from 2,300 to 6,600 volts; that the plaintiff was instructed to assist the lineman, and was told that the lineman would tell him what to do; that at first the plaintiff carried the tools along from pole to pole, and that Harbert then told him to come up on the poles and assit him in fixing the wires; that the plaintiff climbed the poles with climbers, and Harbert instructed him to fix one side of each wire, and that he, Harbert, would afterwards fix the other side; that they worked for a day or two in that way, and then, as the

plaintiff testified, Harbert, finding that it was hard for one man standing up there so long, said:

"'We will both come up at the same time,' he says, 'one can wrap one end of the tie wire while the other wraps the other.' He said, 'We can do it quicker,' and he says, 'We can watch each other at the same time,' and he said, 'Maybe won't get no shock if we watch each other. Maybe it will make it safer.'"

While the plaintiff and Harbert were standing on opposite sides of a pole supported by their climbers, and while Harbert had one end of the middle tie wire unwrapped, the plaintiff unwrapped his end, and took the middle wire in one hand, under the instructions of Harbert, to lift it over the pole so as to keep it further away and prevent its contact with the other wire, the injury occurred. The plaintiff testified:

"I just started to lift up the middle wire, and that is the last I remember."

The plaintiff could not explain how the accident happened, nor did Harbert see exactly how it occurred, but it is very plain from the evidence that while the plaintiff was lifting the wire with one hand, he touched another wire with the other hand. Harbert testified that at the time of the accident the plaintiff was standing on the pole and was leaning—

"with his left arm ahold of this wire just as a rest, and when I seen him, that hand was just thrown up and hit right across the wrist. The contact on the right hand was across the wrist; might have been further up."

Both the plaintiff's hands were seriously injured, and one was amputated.

The complaint alleged negligence on the part of the defendant: (1) In failing to insulate the wires; (2) in not leaving sufficient space between the wires; (3) in placing a dead wire with the live wires; (4) in failing to designate, by colors or otherwise, the arms and poles upon which the live wires were located; (5) in failing to supply employés with proper tools and instruments, and to give them proper instructions and directions; (6) in directing the plaintiff to do and perform his work in an unsafe and dangerous place while he was ignorant of the danger and without instructing him thereof; (7) in directing the plaintiff to climb and work upon poles without furnishing him with a ladder or proper appliances; (8) in failing to turn off the live electric current while the work was being done. The defendant in its answer denied negligence, and denied that the plaintiff was employed to work upon the wires, and alleged his contributory negligence. The action was founded on the Oregon Employers' Liability Act (Session Laws 1911, p. 16). That act requires all persons engaged in the manufacture and transmission of electricity of a dangerous voltage to provide full and complete insulation at all points where employés are liable to come in contact with the wire; that dead wires shall not be mingled with live wires, nor strung upon the same support; that the arms or supports bearing live wires shall be specially designated by a color or other designation; that live electrical wires carrying a dangerous voltage shall be strung at such distances from the poles or sup-

ports as to permit repairmen to engage freely in their work without danger of shock, and it provides:

"And generally, all owners, contractors or subcontractors and other persons having charge of, or responsible for, any work involving a risk or danger to the employés or the public, shall use every device, care and precaution which it is practicable to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the structure, machine or other apparatus or device, and without regard to the additional cost of suitable material or safety appliance and devices."

Section 2 provides:

"The manager, superintendent, foreman or other person in charge or control, of the construction or works or operation, or any part thereof, shall be held to be the agent of the employer in all suits for damages for death or injury suffered by an employé."

Passing the other grounds of negligence alleged in the plaintiff's complaint, we entertain no doubt that there was sufficient evidence to go to the jury on the question of the defendant's negligence, in permitting a boy of 18 years of age, without training or experience, to do the work of a lineman, in so hazardous an occupation as moving uninsulated live wires carrying 2,300 volts. The work was extremely dangerous, and in its performance extreme caution and care, as well as experience, were required to avoid injury. The plaintiff's only support on the pole were climbers or spurs, and, while lifting the wire, which it is testified would weigh 40 or 50 pounds, if the support of either foot gave way, a boy of his age might naturally grasp any wire within reach to avoid falling. It is true that Buxton, the electrician, denied that he instructed the plaintiff to work on the poles, but it is not denied that he directed him to do what Harbert should tell him to do, and Harbert admitted that the plaintiff helped him on the wires. "He came up there, and I let him finish one end there on the wire." Under the Employers' Liability Act, there can be no question that Harbert, who had control of that work, was the agent of the employer. The court in instructing the jury submitted to their decision the question whether the plaintiff was employed to work upon the ground, and charged them that if they found that he ascended the poles voluntarily, and attempted to engage in work there, he would be a volunteer, and that the defendant would not be liable for his injuries, and submitted also to the jury the question whether or not Harbert had authority in the premises to direct the plaintiff to go upon the poles and assist in fixing the wires.

There are some assignments of error to the admission of testimony, but in none of the rulings do we find reversible error, nor do we find that the court erred in refusing certain instructions requested by the defendant. The instructions given covered carefully and correctly all the questions involved in the action.

The judgment is affirmed.

WHITLA & NELSON v. BOYD et al.

In re LANE LUMBER CO.

(Circuit Court of Appeals, Ninth Circuit. May 4, 1914.)

No. 2336.

1. BANKRUPTCY (§ 439*)—PETITION TO REVISE—SCOPE OF REVIEW.
On a petition to revise under Bankruptcy Act July 1, 1898, c. 541, § 24b, 30 Stat. 553 (U. S. Comp. St. 1901, p. 3432), only questions of law can be considered.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 915; Dec. Dig. § 439.*]

2. BANKRUPTCY (§ 482*)—ATTORNEYS—CLAIMS.
Bankruptcy Act July 1, 1898, c. 541, § 64b, 30 Stat. 563 (U. S. Comp. St. 1901, p. 3447), provides that costs of administration including one reasonable attorney's fee for professional services actually rendered to the bankrupt in involuntary cases while performing the duties prescribed in the act, must be paid in preference to certain other of the indebtedness of the estate. *Held*, that the "duties" there referred to are those imposed by section 7, by which the bankrupt is required to attend the first meeting of creditors to prepare and file schedules and submit to examination at the first meeting of creditors and at such other times as the court shall order, etc.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 874–876, 897; Dec. Dig. § 482.*]

3. BANKRUPTCY (§ 482*)—ATTORNEY FOR BANKRUPT—SERVICES.
An attorney's testimony that certain charges made against a bankrupt were for advice with reference to a receivership after the bankruptcy proceedings had been instituted and before the schedules were filed and concerning an application to the court for an order looking to the possession of the bankrupt's books, but that he could not state in greater detail what the services consisted of, was too vague and uncertain to serve as the basis of a conclusion that the services were reasonably necessary to enable the bankrupt to perform its duties or to support a finding as to the reasonable value thereof.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 874–876, 897; Dec. Dig. § 482.*]

4. BANKRUPTCY (§ 482*)—CLAIMS OF STATE COURT RECEIVER—OBJECTIONS.
Where prior to adjudication in bankruptcy the bankrupt's property had been placed in the hands of the state court receiver, the question of the receiver's claim against the bankrupt's estate for fees and expenses incurred was a matter for the determination of the bankrupt's trustee and creditors, and hence the bankrupt's attorney was not entitled to charge him for services in resisting the same.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 874–876, 897; Dec. Dig. § 482.*]

5. BANKRUPTCY (§ 482*)—ATTORNEY FOR BANKRUPT—SERVICES—ATTENDANCE IN BANKRUPTCY COURT.
An oral direction by the referee to the bankrupt's attorney to attend hearings before the referee without any order entered on the docket was insufficient to entitle the attorney to an allowance therefor, since the bankruptcy act does not contemplate that the bankrupt shall be represented by an attorney on every occasion when he appears before the referee.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 874–876, 897; Dec. Dig. § 482.*]

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

Petition for Revision of Proceedings of the District Court of the United States for the Northern Division of the District of Idaho; Frank S. Dietrich, Judge.

In the matter of bankruptcy proceedings of the Lane Lumber Company, a corporation. On petition of Whitla & Nelson, attorneys for the bankrupt, to revise in matter of law a certain order of the District Court (206 Fed. 780) allowing in part petitioners' claim for services rendered to the bankrupt. Affirmed.

Ezra R. Whitla and Ralph S. Nelson, both of Cœur d'Alene, Idaho, and Graves, Kizer & Graves, of Spokane, Wash., for petitioners.

E. N. La Veine, of Cœur d'Alene, Idaho, for respondent trustee.

John H. Wourms, of Wallace, Idaho, for respondent State Bank of Commerce.

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

ROSS, Circuit Judge. [1] This being a petition to revise, under the provisions of section 24b of the Bankruptcy Act, the judgment of the District Court reversing, with directions, an order made by the referee in bankruptcy, questions of law only can be considered. It is doubtful whether it can be properly said that any such are before us; but, since there is some doubt, we overrule the motion to dismiss and consider the case upon its merits.

The demand of the petitioners, who are attorneys at law, was for services claimed to have been rendered the bankrupt. The demand was itemized; the first four items being as follows:

1911.			
Aug.	4.	Advice relating to bankruptcy proceedings instituted against bankrupt	$ 25 00
Aug.	7.	Advice and services relative to bankruptcy proceedings....	15 00
Aug.	12.	Advice and services relative to bankruptcy proceedings....	15 00
		To services, preparing schedules of bankrupt and services in connection therewith, including application to court for orders upon Lawrence F. Connolly, receiver, to compel him to allow bankrupt to examine books.....	750 00

It contained an additional charge of $100 under date August 24th for "preparing proceedings, including objections and brief on objections and contesting receiver's claim for allowance of fees and expenses to himself and attorney fees," and also a series of charges for "attendance in bankruptcy court" on various specified days, at the rate of $50 a day; the whole claim aggregating $2,755. The referee allowed the claimants $2,750, and upon a petition to the court below for the revision of his decision the claim of the petitioners was reduced to $385.

[2] The provision of law upon which the petitioners rely is found in section 64b of the Bankruptcy Act, where it is declared that costs of administration, including "one reasonable attorney's fee, for the professional services actually rendered * * * to the bankrupt in involuntary cases while performing the duties" in the act prescribed, must be paid in preference to certain other of the indebtedness of the

estate. The "duties" there referred to are imposed by section 7 of the act, which, in so far as it is material to be considered, is as follows:

"Sec. 7. Duties of Bankrupt. (a) The bankrupt shall (1) attend the first meeting of his creditors, if directed by the court or a judge thereof to do so, and the hearing upon his application for a discharge, if filed; * * * (8) prepare, make oath to, and file in court within ten days, unless further time is granted, after the adjudication, if an involuntary bankrupt, * * * a schedule of his property, showing the amount and kind of property, the location thereof, its money value in detail, and a list of his creditors, showing their residences if known, if unknown, that fact to be stated, the amounts due each of them, the consideration thereof, the security held by them, if any, and a claim for such exemptions as he may be entitled to, all in triplicate, one copy of each for the clerk, one for the referee, and one for the trustee; and (9), 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, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind, and whereabouts of his property, and in addition all matters which may affect the administration and settlement of his estate."

[3] In respect to the first three items of the petitioners' bill, the court said that the only evidence pertaining to that was the following testimony of one of the claimants:

"'And in regard to the advice for which we charged $25 in one instance, and $15 in two other instances, these were matters connected with the Connolly receivership after the bankruptcy proceedings had been instituted and prior to the time schedules were filed and application made to the court for an order. It was relative to getting possession of the books so that we could decide certain matters and things, and in connection with that I cannot say at this time in detail what they were, but I made the charge at the time the services were performed, and I considered them reasonable at the time.' But this evidence is altogether too vague and uncertain to serve as the basis of a conclusion that the services were reasonably necessary to enable the bankrupt to perform its duties, or a finding of the value thereof. In the most favorable view the testimony may be construed as suggesting, not showing, that the advice may have related to the preparation of the requisite schedules; but for all services connected with that duty a distinct charge of $750 is made, which charge, it is to be inferred from the testimony, was also intended to cover the proceedings to secure possession of the bankrupt's books and papers from the receiver. It is therefore held that the showing was insufficient to warrant the referee in allowing any of the three items."

[4] We see no error in this, nor in the disallowance by the court below of the charge of $100 for "preparing proceedings, including objections and brief on objections and contesting receiver's claim for allowance of fees and expenses to himself, and attorney fees."

It appears that prior to the adjudication in bankruptcy, which was made August 1, 1911, the property of the bankrupt had been placed in the hands of a receiver appointed by one of the courts of the state of Idaho, and the question of such receiver's claim against the estate of the bankrupt for his fees and expenses incurred was a matter, as the court below properly held, for the trustee and creditors of the bankrupt.

In the preparation of the schedules which the bankrupt was by the Bankruptcy Act required to file, it was undoubtedly legally entitled to the benefit of legal advice; and so the court below held. But the learned judge, who, it appears from his opinion, gave very careful

consideration to the evidence in the case, found that a reasonable allowance to the petitioners for their legal services in that regard was not $750, but $250, with the further allowance of $35 for clerical work in connection with the schedules. With that finding it is manifest that we cannot interfere on this proceeding.

[5] The remaining items of charge in the petitioners' bill were for "attendance in bankruptcy court" on various specified days, at the rate of $50 a day, aggregating $1,850.

While it was contended by the claimants that their presence on those occasions was in compliance with the express order and direction of the referee, the court below found that the contention was not justified by the evidence.

"One of the claimants," said the court, "testified that the referee asked them to attend all the hearings; but, if it were to be assumed that the referee has authority to require counsel for the bankrupt to be present, surely such direction, to be efficacious, should be made of record, and oral testimony thereof must be rejected as being incompetent. Upon examining what is furnished to me as the referee's docket, containing a large number of orders pertaining to the proceeding, I find no order or direction requiring counsel to be present. There is in the order of August 22, 1911, appointing the time for the first meeting of creditors September 7, 1911, a requirement that the bankrupt and certain of its officers therein named be present at the first meeting of creditors, and also a direction that notice of the order be sent to the bankrupt and its officers and its attorneys of record, the claimants here. Upon the same day—that is, on August 22, 1911—a specific order was formulated and entered requiring the bankrupt and its officers to appear on September 7th, and this is expressly directed to the bankrupt and to P. H. Wall, its president, and N. K. Wall and B. F. O'Neil, its secretary and treasurer respectively; it makes no mention of the bankrupt's counsel. I find no other order bearing upon the subject. With the one exception noted, I am unable to find from the whole record that there was any reasonable need for the attendance of the claimants at the meetings of creditors or the sessions of the court, as counsel for the bankrupt, and considering all services under this head, which were of benefit to the estate or which fall within the rule hereinbefore stated, it is thought that $100 is all that can properly be allowed upon this account."

We quite agree with the court below that the Bankruptcy Act does not contemplate that estates shall be burdened with the expense of furnishing an attorney for the bankrupt every time he appears before the referee, and that while contingencies may arise where the assistance of counsel would be reasonably required for the protection of the bankrupt, and for that reason such expense be justified no such contingency, so far as the record shows, arose in the present case.

We are unable to see that the action of the court below was erroneous in any particular, and, accordingly, affirm its judgment.

The judgment is affirmed, with costs in favor of the respondents and against the petitioner.

WOOD v. POTLATCH LUMBER CO.†

(Circuit Court of Appeals, Ninth Circuit. May 4, 1914.)

No. 2337.

1. MASTER AND SERVANT (§ 196*)—INJURIES TO SERVANT—FELLOW SERVANTS.
Plaintiff, who had been employed by defendant in the operation of a sawmill to perform various duties, was directed to assist in making repairs in the brickwork about the base of a refuse burner, and while so engaged was injured by a piece of a timber thrown from the conveyor attached to the burner through the negligence of F., who with two assistants had just completed the installation of a new sprocket wheel at the top of the conveyor. F. was in immediate charge of installing the wheel, and another was in charge of the brickwork, but both were subordinate to H., who was a foreman inferior to the superintendent, who in turn was subject to the orders of the general manager. *Held*, that plaintiff and F. were fellow servants at common law.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 375–378, 486–488; Dec. Dig. § 196.*

Who are fellow servants, see notes to Northern Pac. R. Co. v. Smith, 8 C. C. A. 668; Flippin v. Kimball, 31 C. C. A. 286.]

2. MASTER AND SERVANT (§ 107*)—INJURIES TO SERVANT—DANGEROUS PLACE.
Where the place where plaintiff was employed was not dangerous or defective immediately before the accident in which he was injured by being struck by timber negligently thrown from a sawmill refuse conveyor to the ground by plaintiff's fellow servant, and the throwing of the timber would not have been dangerous had care been exercised to warn persons who might be below, or to see that no one was below, defendant was not negligent in failing to provide plaintiff a safe place to work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 199–202, 212, 254, 255; Dec. Dig. § 107.*]

3. MASTER AND SERVANT (§ 141*)—INJURIES TO SERVANT—MANNER OF WORK—DUTY TO PRESCRIBE.
The rule that a master is required to prescribe the manner in which work committed to servants shall be performed extends only to services of a complicated and dangerous character, requiring skill and experience, and had no application to the taking down a scaffold used to install a new sprocket wheel in a refuse conveyor in a sawmill, involving the lowering of timbers from the scaffold to the ground.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 283; Dec. Dig. § 141.*]

In Error to the District Court of the United States for the Eastern District of Washington; Frank H. Rudkin, Judge.

Action by M. C. Wood against the Potlatch Lumber Company. Judgment for defendant, and plaintiff brings error. Affirmed.

W. H. Plummer and Joseph J. Lavin, both of Spokane, Wash., for plaintiff in error.

Edward J. Cannon, George M. Ferris, and C. E. Swan, all of Spokane, Wash., for defendant in error.

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

DIETRICH, District Judge. This action was brought to recover damages for an injury received by plaintiff while in the defendant's

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

† Rehearing denied July 6, 1914.

employ. There was a verdict in his favor for $5,000, notwithstanding which the court entered judgment dismissing the action. By an express agreement in the court below, all questions are eliminated, excepting only the one whether, as a matter of law, the evidence is sufficient to support the verdict. The record is very brief, and the testimony is without substantial conflict. The plaintiff was one of 500 or 600 men employed by the defendant in the operation of its sawmill at Potlatch, Idaho. On September 21, 1911, the day of the injury, he and others were engaged in repairing the "burner," and while in the discharge of his duties he was struck upon the head and severely injured by a piece of timber thrown down from the conveyor by one Fennell, a coemployé. It is conceded that the act constituted negligence upon the part of Fennell, and that the plaintiff was free from blame; and the only question, therefore, is whether Fennell's negligence is to be imputed to the defendant. The court below held that, under the fellow-servant rule, the defendant was not chargeable therewith. The plaintiff excepts to this view, and further contends that the defendant was negligent in not providing a safe place to work and in failing to prescribe a method for carrying on the work in which the men were engaged.

[1] The conveyor is used for the purpose of carrying refuse from the sawmill proper to a receptacle built of brick and mortar, called the burner. It is about 125 feet in length, and by bents is supported in the position of an inclined plane; the mill end being about 4 feet and the burner end about 45 feet from the ground. A contrivance in the nature of an endless belt passes over a sprocket at the burner, and upon this belt the waste is carried from the mill and dumped into the burner. Two or three days before the accident, Fennell had been directed to take two other men and put in a new sprocket wheel. In order to do this, it was necessary to erect a temporary scaffold, and for that purpose several pieces of timber were taken from the mill and carried upon the conveyor to the burner, and there placed in position. In the meantime the plaintiff, who it seems had been in the employ of the defendant for about two years, with various duties, was directed to assist in making repairs in the brickwork about the base of the burner. Upon the day in question, the men engaged upon the wheel, having finished the job and taken down the scaffold, were disposing of the timbers which they had brought up for that purpose. Apparently without any reason for so doing, after carrying them down along the conveyor toward the mill 25 or 30 feet, Fennell directed that they be thrown to the ground. After five or six of them had been so disposed of, the plaintiff, who had gone to one of the outbuildings for material, had occasion upon his return to pass under the conveyor, as was more or less customary, when one of the falling timbers struck him upon the head. No lookout was kept, and it is doubtful whether any warning was given. Fennell was in immediate charge of the work of installing the wheel, and a man by the name of Nelson of the brick repairs. Both were subordinate to one Hibbard, and Hibbard in turn was inferior to the superintendent, Seymour, who was subject to the authority of a Mr. Laird, apparently the general

manager. The accident occurred in the state of Idaho. Section 18 of the Revised Codes of that state is as follows:

"The common law of England, so far as it is not repugnant to, or inconsistent with, the Constitution or laws of the United States, in all cases not provided for in these Revised Codes, is the rule of decision in all the courts of this state."

The rule of the common law thus expressly adopted has not been modified by other legislative provisions, and it is therefore controlling. Applying this rule to the circumstances of the case, we entertain no doubt that Fennell and the plaintiff were fellow servants. Tweeten v. Tacoma Ry. & Power Co., 210 Fed. 828, 127 C. C. A. 378; Baltimore Ry. v. Baugh, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 781; Central Ry. Co. v. Keegan, 160 U. S. 259, 16 Sup. Ct. 269, 40 L. Ed. 418; N. P. Ry. Co. v. Charles, 162 U. S. 359, 16 Sup. Ct. 848, 40 L. Ed. 999; Martin v. Atchison Ry., 166 U. S. 399, 17 Sup. Ct. 603, 41 L. Ed. 1051; Alaska Treadwell G. M. Co. v. Whelan, 168 U. S. 86, 18 Sup. Ct. 40, 42 L. Ed. 390; N. P. Ry. Co. v. Dixon, 194 U. S. 338, 24 Sup. Ct. 683, 48 L. Ed. 1006; Texas Ry. v. Bourman, 212 U. S. 531, 29 Sup. Ct. 319, 53 L. Ed. 641; Bentler v. Grand Trunk Ry., 224 U. S. 84, 32 Sup. Ct. 402, 56 L. Ed. 679.

[2] But the contention most vigorously pressed by the plaintiff is that the case is not one for the application of the fellow-servant doctrine. It is urged in that behalf that the accident was due to the failure on the part of the master to provide a reasonably safe place to work, a default the responsibility for which the master cannot shift It is not suggested that the premises were defective or unsafe immediately before or immediately after the accident, or that there was any danger other than from the falling timbers, and it is, of course, conceded that the timbers fell, not by accident, but as the result only of Fennell's willful act. Fennell's intelligence and general competency are not called into question, and the defendant had no reason to anticipate that he would take such a reckless course. Admittedly the timbers could have been carried back in the same manner in which they were brought up, or, for that matter, they could have been safely thrown to the ground at the very place where the accident occurred. If, under such circumstances, the negligence of the servant is chargeable to the master, the cases would indeed be rare where the latter could escape liability. It is futile for the plaintiff to argue that he makes no complaint of the manner in which the timbers were thrown down, but only that they were thrown down at all. The throwing of the timbers down did not of itself constitute negligence; such a method involved no inherent or unavoidable danger. If some one had stood below to give warning, no one could have been harmed. So that primarily the negligence consisted, not in the selection of the place where the timbers were discharged, but in the manner of their discharge. If this be negligence of the master, then in every case where, in the erection of a building, one workman willfully or carelessly lets fall upon a fellow workman a tool or piece of material, the employer could be held liable. Suppose that Fennell had carelessly let a hammer drop while installing the new wheel, and it had fallen upon

and injured the plaintiff working below, or Nelson had carelessly cast aside a brick, and it had struck and injured the plaintiff, precisely the same principle of liability would be involved. But it is unnecessary to multiply illustrations; the contention is thought to be without merit.

[3] While not very clearly articulated, the plaintiff's further point seems to be that the defendant failed in its duty in that it set Fennell at a piece of work without prescribing the manner in which it should be performed. The principle invoked, however, extends only to services of a complicated and dangerous character, requiring skill or experience. The details even of dangerous business, and simple tasks as a whole, may be rightfully left to the common sense of the workmen. In Deye v. Lodge & Shipley Machine Tool Co., 137 Fed. 480, 70 C. C. A. 64, the Circuit Court of Appeals for the Sixth Circuit, speaking through Judge Lurton, discusses the extent and limitations of the principle, and applies it to facts not unlike those involved in the instant case. It is there said:

"That an employer engaged in a complicated and dangerous business is under obligation to prescribe rules for its orderly and safe conduct is a well-settled principle of the law of master and servant. * * * But this rule presupposes a complicated business, involving danger to those conducting it, unless it be managed upon some prescribed system. A railway business is an example. * * * Unless the business be of such a complex and dangerous character as to require that it shall be conducted upon a system or scheme, in order to secure the orderly conduct of the business, and the safety of those engaged in it, the master's obligation to supply a safe place for his work to be done, and to keep it safe, does not impose the duty of always keeping it in a safe condition so far as its safety depends upon the proper performance of the very work which his servants have there undertaken to do. If a negligent manner of doing the work makes a place less safe, that is one of the risks which all engaged in the work have assumed as a risk of the occupation."

See, also, Central Ry. v. Keegan, 160 U. S. 259, 16 Sup. Ct. 269, 40 L. Ed. 418; American Bridge Co. v. Seeds, 144 Fed. 605, 75 C. C. A. 407, 11 L. R. A. (N. S.) 1041; Portland G. M. Co. v. Duke, 164 Fed. 180, 90 C. C. A. 166; Dill v. Marmon, 164 Ind. 507, 73 N. E. 67, 69 L. R. A. 163; Wagner v. City of Portland, 40 Or. 389, 67 Pac. 300, 60 Pac. 985; Anderson v. Oregon Ry. Co., 28 Wash. 468, 68 Pac. 863; Hermann v. Port Blakely Mill Co. (D. C.) 71 Fed. 853; Donnelly v. San Francisco B. Co., 117 Cal. 417, 49 Pac. 559; Law v. Illinois Central Ry. Co. (C. C. A.) 208 Fed. 869; Ry. Co. v. Hart, 176 Fed. 245, 250, 100 C. C. A. 49; Labatt, Master and Servant (2d Ed). vol. 4, § 1527.

What need was there here for an elaborate scheme or plan? The task was a simple one. The timbers could be gotten to the ground with entire safety, either by taking them back down the conveyor or by throwing them directly to the ground. If the latter course was adopted, it was necessary only to keep a lookout to insure against danger. Was it to be supposed that Fennell needed to be advised by some plan or specific rule of the method which he should adopt? That was a detail which presumably could with safety be left to his common sense. Men generally understand that it is carelessness to throw down a heavy object from an elevation without first taking the

precaution to see that no one is underneath, and an employer has the right to assume that a mature, reasonably intelligent employé will take the precaution dictated by an ordinary measure of common sense.

The judgment is affirmed, with costs to defendant in error.

PREFERRED ACCIDENT INS. CO. v. PATTERSON.

(Circuit Court of Appeals, Third Circuit. May 11, 1914.)

No. 1830.

1. INSURANCE (§ 668*)—ACTION ON ACCIDENT POLICY—SUFFICIENCY OF EVIDENCE.

Evidence considered, and *held* to justify the submission to the jury of the question whether the death of an insured resulted solely from an accidental injury within the terms of an accident policy.

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

Accident insurance—risks and causes of loss, see notes to National Accident Society v. Dolph, 38 C. C. A. 3; New Amsterdam Casualty Co. v. Shields, 85 C. C. A. 126.]

2. INSURANCE (§ 455*)—ACCIDENT INSURANCE—"ACCIDENTAL" INJURY.

Where the death of an insured was caused solely by an injury resulting from his slipping and falling while cranking the motor of an automobile, the injury was "accidental" within the meaning of an accident policy.

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

For other definitions, see Words and Phrases, vol. 1, pp. 62–70; vol. 8, p. 7560.]

3. CONTINUANCE (§ 29*)—SURPRISE AT TRIAL—DISCRETION OF COURT.

The denial of a continuance during a trial, asked because of a hypothetical question asked an expert witness based on an assumed state of facts different from those alleged in the declaration, *held* not an abuse of the court's discretion.

[Ed. Note.—For other cases, see Continuance, Cent. Dig. § 95; Dec. Dig. § 29.*]

In Error to the District Court of the United States for the District of New Jersey; John Rellstab, District Judge.

Action at law by Minnie C. Patterson against the Preferred Accident Insurance Company. Judgment for plaintiff, and defendant brings error. Affirmed.

William W. Smithers, of Philadelphia, Pa., for plaintiff in error.

Harvey F. Carr, of Camden, N. J., for defendant in error.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

JOHN B. McPHERSON, Circuit Judge. [1] The policy sued upon was issued by the Preferred Accident Insurance Company of New York upon the bodily safety, including the life, of Walter L. Patterson, the husband of the plaintiff. He died 17 days after the occurrence hereafter referred to, and the jury has necessarily found as a fact that

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

(in spite of the lapse of time) his death resulted "directly, independently and exclusively of any and all other causes, from bodily injury effected solely through accidental means." This is the clause of the policy that gives rise to the present dispute, the contention of the company being: (1) That the cause of death was not an accident at all; and (2) that, even if an accident was one of the causes, a second cause that contributed materially thereto was a diseased condition of the kidneys antedating the accident. Evidently, this contention presents questions of fact, and if the evidence was so conflicting as to justify their submission to the jury, and if they were submitted with correct instructions, the verdict is beyond our control. One or two other questions concerning the admission of certain expert testimony are raised by the second, third, and fourth assignments of error, but they were not insisted upon, and we shall not consider them.

It is not our province to weigh the evidence. This was for the jury and for the court below. Our duty is confined to the inquiry whether enough competent and relevant evidence was offered (whether contradicted or not) to prove the essential facts of the plaintiff's case. We have therefore examined the whole record and are satisfied that evidence was presented in support of the facts about to be stated, sufficient to require submission to the jury. Indeed, most of the facts were undisputed, but all of them were supported by evidence that was sufficient if believed to justify the jury in accepting them as true:

The policy sued on was taken out by Walter L. Patterson for the benefit of his wife, the present plaintiff. He was 49 years of age, and his health had been excellent for more than 20 years; during 15 years before his death he had been sick only once. Except upon that occasion he had attended to his business continuously during the period first named. About a year before his death he had been examined for life insurance, and had been recommended as a first-class risk. He was a strong and robust man, about six feet in height, and weighed about 190 pounds. On Saturday, August 5, 1911, the events happened that underlie this dispute. He had brought his motor car from Atlantic City to his home in Ventnor, and had turned it into Hillside avenue, the street on which the house faced. The surface of the street was loose and sandy, having been cut up by recent and unusual hauling, and the car stuck fast. His intention was to put it away in a garage in the basement, but the motor did not work properly, and he was engaged for about half an hour in the effort to crank it successfully, and to move the car off the street. While thus engaged, he apparently lost his footing on the loose and sandy surface of the roadway, the crank handle slipped, and he fell on his stomach, striking the ground near the front of the car. At once he seemed to be in pain, rising with difficulty, and saying to a neighbor on the porch of the next house that he had hurt his back. Soon afterwards he succeeded in putting the car away, and almost immediately went into his own house and lay down, complaining of nausea and exhaustion. In the night he was feverish, and his urine soon became bloody. On Monday, August 7th, he consulted a physician in Collingswood (the town where he carried on his business) and received some medicine. On Tuesday he went to a physician

in Atlantic City, and took to his bed on Wednesday. On Saturday, August 12th, he was removed to a sanitarium in Atlantic City, and on the 16th his left kidney was removed. It was found to be covered with large cysts, by which its proper function had been greatly obstructed. The symptoms indicated that the other kidney (which of course could not be removed) was similarly affected, and this belief was confirmed by a post mortem examination. He died on August 22d, 17 days after the occurrence referred to. The condition referred to is described as polycystic, or cystic degeneration. The medical testimony was in conflict upon the point, whether this condition could have been produced, and had actually been produced, by what took place on August 5th; and also upon the point whether the condition of the kidneys at the time they were removed indicated that they had been diseased before the date just named. The verdict has decided this conflict against the company.

[2, 3] We agree that, when a man is injured while doing merely what he intends to do, he is not injured by an accident, unless the course of his action has been interrupted or deflected by some unforeseen and unintended happening. To illustrate from the facts before us: Since the deceased was attempting to start the engine of his car by turning the crank, whatever injury he might sustain from the ordinary strain of that operation would properly be regarded as a result of what he intended to do, and therefore would not be accounted accidental. But we can hardly suppose that he intended to slip and fall in the course of the operation, and therefore if he did slip and fall, and sustained injury as the direct result thereof, the happening would be unforeseen and unintended, and the injury would be accidental. Now, unquestionably, direct testimony was given that the deceased did slip and fall, and medical testimony was also given connecting the fall directly with his subsequent death. And this may serve to bring us to the first assignment of error. The plaintiff's declaration set forth that while the decedent was—

"cranking the engine or motor of, and attempting to start, a certain automobile, the surface of said street, avenue, or highway, gave way and caved in beneath and away from the feet of the said Walter L. Patterson, causing the said Walter L. Patterson to slip, stumble, and lose his footing, whereby he was subjected to a violent wrench, strain, and shock, whereby he sustained bodily injuries which resulted directly, independently, and exclusively of any and all other causes, and which said bodily injuries were effected solely through accidental means, in the death of the said Walter L. Patterson, etc."

The evidence at the trial did not go so far as to show that the surface of the street had "caved in" beneath the feet of the deceased, but it did tend to show that the surface was loose and had "given way" under his feet. In the course of the trial a hypothetical question was addressed to one of the witnesses, which stated, inter alia, that while the deceased was "attempting to crank an automobile on the 5th day of August, 1911, the crank slipped suddenly out of the socket, throwing him suddenly and violently to the ground, and that immediately afterwards he arose slowly and apparently with difficulty, and complained of pain in the back, etc." The defendant's counsel objected on the ground that the question was not framed in accordance with the aver-

ments of the declaration, but was predicated upon a different state of facts. He therefore alleged surprise, and this, of course, was equivalent to a motion that the trial should be continued; the argument being that the plaintiff was attempting to compel the defendant to answer a case different from the case sued upon. That the situation was thus understood is abundantly evident from the colloquy between court and counsel reported in the record. In other words, the defendant was appealing to the discretion of the court for a continuance on the ground of surprise, and unless the discretion was abused we should not interfere with the ruling. We have given this subject careful consideration, looking at it (as we are bound to do) from the same point of view that was presented to the trial judge when he refused the defendant's motion, and we do not see our way to pronounce his ruling erroneous. Much of the argument that was addressed to us does not appear to have been addressed to the trial judge at all, and indeed could not have been addressed to him properly, for it is based in part on evidence that had not then been offered. Indeed, the argument supporting this assignment of error is really an attack on the verdict; the effect of the contention being that the weight of the evidence is strongly with the defendant. But upon this assignment we are confined to the only question that can be properly brought before us, namely, whether the trial judge abused his discretion in declining to continue the case, and upon that question we have already expressed our opinion.

The other three assignments that are insisted on do not need much further discussion. In answer to the fifth—which asked for binding instructions on the ground "that there has been no evidence of an accident"—we repeat that in our opinion the defendant was not entitled to such instructions. In reference to the sixth and seventh assignments, we need only say that the fundamental difficulty about the defendant's argument is that the verdict has practically destroyed it. To state the argument briefly: The policy provides that recovery for a death can be had only when the insured dies from bodily injuries effected through accidental means, as a direct result of the accident, and when the death results solely from such accident, independently and exclusively of any and all other causes. Therefore, if disease existing at the time of the accident was one cause of the death, the plaintiff cannot recover. The jury was properly instructed to that effect, and the verdict therefore establishes that there was an accident, that the accident was the direct and the only cause of death, and that the insured was not diseased at the time of the accident. With these facts established by sufficient evidence, the cases relied on by the company cease to be applicable, and need not be discussed. The charge as a whole was clear and satisfactory, and we see no serious objection to the illustration complained of in the sixth assignment. And, in the absence of sufficient medical evidence concerning the difficult—and, we think we may add, the somewhat obscure—subject of the effect of a predisposition to the particular disease in question, we discover no error in the court's instruction on this subject.

The judgment is affirmed.

MARYLAND CASUALTY CO. v. MORROW.

(Circuit Court of Appeals, Third Circuit. May 11, 1914.)

No. 1838.

INSURANCE (§ 455*)—ACCIDENT INSURANCE—LIMITATION OF LIABILITY BY PROVISIONS OF POLICY—CONCURRENT CAUSES OF DEATH.

Under an accident policy limiting liability to disability or death resulting solely from accidental injury "independently of all other causes," there can be no recovery for the death of the insured resulting from the concurring effect of an injury and pre-existing diseases.

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

Accident insurance—risks and causes of loss, see notes to National Accident Society v. Dolph, 38 C. C. A. 3; New Amsterdam Casualty Co. v. Shields, 85 C. C. A. 126.]

In Error to the District Court of the United States for the Western District of Pennsylvania; James S. Young, Judge.

Action at law by Amanda Morrow against the Maryland Casualty Company. Judgment for plaintiff, and defendant brings error. Reversed.

Don Rose, of Pittsburgh, Pa., for plaintiff in error.

Ralph P. Tannehill, of Pittsburgh, Pa., for defendant in error.

Before BUFFINGTON and McPHERSON, Circuit Judges, and WITMER, District Judge.

J. B. McPHERSON, Circuit Judge. The plaintiff below, Mrs. Amanda Morrow, was the beneficiary in a policy of accident insurance upon the life of her husband, and obtained a judgment in the District Court. The case is now before us upon assignments of error that complain (1) of the court's refusal to direct a verdict in favor of the defendant company, and (2) of certain instructions in the charge, to which reference will hereafter be made. The facts are as follows:

During the night of December 27, 1910, Joseph C. Morrow, the insured, a resident of the city of Pittsburgh, while on his way to the bathroom of his house, stubbed the fourth toe of his left foot against a chair, and the company concedes that the occurrence was accidental. The injury caused a good deal of pain, but was not then regarded as serious. Home remedies were used until January 20th, when a physician was summoned, who found that the middle phalange, or bone, had been broken. The doctor treated the toe until January 25th, when the insured was removed to a hospital. Apparently no gangrene had then appeared—at least not definitely—but the amputation of the toe was believed to be desirable. The usual examination of the patient's urine was promptly made, and he was found to be suffering from diabetes; about 6 per cent. of sugar being discovered. As the presence of diabetes makes an operation hazardous, he was treated medically for this trouble with some success for nearly four weeks. Soon after he entered the hospital, gangrene made itself known and

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

spread over part of the foot and the leg, so that an operation became imperative. On February 22d the leg was removed above the knee, but, although the gangrene apparently ceased to spread, the insured died on March 6th. An autopsy two days later disclosed several diseases, pneumonia of both lungs, arterio-sclerosis—thickening of the left femoral and iliac arteries, with a thrombus or blood clot in one of them—the presence of pus and numerous gallstones in the gall bladder, a chronic affection of the heart, enlarged kidneys showing chronic Bright's disease, and a diseased pancreas. The pneumonia may be disregarded, since this may have been contracted in the hospital; but the medical testimony made it clear that some, if not all, of the other diseases existed at the time of the accident, and were not caused thereby. It was undisputed that the presence of diabetes required the operation to be delayed, and that the gangrene was diabetic. The leg was removed only as a last resource.

Even a layman, if ordinarily well informed, might be confident that the injury to the toe could not have caused all the diseases named, and that these did not spring up after the date of the accident. As the medical testimony was to the same effect, we may take it as a fact in the case that when the toe was injured the insured was afflicted with some or all of the serious diseases just referred to. In that state of the evidence, the trial judge instructed the jury, inter alia, as follows:

"If the result from the injury to the foot was the gangrene, although it was accelerated by or contributed to by the condition of Mr. Morrow as to diabetes, as to his liver or lungs, I would say to you—to put it fairly for counsel—that, if they did contribute, they would not, in my judgment, be the cause. In other words, if Mr. Morrow was in such condition as to his organs that an injury would precipitate the gangrene, although these conditions would contribute to it, then I would say to you that it would be fair to find that the cause was the injury to the foot. * * * I say again that if the injury was the cause of the gangrenous condition, although the condition of Mr. Morrow may have contributed, if he were in a condition that gangrene would develop by a bodily injury, then the plaintiff would be entitled to recover."

Now, when it is considered that the policy in suit insures only against "bodily injuries effected solely through external, violent, and accidental means, that independently of all other causes results in death or the disabilities set forth," the error in the passage just quoted does not seem to need much discussion. The jury were told in effect that, although death might have resulted from two concurring causes—one being the injury and the other being diabetes—the plaintiff would nevertheless be entitled to recover. But this is not the established rule under a policy containing the foregoing clause. The result of the authorities is thus summarized in the note to Stanton v. Insurance Co., 34 L. R. A. (N. S.) 445:

"Under policies of accident insurance limiting the liability of the insurer to disability or death resulting 'independently of all other causes' from accidental injuries, and precluding recovery if the disability or death resulted, wholly or in part, directly or indirectly, from disease or bodily infirmity, it may be laid down as a general rule of law, established by the authorities herein cited, that if the insured, at the time of the alleged accidental injury, was also suffering from a disease, and the accident aggravated the disease, or

the disease aggravated the effects of the accident, and actively contributed to the disability or death occasioned thereby, there can be no recovery upon the policy."

The cases cited in the note amply sustain this statement. As was said by Judge Butler in Hubbard v. Mutual Acc. Ass'n (C. C.) 98 Fed. 930:

"If the assured chooses to bind himself to such a stipulation, he must bear the consequences; the court cannot relieve him."

In Preferred Acc. Ins. Co. v. Patterson, 213 Fed. 595, 130 C. C. A. 175, just decided by this court, the facts differed in the vital point that the jury found the insured to have been free from disease at the time of the accident, whereas both parties here agree (and the charge assumes) that death was caused by the concurring action of the injury and of pre-existing disease.

It is unnecessary to consider the first assignment of error.

The judgment is reversed, with a new venire.

UNITED STATES v. PORTNEUF-MARSH VALLEY IRR. CO.

(Circuit Court of Appeals, Ninth Circuit. May 4, 1914.)

No. 2334.

1. WATERS AND WATER COURSES (§ 242*)—IRRIGATION—RIGHT OF WAY—PUBLIC LAND—RESERVATION.

Act March 3, 1891, c. 561, § 18, 26 Stat. 1101 (U. S. Comp. St. 1901, p. 1570), granting rights of way through public lands and reservations of the United States to any canal or ditch company formed for irrigation to the extent of the ground occupied by the water of the reservoir and of the canal and its laterals and 50 feet on each side of the marginal limits thereof, etc., constituted a grant of rights of way for such purposes through Indian reservations.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 147, 307; Dec. Dig. § 242.*]

2. WATERS AND WATER COURSES (§ 216*)—IRRIGATION—RIGHT OF WAY—STATUTES—REPEAL—ABROGATION.

Act March 3, 1891, c. 561, § 18, 26 Stat. 1101 (U. S. Comp. St. 1901, p. 1570), granting to any canal or ditch company, for the purpose of irrigation, rights of way through public lands and reservations for reservoir, canal, laterals, etc., was not superseded nor repealed by Act May 11, 1898, c. 292, 30 Stat. 404 (U. S. Comp. St. 1901, p. 1572), amending Act Jan. 21, 1895, c. 37, 28 Stat. 635 (U. S. Comp. St. 1901, p. 1572), entitled "An act to permit the use of the right of way through the public lands for tramroads, canals, and reservoirs and for other purposes," the benefits of which were limited to any citizen or association of citizens of the United States engaged in mining, quarrying, or cutting and manufacturing timber, but contained no provision for rights of way or reservoirs for irrigation purposes, the ways provided for by such act being also confined to the public lands of the United States not within the limits of any park, forest, military or Indian reservation.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 305; Dec. Dig. § 216.*]

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

3. INDIANS (§ 27*) — INDIAN LANDS—RESERVATION — USE FOR IRRIGATION — DAMAGES—RECOVERY.

Since the manner, time, and conditions on which the Indians' right of occupancy of the lands of an Indian reservation may be extinguished are matters for the determination of the government, the Department of Justice may not maintain an action to recover damages for the appropriation of Indian reservation land for a reservoir by an irrigation corporation.

[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 19, 20; Dec. Dig. § 27.*]

In Error to the District Court of the United States for the Eastern Division of the District of Idaho; F. S. Dietrich, Judge.

Action by the United States against the Portneuf-Marsh Valley Irrigation Company. From a judgment in favor of defendant (205 Fed. 416), the United States brings error. Affirmed.

James L. McClear, U. S. Atty., of Cœur d'Alene, Idaho.

Edwin Snow, of Boise, Idaho, for defendant in error.

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

GILBERT, Circuit Judge. [1] The United States brought an action against the defendant in error, an irrigation company, alleging that the latter is unlawfully occupying, for the purposes of a reservoir for irrigation, 246.13 acres of land within the Ft. Hall Indian reservation, claiming authority to do so under the Act of Congress of March 3, 1891, granting rights of way for canals and reservoirs through the public lands and reservations of the United States, and the approval of its map of location by the Secretary of the Interior, given on June 27, 1908, and alleging that the irrigation company has constructed a reservoir on said land and impounded therein water to be used in irrigating arid lands in Bannock county, Idaho. For said alleged unlawful occupation of the land, the plaintiff demanded damages in the sum of $2,461.30. A general demurrer to the complaint was sustained by the court below, and, the plaintiff declining to amend, judgment was entered for the defendant.

Section 18 of the Act of March 3, 1891, c. 561, 26 Stat. 1101 (U. S. Comp. St. 1901, p. 1570), provides:

"That the right of way through the public lands and reservations of the United States is hereby granted to any canal or ditch company formed for the purpose of irrigation and duly organized under the laws of any state or territory, which shall have filed, or may hereafter file 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 the ground occupied by the water of the reservoir and of the canal and its laterals, and fifty feet on each side of the marginal limits thereof. * * * Provided, that no such right of way shall be so located as to interfere with the proper occupation by the government of any such reservation, and all maps of location shall be subject to the approval of the department of the government having jurisdiction of such reservation, and the privilege herein granted shall not be construed to interfere with the control of water for irrigation and other purposes under authority of the respective states or territories."

The plaintiff contends that in the words used in section 18, "right of way through the public lands and reservations of the United States

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

is hereby granted," an Indian reservation is not intended to be included; that the Act of March 3, 1891, has been superseded, or by necessary implication repealed, by the Act of May 11, 1898 (Act May 11, 1898, c. 292, 30 Stat. 404 [U. S. Comp. St. 1901, p. 1572]); that the lands in question were segregated and taken out of the category of public lands by the treaty of the Bannock and Shoshone Indians, of date July 3, 1868 (15 Stat. 673); and that, even though the Secretary had authority to grant the right of way under the Act of March 3, 1891, the land could not be taken from the Indians without just compensation.

We think that the grant of rights of way through the "public lands and reservations of the United States," in the Act of March 3, 1891, was intended to include Indian reservations. At the date of that act the Indian reservations were the only considerable reservations of the United States. Military reservations were comparatively small and compact, and were not contiguous to arid lands which might be reclaimed by irrigation. The forest reserve policy of the government had not then been inaugurated. That the United States had the power to grant rights of way over Indian reservations, notwithstanding its treaty obligations with the Indians, had already been firmly established. Buttz v. Northern Pacific Railroad, 119 U. S. 55, 7 Sup. Ct. 100, 30 L. Ed. 330. It was reaffirmed in Missouri, Kansas & Texas Ry. Co. v. Roberts, 152 U. S. 114, 14 Sup. Ct. 496, 38 L. Ed. 377. In the case last cited, although a treaty had been made between the United States and the Osage Indians, reserving to the latter the lands through which the railroad company was granted its right of way, the court said:

"The United States had the right to authorize the construction of the road of the Missouri, Kansas & Texas Railway Company through the reservation of the Osage Indians, and to grant absolutely the fee of the 200 feet as a right of way to the company. Though the lands of the Indians were reserved by treaty for their occupation, the fee was always under the control of the government."

That an Indian reservation is included in the term "reservations of the United States" is indicated by the decision in that case, as well as by Leavenworth, etc., R. Co. v. United States, 92 U. S. 733, 747 (23 L. Ed. 634) in which the court said:

"Every tract set apart for special uses is reserved to the government, to enable it to enforce them. There is no difference, in this respect, whether it be appropriated for Indian or for other purposes."

And referring to the lands reserved by treaty to the Osage Indians, the court observed:

"The treaty reserved them as much to one as to the other of the contracting parties. Both were interested therein and had title thereto. In one sense they were reserved to the Indians; but, in another and broader sense, to the United States for the use of the Indians."

In the case of Rio Verde Canal Co., 27 Land Dec. Dept. Int. 421, Mr. Secretary Bliss in his opinion said:

"The provisions of section 18, Act of Congress of March 3, 1891, granting the right of way through the public lands and reservations of the United States for irrigation purposes, include Indian reservations, subject to the con-

dition that the location and construction of the ditch or canal shall not interfere with the proper occupation of such reservations by the government for Indian purposes and uses. * * * There is no reason apparent why such reservation should not be subject to the grant of the right of way as any other reservation, and the executive department having jurisdiction of such reservation will determine whether it can be so located, and will withhold or give its approval accordingly."

The intention of Congress is further indicated by the language of the Act of February 15, 1901, 31 Stat. 790, authorizing the Secretary of the Interior to permit the use of rights of way through the "public lands, forest and other reservations of the United States," for electrical plants, canal ditches, and reservoirs used to promote irrigation, with the proviso that such permit shall be allowed within or through any of said parks or any forest or military, Indian, or other reservation only upon the approval of the officers of the department under whose supervision such park or reservation falls. It is true that the licenses authorized to be granted under that act gave no permanent rights, but were made revocable by the Secretary of the Interior; but that fact does not render the act the less instructive as indicating the attitude of Congress toward the question of the grant of rights of way over Indian reservations.

[2] Nor do we think that the Act of May 11, 1898 (30 Stat. 404) was intended to supersede or repeal by implication the act of 1891. It is an amendment to the Act of January 21, 1895, c. 37, 28 Stat. 635 (U. S. Comp. St. 1901, p. 1572), which was entitled "An act to permit the use of the right of way through the public lands for tramroads, canals, and reservoirs, and for other purposes." The benefits of the act of 1895 were limited to "any citizen or any association of citizens of the United States engaged in the business of mining or quarrying or of cutting timber and manufacturing timber." The act contained no provision for rights of way or reservoirs for irrigation purposes, and the rights of way were confined to the public lands of the United States, "not within the limits of any park, forest, military or Indian reservation." Section 1 of the amendment of 1898 adds to the act of 1895 authority to the Secretary of the Interior "to permit the use of right of way upon the public lands of the United States, not within limits of any park, forest, military or Indian reservations, for tramways, canals, or reservoirs, to the extent of the ground occupied by the water of the canals and reservoirs, and fifty feet on each side of the marginal limits thereof, or fifty feet on each side of the center line of the tramroad, by any citizen or association of citizens of the United States, for the purposes of furnishing water for domestic, public, and other beneficial uses." Section 2 provides:

"That the rights of way for ditches, canals, or reservoirs heretofore or hereafter approved under the provisions of sections eighteen, nineteen, twenty, and twenty-one of the act entitled 'An act to repeal timber culture laws, and for other purposes,' approved March third, eighteen hundred and ninety-one, may be used for purposes of a public nature; and said rights of way may be used for purposes of water transportation, for domestic purposes, or for the development of power, as subsidiary to the main purpose of irrigation."

While it might be said that the language of the first section of the act of 1898 is sufficiently broad to include rights of way for the use

of water for irrigation purposes, and to show the intention of Congress that such rights of way should be limited to public lands other than reservations, the second section indicates that there was no intention to supersede the act of 1891, for it recognizes the validity not only of the rights of way that had been approved under the act of March 3, 1891, but of those that thereafter might be approved, and provides that the same may be used for public purposes, for water transportation, and for the development of power as subsidiary to the main purpose of irrigation. In other words, that section adds to the uses for which rights of way had been granted by the prior act, or which might thereafter be granted under its terms, and it shows that there was no intention on the part of Congress to retract the authority that had been conferred by that act to grant rights of way over reservations of the United States. It must be assumed also that the language of that section was adopted with full knowledge of the construction which had been placed upon the act of 1891 by the officers of the Land Department.

[3] But if it were true, as contended by the plaintiff, that the land in controversy is, by treaty, guaranteed to the Indians, and that the Secretary of the Interior had no authority to permit the defendant to use the same for reservoir purposes, the complaint would still be subject to demurrer, for there would remain no ground on which the plaintiff could, in this action, recover compensation for such use thereof, since the Department of Justice has no greater authority than has the Interior Department to legalize such use or to divest the Indians of their land, no authority to do so, and no authority to bring the action having been conferred by Congress, and there being no theory in law upon which compensation may be awarded by the court. In Missouri, Kansas & Texas Ry. Co. v. Roberts, cited above, it was held that the manner, time, and conditions on which the Indians' right of occupancy of the lands of an Indian reservation should be extinguished were "matters for the determination of the government."

The judgment is affirmed.

FEDERAL MINING & SMELTING CO. v. HODGE.

(Circuit Court of Appeals, Ninth Circuit. May 4, 1914.)

No. 2325.

1. MASTER AND SERVANT (§ 274*)—ACTION FOR INJURY TO SERVANT—EVIDENCE.
In an action by an employé against a mining company for a personal injury sustained by plaintiff while riding on a skip being drawn up a shaft, in which defendant pleaded contributory negligence as one ground of defense because of the place where plaintiff was sitting on the skip, evidence was admissible to show that it was customary for the men to ride where he did.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 939–949; Dec. Dig. § 274.*]

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

2. MASTER AND SERVANT (§§ 286, 288, 289*)—ACTION FOR INJURY TO SERVANT —QUESTIONS FOR JURY.

Evidence considered in an action by a servant against the master for a personal injury, and *held* to justify the court in denying a motion by defendant for a directed verdict and in submitting the questions of defendant's negligence and plaintiff's contributory negligence and assumption of risk to 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, 1068–1090, 1092–1132; Dec. Dig. §§ 286, 288, 289.*

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

3. APPEAL AND ERROR (§ 169*)—REVIEW—QUESTIONS CONSIDERED.

An appellate court on a writ of error cannot consider questions which were not presented to nor ruled upon by the trial court, but is limited to errors of law in the rulings of that court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1018–1034; Dec. Dig. § 169.*]

In Error to the District Court of the United States for the Northern Division of the District of Idaho; Frank S. Dietrich, Judge.

Action at law by C. H. Hodge against the Federal Mining & Smelting Company. Judgment for plaintiff, and defendant brings error. Affirmed.

The defendant in error was the plaintiff in an action against the plaintiff in error to recover damages for injuries sustained while in the employment of the latter. The parties will be designated plaintiff and defendant, as they were in the court below. The plaintiff when injured was riding upon the bail and cable of a small skip operated on a hoistway or shaft of the defendant's mine. The hoistway was inclined at an angle of about 45 degrees, and was 500 feet long. The skip was a small car about eight feet long and three feet wide, with four wheels which ran on T-rails. To the upper end of the skipway was attached a bail made of an iron rod about an inch in thickness, bent in a semicircular shape, and extending about a foot or a foot and a half above the skip. To the bail was attached a cable which passed up to the top of the skipway, and over a sheave wheel, and thence down the skipway to the drum of a small hoist situate beneath the skipway. There was no indicator upon the hoist. To signal to the engineer to hoist or lower the skip, a flashlight system was used. It consisted of a number of 16 candle power electric lights, one installed at the hoist, and one at each of the levels, the lights being all connected in one circuit, and flashed by means of a cord provided at each level and within reach of persons riding upon the skip. The cord was used by the men riding on the skip, as well as by those who might be standing at stations, to signal the engineer to stop the skip. When the cord was pulled, all the lights would go out momentarily, and this was the signal to the engineer. To prevent the skip from running into the sheave wheel at the upper end of the hoist, there was placed across the skipway near the wheel a bulkhead or timber about 16 inches in diameter. The skip accommodated five men, and, when six rode upon it, it was necessary for one of them to sit upon the bail, leaning upon the cable with his feet braced upon the top of the skip. Six men had been riding on the skip just before the accident. The plaintiff was sitting on the bail. The skip had stopped at one of the levels and two of the men had gotten off. The remaining men intended to stop at the top level, but the skip was being drawn so fast that a signal to stop there could not be given. The skip was drawn on until it ran into the bulkhead where it stopped, and the plaintiff's leg was pinned between the timber and the skip.

The plaintiff in his complaint alleged negligence of the defendant in failing to have an indicator on the hoist so that the hoistman below could know

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

the location of the skip, and in not having a proper system of signals for stopping the skip; in that the skipway was improperly lighted and the cable was old and uneven in size and did not wind evenly around the drum; and in that no proper rules were provided for the operation of the skip. The defendant denied these allegations of the complaint, and alleged that the plaintiff was injured by reason of his own negligence in riding upon the bail of the skip, in disobedience of the rules, regulations, and orders of the defendant, and in failing to give a signal to the hoisting engineer, that he assumed the risks of the occupation, and that if he was injured he was injured from the negligence of a fellow servant. The jury returned a verdict for the plaintiff for $1,000, and judgment was rendered on the verdict.

Featherstone & Fox, of Wallace, Idaho, for plaintiff in error.

Walter F. Morrison, Jr., of Cœur d'Alene, Idaho, and F. C. Robertson and Fred Miller, both of Spokane, Wash., for defendant in error.

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

GILBERT, Circuit Judge (after stating the facts as above). [1] It is contended that the trial court erred in admitting evidence of the custom of the miners to ride six at a time on the skip, one of them sitting on the bail and cable. The contention relates to evidence which was admitted on the examination of one of the plaintiff's witnesses. On cross-examination he had testified that six men would ride on the skip, one of them upon the bail. On redirect examination he testified that the men had been riding six at a time ever since the skip had been installed. He was then asked:

"Q. Was there any rule there as to how many should go up? A. Never heard of any. Q. Any orders? A. No, sir; never heard of any. Q. Any custom? A. Well, the custom was six. Q. Always?"

To the last question objection was made. The objection was overruled, and an exception was taken, and, although there was no answer to the last question, it appears that when the witness was recalled he testified, over the objection of the defendant, that when six rode it was the invariable custom that one of them rode on the bail. The objection which was made to this testimony was that the defendant was not bound by any such custom. If by that it was meant that proof of such custom was not admissible to show liability on the part of the defendant, the answer is that it was not admitted for any such purpose, but for the purpose of showing the customary method of using the skip, and for the light which it might incidentally afford on the question of the plaintiff's contributory negligence. In that connection the court charged the jury that the mere fact that others may have ridden in the same position which the plaintiff occupied that day was not conclusive of the question of his negligence or want of negligence, and also instructed the jury as follows:

"You should bear in mind that the evidence does not show, at least expressly show, the assent of the company to any particular manner or mode of use of the skip."

We find no error therefore in the admission of the testimony.

Nor was it error to permit one of the witnesses to answer the question: "Was there any bell system for signaling?" The objection to

this testimony was that it had been shown that the flash signal worked perfectly on all occasions except one, and that it was the province of the court to determine whether or not that system was sufficient. The witness had already testified without objection from the defendant that there was no indicator on the hoist. The testimony was but explanatory of the method which was used for signaling the engineer at the hoist.

[2] Error is assigned to the refusal of the defendant's requested instruction that the jury return a verdict in its favor. The request was based upon the evidence which, it was said, showed that there was no actionable negligence on the part of the defendant causing the injury complained of, that the injury was caused by the plaintiff's want of care and negligence, and that he assumed the risk. We think the court committed no error in denying the request and in submitting to the jury the question of the defendant's negligence; the evidence tending to show that negligence consisted in the fact that the defendant maintained and operated the skip without installing an indicator, by means of which the man at the hoist could determine from time to time the exact location of the skip. There was evidence tending to show that the method which was used for signaling to the man at the hoist was defective, and that it was because of its defects that the accident occurred. The defendant used that method in violation of the express provisions of a statute of Idaho of the year 1909, which provided:

"Whenever a steam, electric, gas, air, or water driven hoist is used in handling of men in mines, it shall be equipped with an indicator, placed in clear view of the hoist engineer and geared positively to the shaft or drum of the hoist, and so adjusted with dial or slide as to provide a target or indicator that will at all times show the exact location of the bucket, cage or skip."

And the statute further provided that a copy of the bell signals should be posted before the hoist engineer and on each station.

In support of its contention that the motion for a directed verdict should have been granted on the ground of the plaintiff's contributory negligence, the defendant cites decisions in which it has been held that an employé who rides upon the pilot of an engine in going to and from his work is as a matter of law guilty of contributory negligence, on the ground of the inherent and obvious danger of so doing. But it does not appear that the plaintiff was riding in a place which was necessarily dangerous. The only conceivable danger was that of collision between the skip and the bulkhead. If there had been a proper indicator, so that the hoist engineer could have known where the skip was, that danger would have been eliminated. But the defendant says that the plaintiff ought to have removed himself from the place in which he was riding when the skip stopped on the way to permit two men to get off; that, when they did so, he should have taken the place of one of them on the skip. But the evidence shows that the pause was only momentary, that the men who stepped off the skip were on the lower part thereof, that there was no vacant place adjacent to where the plaintiff was, and that there was nothing to indicate to him that there was greater danger in proceeding as he was than there had been before the skip stopped.

[3] But it is urged that in riding on the bail the plaintiff violated the statute of the state of Idaho, which forbids any miner to ride on the bail of a skip, and that therefore he cannot recover. That suggestion is made for the first time in this court. It was not brought to the attention of the court below by any plea, proof, or request for an instruction or ruling, and no error is assigned to any action of the court below in regard to it. This court can consider only errors of law in the rulings of the lower court. Lesser Cotton Co. v. St. Louis, I. M. & S. Ry. Co., 114 Fed. 133, 140, 52 C. C. A. 95; Jones v. United States, 179 Fed. 584, 592, 103 C. C. A. 142; City of Pittsburgh v. Jonathan Clark & Sons Co., 154 Fed. 464, 467, 83 C. C. A. 262; Hatcher v. Northwestern Nat. Ins. Co., 184 Fed. 23, 25, 106 C. C. A. 225; Walker v. Sauvinet, 92 U. S. 91, 23 L. Ed. 678; Robinson & Co. v. Belt, 187 U. S. 41, 50, 23 Sup. Ct. 16, 47 L. Ed. 65; Mercantile Trust Co. v. Hensey, 205 U. S. 298, 306, 27 Sup. Ct. 535, 51 L. Ed. 811, 10 Ann. Cas. 572.

Nor do we think that the case should have been taken from the jury on the ground that the plaintiff assumed the risk, for it cannot be said that the defect of the device for signaling to the hoist engineer was so patent and obvious that he should be charged with knowledge of it.

The only exception to the charge of the court was to that portion thereof which calls to the attention of the jury the fact that they may take into consideration any custom, which existed on the part of the employés, of riding on the bail. The argument in support of the exception is that such a custom would not exonerate the plaintiff of the charge of contributory negligence, and assumption of risk. The argument is based on a misconception of the instructions as they were given. The court did not instruct the jury that the existence of such a custom would exonerate the plaintiff from the charge of contributory negligence. The instruction on that subject was that:

"The mere fact that others may have ridden in the same position which he occupied that day is not conclusive of the question of his negligence or want of negligence."

And the court submitted to the jury the question whether an ordinarily reasonable man, of ordinary prudence, would have occupied the position he did on the skip, and said that they might take into consideration as another circumstance the fact that some others used it, also the testimony of one of the witnesses who had ridden on the car for three years and had never occupied that position, and added:

"All of these facts and circumstances are to be considered by you in determining whether or not the plaintiff himself acted carelessly and negligently in occupying that position at the time of the accident."

We find no error.

The judgment is affirmed.

KENDRICK STATE BANK v. FIRST NAT. BANK OF PORTLAND.

(Circuit Court of Appeals, Ninth Circuit. May 4, 1914.)

No. 2347.

BANKS AND BANKING (§ 134*)—INSOLVENT BANK—DEPOSITS IN DEFENDANT BANK—SET-OFF—NATURE OF INDEBTEDNESS.

Plaintiff state bank, being largely owned by B., who was its president, and members of his family, was indebted to defendant bank on a certificate of deposit, which, having matured, B. requested defendant to cancel in exchange for B.'s note secured by certain certificates of stock of plaintiff bank, in order that the amount might not appear as a liability of plaintiff bank in its reports to the state bank commissioner. This having been acceded to, the loan was carried in this form, and later increased to $10,000, secured by similar additional stock, in which form it remained until plaintiff bank failed. The interest on the note was paid by plaintiff bank, and defendant was instructed by B. to charge plaintiff with the amount of the note at any time it saw fit. At the time of the failure there was a balance standing to plaintiff's credit on defendant's books of $8,283.09. *Held*, that the loan was an indebtedness of plaintiff bank, and not the debt of B., and hence defendant was entitled to apply plaintiff's deposit balance on such debt.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 353–374; Dec. Dig. § 134.*

Deposits in bank after insolvency, see note to Richardson v. New Orleans Coffee Co., 43 C. C. A. 588.]

Appeal from the District Court of the United States for the District of Oregon; Charles E. Wolverton, Judge.

Action by the Kendrick State Bank against the First National Bank of Portland. Judgment for defendant (206 Fed. 940), and plaintiff appeals. Affirmed.

Stapleton & Sleight, of Portland, Or., and C. L. McDonald, of Lewiston, Idaho, for appellant.

Dolph, Mallory, Simon & Gearin, of Portland, Or., for appellee.

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

ROSS, Circuit Judge. We think a bare statement of the substantial facts in this case, appearing from the written correspondence of the parties and by uncontradicted oral testimony, is enough to show that the judgment of the court below should be affirmed.

The action was brought by the plaintiff in error to recover a balance of $8,283.09, claimed to be its money on deposit with the defendant, which the latter refused to repay upon demand. The record shows that the Kendrick Bank had been, for a number of years prior to the transactions in question, a correspondent of the Portland Bank—J. W. Bradbury being its president and the owner of 23,000 of the 25,000 shares of its stock, and all of the balance, with the exception of sufficient to qualify the other directors, being owned by members of his family. In June, 1910, the Kendrick Bank obtained a loan from the Portland Bank of $5,000 at 6 per cent. per annum interest, giving as security therefor a certificate of deposit in that amount, with

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

certain other collaterals; the money so loaned being deposited with the Portland Bank to the credit of the Kendrick Bank. That loan was extended from time to time at the request of the Kendrick Bank. In December, 1910, the Portland Bank received from the Kendrick Bank these two letters:

"Kendrick State Bank, Kendrick, Idaho, Dec. 6, 1910.

"J. W. Newkirk, Cashier First National Bank, Portland, Oregon—Dear Sir: In reference to our C— D— due Dec. 12th for $5,000.00. Would it be possible for us to get an extension on this for six months? The collections with (us) are at a standstill, and from the outlook I am of the opinion they will continue so until another crop is harvested. We inclose our C— D— for $5,000.00 for the time asked for in case you can grant us the extension asked to replace the one you hold. We are writing you on another sheet for this to be carried in another way, with our reasons for asking for the change. Hoping you will grant us the favor of an extension, and thanking you for your many kindnesses of the past, I am,

"Very truly yours, J. W. Bradbury, Prest."

"Kendrick State Bank, Kendrick, Idaho.

"Kendrick, Idaho, Dec. 6, 1910.

"J. W. Newkirk, Cashier First National Bank, Portland, Oregon—Dear Sir: I am sending herewith my personal note for $5,000, with Kendrick Bank stock for the like amount attached, for your consideration. We would like to have you, in case you can grant us the extension asked in letter regarding our C— D— for $5,000 due Dec. 12, 1910, to have you take this note and pass to our credit in place of the C— D—. The reason for this is: In our statements to the state bank commissioner, which are published, we now have to publish any certificates of deposit to other banks for borrowed money as such, and in a farming community this always causes unfavorable comment and naturally hurts. I feel sure our average daily balance as we have kept it for the past few months will be kept as strong, and we want this extension more to keep our reserve in as good shape as possible. Hoping, if you can carry us for the extension, you will accept this method of loaning us this amount, and again thanking you for your great kindness of the past, I am,

"Yours truly, J. W. Bradbury, Prest."

To the foregoing letters the Portland Bank replied, through its cashier, J. W. Newkirk, as follows:

"December 7, 1910.

"Kendrick State Bank, Kendrick, Idaho—Gentlemen: Answering yours of the 6th instant, we will be pleased to make the extension referred to by you, and will accept the note in lieu of the certificates of deposit. We inclose herein for indorsement two certificates aggregating 30 shares of stock, which you may return to us after procuring the required indorsement.

"Yours very truly, J. W. Newkirk, Cashier."

That arrangement was consummated, and the loan continued, against which the Kendrick Bank drew drafts. In the early part of December, 1911, the Portland Bank, at the request of the president of the Kendrick Bank, increased the loan to the latter bank to $10,000; Bradbury, its president, executing his individual note in that amount to the Portland Bank, and also indorsing to it an additional 50 shares of the stock of the Kendrick Bank as security for the loan, all of the additional money being placed by the Portland Bank to the credit of the Kendrick Bank, and by the latter checked against from time to time. The testimony is to the effect that the loan in each instance was made by the Portland Bank to the Kendrick Bank, and

not to Bradbury individually. Such is the testimony, not only on behalf of the Portland Bank, but is the distinct testimony of Bradbury himself. The interest on the note given by Bradbury to the Portland Bank was paid by the Kendrick Bank, and the Portland Bank was instructed by Bradbury to charge the Kendrick Bank with the amount of the note at any time it saw fit.

Newkirk, the cashier of the Portland Bank, testified, among other things, as follows:

"It is not customary for banks not as a bank to issue their promissory note. This is not the only bank in the Northwest that borrows money; that is an ordinary transaction. They borrow in various ways. Sometimes they will borrow it on certificates of deposit; but if for reasons they don't want to issue their certificate of deposit, the president will give his note, or the vice president, or some of the directors will give their personal notes. Money is not loaned to banks without receiving any paper of any kind, either certificate or note. We always take something, but it is done in the way just outlined."

The uncontradicted evidence also shows that when Bradbury secured the loan from the Portland Bank, and gave his note for the $10,000, he caused a like amount to be credited to himself on the books of the Kendrick Bank, and the Portland Bank to be thereon charged with the same amount, which entries remained at the time of the failure of the Kendrick Bank about the 1st of February, 1912. Prior to that all the collateral except the bank stock held by the Portland Bank had been returned to the Kendrick Bank, and after the failure the bank stock was returned to Bradbury. Subsequently the stock was acquired from Bradbury in the process of reorganizing the Kendrick Bank, together with a check for $10,000 of the amount standing to his credit on its books; the depositors' committee turning over to him certain assets of the bank of questionable value. When the Kendrick Bank failed there was a balance standing to its credit with the Portland Bank of $8,283.09, which the latter bank thereupon took credit for and charged it against the $10,000 note Bradbury had executed to it. It is for that balance that the suit was brought by the Kendrick Bank as for moneys deposited with it subject to check or draft.

As indicated above, we think the court below clearly right in holding that the agreements in question were agreements between the two banks, and not between the Portland Bank and Bradbury as an individual, and that the Kendrick Bank should not be permitted, as against its creditor, to take advantage of the action of its president in obtaining the last loan by a method designed to suppress a full statement of the liabilities of the bank to the state bank commissioner.

The judgment is affirmed.

THE GENERAL PUTNAM.

JOHN E. MOORE CO. v. DELAWARE, L. & W. R. CO.

(Circuit Court of Appeals, Second Circuit. March 10, 1914.)

Nos. 181, 182.

COLLISION (§ 93*)—STEAM VESSELS MEETING—FAILURE TO OBSERVE PASSING AGREEMENT.

A steamship *held* solely in fault for a collision with a meeting ferryboat on the North River at night, and a resulting collision between the ferryboat and a car float in tow, on the ground that, although the two vessels as they approached each other were showing green to green and had properly exchanged signals to pass starboard to starboard, she afterwards ported and went ahead at full speed until she struck the ferryboat, which was proceeding according to the agreement, because she mistook a signal which the latter attempted to give to the tug having the car float in tow, which was coming down the river.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 194, 195; Dec. Dig. § 93.*

Collision, signals of meeting vessels, see note to The New York, 30 C. C. A. 630.]

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

Suit in admiralty for collision by the Delaware, Lackawanna & Western Railroad Company, as owner of the ferryboat Binghamton, against the steamship General Putnam, John E. Moore Company, claimant, with cross-suit by such claimant against the railroad company. Decrees against the Putnam, and her claimant appeals. Affirmed.

The opinion of Hough, District Judge, filed May 13, 1913, is as follows:

By all the testimony the Binghamton and Putnam were approaching each other "green to green." The night was not so dark but that those on the Putnam knew the Binghamton to be a Lackawanna ferryboat bound for Barclay street, while those on the Binghamton recognized the Putnam as a familiar vessel pursuing her usual business.

Not only the business convenience of each vessel, but the law, positively required that they should pass each other starboard to starboard.

Admittedly signals to that effect were exchanged, and admittedly each vessel slightly starboarded her helm in furtherance of the maneuver agreed upon.

Then the Binghamton intended to blow one whistle—to the tug Cowen, which was at the time on her port side, and in my judgment, therefore, hidden from the Putnam. A breakdown of the Binghamton's whistle valve converted the intended one short blast into a long shriek that terminated only when steam was cut off. The fact that this endeavor to blow one short blast was not successful makes no difference at all in this case, for the Putnam assumed that one blast was intended, and further assumed that it was intended for her, and consequently acted upon the assumption that after having agreed to pass starboard to starboard the Binghamton had changed her mind and was proposing to take a course both dangerous and unlawful.

The first question in this case is whether the Putnam was justified in believing that the Binghamton's one blast was intended for her.

The Putnam's excuse for this belief is that there was nothing else in the river to which the Binghamton could have been blowing. Whatever force this excuse has is much weakened by the testimony from the Cowen introduced by

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

the Putnam. According to the report of the Cowen's master and the testimony of her mate, there had been an exchange of whistles between the Putnam and the Cowen before the Binghamton appeared upon the scene.

It of course follows that, if the Putnam and Cowen had been navigating with reference to each other before the Putnam was called upon to exchange signals with the Binghamton, the Putnam's navigators should have appreciated the fact that the ferryboat had come between them and the Cowen, and no excuse at all exists for their asserted belief that there was nothing else in the river to which the Binghamton could be blowing.

I am myself inclined to credit the testimony from the Cowen, but even without that evidence I am of opinion that what the Putnam's navigators thought the Binghamton meant by one whistle was so obviously dangerous and unlawful that they were not justified in acting as they did.

As soon as the Putnam's helm was ported the collision was inevitable, and for the natural results of that collision the Putnam is solely responsible.

It is, however, quite obvious that much, if not most, of the Binghamton's damages resulted from collision with the Cowen's car float, and the second question in the case is whether for that damage she can recover against the Putnam.

I am convinced that when the Binghamton blew one whistle (or intended so to do) she was close aboard the Cowen. In order to avoid the Putnam she edged still closer. In respect of the Cowen, this was bad navigation, and, as against the Putnam, the ferryboat would have been completely justified in maintaining the course upon which she was when the Putnam swung under a port helm.

But the primary fault was that of the Putnam. The blunder of that vessel in assuming that the ferryboat's one whistle was intended for her is inexcusable, and the result of the ferryboat's having changed her course was to ease the blow between the Putnam and herself. The most stringent rule to which the ferryboat may be held is that of the privileged vessel bound to maintain her course and speed; yet even such a vessel has been excused for changing her course where collision appeared inevitable if the course was maintained and the danger was solely due to the fault of another vessel. The Queen Elizabeth, 122 Fed. 406, 59 C. C. A. 345. Here collision was inevitable. The ferryboat's course was changed to the probable—indeed, almost certain—benefit of the Putnam, so far as that vessel's own injuries were concerned; for I believe that if the collision had been more direct the Putnam might have been sunk. If in thus easing the blow and lessening damage on one side, injury arose on the other side, the whole damage was proximately caused by the General Putnam.

It follows, therefore, that the Putnam's libel is dismissed, and that of the Binghamton sustained—in each case, with costs.

This cause comes here on appeal from decrees holding the General Putnam solely in fault for a collision of the Binghamton, first with the Putnam, and afterwards with a car float in tow of the tug John K. Cowen. The collision occurred at night. The Putnam was landing immigrants from Ellis Island at several piers. She had left a pier of the Erie Railroad, and was bound for a pier of the Delaware, Lackawanna & Western Railroad, just south of its Hoboken ferry slips. The Binghamton left one of these slips bound for Barclay street, New York. They sighted each other in ample time, showing green to green. The Putnam gave a two-blast signal, which was answered with a like signal by the Binghamton, and both vessels starboarded slightly. Immediately after this exchange of signals, the mate of the Binghamton called her master's attention to the Cowen and float, which was coming straight down the river on the ferryboat's port beam. The master thereupon pulled his whistle cord to give a single blast to the Cowen, the whistle jammed, and the signal became a prolonged shriek, which continued until after collision. The master of the Putnam, who had stopped his engines, assumed that it was one blast when it began to blow, and at once blew a single whistle, started up full speed and ported, but, seeing the Binghamton keeping on, without apparent change, stopped and backed. The Binghamton tried to get away by hauling towards the New York side, but without success, and the Putnam struck her a little forward of amidships. The Binghamton at once stopped to

avoid raking the bow of the Putnam the whole length of the Binghamton and turning the Putnam over. Each knew the other boat carried passengers. The Binghamton did not back, because of the position of the Cowen, which was close on her port side, and would have struck her amidships with great force, if the latter had then backed. Shortly after the first collision, and while the Putnam was backing clear, the car float collided with the Binghamton.

Herbert Green, of New York City, for appellant.

J. L. Seager, of New York City (A. J. McMahon, of New York City, of counsel), for appellee.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

PER CURIAM. We fully concur with Judge Hough, and affirm on his opinion.

There would have been no collision with either vessel, had the Putnam carried out the navigation she agreed to, which involved no departure from the rules, and was the proper navigation for the Binghamton and the Putnam to agree on when, bearing green to green, they exchanged signals. The Putnam was not warranted in changing her course when she heard the subsequent long blast from the Binghamton. Possibly she might, without fault, have checked her own motion to see what the ferryboat was going to do; but she was in fault, when starboard to starboard was the course the rules indicated and which both had agreed to, in suddenly undertaking to pass port to port.

No doubt the master of the Binghamton should have seen the Cowen sooner. The latter must have been about opposite or a bit below the Binghamton's slip when she came out and turned down river. But this failure to see the Cowen earlier did not cause the trouble. The Binghamton had already overtaken the Cowen, and at her own rate of speed —nearly double that of the tug—could safely have gone on and crossed the Cowen's bow, had not the Putnam got in the way and thereby made it necessary for her to stop and maneuver to make the contact of the Putnam and Binghamton less perilous for the passengers on both boats.

The decrees are affirmed, the first with interest, and a single bill of costs in both suits.

THE HERCULES.

THE IRA M. HEDGES.

(Circuit Court of Appeals, Second Circuit. March 10, 1914.)

No. 105.

TOWAGE (§ 11*)—INJURY TO TOW BY FLOATING ICE—LIABILITY OF TUG.

Merely to tow in the Hudson river while there is floating ice there, even at night, is not negligence, and the owner of a barge who placed her in a tow in February to go up the river, with as much knowledge of conditions as the towing company had, cannot recover for her injury by ice, without negligence on the part of the tug.

[Ed. Note.—For other cases, see Towage, Cent. Dig. §§ 11–23; Dec. Dig. § 11.*]

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

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

Suit in admiralty by John Cook against the steam tugs Hercules and Ira M. Hedges; the Cornell Steamship Company, claimant. Decree for respondents, and libelant appeals. Affirmed.

The following is the statement of the case by Hand, District Judge, with his opinion thereon:

This is a libel in rem for damages caused by an alleged negligent towing on the Hudson river on the 26th of February, 1912. The injured boat was a coal barge which had been delivered to the claimant at its wharf in New York off Fifty-First street some time about midday on that day. She was then put on the end of a tow in charge of claimant's two tugs, Hercules and Hedges, in the first two tiers of which there were three boats; the starboard boat being a lighter somewhat larger than the barges which made up the rest of the tow. The libelant's barge was the starboard barge on the last tiers. The tow left Fifty-First street about 2 p. m., took on three boats at Edgewater, and slowly worked its way up to above Spuyten Duyvil about 9 o'clock p. m. At that time it met a field of ice floating down the river which extended well over to the east shore, but left a space on the west shore to within about 200 feet. The tug starboarded from a course about 500 feet off shore and the tow slowly followed on. The ice continuing down the river struck the libelant's barge before it had wholly straightened out under the starboarding of the tug, thus causing the injuries complained of, from which the barge soon after had to be beached and eventually sank. The libelant during the day had gone to the officers of the claimant in New York and asked some one in charge whether there was any ice in the river. There is some dispute as to the answer he got. He says he was assured there was none, and the claimant says that the answer was that there was none to be seen from Pier 51. As matter of fact the river was closed over as far down as Dobb's Ferry or Hastings, but at the time the tow started no ice could be seen as far off as Yonkers, which was the terminus of the proposed voyage. In fact none was encountered, except the floe in question, until the tow arrived early next morning opposite Yonkers, when there was some difficulty in breaking through the ice on the east shore. The winter had been an unusually severe one, and there had been from time to time much ice in the river.

Opinion.

The only question in this case is whether it was negligent to tow the barge at night during a season of the year when ice was to be expected. As to the danger from ice, I cannot see how that was the tug's fault; the barge need not have joined the tow, and, if it did, it took its own chances. Cook knew as well as the claimant what was the likelihood of ice. He inquired and got answer that there was no ice as far as Yonkers, which was the truth as far as has been shown, and that was all the assurance that he could get. Of course, the claimant could not guarantee that no floe would break loose before the flotilla arrived at Yonkers, and, if he so understood their statement, he is to blame for his mistake. Merely to tow in the Hudson river while there is ice there is not negligent (The Edwin Terry, The William E. Cleary, 162 Fed. 309, 89 C. C. A. 17 [C. C. A. 2d Cir.]), not even though the towing be done at night (The Edwin Terry, 162 Fed. 311, 89 C. C. A. 19). Indeed, those cases are, if anything, stronger for the libelant than the case at bar, because here the libelant delivered the barge for this particular voyage, while in those cases the consent was implied from a standing agreement which covered this period. "People who navigate the Hudson river at 3 o'clock in the morning of a day in February take their chances of meeting ice."

But, the libelant says, this rule has been modified or overruled in Monk v. Cornell Steamboat Co., 198 Fed. 472, 117 C. C. A. 232. At least it was not expressly overruled, although the same judges sat as in the cases of The Ed-

win Terry, supra. Furthermore the tug was absolved as in the case of the Terry. The libelant's reliance is upon Judge Ward's language on page 475 of 198 Fed., on page 235 of 117 C. C. A.: "If a tug tows a boat in her charge through dangerous ice without any consultation with her master or owner, the tug and owners will be solely responsible for damage to the boat. The Rambler (D. C.) 66 Fed. 355. If in such case the tug tow the boat with the consent of her master or owner, the tug and owners will be only liable for half the damages the boat may sustain. The Phœnix (D. C.) 143 Fed. 350. In such case the master or owner of the boat towed agrees to take the risk of towing in the ice; the tug and owners will not be liable for towage in ice, but only for negligence in so towing. The Packer (C. C.) 28 Fed. 156."

The libelant says that in this case like The Phœnix (D. C.) 143 Fed. 350, cited by Judge Ward, damages should be divided. The facts in Monk v. Cornell Steamboat Co., supra, were different from The Edwin Terry, supra, in this important respect: That in The Edwin Terry there was floating ice in the river, while in Monk v. Cornell Steamboat Co. the tug had to break her way through a quarter of a mile of solid ice. So in The Phœnix, supra, the tug had to tow out the barge through a channel 40 feet wide in a completely frozen harbor. The Rambler, supra, while not a case of towing through a channel in solid ice, was one of towing without the owner's knowledge. In The James A. Wright, 3 Ben. 248, Fed. Cas. No. 7,190, the tug attempted to force a passage through solid ice. In The Packer, supra, the tug was breaking through ice when the scow was hurt.

Now it may seem as though the distinction were somewhat trivial between navigating in a river where there is, or might be, floating ice, and moving through a channel in solid ice; yet this is a valid distinction, because otherwise all towing in the Hudson river for four or five months of the year must be condemned as negligent and the tugs held in half damages unless they get an express acceptance of the risk. Such a result seems to me absurd; there doubtless is inherent danger in such towing, but the cost of escaping it is too great, if it involves stopping all winter navigation. A prudent man will undertake some risks when he must stop all gainful use of his property, as the cost of avoiding them. The fraction of negligence has not only the dividend of the probability of danger but the divisor of the pressure of necessity. On the other hand, the difficulties and dangers in breaking through solid ice, or navigating in a narrow channel, are too great to make it in usual circumstances of great value to commerce; people will not do it except under especial stress, and it ought to be done only after some express understanding is reached. So I have no idea that the three judges meant to overrule The Edwin Terry, supra, when they decided Monk v. Cornell Steamboat Co.

There remains the question of the time of starting, which was at 2 o'clock in the afternoon. At that season of the year the sun is up only about 11 hours, and daylight lasts no more than 12. This voyage from New York to Yonkers began at about 2 p. m., and the last boat was not landed till 8 the next morning, about 16 hours in all. Therefore some of the journey had to be undertaken in the dark, if it was to be undertaken at all. Must the tows be made up at daybreak, so as to secure the minimum of daylight for the voyage? Must the boats that make them up be brought there in the night or lie at the wharf all night? Surely these are unreasonable requirements, more than any corresponding security warrants. The custom of towing at night is well known and was a necessary incident of the voyage which Cook accepted when he delivered his barge. He then knew that she could not start until afternoon, and he knew she could not arrive till after dark.

I can see no respect in which the tugs are to blame, and the libel will be dismissed.

This cause comes here upon appeal from a decree of the District Court, Southern District of New York, dismissing a libel filed against steam tugs to recover damages sustained by the tow being brought into collision with floating ice in the Hudson river about a mile above Spuyten Duyvil.

Martin A. Ryan, of New York City, for appellant.
Amos Van Etten, of Kingston, N. Y., for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

PER CURIAM. The decree of the District Court is affirmed, with costs of appeal, on the opinion of Judge Hand.

STONE-ORDEAN-WELLS CO. v. HANSFORD.

(Circuit Court of Appeals, Ninth Circuit. May 11, 1914.)

MASTER AND SERVANT (§§ 293, 295*)—ACTION FOR INJURY TO SERVANT—QUESTIONS FOR JURY—INSTRUCTIONS.

Plaintiff, in defendant's employ in its wholesale grocery store, while standing on a large platform, nine feet above the floor, handing down goods, stepped upon a board which had been put up along one side of the platform and nearly on a level with it as a shelf for light articles, and the breaking of the board caused his fall and injury. *Held*, in an action for the injury, that the instructions given properly submitted to the jury the questions of defendant's negligence in failing to provide stronger support for the shelf, or to guard it by a railing on the edge of the platform, and of plaintiff's assumption of the risk.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1148–1156, 1158–1160, 1168–1179; Dec. Dig. §§ 293, 295.*

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

In Error to the District Court of the United States for the District of Montana; George M. Bourquin, Judge.

Action at law by William A. Hansford against the Stone-Ordean-Wells Company. Judgment for plaintiff, and defendant brings error. Affirmed.

See, also, 201 Fed. 185.

J. H. Johnston, of Billings, Mont., and Gunn, Rasch & Hall, of Helena, Mont., for plaintiff in error.

Nichols & Wilson, of Billings, Mont., for defendant in error.

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

DIETRICH, District Judge. William A. Hansford, the plaintiff, had judgment in the lower court against Stone-Ordean-Wells Company, the defendant, for $5,000, on account of a personal injury received by him while in its employ. In substance his testimony is that he is 30 years old, and that he makes his living by manual labor in various lines; that the defendant is engaged in the wholesale grocery business at Billings, Mont., and that on June 1, 1912, he entered its employ, with duties relating to the receipt and shipment of merchandise. When goods came in he stacked them in an orderly manner upon the floor, and if there were consignments to go out it was his business to wheel them upon the platform. This work took him to vari-

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

ous places in the building in which the defendant carried on its business. In this building there were three floors, and upon the first floor was a platform approximately 20 by 30 feet, at an elevation of about 8 or 9 feet above the floor, upon which were stored certain classes of merchandise. It was reached by a ladder. A board about 10 inches wide and from 10 to 12 feet in length, resting upon two cleats, one at either end, extended along one side of the platform, but on a level about 3 or 4 inches below the level of the platform floor. It appears from the testimony offered on behalf of the defendant that this board had been put in the position described as a sort of a shelf for spices and other light articles of merchandise, but at the time of the accident apparently nothing at all was upon it.

On the afternoon of June 21, 1912, an order for some empty coffee cans was to be filled, and for the purpose of making the shipment the plaintiff went upon the platform and began to hand down the cans to the shipping clerk, who was standing below and upon the side where this board was placed. After he had handed down two or three of the cans, and while in the act of handing down another, apparently he stepped on the board, it broke, and he was precipitated to the floor. There was no railing to prevent him from stepping upon the board, and he alleges that the defendant was negligent, in that it failed to provide a suitable railing, and, further, in that it failed to provide sufficient support for the board. Generally speaking, the defendant's defense was that the board was not intended to be, and was not, a part of the platform, and that in accepting employment the plaintiff must be deemed to have assumed the risk.

The plaintiff, though admitting that he had been upon the platform a large number of times, denied that he had ever noticed, or that he was aware, that the board was lower than the platform, or was not a part thereof, or that it was not sufficiently supported to sustain his weight. There are some circumstances tending to sustain a contrary view, and the plaintiff's own testimony as to the precise manner in which the accident occurred is not entirely satisfactory; but upon the whole, it is clear that the jury were warranted in accepting the plaintiff's statement, and in concluding that he stepped upon the board without knowledge of the fact that it was not a part of the platform and was not substantially supported. There is no question that the board broke, and that he fell and was injured.

The plaintiff's right to recover is controlled by general principles of law so familiar that it is unnecessary even to state them. The only question arises in their application. No complaint is made touching the rulings of the court in the admission of testimony, and while in form there are four assignments of error, when analyzed they really involve but one general question, namely, the correctness of the following instructions, which are the only ones to which exceptions were taken:

"It would appear, from the facts in evidence here, that the defendant's servants placed the board that finally broke, where it was placed, for the purpose of a shelf only. The evidence is such that you could not come to any other reasonable conclusion; but that is not conclusive that the plaintiff would not be entitled to recover, even though he may use that shelf as a standing place. It is for you to determine whether, under all the circumstances, considering

the situation of the elevated platform and this shelf, placed as it was, of the uses to which the platform was placed and the manner in which merchandise was taken down therefrom—it is for you to say whether the defendant ought to have known that this shelf might have been used as a stepping place by its servants when taking down merchandise from the platform to the floor below. Should the defendant have reasonably anticipated that in handing down merchandise its employés were likely to step on the board—if the defendant ought to have known that the board was likely to be so used? If it should reasonably have anticipated that its servants were likely, in handing down merchandise, to make use of this shelf as a stepping place, then it would be held to the same duty to exercise ordinary care to make it reasonably safe for a stepping place, even as though it had originally erected it for that purpose. * * *

"But if you find that with the shelf in the position as it was, and that the master or defendant ought to have anticipated the likelihood of this shelf being used as a stepping place, if you should thus find—further find that in order to avoid and prevent the employés using this shelf as a step, the exercise of ordinary care required the master to place a railing at that point, then you will find that the absence of the railing was negligence, and if it contributed to the injury of the plaintiff or caused his injury, then you would find that the plaintiff was entitled to recover."

This we think is a correct statement of the law, and upon the whole the instructions to the jury were full, fair, and discriminating. The issues submitted were eminently questions for the jury, and their finding should not be disturbed.

The judgment will be affirmed, with costs to defendant in error.

THE MELVILLE.

(Circuit Court of Appeals, Ninth Circuit. May 4, 1914.)

No. 2362.

SHIPPING (§ 168*)—CARRIAGE OF PASSENGERS—STATUTORY PENALTY FOR OVERLOADING.

While a tug was taking on a small invited party to witness a launching, other people who were waiting on the pier climbed on the boat and, refusing to leave, were taken a quarter of a mile to the place of the launching and return. They were charged no fare. The entire number on board exceeded that named in the boat's certificate of inspection. *Held*, that under the circumstances the case was not within the meaning of Rev. St. §§ 4465, 4499 (U. S. Comp. St. 1901, pp. 3046, 3060), and the boat was not subject to the penalty imposed by the latter section for overloading.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 556–562; Dec. Dig. § 168.*]

Appeal from the District Court of the United States for the District of Oregon; Charles E. Wolverton, Judge.

Suit in admiralty by the United States against the steamer Melville; the Callender Navigation Company, claimant. Decree for respondent, and libelant appeals. Affirmed.

Clarence L. Reames, U. S. Atty., and Robert R. Rankin, Asst. U. S. Atty., both of Portland, Or., for appellant.

G. C. Fulton, of Astoria, Or., 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 VAN FLEET, District Judge.

ROSS, Circuit Judge. Sections 4465 and 4499 of the Revised Statutes are as follows:

"Sec. 4465. It shall not be lawful to take on board of any steamer a greater number of passengers than is stated in the certificate of inspection; and for every violation of this provision the master or owner shall be liable, to any person suing for the same, to forfeit the amount of passage money and ten dollars for each passenger beyond the number allowed."

"Sec. 4499. If any vessel propelled in whole or in part by steam be navigated without complying with the terms of this title, the owner shall be liable to the United States in a penalty of five hundred dollars for each offense, one-half for the use of the informer, for which sum the vessel so navigated shall be liable, and may be seized and proceeded against by way of libel in any district court of the United States having jurisdiction of the offense."

To recover the penalty of $500 provided for in the section last quoted, the government libeled the steamer in question, which is a large steam tug, for taking on board and carrying, on a certain stated occasion, more passengers than permitted by its certificate of inspection, which authorized the carrying thereon of 75 passengers only. On the hearing of the evidence given on behalf of the respective parties, the court below dismissed the libel, and the government has brought the case here.

The material facts are undisputed, and the merits of the matter may be fairly judged by this extract from the testimony of the witness Callender, who was the secretary and general manager of the claimant company:

"Q. I wish you would detail to his honor here the facts pertaining to the taking and carrying of these passengers with which you are charged. Just explain it. A. Well, I invited a few of my own friends in Astoria to make that trip, to go up and see the launching of this big ship. As long as it had been the first one that was launched in the Columbia river, it was quite an event. I think there were about 12 or 15 of us took the boat in the morning, and figured on getting up there possibly an hour before the launching—figured on looking around the mill. We were a good deal longer coming up than we figured on. There was a pretty good current in the river. When we arrived at St. Helen's dock, was going by there, we realized it was just about the time the ship was to be launched. Going by the wharf there, we saw quite a number of people on the wharf, and we heard somebody hallooing. And I looked over there and saw several of my friends there—Mr. Morton, Mr. Yeon and Mr. Brady, and Mr. McCormack, and two or three people from Astoria, Mr. Halterman, and several others. So I sung out to the captain to swing around and make a landing, and we would pick those people up. As we went in there was a wide slip, possibly 10 or 15 feet wide. As we started to go in there, these people began to jump into that slip. We ran the nose of the boat in there, and Mr. Morton was pretty well back of the crowd with his folks, and in trying to get them through the crowd, and get them down there, of course everybody began to jump aboard. I tried to hold them back. They all hallooed there was no other boat—'We can't get up there.' In our efforts to get Mr. Yeon and Mr. Brady and Mr. Morton and the ladies aboard, this crowd kept piling in. I didn't realize there was anybody coming on top of the boat till, after we started to back away, I saw a whole crowd of them on the boat, jumping over on top of our house. Of course, we tried to stop them just as soon as I saw the rush. But when they started to crowd into the slip there like a lot of cattle, people on the back end of the slip shoving the front ones aboard the boat, if the boat had pulled away very suddenly

it would have pulled them all overboard. As soon as we stopped and got our boat away, we backed right away. We didn't have lines out or anything else. We just had her nose up against the dock. We stopped and backed her away as soon as we could, till they realized they was going to get overboard, then they hallooed, 'Quit.' We proceeded up close to the dock and along close to the log rafts. I don't think any of the time we was more than two or three lengths of the boat away from the shore. We tied up to the log raft right across from where the launching took place. As soon as the steamer was in the water we went right back to the dock and put this crowd off. I don't think it was over a quarter of a mile from the wharf up to where the ship was launched. It possibly might be a little more, but I don't think it is.

"(Examination by the court:)

"Q. You took the same crowd back that went over? A. Yes, the same crowd went back. I don't think anybody got off. Of course, there were a few people, after the boat tied up to the log raft, got off. I did. I was in the lumber business. While I was waiting there for the launching, I got off on the raft, and several people got off.

"Q. Were there any people on the raft? A. I think there were. There was a lot of these little fishing boats and pleasure boats, and two or three rafts of logs all up and down the slough, quite a number of boats tied up there, and people walking around on the raft, as I remember.

"Q. Do you remember whether any more people got on your boat? A. No, I am satisfied there wasn't anybody got on there. I don't think they did.

"Redirect examination:

"Q. Was there any charge made for any of these people? A. No charge at all. We were simply out for a picnic.

"Q. Would you have permitted these people to have gotten aboard could you have avoided it? A. I should certainly not. I didn't want them aboard there. We had a little party of our own, and we had some refreshments served in the cabin there, some sandwiches and things. We were just having a little party. I didn't want any strangers aboard the boat. I didn't know these people."

The fact is undisputed that more than a hundred people got on the tug and were carried by it, under the circumstances stated; but we agree with the court below that those circumstances were such that the case is not within the meaning of the prohibition contained in section 4499 of the Revised Statutes, above quoted, which contemplates, in our opinion, the voluntary taking on board any more than the permitted number of passengers, and not a case of the nature here presented, which conclusion finds support in the cases of The Nelson (D. C.) 149 Fed. 846, and The Geneva (D. C.) 26 Fed. 647.

The judgment is affirmed.

TAYLOR v. DELAWARE & E. R. CO. et al.

(Circuit Court of Appeals, Second Circuit. April 21, 1914.)

No. 41.

RECEIVERS (§ 158*)—MORTGAGES—OPERATION EXPENSES—PAYMENT—PRIORITY.

Where there had been no diversion of income by a railroad company to pay interest to bondholders, but the expenses of operating the road during receivership exceeded the income by $84,000, which was necessarily paid out of the corpus of the estate, the fact that the receivers paid various sums for rental of equipment, for wages, station rentals, and balances due connecting lines incurred within four months prior to receiver-

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

ship, and to replace worn-out ties and rails, and for maintenance necessary to a continued operation of the road by the receivers, did not entitle claimant to priority of payment for coal furnished the railroad company within four months prior to the receivership in advance of the lien of the first mortgage.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 301–306; Dec. Dig. § 158.*]

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

Action by Clyde C. Taylor against the Delaware & Eastern Railroad Company and another. Application by the Shawmut Coal & Coke Company for priority of payment for coal furnished the railroad company prior to the appointment of receivers as a prior claim to the lien of the first mortgage. From a decree denying priority, claimant appeals. Affirmed.

F. W. Frost, of New York City, for appellant.

Carlisle J. Gleason, of New York City, for appellees.

Before COXE, WARD, and ROGERS, Circuit Judges.

WARD, Circuit Judge. The Delaware & Eastern Railroad Company was the owner of a railroad about 45 miles long, which was leased to the Delaware & Eastern Railway Company in consideration of that company's paying all expenses of maintenance and operation and the interest on bonds aggregating $1,000,000, secured by a mortgage on the property. The road was always operated at a loss.

February 25, 1910, the company being insolvent and interest on the bonds in arrear for 18 months, the same persons were appointed receivers of both companies. The railroad was in a very bad condition, wages for two months, moneys due connecting roads for station rentals and freight interchanges and bills for car repairs were unpaid.

March 4, 1910, the court authorized the issuance of receivers' certificates to pay these items and certain estimated expenses for the operation of the road by the receivers during the month of March, which certificates were to be a primary obligation of the railway and a first lien upon the property of the railroad company.

August 16, 1911, the property was sold for $150,000 under a decree foreclosing the mortgage to a reorganization committee of the bondholders. This is the only fund to which creditors of the railway company or of the railroad company can resort for payment of their claims.

January 16, 1912, the accounts of the receivers were approved and they were ordered to pay their own fees, the fees of their attorneys and the balance to a special master appointed in the foreclosure suit to report whether any claims of creditors were entitled to priority over the first mortgage.

The Shawmut Coal & Coke Company had delivered coal to the railway company necessary to its operation within four months prior to the receivership at the price of $2,041.69. The special master reported to the effect that no claims against either company had priority

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

to the lien of the first mortgage, the District Judge confirmed the report, and the coal company took this appeal.

There was no direct diversion of income to pay the interest to the bondholders, but the appellant contends that surplus income had been applied by the receivers to permanent improvements of the property for the benefit of the bondholders, and to that extent the lien of the mortgage should be displaced. Southern Railway Co. v. Carnegie Steel Co., 176 U. S. 257, 20 Sup. Ct. 347, 44 L. Ed. 458. On the contrary, the special master and the court below have found that the expenses of operating the road during the receivership exceeded the income by some $84,000, which had to be paid out of the corpus of the estate.

The appellant contends that there should be deducted from the alleged expense of operation the following sums:

$34,406 paid by the receivers on account of rental for cars, because this increased the security of the bondholders. This is true, but car equipment was essential to the operation of the road, and the special master has reported that if this rental had not been paid the receivers would have been obliged to rent cars elsewhere at about an equal expense.

$15,908.17 paid on account of wages, station rentals, and balances due connecting lines incurred within four months prior to the receivership. It is said that these charges were entitled to no greater consideration than was the bill for coal. This may be so, but it is entirely within the discretion of the court to determine which, if any, of such claims shall be paid by receivers, and it is those which are not only necessary, but whose *payment* is necessary to keep the road a going concern, which should be paid out of the corpus of the property. Gregg v. Metropolitan Trust Co., 197 U. S. 186, 25 Sup. Ct. 415, 49 L. Ed. 717. It is to be presumed that the court found payment of these claims necessary.

$10,251.48 spent by the receivers to replace worn-out ties and rails and $43,949.16 for maintenance. It is said that these outlays enhanced the value of the mortgaged premises. While this is true, these expenses have been found to have been necessary for the continued operation of the road by the receivers, and even if they were deducted there would still be a deficit in operation of some $30,000.

We agree with Judge Hand that there was no surplus income in the hands of the receivers out of which the appellant's claim could have been paid. The court had no power to charge the claim on the corpus of the property to the prejudice of the mortgagee. Fosdick v. Schall, 99 U. S. 235, 253, 25 L. Ed. 339; Gregg v. Metropolitan Trust Co., supra.

It was also suggested that the appellant continued to supply coal to the receivers upon the tacit understanding that they would pay for that supplied before the receivership. Even if this be material, the proofs do not establish it.

The decree is affirmed.

In re JOROLEMON-OLIVER CO.

In re UNITED SHOE MACH. CO.

(Circuit Court of Appeals, Second Circuit. April 7, 1914.)

No. 212.

BANKRUPTCY (§ 314*)—DEBTS PROVABLE—TIME OF ACCRUAL.

Under a lease of machinery providing that if the lessee became bankrupt it might be terminated at the lessor's option, that upon the expiration of the lease the lessee should deliver the machinery to the lessor in good condition and pay such sum as might be necessary to put it in condition suitable for leasing to another lessee, and also providing for the payment of a fixed sum for deterioration and for a fixed sum for each machine, which might be reduced if the lessee had acted to the lessor's satisfaction, claims for repairs, freight, and return charges on machines, the lease of which was not terminated until after the adjudication in bankruptcy, were not provable under Bankr. Act July 1, 1898, c. 541, § 63a, subds. 1, 4, 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, or which are founded upon a contract express or implied.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 469–473, 478, 483–487, 489, 490; Dec. Dig. § 314.*]

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

On appeal from an order of the District Court for the Western District of New York affirming an order of the referee in bankruptcy reducing the claim of the appellant to $126.14 and allowing it at that amount. Affirmed.

Walter Bates Farr and Nelson B. Todd, both of Boston, Mass., for appellant.

Isaac Adler, of Rochester, N. Y., for trustee in bankruptcy.

Before LACOMBE, COXE, and WARD, Circuit Judges.

COXE, Circuit Judge. The United Shoe Machinery Company proved a claim against the estate of the bankrupt—the Jorolemon-Oliver Company aggregating $846.50. Objection being made, a part of the claim amounting to $126.14 was allowed and the remainder was withdrawn or disallowed. The items in controversy which were disallowed are as follows:

Repairs on returned machines	$101 40
Freight on returned machines	54 23
Return charges on General Department machines	155 00
Return charges on Goodyear machines	346 67
	$657 30

The appellant assigns as error the disallowance of these items.

The machines in question were held by the bankrupt under leases from the appellant and, on February 5, 1913, shortly after the adjudication in bankruptcy the appellant served notice upon the trustee in bankruptcy terminating the leases and the machines were surrendered, and

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

returned to the appellant. These leases cover 31 pages of the record, they are exceedingly voluminous and verbose and, like most documents of such prolixity, fail to make intelligible an agreement which could have been more clearly stated on a single printed page. The attempt, whether in a contract or a statute, to cover every conceivable future contingency, is usually a failure.

In paragraph No. 1 of the General Department lease it is stated that if the lessee becomes a bankrupt the lease may be terminated at the option of the lessor and the possession and control of the leased machines shall revest in the lessor free of all claims. Other paragraphs provide that the term of the agreement shall be for 17 years, with the right reserved in the lessor to terminate it for breach or default. If upon the expiration of the full term the lessor does not request a return of the machinery, the terms of the agreement shall be extended indefinitely. It is further provided that upon the expiration of the leases the lessee shall deliver the leased machinery to the lessor in good condition and shall pay to the lessor such sum as may be necessary to put the machine in condition suitable for leasing to another lessee.

The leases also provide for the payment of a fixed sum for deterioration of the leased machinery and for the payment upon the expiration of the lease of a fixed sum set opposite the name of the machine provided, however, that if the lessee has behaved himself to the satisfaction of the lessor the amount so fixed may be reduced.

At the time of filing the petition in bankruptcy none of these claims was enforceable against the Jorolemon Company. The bankruptcy did not terminate the leases, ipso facto, for the right to terminate was vested in the lessor and could be exercised or not at its option. They were not in fact terminated until February 5, 1913, after the adjudication in bankruptcy. The claims under the leases were not "founded upon an open account or upon a contract express or implied," "absolutely owing at the time of the filing of the petition." Section 63a, subds. 1 and 4, of the act.

There was nothing due and owing when the petition was filed. There might or might not be such a debt in the future, depending upon various contingencies, but it is enough that there was no provable debt when the petition was filed. We think the situation is fully covered by the decision of this court in Re Roth and Appel, 181 Fed. 667, 104 C. C. A. 649, 31 L. R. A. (N. S.) 270. See also Colman v. Withoft, 195 Fed. 250, 115 C. C. A. 222; Zavelo v. Reeves, 227 U. S. 625, 33 Sup. Ct. 365, 57 L. Ed. 676.

The order is affirmed.

JOSEPHS v. POWELL & CAMPBELL.

(Circuit Court of Appeals, Second Circuit. April 28, 1914.)

No. 170.

BANKRUPTCY (§ 407*)—DISCHARGE—OBJECTIONS—FALSE STATEMENTS OF ASSETS FOR CREDIT.

One who, to obtain credit, stated that his stock at cash price was worth $7,000, and was insured for $5,500, and that he had $100 cash on hand, that his liabilities on open account were $2,500, and that he owed for borrowed money $250, while as a fact he owed his father about $10,000, and to other relatives sums aggregating over $2,000, so that he was hopelessly insolvent, was guilty of making a false statement, barring on objections of creditors his discharge in bankruptcy, under Bankr. Act July 1, 1898, § 14b (3), as added by Act Feb. 5, 1903, c. 487, § 4, 32 Stat. 797 (U. S. Comp. St. Supp. 1911, p. 1496), declaring that a bankrupt who has made materially false statements to obtain credit shall not receive a discharge, though two years later the undisclosed debts had been paid or released, and though the bankrupt, when making the statement, believed that his relatives would not press him for payment.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 729–731, 737, 738, 740–751, 758, 760, 761; Dec. Dig. § 407.*]

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

In the matter of Isaac Josephs, bankrupt. From an order of the District Court (205 Fed. 548), granting a discharge to the bankrupt, Powell & Campbell appeal. Reversed.

William Lesser, of New York City, for appellants.

George B. Class, of New York City, for bankrupt.

Before LACOMBE, COXE, and WARD, Circuit Judges.

COXE, Circuit Judge. The issue presented by the bankrupt's petition for a discharge, and the creditor's specifications in opposition thereto, were referred to a special commissioner. After taking proof he reported that the first specification, which charged the bankrupt with having made a false statement of his financial condition for the purpose of obtaining credit, was sustained by the proof and that the other specifications—two in number—were not sustained. Thereafter the District Judge permitted the bankrupt to obtain releases from the debts which he had failed to include in the statement of his financial condition which debts were due to his father and other relations. These releases having been subsequently filed, the court made an order granting a discharge to the bankrupt. We appreciate the motive of the District Judge in making an exception of this case because of its somewhat unusual circumstances, but we fail to perceive how this can be done without ignoring the provisions of the Bankruptcy Act. To do so will establish a precedent which will enable a bankrupt to avoid the consequences of a false statement by showing that though false at the time it was made, it might have been made truthfully several months thereafter. The law—section 14b (3)—explicitly says that a

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

bankrupt shall not receive a discharge if he has made a materially false statement in writing for the purpose of obtaining credit.

In June, 1911, this bankrupt made a statement for the purpose of obtaining credit, in which he stated that his stock, at cash price, was worth $7,000 and was insured for $5,500. He also stated that he had $100 cash on hand and that his liabilities on open account were $2,500 and that he owed for borrowed money $250.

The commissioner finds that at this time he owed his father about $10,000 and to other relatives sums aggregating over $2,000. In other words, he was hopelessly insolvent and could not have paid his creditors 50 cents on the dollar. How can we overlook so plain a case of false representations? Were not those who were asked to extend credit to the bankrupt entitled to know that he owed $12,000 to his relatives? Is it likely that any one would have extended credit had he known that the bankrupt was insolvent to the extent of $7,000? There is no doubt that the bankrupt made a materially false statement for the purpose of obtaining credit. The moment this was done the bar to a discharge, if the creditors chose to assert it, was absolute. The bankrupt had done an act which prevented his obtaining a discharge. The fact that two years afterwards these debts had been paid or released or that when the statement was made the bankrupt believed that the relatives to whom he owed money would not press him for payment in no way mitigates the falsity of the statement when it was made.

Being convinced that the statement of June 9, 1911, which was given to obtain credit, was materially false, we think the discharge should be refused.

The order granting the discharge is reversed with costs.

In re BAAR.

(Circuit Court of Appeals, Second Circuit. April 7, 1914.)

No. 214.

BANKRUPTCY (§§ 181, 188*)—CHATTEL MORTGAGES—VALIDITY—FRAUD.

Where a chattel mortgage, executed by a mortgagor subsequently adjudged a bankrupt, was valid under the laws of the state where made, because duly filed, it was good as against the trustee in bankruptcy, under Bankr. Act July 1, 1898, c. 541, § 67 (d), 30 Stat. 564 (U. S. Comp. St. 1901, p. 3449), unless it was given and accepted with intent to hinder, delay, and defraud creditors, and the mere fact that the mortgagee, giving full consideration, knew or stipulated that part of the proceeds of the loan should be applied to relieve a corporation of which he was president and a relative of liability as accommodation indorsers on the notes of the bankrupt, did not invalidate the mortgage, though a preference resulted, because of want of actual fraud on the part of the bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 259, 260, 270, 271, 273, 274, 286–289, 291–295; Dec. Dig. §§ 181, 188.*]

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

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

In the matter of bankruptcy proceedings of Jacob Baar, bankrupt. From an order adjudging void a chattel mortgage executed by the bankrupt to Solomon Baar, the latter appeals. Reversed.

D. C. Myers, of New York City, for appellant.
H. C. Glore, of Brooklyn, N. Y., for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. Jacob Baar, the bankrupt, had carried on for many years the fat rendering business under the name of the Long Island Soap Works. On or about July 3, 1912, Baar Bros., Incorporated, of which his brother Solomon Baar was president, had indorsed as an accommodation two of the bankrupt's notes, each for $250, one due September 3, and the other October 3, 1912, which were discounted by the Greenpoint National Bank. The bankrupt had also discounted his note for $500, indorsed by his son Sigmund, due August 9, 1912, in the Broadway Bank of Brooklyn, and another for $1,000, indorsed by his son, due September 26, 1912, in the Greenpoint National Bank.

August 3, 1912, being in financial straits, he applied to his brother Solomon for a loan of $2,500, to be secured by a chattel mortgage on the horses, wagons, tools, and machinery used in his business. The special commissioner and the District Judge have found that Solomon Baar stipulated that the loan should be applied in payment of the notes aforesaid and that he knew Jacob was in financial difficulties. The chattel mortgage was duly recorded on that day, the $2,500 paid over, and some $2,000 of it went to take up the notes in bank before their maturity.

September 17th, an involuntary petition in bankruptcy was filed, and subsequently Jacob Baar was adjudicated a bankrupt. The trustee obtained an order upon Solomon Baar to show cause why the chattel mortgage should not be declared null and void against creditors, because made within four months of the filing of the petition and with the intent of hindering, delaying, and defrauding creditors. Solomon Baar submitted to the jurisdiction of the court, and it was so proceeded that the mortgage was declared null and void. This appeal is from that order.

The mortgage was valid under the law of the state of New York against creditors, because it was duly filed in accordance with article 10 of the Lien Law (Consol. Laws N. Y. c. 33). As such it is good against the trustee in bankruptcy under section 67 (d) of the Bankruptcy Act, unless it was not accepted in good faith or was in fraud of the act. It could not be set aside under section 67 (e) unless it was given and accepted with the intent of hindering, delaying, and defrauding creditors. Solomon Baar gave a full present consideration. If he knew or even stipulated that part of the proceeds of the loan should be applied to relieve the corporation of which he was president and his nephew of liability as accommodation indorsers on the bankrupt's notes, there was nothing fraudulent in that. The payment was a preference of the banks, and so of the indorsers; but the bankrupt had at common law and under the statute of Elizabeth a right to prefer any

bona fide creditor. The trustee could recover the payments under section 60, if the banks received them having reasonable cause to believe that they were intended as preferences; but to invalidate the mortgage under section 67 (e) a preference is not sufficient. Actual fraud on the bankrupt's part must be shown. Van Iderstine v. National Discount Co., 174 Fed. 518, 98 C. C. A. 300; Coder v. Arts, 213 U. S. 223, 241, 29 Sup. Ct. 436, 53 L. Ed. 772, 16 Ann. Cas. 1008.

No such fraud being shown, the order is reversed.

THE BERN.

(Circuit Court of Appeals, Second Circuit. March 10, 1914.)

Nos. 185, 186.

TOWAGE (§ 11*)—INJURY TO TOW BY FLOATING ICE—LIABILITY OF TUG.

A tug, which started across the Hudson river in the daytime with a coal laden barge in tow alongside projecting ahead, *held* liable for injury to the barge by floating ice on the ground that when the ice was seen she should have placed the barge behind her on a hawser, instead of which she used it to push a way through the ice.

[Ed. Note.—For other cases, see Towage, Cent. Dig. §§ 11–23; Dec. Dig. § 11.*]

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

Suits in admiralty by Bernard McLain and by the W. C. Mason Company against the steam tug Bern; the Philadelphia & Reading Railway Company, claimant. Decrees for libelants, and respondent appeals. Affirmed.

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

Admittedly the Bern took libelant's barge through heavy ice, and, since it was broad daylight, it was well known that the towage was to be of this nature.

This statement about heavy ice is taken from the Bern's report to the local inspectors. Admittedly, the tug went at slow speed, and according to her engineer, stopped two or three times before the barge began to leak. This is corroboration, not only of the heaviness of the ice, but of the expected difficulties of navigation.

The engine was also backed, although there was no vessel in the neighborhood requiring this manœuvre. Why the engine was backed is explained by the deck hand, who says that "we backed to let the bow get easy into the ice" (this means the bow of the barge).

The result is that a very powerful tug of some 600 horse power, 113 feet long by 29 feet beam, and drawing 13 feet, used a laden scow as a ram with which to push through very heavy ice. The natural inquiry is: Why was not the barge put astern and the tugboat used to clear the ice?

The master of the tug gave his theory on this matter, expressing the opinion that, owing to the distance between his towing bitts and the stern of his tug, any tow astern, even on the shortest of hawsers, would sheer and yaw, and be quite as much exposed to injury by ice as if her bow were sticking out ahead.

In the first place, this explanation will not stand mathematical tests, and, in the second place, I do not think it is the true explanation; for the master

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

elsewhere said that he put the boat alongside "so I could handle her and land her proper." In other words, it is admittedly much easier to handle a tow in a slip and land her when she is alongside, than when upon a short hawser. This was the real reason for not towing astern.

Further, I am of the opinion that the expert testimony is against the Bern. His own expert, Capt. Knott (a man whose experience is very great, if not unsurpassed), did not uphold the view advanced by claimant. It is not necessary to pass upon the story of the barge master to the effect that he asked to be towed astern. In my opinion, reasonable prudence demanded that, at the time and place of disaster, the slower, more inconvenient, but safer method of towage should have been adopted.

Decrees for libelants.

These causes come here upon appeal from decrees of the District Court, Southern District of New York, holding the tug Bern liable for damages sustained by a coal scow and its cargo, while being towed through ice.

Armstrong & Brown, of New York City (P. M. Brown, of New York City, of counsel), for appellant.

Hyland & Zabriskie, of New York City (N. Zabriskie, of New York City, of counsel), for McLain.

James S. Macklin, of New York City (De Lagnel Berier, of New York City, of counsel), for Mason Co.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

PER CURIAM. Judge Hough has sufficiently discussed the evidence in the case and we concur with his findings and conclusion. The case of Monk v. Cornell Steamboat Co., 198 Fed. 472, 117 C. C. A. 232, which has been referred to in argument, treats of the duty of tug and tow when the situation as to ice is fully understood before starting. We do not think the tug in this case was at fault in starting from the stakeboat with the scow alongside. However, when she got over towards the New York shore, she found heavy ice and should then, if she decided to go on, have dropped the scow astern.

The decrees are affirmed with interest and a single bill of costs.

FULLERTON v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. May 4, 1914. Rehearing Denied May 18, 1914.)

No. 2341.

CRIMINAL LAW (§ 678*)—TRIAL—INDICTMENTS.

Where two indictments were returned against accused for violating the White Slave Act (Act Cong. June 25, 1910, c. 395, 36 Stat. 825 [U. S. Comp. St. Supp. 1911, p. 1343]), but he had been arraigned and had pleaded only as to one of them, which was handed to the jury on their retirement to consider their verdict, it sufficiently appeared that the trial was had on that particular indictment, and there was no error in requiring accused to go to trial without an election by the district attorney as to which in-

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

dictment he would move for trial, or an order consolidating the two indictments.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1580–1583; Dec. Dig. § 678.*

Consolidation of and trial of indictments together, see note to Dolan v. United States, 69 C. C. A. 287.]

In Error to the District Court of the United States for the First Division of the Northern District of California.

Earl Fullerton was convicted of violating the White Slave Act, and he brings error. Affirmed.

Sea & Fallon, of San Francisco, Cal., for plaintiff in error.

John W. Preston, U. S. Atty., of San Francisco, Cal.

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

GILBERT, Circuit Judge. Two indictments were found against the plaintiff in error, under the act of June 25, 1910, known as the "White Slave Act." The indictments were numbered 5,262 and 5,274. The first was filed April 17, 1913, and the second was filed May 1, 1913. The following is stated as ground for reversing the conviction on indictment 5,274: That on June 13, 1913, while both indictments were in full force and effect, the plaintiff in error was brought to trial; that at that time no mention was made of the indictment under which he was to be tried; that when the jury retired to consider their verdict, the court handed them indictment No. 5,274, and they thereafter brought in a verdict of guilty on that indictment. A motion to set aside the verdict and a motion for a new trial were denied, and the plaintiff in error was thereafter sentenced.

There are assignments of error, all of which raise substantially the same question—whether it was error to go to trial in the absence of election by the district attorney, or an order consolidating the two indictments. We find nothing in the record of the court below to show that error was committed. Although there were two indictments pending, the only indictment on which the plaintiff in error was arraigned, and to which he pleaded, was indictment 5,274. This occurred on May 5, 1913. The first indictment is nowhere mentioned in the proceedings of the court below. The plaintiff in error could not have been tried on that indictment without arraignment and plea. When the case was called for trial, he must have known that he was about to be tried upon the indictment to which he had entered his plea of "not guilty." He made no suggestion of want of knowledge on that subject, and made no objection when the court handed to the jury indictment No. 5,274. We find no merit in the writ of error.

The judgment is affirmed.

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

RUSSO-CHINESE BANK v. NATIONAL BANK OF COMMERCE OF SEATTLE, WASH.

(Circuit Court of Appeals, Ninth Circuit. May 4, 1914.)

No. 2182.

On motion for rehearing. Affirmed.
For prior opinion, see 206 Fed. 646, 124 C. C. A. 434.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

PER CURIAM. Further consideration of this case satisfies us of the correctness of our decision when it was last under consideration (206 Fed. 646, 124 C. C. A. 434), and for the reasons there given the judgment is affirmed.

CROWE v. OSCAR BARNETT FOUNDRY CO.

(Circuit Court of Appeals, Third Circuit. March 26, 1914.)

No. 1839.

PATENTS (§ 328*)—INFRINGEMENT—GRATE-BAR.
The Crowe patent, No. 668,495, for a grate-bar, construed, and *held* not infringed.

Appeal from the District Court of the United States for the District of New Jersey; Joseph Cross, Judge.

Suit in equity by Paul L. Crowe against the Oscar Barnett Foundry Company. Decree for defendant, and complainant appeals. Affirmed.

For opinion below, see 206 Fed. 164.

W. P. Preble, of New York City, for appellant.
Russell M. Everett, of Newark, N. J., for appellee.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

BUFFINGTON, Circuit Judge. Paul L. Crowe, the plaintiff, on February 19, 1901, obtained patent No. 668,495 for a grate and bar therefor. He filed this bill against the Oscar Barnett Foundry Company, charging infringement thereof. On final hearing the court below, in an opinion reported at 206 Fed. 164, held defendant did not infringe. Thereupon the plaintiff took this appeal.

The claims in question are as follows:

"1. A grate-bar comprising a body portion having a strengthening-web beneath it, a fire-bearing surface comprising a series of teeth formed by vertical corrugations upon the opposite sides of the bars, and depending single hooks near both ends of the grate-bar, said hooks having chain-engaging portions extending longitudinally of the bar, and adapted to engage the links of ordinary chains for forming a traveling grate.

"2. A grate-bar for traveling grates comprising a body portion, laterally-extending fingers forming a fire-bearing surface, a depending projection near each end of the bar upon the under side thereof terminating respectively in

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

a laterally-projecting finger forming chain-engaging hooks, the hooks at both ends extending in one direction, substantially as described."

It will be noted that these claims are for a single article, viz., a grate-bar. For while, as stated in the claims, the contour of the bar is such as to adapt it "to engage the links of ordinary chains," yet a chain is not a part or element of the claim. Indeed, the claim is not a combination of separate elements, but is for a single article combining in itself several individual features. Turning, then, to the specification and claims, we find that among those individual features the grate-bar has "depending single hooks near both ends of the grate-bar." Further:

"The body-portions of the grate-bars are provided at their ends with depending portions *5 5*, provided with laterally-extending pins *6 6*. These depending portions *5* and the pins *6* form hooks near each end of the bars for engaging the chains used in connecting up the traveling grate. * * * The alternate grate-bars are arranged with their attaching-hooks extending in opposite directions. * * * When these hooks are inserted in the links of the chain *10*, as seen in Fig. 3, they will enter the same from the opposite sides of the chain, and the grates will thereby lock each other against accidental displacement because of their intermeshing fingers. * * * One or more of said bars can also easily and quickly be detached from said chain or chains without detaching other bars from said chain and can be as quickly replaced by a new bar or bars."

From these extracts and the illustrations of the patent it will be seen that the important functional feature consisted of hooks, or as Crowe calls them "attaching hooks." These hooks, which were either "integral with the grate-bars" or "made separate therefrom and secured thereto in any suitable manner," were of particular form, location, and number. In the first place they were a part of the bar itself, either integrally or by securing, and as a part of the bar they hooked into the links. In other words, the hooks as a part of the bar were—as described in the claim—"adapted to engage the links of an ordinary chain." This engaging was possible because a hook form was used, and because, as described in the claim, the hooks had their "chain-engaging portions extending longitudinally of the bar." And, lastly, because such hooks were duplicated and located "near both ends of the grate-bar." As we noted, a chain is no part of the claim; but the patent shows that Crowe's bars were, when attached to the chain, so alternately placed in reversed order that the two hooks on one bar pointed in the opposite direction from the two hooks on the adjoining bar. Moreover, since, as quoted above, these oppositely pointed hooks on adjacent bars "are inserted in the links of the chain * * * and enter the same from opposite sides of the chain," it will be apparent that the links of the chain must stand in an X or inclined relation relatively to each other, and not in successive vertical and horizontal relation.

The patent proceedings show that all of these features were moving characteristics in securing to Crowe the issue of his patent. The number of his hooks, the location of one at each end, their being longitudinal of the bar and all pointing in one direction, these were all factors of number, form, and location which contributed to that facility and ease of removal of one bar and supply of another which secured

the patent grant. It follows, therefore, that to now ignore these features, to put aside the foundation on which the patent was granted and must now stand, and seek to widen the patent to include methods of attachment wholly different in numbers, in form, and in manner of engagement, is to now use the latter term of the patent for a purpose that would have been fatal to its grant. Viewing the patent in this light, it follows the defendant does not infringe. Beyond the use of a hook at one end, which was common in the prior art, and from which Crowe differentiated himself by the use of two, the defendant's grate-bar is wholly different. As we said, he places a hook at one end, as does Crowe; but what he uses at the other is not a hook in the sense of Crowe's claim, as "adapted to engage the links of ordinary chains for forming a traveling grate." In other words, if the bolt which Crowe alleges is his hook were made, as the patent says, "integral with the grate-bars," or "made separate therefrom and secured thereto," we would not have the element of Crowe's claim, namely, a hook "adapted to engage the links," etc. The grate-bar thus formed—and as we must bear in mind Crowe's claim is for a grate-bar—has no hook and it will not hook into or engage the link. Mechanically the defendant does a wholly different thing. He does not and cannot have the chain in the X or inclined relation which Crowe must have. On the contrary, he first brings his successive horizontal links into a relation with the hookless end of his grate-bar, and when the two are thus in position he clamps them together by a bolt. This third member or T-bolt is equally independent of both grate-bar and link. If it be called a hook, and be described as a hook depending from a grate-bar, it can be equally well described as a hook depending from a log chain link and adapted to engage a grate-bar. In point of fact it is neither a hook nor a dependent hook, but is a bolt and an independent bolt, which serves by its T-head at one end and its cotter pin at the other to clamp the grate-bar and the link together. In that respect the court below, referring to Tibbitts' patent, No. 561,627, well summed up the mechanical features of the defendant's fastening in these words:

"Tibbitts' bar is fastened to the chain at one end by a hook; the bar is then drawn over and bolted to the chain at its other end. Defendant's device is operated quite similarly; its bar is hooked at one end in a vertical link in the chain and fastened thereto by passing upward through a horizontal link, a T-headed bolt into a socket in the bar, after which a cotter pin is passed through said socket and the end of the bolt therein. It manifestly is *not fastened to the bar by hooks*, such as are called for by the claims of the patent in suit."

The decree below is therefore affirmed.

W. F. & JOHN BARNES CO. v. VANDYCK CHURCHILL CO. et al.

(Circuit Court of Appeals, Second Circuit. March 10, 1914.)

No. 157.

PATENTS (§ 328*)—INVENTION—DRILLING MACHINE.

The Barnes patent, No. 862,861, for a drilling machine, which covers a combination with old elements of a brace to strengthen the framework of the machine, having no functional relation to the other parts, is void for lack of invention.

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

Suit in equity by the W. F. & John Barnes Company against the Vandyck Churchill Company, a corporation, and others. Decree for defendants, and complainant appeals. Affirmed.

See, also, 213 Fed. 637.

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

The suit is for infringement of United States letters patent No. 862,861, granted to John S. Barnes, assignor of complainant, on August 6, 1907, for a drilling machine.

The object of the alleged invention is "to construct a drilling machine frame of great strength by the employment of a suitable diagonally arranged backbone or brace extending substantially parallel with the driving shaft."

The single claim of the patent is as follows:

[1] "In a drilling machine, the combination of (1) a base, (2) a frame connected with the base, (3) a drill spindle supported by the frame, (4) a driving shaft having a driving connection with the drill spindle and located diagonally with respect to the drill spindle, and (5) a backbone or brace extending substantially parallel with the driving shaft and connecting the base with the upper portion of the frame."

1, 2, 3, and 4 are old in the art. As to 4, see especially Dalin No. 462,397, November 3, 1891, and Wessman No. 697,581, April 15, 1902.

The sole question is whether invention is to be found in the combination with these old elements of a brace extending substantially parallel with the driving shaft and connecting the base with the upper portion of the frame.

Upright drills are constructed with the frame consisting of an upright column, having a lateral offset to bring the drill spindle over the work, and this offset receives the upward thrust transmitted from the drill through the drill spindle.

In heavy work, the thrust of the tool may create a tendency to bend the upright column in its upper portion if the work is placed on the table supported by the column or to bend the column and to upset or tip the column at its point of connection with the base of the drill if the work is placed on the base. Under such conditions, a brace is obviously necessary.

Unless there is a functional relation between the brace and other parts of the drill, the form of the brace and its position and direction are merely matters of mechanical skill.

The experts in this case (doubtless able men) are not practical workmen in this art, and their testimony amounts to nothing more than arguments duly verified.

Even a layman, I think, can conclude from a study of the patent in suit, the Barnes Drill Company's drill, and the prior art, that there is no functional

[1] Note: For convenience I have numbered the elements of the asserted combination.

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

relation between the brace in question, and the diagonal driving shaft or any other part of the drill.

The brace is merely a strengthener of the framework of the drill and in purpose, character, and expected result, not beyond the skill of one familiar with the manufacture of drills of this type.

If there were any doubt in this regard, complainant has not adduced testimony to resolve that doubt in its favor. There is nothing to show a striving for the solution of a problem nor the filling of a "long felt want." There is no evidence of commercial utility; for complainant has not only not manufactured drills under the patent, but has not even built a drill for experimental or demonstrative purposes. It is said on behalf of complainant that it did not desire to create a market for such a drill under its name until the validity of the patent was unassailable; but, in view of the high standing and financial ability of complainant, I am inclined to conclude that, if it had strong convictions on the subject, it would not have waited for the end of a lawsuit to put a commercial invention on the market.

For want of invention, the bill is dismissed, with costs.

Offield, Towle, Graves & Offield, of Chicago, Ill. (C. K. Offield, of Chicago, Ill., of counsel), for appellant.

Luther L. Miller, of Chicago, Ill. (Duncan & Duncan, of New York City, and Lincoln B. Smith, of Chicago, Ill., of counsel), for appellees.

Before COXE, WARD, and ROGERS, Circuit Judges.

PER CURIAM. Decree affirmed on the opinion of Judge Mayer.

W. F. & JOHN BARNES CO. v. VANDYCK CHURCHILL CO. et al.

(Circuit Court of Appeals, Second Circuit. March 10, 1914.)

No. 158.

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

Suit in equity by the W. F. & John Barnes Company against the Vandyck Churchill Company and others. Decree for defendants, and complainant appeals. Affirmed.

For opinion below, see 207 Fed. 855.

Offield, Towle, Graves & Offield, of Chicago, Ill. (C. K. Offield, of Chicago, Ill., of counsel), for appellant.

Luther L. Miller, of Chicago, Ill. (Duncan & Duncan, of New York City, and Lincoln B. Smith, of Chicago, Ill., of counsel), for appellees.

Before COXE, WARD, and ROGERS, Circuit Judges.

PER CURIAM. Decree affirmed on the opinion of Judge Mayer, 207 Fed 855.

STANDARD SANITARY MFG. CO. v. IRON CITY MFG. CO.

(District Court, W. D. Pennsylvania. April 28, 1914.)

No. 109.

PATENTS (§ 328*) — VALIDITY — PRIOR USE — DREDGER FOR PULVERULENT MATERIAL.

The Arrott patent, No. 633,941, for a dredger for pulverulent material, *held* void for prior public use of the device by another than the patentee.

In Equity. Suit by the Standard Sanitary Manufacturing Company against the Iron City Manufacturing Company. On final hearing. Decree for defendant.

Christy & Christy, of Pittsburgh, Pa., for plaintiff.

Fagan & McElroy, James Negley Cooke, and Kay & Totten, all of Pittsburgh, Pa., for defendant.

ORR, District Judge. The plaintiff complains that the defendant has infringed United States patent No. 633,941, issued September 26, 1889, to James W. Arrott, Jr., for a dredger for pulverulent material, which patent is owned by the plaintiff. The main defense relied upon is that the patent is invalid by reason of a prior use. The patent was sustained by the Circuit Court of Appeals of this circuit in J. L. Mott Iron Works v. Standard Sanitary Mfg. Co., 159 Fed. 135, 86 C. C. A. 325. The nature of the patent is there sufficiently set forth, and the value of the apparatus covered by the patent is there properly emphasized. The defense, however, of prior use in the present case must be sustained.

This court, after an examination of the evidence, is satisfied beyond a reasonable doubt that the apparatus described in the claims of the patent was used in the plant of the Kohler, Hayssen & Stehn Mfg. Co. at Sheboygan, Wis., as early as the year 1896, and more than three years before the application for the patent in suit was filed. The users were manufacturers of enameled ware. They installed in 1895 or 1896 a system for the use of compressed air. Prior to the time of the installation of the system it occurred to Mr. Hayssen that compressed air could be used to operate a pneumatic hammer, which should be located upon the handle of the dredger, which would cause the sieve to be vibrated so as to make a uniform distribution of the enameling material through the sieve upon the article to be enameled. Hayssen built the pneumatic hammer, tested it with a beer pump in a neighboring saloon, because of the absence of compressed air at that time in the factory, and found that it would work. It was subsequently attached to the handle of a dredge, and was operated in the factory for the manufacture of commercial products for some years. The testimony is conclusive as to these facts. Hayssen, who designed the hammer, and numerous persons who had used the hammer and persons who had seen it used, all testified to these facts, fixing the date of its first use in 1896. But the matter does not rest solely upon the parol testimony of these witnesses. The identical hammer and connections

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

just as used at that time and long afterwards were produced in this court. In addition, there was produced in evidence an original letter from Mr. E. L. Dawes, then of the firm of Dawes & Myler, but now vice president of the plaintiff company, addressed to the Kohler, Hayssen & Stehn Mfg. Co., under date of November 22, 1899, in which he used the following language:

"When at your place about two years since, Mr. Hayssen told us about the air valve that he had gotten possession of, using the same on a dredge for the purpose of dusting the powder on your work, and that the party having the valve then refused to sell it, or did something similar to this. Now what we are after is that the S. M. Company claim a patent on a pneumatic dredger. We have no desire whatever to steal any one's invention. At the same time it strikes us that you had tried this prior to their application for a patent. Will you kindly advise us as to this at once and oblige, Yours truly, E. L. Dawes."

The plaintiff, at least as early as 1905, had information of the use of the machine of the patent at Sheboygan, and never instituted any proceedings to test the validity of the use by the Sheboygan manufacturers, although it appears in evidence they were important competitors of the plaintiff. In every aspect of the case this court must hold the patent to be invalid by reason of the prior use at Sheboygan.

This is also the view of Judge Hollister in an opinion filed February 28, 1912, as certified to this court in the case of Wayman v. Louis Lipp Company, wherein the same patent was involved. By stipulation the same testimony as presented in the case now under consideration was used in that case. After commenting upon the seriousness of holding a prior use to be established by evidence appearing in affidavits, Judge Hollister says:

"But I am unable to escape conviction amounting to moral certainty that the complainant's very apparatus in cruder form, but probably quite as effective in operation, was made by Mr. Hayssen and was in use in the factory of Kohler, Hayssen & Stehn, at Sheboygan, Wis., prior to the time the patent in suit was granted. There is a wealth of evidence from workmen in that factory, both those who used the apparatus and those who saw it in use."

His decision was upon a motion for a preliminary injunction which he denied, notwithstanding the fact that the patent had been sustained in other jurisdictions. The case at bar was tried at length upon the testimony of witnesses who had been subjected to rigid cross-examination. Plaintiff did contend that the use at Sheboygan never passed beyond the experimental stage, but this court must find the fact to be otherwise, in view of the overwhelming testimony to the contrary.

The bill must be dismissed, at plaintiff's costs.

THE STURTON.

THE VIRGINIAN.

(District Court, E. D. Virginia. March 27, 1914.)

COLLISION (§ 95*)—TUG TOWING STEAMER FROM PIER—COMBINED FAULTS OF TUG AND TOW.

The steamship Sturton, which was light and a very large and high vessel, was being towed out from the south side of the coal pier at Sewell's Point, while a very heavy southwest wind was blowing, and was blown to leeward and came into collision with another steamer lying on the north side of the pier and projecting about 30 feet beyond the end. *Held*, on the evidence, that the tug was in fault for failing to exercise the care, prudence, and caution required in view of the light condition of the steamship and the prevailing windstorm, and that the Sturton was also in fault in not having a competent crew nor sufficient steam up to properly assist in the maneuver.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 200–202; Dec. Dig. § 95.*]

In Admiralty. Suit for collision by William Leisk, master of the steamship Sturton, against the steam tug Virginian. Decree for libelant for half damages.

Hughes, Little & Seawell, of Norfolk, Va., for libelant.

Harrington, Bigham & Englar, and T. Catesby Jones, all of New York City, and John W. Oast, Jr., of Norfolk, Va., for respondent.

WADDILL, District Judge. On the morning of the 20th of October, 1913, the steamship Sturton, and the steamship Lucigen were each coaling at the Virginia Railway piers, Sewell's Point, Va.; the Sturton on the south side of, and some 500 feet up in the dock, with her bow inshore, and the Lucigen on the north side immediately at its outer end, her bow extending out into the stream from the end of the pier some 30 feet.

About 12 o'clock noon, the steam tug Virginian, stationed at Sewell's Point to dock and undock vessels, made fast to the port quarter of the Sturton and proceeded to take her from the pier out to anchorage in Hampton Roads. The wind at the time was blowing heavily from the southwest. The Virginian moved the Sturton alongside of the pier in such a manner as she believed to be prudent, having regard to the safety of the ship and the pier, until she reached the outer end, when the Sturton, which was light, sitting high up out of the water, 49 feet at the bridge, encountered the full force of the storm, and was driven down and across the front of the pier, her port bow coming in collision with the port bow of the Lucigen, causing considerable injury to her, the Sturton being less damaged. The latter was a large tramp steamship 8,000 tons gross, 4,406 net, 395 feet overall, 51 feet beam, 28 feet deep, and the Virginian was a large ocean going tug of 500 horse power.

The Sturton's faults charged against the Virginian involve the lack of a skillful master; making fast to the ship improperly; taking out the ship in the existing weather; the failure to keep the tug up into

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

the wind in coming out of the pier, and for allowing the Sturton to go to leeward. The Virginian's charges against the Sturton are that she was manned with an incompetent Chinese crew; that she failed to carry out the orders given by the master of the Virginian navigating her; that the steamship's starboard anchor was unseasonably and negligently let go by the crew of the steamship; and that the Sturton at the time of starting from her berth did not have available the steam power to carry out the necessary maneuvers as she had led the Virginian to believe.

Considerable testimony was taken by the parties respectively, and the case turns almost entirely upon the questions of fact, the law determining the obligation due from the tug to its tow being well settled (The E. V. McCaulley [D. C.] 189 Fed. 829; The Oak [D. C.] 148 Fed. 1005); and the conclusion reached by the court is that the accident was brought about as the result of the combined negligence of the two vessels, the tug in that it failed to exercise the care, prudence, and caution required of it in attempting to remove the ship in her light condition in the then prevailing windstorm, without taking into consideration the presence of the Lucigen. The pier is an exceedingly exposed place during the prevalence of high winds either from the northwest or the southwest; and, while ordinarily vessels can be docked and undocked there without difficulty, still the taking out from the southern side of the pier a ship of the size of the Sturton, light, with another ship extending beyond the end of the pier on the opposite side, was exceedingly difficult, and required the highest nautical skill to prevent the happening of such an occurrence as took place. The ship was a long one, unusually high out of the water, especially at her bow, the windstorm then prevailing very heavy, the exact velocity not known, though in the city of Norfolk, several miles inland, at and about the time of the collision, it was 48 miles an hour, and it is fair to assume that at this exposed place it was between 50 and 60 miles, most likely 60, which struck the Sturton full broadside as she emerged from the end of the pier, and made it extremely difficult to haul her into and hold her against the wind. The tug apparently appreciated this, and attempted to go slightly to leeward, with a view of the better escaping the full force of the wind; but this maneuver failed, the tug herself being forced one point to leeward. The Virginian, moreover, in attempting to take the ship out under the circumstances was at fault in failing to go and keep to windward, which she did not do; whether because she could not is immaterial, as far as the result of this case is concerned. The fact that the steamship was manned by a Chinese crew is indisputable, and that many of them were of doubtful competency is fairly apparent. How far that contributed to the accident cannot be said, further than that from the preponderance of the testimony it appears that the ship's carpenter, a Chinaman, did drop the starboard anchor about the time the bow of the ship emerged from the end of the pier, which seriously hampered the tug in its control of the ship, and undoubtedly helped to and did in part bring about the accident. It is not entirely clear that the steamship had up as much steam as would have been desira-

ble for the prompt and successful maneuvering of the ship in the prevailing weather conditions, which also tended to obstruct the tug in handling her.

It follows from what has been said that the accident was the result of the combined negligence of the two vessels, and a decree will be entered so ascertaining.

MILKMAN v. ARTHE et al.

(District Court, E. D. New York. April 23, 1914.)

1. COURTS (§ 279*)—UNITED STATES COURTS—JURISDICTION—PLEADING.
Where a cause of action under the Bankruptcy Law (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]) over which a United States court has jurisdiction is stated, the jurisdiction is not ousted by failure to allege diverse citizenship, or that the amount involved is more than $3,000.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 279.*]

2. BANKRUPTCY (§ 178*)—FRAUDULENT CONVEYANCES—AVOIDANCE.
While a transfer by some third person for the benefit of a bankrupt could not be avoided by a creditor within Bankruptcy Law (Act July 1, 1898, c. 541, § 70e, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3452]), authorizing the trustee to avoid any transfer by the bankrupt of his property which any creditor might have avoided, where the money of a bankrupt was by agreement used by his brother in creating a trust for the bankrupt's wife for the purpose of concealing the money of the bankrupt, the transfer could be avoided.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 221, 264–274, 283, 284; Dec. Dig. § 178.*]

In Equity. Bill by Walter Milkman, as trustee in bankruptcy, against John C. Arthe and others. On motion to dismiss the complaint. Motion denied.

Harry E. Lewis, of Brooklyn, N. Y. (David Steckler, of New York City, of counsel), for plaintiff.

Robert A. Inch, of New York City, for defendants Arthe and Lancaster.

CHATFIELD, District Judge. This action, brought by a trustee in bankruptcy, against the bankrupt, his wife, and her brother, seeks to trace certain funds of the bankrupt (the exact amount not being specified) into the purchase of certain shares of stock held by the brother for the wife of the bankrupt.

[1] The bill alleges that at the time of original purchase, the bankrupt was insolvent, and that a secret trust exists under which the shares of stock are concealed by the brother and the bankrupt's wife for the benefit of the bankrupt. It is alleged that the shares of stock are really a part of the bankrupt's estate. Motion has been made by the defendants, appearing specially for the bankrupt's wife and her brother, to dismiss the complaint under equity rule 29 (33 Sup. Ct. xxvii). No diversity of citizenship is stated in the complaint, nor is the amount of money used upon the original purchase of the stock

stated. But if a cause of action be stated under the bankruptcy law, over which this court has jurisdiction, that jurisdiction will not be ousted by failure to show that the amount involved was more than $3,000, or by residence of all the parties within the same district.

[2] This action is not one to recover a preference, and the complaint was apparently considered by the pleader to fall under section 70e, which expressly gives jurisdiction to the United States court. The defendants support the motion by stating that the complaint shows no "transfer by the bankrupt of his property which any creditor of said bankrupt might have avoided."

It is insisted that the purchase of the stock by the brother, or any transfer by him to the wife of the bankrupt, would not come within the words "transfer by the bankrupt." The cases of Newcomb v. Biwer (D. C.) 199 Fed. 529, Hull v. Burr, 153 Fed. 945, 83 C. C. A. 61, and Harris v. First National Bank of Mt. Pleasant, 216 U. S. 382, 30 Sup. Ct. 296, 54 L. Ed. 528, are cited as authority for the proposition that a transfer by some other party for the benefit of the bankrupt could not be avoided by a creditor of the bankrupt. This proposition is evidently true, but the defendants overlook the allegation of the complaint that the money of the bankrupt was by agreement used by the brother in creating a trust for the wife, and that the entire transaction was an attempt to conceal the money of the bankrupt by transferring it into the form of stock. The transfer complained of was the transfer of funds from the bankrupt's estate to another party for use, and the complaint sufficiently sets forth a tracing of those funds, so that relief could be granted if the facts are substantiated.

The motion to dismiss will be denied, and the defendants will be directed to answer over.

In re WALSH.

(District Court, N. D. New York. May 11, 1914.)

1. BANKRUPTCY (§ 417*)—DISCHARGE—REVOCATION—GROUNDS—JURISDICTION.
Bankr. Act July 1, 1898, c. 541, § 15, 30 Stat. 550 (U. S. Comp. St. 1901, p. 3428), provides that the judge, on application of the parties in interest who have not been guilty of undue laches, filed at any time before a year after the bankrupt's discharge, may revoke it on a trial, if it shall be made to appear that it was obtained through the bankrupt's fraud, and that the knowledge of the fraud has come to the petitioners since the granting of the discharge, and that the actual facts did not warrant a discharge. *Held*, that a bankruptcy court has no power to revoke a discharge on the ground that a creditor did not receive notice of the hearing of the application for the discharge, which was duly mailed.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 867–871; Dec. Dig. § 417.*]

2. BANKRUPTCY (§ 417*) — DISCHARGE — VACATION — OBJECTING CREDITOR — PROOF OF CLAIM.
A creditor's right to apply to vacate a bankrupt's discharge is not affected by the creditor's failure to file proof of its scheduled claim.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 867–871; Dec. Dig. § 417.*]

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

3. BANKRUPTCY (§ 417*)—DISCHARGE—VACATION—MOVING PAPERS.
Moving papers on an application to set aside a bankrupt's discharge should set out facts which, if proved, would require a denial of the discharge, and show that the creditor has sufficient proof, or reasonable proof which would be prima facie sufficient, to require a denial of the application for discharge.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 867–871; Dec. Dig. § 417.*]

In Bankruptcy. In the matter of bankruptcy proceedings against Mary H. Walsh, bankrupt. On motion of the City Bank of Syracuse to open and vacate an order granting a discharge to the bankrupt and revoking a discharge, on the ground that the bank did not receive notice of the application therefor. Denied.

Newell, Chapman & Newell, of Syracuse, N. Y., for petitioner.
Frank J. Cregg, of Syracuse, N. Y., for bankrupt.

RAY, District Judge. [1] Section 15 of the Bankruptcy Act provides:

"Sec. 15. Discharges, When Revoked. (a) The judge may, upon the application of parties in interest who have not been guilty of undue laches, filed at any time within one year after a discharge shall have been granted, revoke it upon a trial if it shall be made to appear that it was obtained through the fraud of the bankrupt, and that the knowledge of the fraud has come to the petitioners since the granting of the discharge, and that the actual facts did not warrant the discharge."

If a false affidavit should be presented to the court to the effect that notice had been given by mail to all creditors, when in fact such notice had not been given, even though the notice had been published, this court would unhesitatingly revoke the discharge.

Here the City National Bank presents affidavits to the effect that certain of its employés were watching for a notice through the mails, but did not receive one. The failure to find the notice in the mail and read it may have been due to oversight or neglect on the part of these employés. The bankrupt, through her attorney, presents the affidavits of three persons to the effect that they were paying particular attention to the mailing of these notices, and these three persons give in great detail the mode pursued and the things done in mailing the notices of the application for the discharge of this bankrupt.

I cannot find from the affidavits presented that the attorney for the bankrupt failed to mail the notice. It is beyond all question that the notice was duly published in an official paper in the city of Syracuse, where all the parties reside. The failure to deliver the notice through the mails to the City Bank may have been due to some neglect or wrongdoing on the part of the postmaster or some employé or mail carrier. The duty imposed on the bankrupt is to mail the notice, or serve it personally, and also publish it. I do not think the court has power to revoke a discharge on the ground that a creditor did not receive his notice, which was duly mailed.

[2] It was stated on the argument that the City Bank, although knowing of the bankruptcy proceeding, and although its claim was duly

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

scheduled, failed to file its proof of claim. I do not see that this has any particular bearing in this case. In view of In re Downing (D. C.) 199 Fed. 329, and In re Griffin (D. C.) 154 Fed. 537, 19 Am. Bankr. Rep. 78, I think this application must be denied, and that grounds for revoking the discharge are not shown.

[3] The moving papers do not present proposed specifications of objection to the bankrupt's discharge. Neither do such moving papers set out facts which, if proved, would require a denial of the discharge, and within the cases cited it should appear, before revoking a discharge, that the creditor has sufficient proof or reasonable proof and prima facie sufficient to require a denial of the application for a discharge.

Motion denied.

THE DORA ALLISON.

(District Court, S. D. Alabama, S. D. March 18, 1914.)

No. 1444.

1. COLLISION (§ 96*)—VESSEL OBSTRUCTING ENTRANCE TO SLIP—NEGLIGENCE OF PILOT.

A schooner, which lay with bowsprit and jibboom projecting across the mouth of a slip some 30 or 40 feet, *held* improperly moored and liable for a collision in which another vessel coming out of the slip was injured; the pilot of the latter vessel also *held* in fault for failing to exercise the care and skill required of him.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 203–205; Dec. Dig. § 96.*]

2. PILOTS (§ 15*)—DEGREE OF SKILL AND CARE REQUIRED.

The care and skill required of a pilot is the care and skill of an expert, such as is commonly possessed by others in his profession.

[Ed. Note.—For other cases, see Pilots, Cent. Dig. § 18; Dec. Dig. § 15.*]

In Admiralty. Suit for collision by E. L. Whitney, as master of the barkentine Stranger, against the schooner Dora Allison and against Thomas Cook in personam. Decree for libelant against both respondents.

Hanaw & Pillans, of Mobile, Ala., for libelant.
Rickarby & Austill, of Mobile, Ala., for claimant.
Stevens, McCorvey & Dean, of Mobile, Ala., for respondent Cook.

TOULMIN, District Judge. [1] I find from the evidence in this case that the bowsprit and jibboom of the schooner Dora Allison projecting across the mouth of the slip of Hieronymus Docks, where she was moored, some 30 or 40 feet, was a menace to vessels going in and out of said slip, and that it was an obstruction to navigation—at least, very hazardous to take another vessel out of the slip under the circumstances. I find that said schooner was improperly moored, in violation of rule 1, Harbor Rules, etc., in reference to unrigging of the jibboom when at anchor or moored. I therefore consider said schoon-

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

er guilty of negligence which proximately contributed to the collision from which damage resulted to the barkentine Stranger.

I, however, find from the evidence that there was negligence on the part of the barkentine; that is, in the failure of the pilot to exert that needful skill required in the case in view of the locality, the attending conditions, and the special difficulties connected therewith. The pilot, Thomas Cook, was in control of the movements of the Stranger and of the tug attending the same. He was charged with the safety of the vessel, and bound to use due diligence and care and reasonable skill in the exercise of his important functions. He is answerable if the vessel suffered damage through his negligence or want of skill while she was under his control. He is chargeable for negligence if he fails in due care and skill in avoiding obstructions or difficulties known or which should have been known to him.

[2] The *highest possible* degree of skill and care was not probably required of the pilot; but he was bound to bring to the performance of the duty he assumed reasonable skill and care, and to exercise them in everything relating to the work. The skill required of a pilot is the ordinary care of an *expert* in his profession. When in charge of navigation, he supersedes the master, and is liable for negligence. "The ordinary care required of an *expert* is much higher [say the authorities] than the ordinary care required of a simple driver of a land vehicle." His liability for ordinary care means the ordinary care of an expert in his profession. While he is not liable for mere errors of judgment, he is liable for any accident that due care and attention, and the knowledge of existing conditions and circumstances, which he had, or is supposed or charged to have had, might have avoided. "A pilot is not liable for damage to the vessel in his charge unless caused by his failure to use ordinary diligence; i. e., the degree of skill commonly possessed by others in the same employment." Wilson v. Charleston Pilots' Ass'n (D. C.) 57 Fed. 227.

Pilot Cook was shown to have borne an excellent reputation for skill, caution, and care, and of long experience, yet in this instance it appears from the weight of the evidence of expert witnesses in the case that he did not exercise the needful skill and attention required under the existing conditions. He undoubtedly had the degree of skill ordinarily possessed by others of his class, but it appears that he failed to apply that knowledge and skill when required, and I am of opinion that he is liable for a part of the damages which he contributed to occasion. Cooley on Torts, 647; Mason v. Ervine (C. C.) 27 Fed. 459; Shubert v. Brown (D. C.) 45 Fed. 503; The Tom Lysle (D. C.) 48 Fed. 690–693; Wilson v. Charleston Pilots' Ass'n (D. C.) 57 Fed. 229; The Margaret, 94 U. S. 494, 24 L. Ed. 146; The Overbrook, 142 Fed. 950, 951, 74 C. C. A. 120. The expert testimony is that it was, under the conditions and circumstances, very hazardous to attempt to take the vessel out of the slip; that it was taking great risk, and, if undertaken, due care, skill, and good seamanship required that the vessel should have been held close to the wharf on the north side of the slip by lines therefrom fastened to the vessel.

My opinion is that the libelant is entitled to a decree for the dam-

ages sustained by the collision; the decree to be for a division of the damages between the Dora Allison and Thomas Cook. Let a decree be entered accordingly. An order will be entered appointing Richard Jones as special commissioner, to whom it is referred to ascertain and report the amount of damages sustained by the barkentine Stranger.

LEWICKI v. JOHN C. WIARDI & CO.

(District Court, E. D. New York. April 23, 1914.)

1. ALIENS (§ 4*)—REMEDY FOR INJURIES—STATUTORY PROVISIONS.
   The cause of action given by Labor Law N. Y. (Consol. Laws, c. 31) § 200, which provides that when personal injury is caused to an employé in the exercise of due care and diligence, by any defect in the ways, works, machinery, etc., or by the negligence of any person intrusted with superintendence, the employé shall have the same right of compensation and remedies as if he had not been an employé, is not limited to citizens of the United States, and an alien may sue thereunder in a United States court, in view of Judicial Code, § 28 (Act March 3, 1911, c. 231, 36 Stat. 1094 [U. S. Comp. St. Supp. 1911, p. 140]), allowing removals of actions, and section 38 providing that, in suits so removed, the District Court shall proceed as if the suit had been originally commenced in that court, as the courts of the state and of the United States have jurisdiction over suits by aliens against citizens.
   [Ed. Note.—For other cases, see Aliens, Cent. Dig. § 4; Dec. Dig. § 4.*]

2. COURTS (§ 280*)—JURISDICTION—RAISING QUESTION OF JURISDICTION.
   The defense that a United States District Court has no jurisdiction over the alleged cause of action can be raised at any time.
   [Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 816–818; Dec. Dig. § 280.*]

3. COURTS (§ 280*)—DEFENSES—LACK OF JURISDICTION.
   A defense that the court has no jurisdiction of the cause of action must be based upon some defect apparent on the record or appearing upon the proof.
   [Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 816–818; Dec. Dig. § 280.*]

4. COURTS (§ 280*)—DEFENSES—LACK OF JURISDICTION.
   A defense that the court has no jurisdiction of the alleged cause of action must point out or definitely state the defect, so as to be apparent to the court, and must be sufficient to form the basis of a judgment apart from the portions of the record relied upon.
   [Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 816–818; Dec. Dig. § 280.*]

At Law. Action by Kostanti Lewicki against John C. Wiardi & Co. On demurrer to certain defenses. Sustained.

Max Keve, of New York City, for plaintiff.
Robert M. McCormick, of New York City, for defendant.

CHATFIELD, District Judge. [1] Plaintiff is an alien and has sued, alleging a cause of action under the Employers' Liability Law of New York (Consol. Laws, c. 31, §§ 200–204). A "third defense" to the cause of action which, or so much of the cause of action as,

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

arose under that statute was based upon allegations that the plaintiff could not invoke the New York statute which was alleged to be limited to citizens.

Plaintiff cites the case of Krzus v. Crow's Nest Pass Coal Co., 16 Br. C. 120, and Jeffries v. Boosey, 4 House of Lords Cases, 815, to show that the English and Canadian statutes extend the benefit of those statutes to no one but citizens. But the New York statutes (Consolidated Laws 1909, c. 31, § 200) gives a cause of action against an employer to any employé. The courts of New York and of the United States have jurisdiction over suits by aliens against citizens, and the laws of the United States (section 28 of the Judicial Code [Act March 3, 1911, c. 231, 36 Stat. 1094, U. S. Comp. St. Supp. 1911, p. 140]) allow removal of such a cause of action and provide for application of the state laws in so far as may be (section 38).

[2-4] A "fourth defense" is a plea that the federal court has not "jurisdiction over the alleged cause of action." This defense can be raised at any time. It must be based upon some defect either apparent upon the face of the record or appearing upon the proof.

Before ruling upon such an objection, the defect must be pointed out or definitely stated in such a way as to be apparent to the court. In this respect the "fourth defense" is not sufficient, as it stands, to form the basis of a judgment apart from the portions of the record relied upon. In a sense, therefore, the demurrer is well founded, so far as the criticism of the wording of the "defense" is based merely upon the wording when standing alone.

The demurrer to the "third defense" will therefore be sustained, and the demurrer to the "fourth defense" will be sustained to the extent of requiring a statement of the alleged defect in jurisdiction before it will be heard by the court.

HELM et al. v. ZARECOR et al.†

(District Court, M. D. Tennessee, at Nashville. July 24, 1913. On Petition for Rehearing, September 20, 1913.)

No. 3590.

1. EQUITY (§ 97*)—JURISDICTION OF FEDERAL COURTS—INDISPENSABLE PARTIES—CLASS SUIT.

A suit by members of the Presbyterian Church in the United States of America, on behalf of themselves and all other members, against individuals who are members of the Cumberland Presbyterian Church, as representing all of such members who refuse to recognize the union between said churches in 1906, and claim that the Cumberland Presbyterian Church is still a separate association, with all its original rights and powers, and also against the Board of Publication of the Cumberland Presbyterian Church, which is a corporation created by such church as an agency to hold property and conduct its publishing business, for the purpose of obtaining a decree that the united church has become vested with the right to use and control the corporation and its property

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

† Published by request.

in denominational work, and declaring the trust upon which such property is held, and the uses and purposes for which it is to be administered, is a class suit, and the members of the Board of Publication appointed by the Cumberland Presbyterian Church before the attempted union, or since that time, are not indispensable parties, whose nonjoinder either as plaintiffs or defendants will defeat the jurisdiction of a federal court of equity.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 257; Dec. Dig. § 97.*]

2. JUDGMENT (§ 701*)—RES JUDICATA—IDENTITY OF ISSUES.

The question involved in such suit is not res judicata because of an adjudication in a state court in quo warranto proceedings between rival appointees to determine who were the lawful directors of the corporation, which ousted the incumbents and installed the relators, as such judgment affected only the individual rights of the parties to the offices and was binding on them only.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1226; Dec. Dig. § 701.*]

3. JUDGMENT (§ 675*)—PERSONS CONCLUDED—ASSISTANCE IN DEFENSE.

Although a person assists in the defense of a suit against another because of his individual interest in the decision as a judicial precedent, the result as to him is merely that of precedent, and not of res judicata, and no estoppel is created against him because of his assistance in the defense.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1190, 1191, 1194; Dec. Dig. § 675.*]

4. COURTS (§ 365*) — FEDERAL COURTS — AUTHORITY OF DECISIONS OF STATE COURTS.

A decision of the Supreme Court of a state as to the validity of an attempted union between two church organizations is not binding on a federal court sitting in the state, in a suit where the parties are not such as to render the question res judicata, where the rights of the parties were fixed prior to such decision, and no rule of property had been established by repeated decisions of the state tribunal and in determining such rights the federal court is required to exercise its independent judgment.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 950, 952, 955, 969–971; Dec. Dig. § 365.*]

5. RELIGIOUS SOCIETIES (§ 34*)—UNION OF CHURCHES—LEGALITY.

The union between the Cumberland Presbyterian Church and the Presbyterian Church in the United States of America, effected in 1906, was a valid union, not in conflict with the constitution of the Cumberland Presbyterian Church, lawfully entered into by its General Assembly in the exercise of its implied authority, and not involving any such differences in the doctrine and polity of the two churches as to constitute an insuperable barrier to the union, as conclusively determined by their General Assemblies, their highest legislative and judicial tribunals.

[Ed. Note.—For other cases, see Religious Societies, Cent. Dig. §§ 209–211; Dec. Dig. § 34.*]

In Equity. Suit by T. O. Helm and others against J. H. Zarecor and others. On final hearing. Decree for complainants.

See, also, 222 U. S. 32, 32 Sup. Ct. 10, 56 L. Ed. 77.

This bill, as amended, was brought in the United States Circuit Court for this district in April, 1909, by certain ministers, ruling elders and laymen, of the Presbyterian Church in the United States of America, citizens of states other than Tennessee, suing for themselves and for all the members of said church, against individuals, citizens of Tennessee, described as representing

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

not only their own interests but also those of all the members of the Cumberland Presbyterian Church, and "The Board of Publication of the Cumberland Presbyterian Church," a Tennessee corporation.

The controversy disclosed by the bill arose from the proceedings, taken in 1906, to effect the union of the Cumberland Presbyterian Church and the Presbyterian Church in the United States of America, both voluntary religious associations, and relates to the property and management of the defendant corporation. The Board of Publication had been incorporated in 1860, under the direction of the General Assembly of the Cumberland Presbyterian Church, for the purpose of conducting its publishing work, and had acquired valuable property consisting of a publishing house and its equipment in Nashville, Tennessee. The original members of the corporation were the committee of publication of the Church, and their successors under the charter were appointed by the General Assembly to which was committed its regulation and control. The bill alleged that the two Churches had been legally united and that as a result the property in question was held by the corporation in trust "for the entire reunited denomination"; and, further, that "the Board and its officers and managers were advised and believed and still believe" that the union was valid, that "thereby the Board of Publication became a corporation and institution of the reunited Church," and that the managers of the corporation "could do nothing else than recognize the General Assembly of the united Church by reporting to it and otherwise recognizing its authority." It was also alleged that a minority of the members of the Cumberland Presbyterian Church, and of its ministers, who were opposed to the consolidation, repudiated it and effected a separate organization under the former name; that thereupon a body assuming to be the General Assembly of the Cumberland Presbyterian Church declared the offices of all the members of the Board of Publication vacant and proceeded to elect persons of their own organization to fill the supposed vacancies; that these persons had made demand for the possession of the corporate property, claiming to be the rightful members of the corporation and that its property was held in trust for the religious association by whose General Assembly they had been elected; and that this claim cast a cloud upon the equitable title to the property. After reviewing at length the history of the Cumberland Presbyterian Church, the action of the representatives of the two Churches which culminated in the alleged consolidation, and the subsequent antagonistic proceedings, the bill prayed for decree that the property in question is held in trust by the corporation for the benefit of the Presbyterian Church in the United States of America or the members thereof, and that the members of the Board elected by the reunited Church are the true and lawful members of said Board; that the defendants be enjoined from interfering with the control and management of the corporation by those members or with the corporation property, and that if mistaken with respect to the relief prayed for as to the persons who constitute the Board and have the right of management, the court should decree that "whoever may be the members of the Board and whoever may be entitled to such management, they shall manage the corporation and administer the trust for the use and benefit of said reunited Church."

The defendants filed two pleas to the jurisdiction. In the first plea it was alleged that the complainants had collusively made and omitted both complainants and defendants for the purpose of showing the requisite diversity of citizenship. The second plea set up the pendency of a suit in the Chancery Court of Davidson County, Tennessee, in the nature of a quo warranto proceeding, brought on the relation of J. H. Zarecor and other individual defendants herein to oust those named as defendants in that suit from membership in the Board of Publication, and from the control and management of its property and to install the relators in their stead.

The court overruled both of these pleas, but of its own motion dismissed the bill for want of jurisdiction, on the ground that the defendant corporation, the Board of Publication, should be aligned upon the same side of the controversy with the complainants, thereby destroying the requisite diversity of citizenship. On appeal to the Supreme Court on the jurisdictional question involved, it was held that the court had correctly overruled the defendants' pleas to the jurisdiction, but had erred in dismissing the bill for want of

jurisdiction. Helm v. Zarecor, 222 U. S. 32, 32 Sup. Ct. 10, 56 L. Ed. 77. The case was therefore remanded for further proceedings; after which answers were filed by the defendants and proof taken.

John M. Gaut, of Nashville, Tenn., and Alex P. Humphrey, of Louisville, Ky., for plaintiffs.

W. C. Caldwell, of Trenton, Tenn., W. B. Lamb, of Fayetteville, Tenn., and Frank Slemmons, of Nashville, Tenn., for defendants.

SANFORD, District Judge. This case was heard upon the pleadings, stipulations and depositions before the new equity rules went into effect. I have been greatly assisted in the consideration of the important and difficult questions involved by the thorough briefs of counsel upon both sides and by the oral arguments made upon the hearing, to all of which I have given careful consideration. In view, however, of the number of questions involved and the fact that many of them have been already passed upon by the courts of various States in similar litigation arising out of the same unfortunate controversy between the two contending churches, and the fact that the reasons supporting the divergent views which have been entertained have been clearly expressed in several published opinions, I shall not, in this opinion, set out at length the reasons which have led me to the conclusions reached or discuss the many authorities cited in the briefs, but shall merely state my conclusions upon the several questions involved, with citation of the principal authorities bearing upon them, without elaboration.

The conclusions which I have thus reached are as follows:

[1] The first contention of the defendants is that W. A. Provine and his associates, originally appointed as members of the Board of Publication of the Cumberland Presbyterian Church, are necessary and indispensable parties to the suit, and that it hence cannot be proceeded with without them.

It is well settled that persons who have an interest in a controversy of such a nature that a final decree cannot be made without affecting their interest or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience, are indispensable parties. Shields v. Barrow, 17 How. 130, 139, 15 L. Ed. 158; Barney v. Baltimore City, 6 Wall. 280, 284, 18 L. Ed. 825. And where the interest of the parties present and of absent indispensable parties are inseparable and such absent parties do not voluntarily appear, or from a jurisdictional objection going to the person in the United States courts they cannot be made parties, the bill must be dismissed. Ribon v. Railroad Co., 16 Wall. 446, 450, 21 L. Ed. 367; Gregory v. Stetson, 133 U. S. 579, 587, 10 Sup. Ct. 422, 33 L. Ed. 792; Construction Co. v. Cane Creek, 155 U. S. 283, 285, 15 Sup. Ct. 91, 39 L. Ed. 152. It is also true that where the plaintiff in a suit is seeking to recover the possession of property, the person in possession is a necessary and indispensable party. Construction Co. v. Cane Creek (U. S.) at page 283, supra, citing Wilson v. Oswego Township, 151 U. S. 56, 14 Sup. Ct. 259, 38 L. Ed. 70.

However, in Helm v. Zarecor, 222 U. S. 32, 36, 32 Sup. Ct. 10, 12

(56 L. Ed. 77) in an opinion upon the jurisdictional question involved in the present case, the Supreme Court of the United States said:

"The complainants sue for themselves and on behalf of all members of the Presbyterian Church in the United States of America, and the object of their suit is to enforce the right of the members of that Church as it was constituted after the alleged union. The Board of Publication was incorporated merely as a convenient agency for the publishing work of the Cumberland Presbyterian Church. * * * It was an incorporated committee of publication, which lost none of its essential qualities as an agent of denominational service when it became an artificial person, clothed with power to hold property in a corporate capacity. * * * The contention of the complainants is that, after the union, the Cumberland Presbyterian Church continued in the united Church and that the General Assembly of the latter succeeded to the authority formerly possessed by the General Assembly of the separate denomination. The defendants are sued as the representatives of the religious association which insists that it is still the original Cumberland Presbyterian Church, continuing with all its separate powers unimpaired. It is thus evident that the controversy transcends the rivalries of those claiming membership in the Board and the assertion of rights inhering in that corporation itself. It embraces the fundamental question of the rights of these religious associations, said to be represented by the respective parties, to use and control the corporate agency and to have the benefit in their denominational work of the corporate property. * * * The Board is simply a title holder, Watson v. Jones, 13 Wall. 679, 720 [20 L. Ed. 666] an instrumentality, the mastery of which is in dispute. But, as it is the holder of the legal title, the complainants seek a decree defining, in the light of the proceedings alleged in the bill, the equitable obligations arising from the nature and purpose of the corporate organization."

In the light of this decision this suit must therefore be held to be a class suit, brought by representatives of the Presbyterian Church of the United States of America against representatives of the original Cumberland Presbyterian Church, to determine the fundamental question of the rights of these two religious associations to use and control the Board of Publication and have the benefit in their denominational work of its corporate property, and to define the equitable obligations arising from the nature and purpose of the corporate organization. And as suitable representatives of each of these two religious associations are before the court in their representative character as members of the respective churches, and as the Board of Publication, which is the holder of the legal title to the property and whose equitable obligations are sought to be defined, is before the court, I am constrained to hold that, for the purpose of determining the fundamental question presented by the bill, as stated by the Supreme Court, it is only necessary that suitable representatives of each of these two religious associations be made parties complainant and defendants respectively, and that it is not essential that the rival members of the Board of Publication be made parties, either as complainants or defendants, in their capacity as such. And while I am of opinion that the presence of the members of the original board would be essential in order that they might be decreed to be the true and lawful members of said Board, and that no decree declaring them to be the true and lawful members of said Board could be properly made without their presence, yet their presence is clearly not essential for the purpose of granting the main relief prayed by the bill, as construed by the decision of the Supreme Court that the controversy presented transcends the rivalries

of those claiming membership in the Board and embraces the fundamental question of the rights of the two religious associations to use and control the corporate agency and have the benefit in their denominational work of the corporate property; nor, in the light of the opinion of the Supreme Court, is their presence necessary, as I view it, to a decree defining the equitable obligations arising from the nature and purpose of the corporate organization of the Board of Publication.

For similar reasons I am of opinion that the second objection made by the defendants, namely, that A. C. Biddle, a member of the rival Board of Publication appointed by the Cumberland Presbyterian Association in May, 1907, is not a necessary and indispensable party. While I think that the said Biddle would be a necessary and indispensable party to any decree adjudging who were the lawful members of the Board of Publication, I must conclude that he is not an indispensable party to the determination of the fundamental question involved in the bill as it has been construed by the Supreme Court.

[2] The main issue thus presented by the bill is not, in my opinion, res adjudicata by reason of the adjudication in the quo warranto proceedings in the case of State ex rel. v. W. A. Provine et al. Those proceedings were pending in the Chancery Court of Davidson County, Tennessee, when the second plea to the jurisdiction was filed, and were set up and relied upon in said plea. In passing upon this plea in my memorandum opinion of March 26, 1910, I said:

"Obviously the bill goes further than to seek merely a decree as to who are the true and lawful members of the corporation, which is the only matter involved in the above named quo warranto proceedings, and seeks a decree broadly declaring the trust upon which the property of the corporation is held, and the use and purpose for which it is to be administered by such persons as may be its true and lawful members."

In Helm v. Zarecor (U. S.), supra, the Supreme Court said:

"The second plea was overruled because it did not reach the whole case made by the bill, as the bill did not merely ask a determination as to the persons who were the true and lawful members of the corporation, which was the only matter involved in the quo warranto proceeding in the state court, but sought a decree declaring the trust upon which the property of the corporation is held and the uses and purposes for which it is to be administered, whoever might be found to be the true and lawful members of the corporation. We need add nothing to what was said by the court below upon these points."

The purpose of this quo warranto proceeding, as appears from the bill and the prayer for relief, was merely "for the purpose of ousting the defendants (Provine and others) from the offices of members of the Board of Publication of the Cumberland Presbyterian Church and installing the relators (Zarecor and others) in their room and stead." It was brought by the State on the relation of Zarecor and others against the defendants Provine and others. It affected merely the right of the relators, on the one hand, and the defendants, on the other, to hold offices as members of the Board of Publication. It did not purport to be brought as a class suit by the relators as representatives of their religious association against the defendants as representatives of their religious association, to declare the uses and purposes for

which the corporate property was held, but was merely a suit brought for the purpose of determining the single question as to whether the relators or the defendants were entitled to hold office as members of the Board. It is true that the decree of the Supreme Court of Tennessee, sustaining the bill, contained the introductory recital that it appeared that the proceedings taken in 1906 to effect the union of the Cumberland Presbyterian Church and the Presbyterian Church in the United States of America were not effective to merge the Cumberland Presbyterian Church into the Presbyterian Church U. S. A., and that the Cumberland Presbyterian Church still remained a vital and independent organization, and that the relators were identified therewith and had been duly elected directors of the Board of Publication of the Cumberland Presbyterian Church, and the defendants had been removed, and were diverting the trust property from the uses and purposes for which it was placed in their hands. However, after this preliminary recital, the order, judgment and decree of the court merely was that the defendants were not entitled to hold the offices of Directors of the Board of Publication, and that the relators were so entitled, and therefore that the defendants be removed from their said offices as Directors of the Board, and that the relators be installed as members of said Board; with a further provision directing the surrender of the corporate property and other matters not here material. On the whole I think it clear that this decree cannot properly be regarded as made in a class suit between representative members of the two religious associations; that its effect as a prior adjudication must be limited to the adjudication, as between the parties themselves, that the relators were lawful members of the Board of Publication entitled to hold office as such in lieu and instead of the defendants; and that the introductory recitals contained in the decree, stating the reasons which led the court to its conclusion, cannot properly be held as binding upon the two religious associations respectively, as they might perhaps have been if made in a class suit between representatives of the two associations by the result of which all members in each were bound.

[3] Nor does the Presbyterian Church in the United States of America appear to be bound by this decree by any participation which its Philadelphia Board may have taken in bearing the expenses of this litigation in behalf of Provine and others or any action taken by its General Assembly. Although a person individually interested in the result of a suit against another assists in its defence, because of interest in the decision as a judicial precedent, the result as to him is merely that of precedent, and not of res adjudicata, and no estoppel is created against him by assisting in such defence. Bigelow v. Old Dominion Copper Co., 225 U. S. 111, 32 Sup. Ct. 641, 56 L. Ed. 1009, Ann. Cas. 1913E, 875. And while the decree in State ex rel. v. Provine would apparently be res adjudicata binding on all of the parties to that suit, either as relators or defendants, which, even if the necessary parties were before the court, would now bar any decree ousting the defendants Zarecor and his associates as members of the Board of Publication and re-instating Provine and his associates in their room and stead, I do not think that, in accordance with the opinion of the Supreme Court, it can operate as a bar to the complainants' rights, if

otherwise established, to a decree declaring in this class suit, the trust upon which the property of the corporation is held and the uses and purposes for which it is to be administered, whoever may be the true and lawful members of the corporation. And see Watson v. Jones, 13 Wall. 679, 20 L. Ed. 666.

For like reasons I conclude that the decree of the Supreme Court of Tennessee in State ex rel. v. Provine et al. is not conclusive upon this court as a construction of the Tennessee statute creating the Board of Publication further than relates to the specific point in controversy in that suit, to-wit, that under that charter the relators were the lawfully elected members of the Board and entitled to hold office as such in lieu and instead of Provine and his associates.

[4] The decision of the Supreme Court of Tennessee in Landrith v. Hudgins, 121 Tenn. 556, 120 S. W. 783, rendered in April, 1909, a few days before the present bill was filed, in which the invalidity of the church union upon which the complainants predicate their rights, was adjudged, and the four subsequent decrees of the Supreme Court of Tennessee, rendered after the present bill was filed, in First Cumberland Presbyterian Church v. Keith, Ridings v. Bowen's Chapel Congregation, State ex rel. v. Provine, and Bonham v. Harris, 125 Tenn. 452, 145 S. W. 169, in at least three of which the doctrine of Landrith v. Hudgins was expressly reaffirmed, do not, in my opinion, constitute a rule of property in Tennessee controlling in the present case.

In Bucher v. Railroad Co., 125 U. S. 555, 584, 8 Sup. Ct. 974, 978 (31 L. Ed. 795) the court said:

"It may be said generally that wherever the decisions of the state courts relate to some law of a local character, which may have become established by those courts, or has always been a part of the law of the State, that the decisions upon the subject are usually conclusive, and always entitled to the highest respect of the Federal courts. The whole of this subject has recently been very ably reviewed in the case of Burgess v. Seligman, 107 U. S. 20 [2 Sup. Ct. 10, 27 L. Ed. 359]. Where such local law or custom has been established by repeated decisions of the highest courts of a State it becomes also the law governing the courts of the United States sitting in that State."

And in Kuhn v. Fairmont Coal Co., 215 U. S. 349, 360, 30 Sup. Ct. 140, 143 (54 L. Ed. 228), in which Burgess v. Seligman (U. S.), supra, and Bucher v. Railroad (U. S.), supra, were reviewed, the court said that

"it is no longer to be questioned that the Federal courts in determining cases before them are to be guided by the following rules: 1. When administering state laws and determining rights accruing under those laws the jurisdiction of the Federal court is an independent one, not subordinate to but coordinate and concurrent with the jurisdiction of the state courts. 2. Where, before the rights of the parties accrued, certain rules relating to real estate have been so established by state decisions as to become rules of property and action in the State, those rules are accepted by the Federal court as authoritative declarations of the law of the State. 3. But where the law of the State has not been thus settled, it is not only the right but the duty of the Federal court to exercise its own judgment, as it also always does when the case before it depends upon the doctrines of commercial law and general jurisprudence. 4. So, when contracts and transactions are entered into and rights have accrued under a particular state of the local decisions, or when there has been no decision by the state court on the particular question involved, then the Federal courts properly claim the right to give effect to their own

judgment as to what is the law of the state applicable to the case, even where a different view has been expressed by the state court after the rights of parties accrued."

And see Louisville Trust Co. v. Cincinnati, (6th Circ.) 76 Fed. 296, 301, 22 C. C. A. 334.

In accordance with the foregoing cases I am constrained to hold that the decision in Landrith v. Hudgins, 121 Tenn. 556, 120 S. W. 783, which was rendered only a few days before the filing of the bill in this case, is not conclusive upon this court as a rule of property, for two reasons: First, because the rights of the two religious associations in the property involved in this controversy depend upon the union of the churches made in 1906, more than three years before this decision was rendered; and, second, because this single decision in Landrith v. Hudgins, which was the only decision that had then been rendered by the Supreme Court of Tennessee on the broad question herein involved, to-wit, the validity of this union, had not, even at the time that this bill was filed, been so established by repeated decisions of the Supreme Court of the State as to become a rule of property binding upon the Federal court. Nor do I find that any rule of property involving in any way the question of the validity of the church union in controversy, is established by the decisions in Bridges v. Wilson, 11 Heisk. (Tenn.) 458, and Rodges v. Burnett, 108 Tenn. 173, 65 S. W. 408.

[5] The union between the Cumberland Presbyterian Church and the Presbyterian Church of the United States of America, as effected in 1906, whether termed a union, re-union, merger or absorption, was, in my opinion, a valid union, not in conflict with the constitution of the Cumberland Presbyterian Church, lawfully entered into by its General Assembly in the exercise of its implied authority, and not involving any such difference in the doctrine and polity of the two churches as to constitute an inseparable legal barrier to the union, as conclusively determined by its General Assembly, its highest legislative and judicial tribunal.

As to the validity of this union there has been a direct conflict of authority. On the one hand it has been held invalid by the Supreme Courts of two States, in the following reported cases: Landrith v. Hudgins, 121 Tenn. 556, 120 S. W. 783 (1909); Boyles v. Roberts, 222 Mo. 613, 121 S. W. 805 (1909); and Bonham v. Harris, 125 Tenn. 452, 145 S. W. 169 (1911). On the other, it has been held to be valid by the Supreme Courts of nine States, in the following reported cases: Mack v. Kime, 129 Ga. 1, 58 S. E. 184, 24 L. R. A. (N. S.) 675 (1907); Wallace v. Hughes, 131 Ky. 445, 115 S. W. 684 (1909); Brown v. Clark, 102 Tex. 323, 116 S. W. 360, 24 L. R. A. (N. S.) 670 (1909); Permanent Committee of Missions v. Pacific Synod, 157 Cal. 105, 106 Pac. 395 (1910); Ramsey v. Hicks, 174 Ind. 428, 91 N. E. 344, 92 N. E. 164, 30 L. R. A. (N. S.) 665 (1910), reversing Ramsey v. Hicks, 44 Ind. App. 490, 87 N. E. 1091, 89 N. E. 597; First Presbyterian Church v. First Cumberland Presbyterian Church, 245 Ill. 74, 91 N. E. 761 (1910); Sanders v. Baggerly, 96 Ark. 117, 131 S. W. 49 (1910); Harris v. Cosby, 173 Ala. 81, 55 South. 231 (1911); and Carothers v. Moseley, 99 Miss. 671, 56 South. 881 (1911). Its validity has also been recently sustained by the United States District Court for the Western

District of Tennessee, in the case of Sherard v. Walton (D. C.) 206 Fed. 562.

Without referring in detail to the various objections to the validity of the union, which are urged with great clearness and force in the briefs submitted in behalf of the defendants, a full discussion of which would carry this opinion to undue length, it is sufficient for present purposes to say, that, after careful consideration of the foregoing cases, I am constrained to conclude that not only the weight of authority but the sounder reasoning is on the side of those cases in which the union has been held to be valid. The reasons leading to that conclusion are stated so fully in the cases in which the union has been upheld, especially in Wallace v. Hughes, Ramsey v. Hicks, Sanders v. Baggerly, and First Presbyterian Church v. First Cumberland Presbyterian Church, supra, that I deem it unnecessary to repeat them here. The corner stone upon which these opinions are, in my judgment, to be based, is the decision in Watson v. Jones (U. S.), supra, in which, after careful consideration, it was held by the Supreme Court of the United States that where in a controversy in a civil court, the property rights of a religious organization is dependent upon a question of doctrine, discipline, ecclesiastical law, rule, custom or church government that has been decided by the highest tribunal within the organization to which it has been carried, the civil court will accept that decision as conclusive, and will be governed by it in its decision of the case before it. This rule was followed by the Supreme Court of Tennessee in Nance v. Busby, 91 Tenn. 303, 326, 18 S. W. 874, 879 (15 L. R. A. 801), in an opinion delivered by Judge Lurton (now Mr. Justice Lurton), in which "the great case of Watson v. Jones" was cited and expressly followed. It is also the rule which has been followed by the Circuit Court of Appeals for this circuit in Brundage v. Deardorf (6th Cir.) 92 Fed. 214, 34 C. C. A. 304. And this is not only the established rule in the Federal courts, but is, in my opinion, as clearly appears from the cases above cited, the rule supported by the great weight of authority in the State courts as well.

And while under the doctrine of Burgess v. Seligman and Kuhn v. Coal Co., supra, it would undoubtedly be the duty of this court, for the sake of comity and to avoid confusion, to lean to an agreement with the State court where a question of this character is balanced with a doubt, the Federal court, on the other hand, as stated in Kuhn v. Coal Co., "would not only fail in its duty, but would defeat the object for which the national courts were given jurisdiction of controversies between citizens of different States, if, while leaning to an agreement with the State court, it did not exercise an independent judgment in cases involving principles not settled by previous adjudications." And the duty of thus exercising an independent judgment is rendered the plainer in the present case by reason of the fact that, in my judgment, the decision in Landrith v. Hudgins is not only in conflict with the doctrine of Watson v. Jones, but in conflict with the earlier decisions of the Supreme Court of Tennessee in Nance v. Busby, supra, in which Watson v. Jones had been followed. And I may add that in the last of the cases in which this question came before the

Supreme Court of Tennessee, namely, Bonham v. Harris, supra, while Landrith v. Hudgins was followed by a majority opinion, Lansden, J., in concurring, expressed (125 Tenn. 466, 145 S. W. 172) in clear and forceful language his reason for believing that Landrith v. Hudgins "was decided contrary to the great weight of authority, and is unsound upon principle," though believing that it should be then followed by the Supreme Court of Tennessee on the principle of *stare decisis;* while Green, J., expressly dissented (125 Tenn. 470, 145 S. W. 173) on the ground that he could not agree that Landrith v. Hudgins made "a proper disposition of this unfortunate controversy," and that he believed "the case should be overruled." In this connection he said:

"In Landrith v. Hudgins this court undertakes to review a decision of a high ecclesiastical tribunal of competent jurisdiction passing upon points of church faith and doctrine. The opinion undertakes a comparison of creeds, and discovers doctrinal differences, which learned theologians officially declared did not exist. Landrith v. Hudgins commits this court to a policy that will, in my judgment, always prove embarrassing, and compel us to review and overhaul every sectarian or intersectarian dispute that may hereafter arise, if, perchance, so-called property rights are involved. This, too, although such matters have been formally and regularly determined by the judicatories organized and empowered by the disputants themselves to settle such differences. The true rule is that the civil courts shall accept as conclusive the determination of the proper ecclesiastical authority in these controversies. It was so held formerly in Tennessee, in Nance v. Busby, 91 Tenn. 328, 18 S. W. 874, 15 L. R. A. 801. It was so held in Watson v. Jones, 13 Wall. 679, 20 L. Ed. 666, by the Supreme Court of the United States. It is so held by all the late decisions, except in Tennessee and Missouri, and this rule applied to this particular controversy by the courts of Georgia, Texas, Kentucky, Arkansas, Alabama, Illinois, Indiana, Mississippi, California, and perhaps others. So that Landrith v. Hudgins is out of line with our own decisions, with the Supreme Court of the United States, and with the practically unbroken current of modern authority."

And in the note to Ramsey v. Hicks, supra, 30 L. R. A. (N. S.) 666, the editor says:

"In spite of the contrary conclusion reached in Missouri and Tennessee and by the Indiana Appellate Court and by the dissenting judges in some of the other cases, it is apparent that the weight of authority sustains the validity of the union or re-union as affecting property rights. Doubtless, the reluctance of the court to throw any obstacle in the way of church unity would in any event dispose them to obviate, if possible, the effect of merely technical objections. But in view of the broad principles laid down by the United States Supreme Court in Watson v. Jones, 13 Wall. 679, 20 L. Ed. 666, and especially the principle that the civil courts, in the disposition of property rights depending indirectly upon the decision of an ecclesiastical tribunal, will accept that decision as conclusive, without re-examining its merits in the light of church history or polity, it would seem that the conclusion of those courts in upholding the union is abundantly fortified by legal precedent."

I am of opinion that the evidence upon the issue of fraud in the procurement of the union is insufficient to impeach the validity of the union. It is well settled that a court cannot set aside the action of a legislative body on the ground of fraud perpetrated on the part of its members. Williams v. Nashville, 89 Tenn. 487, 15 S. W. 364. Furthermore, without reciting the evidence in detail, it is sufficient to say that it does not, in my opinion, make out a case of fraud or necessarily show that the result was effected by the means complained of.

It results that, in my opinion, the complainants are entitled to a decree adjudging in behalf of themselves and all other members of the Presbyterian Church in the United States of America, as against the defendants and all other members of the Cumberland Presbyterian Church, that the property of the defendant corporation, the Board of Publication, is held in trust for the use and benefit of said Presbyterian Church in the United States of America, which is entitled to its use and control and to have its benefit in its denominational work, and that the individual defendants and any and all other persons who may be members of said Board and entitled to its management, shall manage said corporation and administer its property in trust for the use and benefit of said Presbyterian Church in the United States of America; and to a decree against the defendants for all costs of the cause not heretofore adjudged.

For the reasons above indicated, however, the complainants are not, in my opinion, entitled to a decree determining what persons are now the true and lawful members of the said Board of Publication or to any other relief prayed by the bill than as above stated.

A decree will be entered accordingly.

On Petition for Rehearing.

I have carefully considered the petition for rehearing filed by J. H. Zarecor and other petitioning defendants, and am of opinion that the prayer of the petition for rehearing should be denied.

I do not think that the entire membership of both the Presbyterian Church of the United States of America and the Cumberland Presbyterian Church are shown to have had any such interest in the specific church property involved in Landrith v. Hudgins as to make that suit properly a class suit binding on members of both churches throughout the United States, or upon any other persons than members of the particular church whose property was in question therein, and in reference to the beneficial ownership of such property.

Furthermore the defendants' contention in reference to the effect of the quo warranto proceedings cannot be sustained in the light of the construction placed upon the issues in said quo warranto proceedings in the opinion of the Supreme Court of the United States in Helm v. Zarecor, 222 U. S. 32, 32 Sup. Ct. 10, 56 L. Ed. 77, and for the reasons heretofore stated in my former opinion.

The prayer of the petition for a rehearing must accordingly be denied.

SHARP et al. v. BONHAM et al.

(District Court, M. D. Tennessee, at Nashville. August 9, 1913.)

No. 3585.

1. COURTS (§ 317*)—JURISDICTION OF FEDERAL COURTS—DIVERSITY OF CITIZENSHIP—REALIGNMENT OF PARTIES.

In a suit in a federal court of equity by members of one religious society, on behalf of themselves and all other members, against the representatives of another society, each society claiming the right to the possession and use of certain church property, to have the same decreed to be held in trust for the use and benefit of the society represented by complainants, to which suit the trustees who hold the legal title to the property are made parties defendant, the fact that such trustees, who are citizens of the same state as their codefendants, are in sympathy with complainants, does not require their realignment as complainants and defeat the jurisdiction of the court, nor does the further fact that they are active members of the society represented by complainants, since they are sued only in their capacity as trustees and title holders and are not required to personally take any part in the litigation.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 317.*]

2. RELIGIOUS SOCIETIES (§ 31*)—ACTIONS—INDISPENSABLE PARTIES—CLASS SUIT IN BEHALF OF MEMBERS.

In such suit, which is a class suit in behalf of all members of the society represented by complainants, it is not necessary that the elders or other persons who constitute its governing body should join as complainants.

[Ed. Note.—For other cases, see Religious Societies, Cent. Dig. §§ 199–207; Dec. Dig. § 31.*]

3. COURTS (§ 493*)—JUDGMENT (§ 828*)—RES JUDICATA—SUITS IN FEDERAL AND STATE COURTS—PRIORITY OF JURISDICTION.

A class suit, brought in a federal court by representatives of one religious society against representatives of another, to determine as between the two societies the right to the possession and use of certain church property held by trustees, who are made defendants, is in the nature of a suit in rem, and the court retains jurisdiction to the end of the litigation, notwithstanding a decree of a state court rendered in a cross-suit between representatives of the same societies and involving the same issues, which was commenced pending an appeal in the federal suit, and wherein neither party apparently called the attention of the state courts to the pending suit.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1346–1352; Dec. Dig. § 493;* Judgment, Cent. Dig. §§ 1504–1509; Dec. Dig. § 828.*]

4. RELIGIOUS SOCIETIES (§ 34*)—UNION OF CHURCHES—VALIDITY.

The union effected in 1906 between the Presbyterian Church in the United States of America and the Cumberland Presbyterian Church was valid, and vested the united church with all property rights at the time existing in either of the constitutent churches.

[Ed. Note.—For other cases, see Religious Societies, Cent. Dig. §§ 209–211; Dec. Dig. § 34.*]

In Equity. Suit by C. R. Sharp and others against E. W. Bonham and others. On final hearing. Decree for complainants.

This bill was brought in the United States Circuit Court for this district by members of a religious society in Nashville, Tennessee, known as Grace Church, citizens of States other than Tennessee, against the pastors and elders of another religious society calling itself Grace Cumberland Presbyterian

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

Church, and also against three individuals described as trustees, who held the legal title to certain land and a house of worship in the City of Nashville, all the defendants being citizens of Tennessee. The controversy grew out of the proceedings consolidating the Cumberland Presbyterian Church with the Presbyterian Church in the United States of America. It was alleged in the bill that the union had been legally effected; and the complainants sought a decree that the church property be declared to be held in trust for the congregation which adhered to the alleged united body. The defendants, other than the trustees, filed a plea in abatement to the jurisdiction, alleging, among other things, that the defendant trustees, who held the legal title to the property involved, were in substance parties complainant, and had been improperly joined as defendants for the purpose of creating a case cognizable in the Federal court. It was held by the court that, in the absence of any showing of antagonism between the trustees and the complainants, they should be re-aligned upon the same side of the controversy with the complainants, and the requisite diversity of citizenship being therefore destroyed, the plea to the jurisdiction was sustained. On appeal to the Supreme Court on the jurisdictional question involved, it was held that this court had erred in aligning the trustees with the complainants and in sustaining the defendants' plea to the jurisdiction. Sharpe v. Bonham, 224 U. S. 241, 32 Sup. Ct. 420, 56 L. Ed. 747. After the case had been remanded to this court the bill was amended, answers filed by the defendants and proof taken.

John M. Gaut, of Nashville, Tenn., for plaintiffs.

W. C. Caldwell, of Trenton, Tenn., W. B. Lamb, of Fayetteville, Tenn., and Frank Slemmons and J. H. Zarecor, both of Nashville, Tenn., for defendants.

SANFORD, District Judge. This case was heard upon the pleadings, stipulations and depositions before the new equity rules went into effect.

After careful consideration I have reached the following conclusions:

[1] The bill should not be dismissed for want of requisite diversity of citizenship on which to found the jurisdiction of the court. I held originally that as the essential object of this suit was to obtain a decree that the defendants Rhea, Gaut and Hardison, trustees of the Grace Church property, held title in trust for the exclusive use and benefit of the congregation of that Church, of which the complainants are members, in the absence of any showing of antagonism between them and the complainants they should be aligned upon the same side of the controversy with the complainants, and that as such re-alignment placed them, being citizens of Tennessee, upon the same side of the controversy with their co-defendants, also citizens of Tennessee, and the requisite diversity of citizenship was therefore destroyed, the plea in abatement to the jurisdiction of the court must be held good. On appeal to the Supreme Court, however, this was held to be erroneous, the Supreme Court saying that as the controversy in this case is with respect to the control of the church property which the three trustees held in trust, "as mere title holders, they were properly made parties defendant." Sharpe v. Bonham, 224 U. S. 241, 243, 32 Sup. Ct. 420, 56 L. Ed. 747.

After the suit had been remanded to this court for further proceedings the other defendants filed an answer in which they alleged that their two co-defendants Gaut and Hardison were at the time this bill

was filed active members and elders of the Grace Church and as such elders in the possession and control of the church property, and claimants of the property as against their co-defendants, the members of the Grace Cumberland Presbyterian Church, and that being on the same side of the controversy with the complainants they should be aligned accordingly; and the proof in the case, taken in connection with the averments of the complainants' bill substantially establishes these facts, which are not, as I understand, disputed. On this state of facts the complainants now insist that as this is, in effect, a class suit for the benefit of the congregation of Grace Church, of which these two trustees are members and elders, and as their interest as members in said church is identical with that of the complainants, they must now, upon the facts developed subsequently to the decision by the Supreme Court, be re-aligned as parties complainant and the bill dismissed for want of jurisdiction. And in this connection they rely upon the general rule in reference to the duty of the court as to the re-alignment of the parties as stated in my opinion in Stephens v. Smartt (C. C. E. D. Tenn.) 172 Fed. 466, 471, and the cases therein cited. In view of the fact that these two defendants as members of the Grace Church are, in a sense, as it now appears, at least inchoate parties plaintiff with the complainants as members of the class for whose benefit the suit is brought (30 Cyc. 138), there is strong ground for the contention that as their interests as such inchoate parties plaintiff and beneficiaries appears to be identical with that of the complainants, they should be re-aligned upon the same side of the controversy with them. However, no direct authority has been cited by either side upon this precise question, and after careful consideration I am constrained to hold that as the Supreme Court has held that, as mere title holders, the trustees were properly made defendants, the fact that they are now shown to have an inchoate interest with the complainants, as belonging to the class of beneficiaries for whom the complainants have brought this suit, does not so affect their status as parties, as trustees and title holders, in which capacity alone they have, in effect, been brought before the court, as to require a re-alignment of their position in the litigation, especially as they have filed an answer in which they disclaim any personal interest in the litigation and are as trustees taking no part in the contest between the complainants and their co-defendants. I therefore conclude that the bill should not be dismissed for want of Federal jurisdiction.

[2] For reasons analogous to those stated in my opinion, in the companion case of Helm v. Zarecor, 213 Fed. 648, I am of opinion that J. T. Harris and his associates, elders of the Grace Church, are not necessary parties to this suit in determining the essential controversy therein presented, as the bill has been construed by the Supreme Court, that is, the controversy "with respect to the control of the church property which the three trustees hold in trust."

[3] The next defense relied on is that of res judicata. The bill, as originally filed, was, in effect, a class suit brought by the complainants for the benefit of themselves and all other members of the Grace Church, against the trustees and all members of the Grace Cumberland

Presbyterian Church, its essential object being to obtain a decree that the trustees held the Grace Church property in trust for the exclusive use and benefit of the congregation of Grace Church, with injunctive relief incident thereto. By an amendment allowed after the case had been remanded to this court the bill was amended so as to show that the complainants sued in behalf of all the members of the Presbyterian Church in the United States of America as well as in their own behalf, but this amendment did not allege that the members of said Church in general had any substantial property interest in this particular church property, nor does the proof disclose such interest; and in so far as any material property rights are involved they are limited, in so far as disclosed by the proof, to the rights in the property claimed by and in behalf of the members of the Grace Church and the Grace Cumberland Presbyterian Church, respectively.

The essential facts alleged and proven in reference to the defense of res judicata are these:

The original bill in this case contained no prayer for the appointment of a receiver of the church property and no application for the appointment of a receiver was made at any time.

On April 14, 1910, the complainants' motion for a temporary restraining order was denied.

On March 26, 1910, my memorandum opinion was sent to the clerk holding that the plea in abatement to the jurisdiction should be allowed, and the preliminary injunction therefore denied, and directing that an order be entered accordingly. This opinion was filed on March 28, 1910. On the same day, March 28, 1910, the defendants Bonham and others, exclusive of the three trustees, and other members of the Grace Cumberland Presbyterian Church, filed a bill in the Chancery Court of Davidson County, Tennessee, entitled E. W. Bonham et al. v. J. T. Harris et al., in behalf of themselves and all other members of said church, against the elders of the Grace Church, including the defendants Gaut and Hardison, who were then in possession of the church property, and who were sued in their own right and as representatives of the membership of the Grace Church, seeking a decree that the church property belonged to the Grace Cumberland Presbyterian Church and not to Grace Church, that Bonham and his associates had the right to its possession and control, and that the union between the Cumberland Presbyterian Church and the Presbyterian Church in the United States of America, upon which the complainants in the present suit rely, was invalid. In other words, this was a class suit filed by representatives of the Grace Cumberland Presbyterian Church against representatives of the Grace Church, involving exactly the same fundamental question that is presented in the present case as to whether the church property was held in trust for the benefit of the members of the Grace Cumberland Presbyterian Church or for the members of the Grace Church, and necessarily involving, as in the present case, a determination of the question as to whether the union between the Cumberland Presbyterian Church and the Presbyterian Church of the United States of America was valid or invalid. It does not appear on what date subpœna to answer was served on the defendants in this suit in the Chancery Court.

On April 13, 1910, the complainants in the present suit having declined to plead over in this court, the present bill was dismissed for want of jurisdiction, and on April 14th the complainants in the present suit prayed and were granted an appeal to the Supreme Court of the United States.

The defendants in the Chancery Court at a subsequent date, not precisely shown, answered the bill in the Chancery Court. Their answer referred in a general way to the pendency of a bill in this cause, wherein, it was alleged, certain non-resident members of Grace Presbyterian Church prayed that the complainants in said cause be enjoined from attempting to interfere or molest the defendants or their trustees constituting Grace Presbyterian Church in the use, enjoyment and possession of the property described in the bill in this cause; and, after setting forth the pendency of the appeal to the Supreme Court of the United States, they further answering said: "Defendants are advised that according to well-known rules of comity between the State and Federal courts this court will not take jurisdiction of this cause during the pendency of said former suit, and they therefore deny the right of complainants to institute or prosecute this suit at the present time."

It will be noticed from this answer that no formal plea to the jurisdiction of the Chancery Court appears to have been made, but a mere denial is made of the right to proceed, based on the rule of comity. And no motion to stay the proceedings in said chancery suit pending the determination of this present suit appears to have been made. And it is to be noted that the answer does not even set out the parties to the suit in this court or show that it was a class suit or even show that the trustees who hold title to the property were before the court in the present suit; and, in short, it does not in substance set forth a state of facts which would show that the suit was anything more than a mere suit in personam against certain defendants for the purpose of obtaining certain injunctive relief. It was further stated in this answer that the defendants would introduce a certified copy of the record in this cause as an exhibit to their answer, but whether this was done does not appear. Neither does it appear that this defense was ever actively brought to the attention of the Chancery Court, and no ruling appears to have been ever invoked or made by the Chancery Court in reference thereto, but the Chancery Court appears to have proceeded to a hearing of the cause on its merits, and to have decreed, without reference to any question of prior jurisdiction in this court, that the congregation of the Grace Cumberland Presbyterian Church was entitled to the possession, ownership, use and control of the church property. The defendants appealed from this decree to the Supreme Court of Tennessee, and at a later date that court affirmed the decree of the Chancery Court and adjudged that the complainants and other members constituting the congregation of Grace Cumberland Church were entitled to the ownership, use and possession of the Church property, and awarded the complainants a writ of possession therefor. Bonham v. Harris, 125 Tenn. 452, 145 S. W. 169. However, so far as appears from the published opinion of the Su-

preme Court of Tennessee, the question of the prior jurisdiction of this court was not presented to that court; and this question was neither considered in its opinion nor referred to in the decree of the court.

Subsequently the prior decree of this court, dismissing the bill for want of jurisdiction, was reversed by the Supreme Court of the United States and the cause remanded to this court for further proceedings. After this cause had been so remanded the defendants herein, other than the trustees, filed an answer in this cause in which they set up and relied upon the aforesaid proceedings and decrees in Bonham v. Harris in the State courts as res judicata of the questions involved in this suit.

It is clear to my mind, in the first place, that as Bonham v. Harris was a class suit by proper representatives of the Cumberland Presbyterian Church against proper representatives of the Grace Church, involving the same questions as to the validity or invalidity of the church union and the trust upon which the church property was held as are involved in the present suit, the decree of the State courts in favor of the representatives of the Grace Cumberland Presbyterian Church is conclusive of the issues involved in the present case as res judicata, provided the State courts had, under all the circumstances, jurisdiction to determine those questions; and this depends upon the question whether or not the proceedings earlier commenced in this court were such as to vest in this court exclusive jurisdiction of the subject matter of the controversy so as to deprive the State courts, under the circumstances, of any jurisdiction in reference thereto.

I furthermore think it clear, in view of the subsequent decree of the Supreme Court of the United States reversing the decree of this court, dismissing the bill and remanding the cause to this court for further proceedings, that the suit in this court must be deemed to have been continuously in this court for all jurisdictional purposes from the time the suit was instituted, especially as the proceedings in the State court were commenced while the suit was still pending in this court and before the entry of the decree of dismissal in this court, and it does not appear that process was issued or the defendants served with process in the State court in the interval between the dismissal of the suit in this court and the allowance of the appeal; although I do not think that if exclusive jurisdiction had been originally vested in this court it would be lost during the interval pending between the decree of dismissal and the allowance of the appeal to the Supreme Court.

Under these circumstances the controlling question presented is whether or not the proceedings in this court prior to the institution of the suit in the Chancery Court were such as to vest in this court exclusive jurisdiction of the subject matter of the litigation so as to deprive the State courts of any jurisdiction in regard thereto, pending the final termination of the suit in this court.

It is clear, on the one hand, as a rule of substantive law, applicable as between the Federal and State courts, that the court which first acquires jurisdiction over property in controversy or the res which constitutes the subject matter of the suit, is entitled to retain that

jurisdiction to the end of the litigation without interference from any other court whatever. 3 Street, Fed. Eq. Pract. § 2529, p. 1466, and cases cited in note 41. And this is more than a mere rule of comity as between the State and Federal courts; it is a "principle of right and law" which so operates that when one court takes a specific thing into its jurisdiction that res is as much withdrawn from the judicial power of any other court as if it had been carried physically into a different territorial sovereignty. Covell v. Heyman, 111 U. S. 176, 182, 4 Sup. Ct. 355, 28 L. Ed. 390.

It is equally clear, on the other hand, that the mere fact of the pendency of two suits in personam between the same parties, upon the same identical cause of action, in courts of different jurisdictions, does not make a case in which the jurisdiction of one court is impeded or interfered with by the action of the other. Stanton v. Embry, 93 U. S. 548, 23 L. Ed. 983; Gordon v. Gilfoil, 99 U. S. 168, 178, 25 L. Ed. 383; Hubinger v. Trust Co. (8th Cir.) 94 Fed. 788, 36 C. C. A. 494; Powers v. Building & Loan Assoc. (C. C.) 86 Fed. 705, 708; 1 Fost. Fed. Pract. (4th Ed.) 506. In such case the pendency of the former suit in personam is not a matter going to the jurisdiction or ground for the abatement of the second suit, although as a rule of comity between the courts the second court will ordinarily upon proper motion stay its proceedings until the termination of the litigation in the former court. Simk. Fed. Suit Eq. [2d Ed.] 410. But in such case if such stay is not had and if final judgment be rendered first in the court in which the proceedings were later instituted, such judgment will thereafter be binding as res judicata between the parties in the court in which the proceedings were first instituted. Merritt v. Steel-Barge Co. (8th Cir.) 79 Fed. 228, 24 C. C. A. 530. And see Gates v. Bucki (8th Cir.) 53 Fed. 961, 965, 4 C. C. A. 116.

The precise question for determination in the present case then is whether this suit, which was brought to declare and enforce a trust upon which the church property was held, and in which the trustees holding title to the property were made party defendants and brought before the court, is to be deemed as falling within the rule applicable to suits where the res is in the actual possession of the court, on the one side, in which case its jurisdiction remained exclusive until the determination of the litigation, or whether, on the other hand, it is to be deemed analogous to a mere suit in personam, in which this court had not exclusive jurisdiction and in which the prior judgment in the State courts should be held conclusive as to the rights of the present litigants through their proper class representation in the other suit.

After careful consideration of the authorities I am of opinion that the nature of this suit is such that this court must be held to have had exclusive jurisdiction of the subject matter of the controversy even although the property involved had not been taken into its actual custody. In Powers v. Building & Loan Assoc. (C. C.) supra, Judge Lurton (now Mr. Justice Lurton) said (86 Fed. at page 707):

"The principle that, where property is in the actual possession of one court of competent jurisdiction, such possession cannot be interfered with by process out of another court, is well settled. Buck v. Colbath, 3 Wall. 334

[18 L. Ed. 257]; Krippendorf v. Hyde, 110 U. S. 276, 4 Sup. Ct. 27 [28 L. Ed. 145]; Byers v. McAuley, 149 U. S. 608, 13 Sup. Ct. 906 [37 L. Ed. 867]; Compton v. Railroad Co., 31 U. S. App. 486, 523, 530, 15 C. C. A. 397, 68 Fed. 263. There are two classes of cases in which the court first obtaining jurisdiction should be suffered to proceed without any interference by process from another of concurrent jurisdiction. The first class consists of those cases in which the exercise of jurisdiction by one court will interfere with the prior possession of the res by another court of competent and concurrent jurisdiction. Krippendorf v. Hyde, 110 U. S. 276, 4 Sup. Ct. 27 [28 L. Ed. 145]; Heidritter v. Oil-Cloth Co., 112 U. S. 294, 5 Sup. Ct. 135 [28 L. Ed. 729]; Byers v. McAuley, 149 U. S. 608, 13 Sup. Ct. 906 [37 L. Ed. 867]. The second class is where there are two suits pending in different courts of concurrent jurisdiction, in which the parties are the same, and which involve and affect the same subject-matter, and where the jurisdiction of neither is complete nor effectual unless it may, if necessary or proper, exercise exclusive dominion over the res in litigation. The cases relied upon by counsel for defendants of Gates v. Bucki, 12 U. S. App. 69, 4 C. C. A. 116, 53 Fed. 961; Merritt v. Barge Co., 24 C. C. A. 530, 79 Fed. 228; Zimmerman v. So Relle, 25 C. C. A. 518, 80 Fed. 417; and Sharon v. Terry (C. C.) 36 Fed. 337—are cases belonging to the latter class. The conflict exists in such instances because the suits are in the nature of suits in rem."

In Illinois Steel Co. v. Putnam (5th Cir.) 68 Fed. 515, 517, 15 C. C. A. 556, 558, the court said in language which is cited with approval in 3 Street, Fed. Eq. Pract. § 2534, p. 1470:

"Where a bill in equity brings under the direct control of the court all the property and estate of the defendants, or of certain named defendants, or certain designated property of all or of either of the defendants, to be administered for the benefit of all entitled to share in the fruits of the litigation, and the possession and control of the property are necessary to the exercise of the jurisdiction of the court, the filing of the bill and service of process is an equitable levy on the property, and pending the proceedings such property may properly be held to be in gremio legis. The actual seizure of the property is not necessary to produce this effect, where the possession of the property is necessary to the granting of the relief sought. In such cases the commencement of the suit is sufficient to give the court whose jurisdiction is invoked the exclusive right to control the property. Adams v. Trust Co., 66 Fed. 617 [15 C. C. A. 1]."

In Merritt v. Steel-Barge Co. (8th Cir.) 79 Fed. 228, 231, 24 C. C. A. 530, 533, the court said:

"The doctrine is well settled that when a court, in the progress of a suit properly pending before it, takes possession of property, either under a writ of replevin or attachment, or by other mesne or final process, or by the appointment of a receiver or assignee, its jurisdiction over the property for the time being becomes exclusive, and no other court can lawfully interfere with the possession so acquired. While property is so held it cannot be sold under the judgment, sentence, or decree of any other tribunal. Moreover, so long as the property remains in custodia legis, no other court, unless by special leave of the court which first acquired jurisdiction, can lawfully proceed with the trial and determination of a suit the object of which is to establish a lien against the property, or to subject the specific property to the payment of debts, or which may result in creating conflicting rights or titles thereto. The possession of the res vests the court which has first acquired jurisdiction with the power to hear and determine all controversies relating thereto, and for the time being disables other courts of co-ordinate jurisdiction from exercising a like power. This rule is essential to the orderly administration of justice, and to prevent unseemly conflicts between courts whose jurisdiction embraces the same subjects and persons. Freeman v. Howe, 24 How. 450 [16 L. Ed. 749]; Peck v. Jenness, 7 How. 612, 624, 625 [12 L. Ed. 841]; Taylor v. Carryl, 20 How. 583, 597 [15 L. Ed. 1028]; Wiswall v. Sampson, 14 How. 52

[14 L. Ed. 322]; Covell v. Heyman, 111 U. S. 176, 4 Sup. Ct. 355 [28 L. Ed. 390]; Heidritter v. Oil-Cloth Co., 112 U. S. 294, 302, 5 Sup. Ct. 135 [28 L. Ed. 729]; Riggs v. Johnson Co., 6 Wall. 166, 190 [18 L. Ed. 768]; Central Trust Co. of New York v. South Atlantic & O. R. Co. (C. C.) 57 Fed. 3. The doctrine in question is not limited in its application to cases where property has actually been seized under judicial process before a second suit is instituted in another court, but it applies as well where suits are brought to enforce liens against specific property, to marshal assets, *administer trusts*, or liquidate insolvent estates, and in all other suits of a similar nature, where, in the progress of the litigation, the court may be compelled to assume the possession and control of specific personal or real property. In cases of the latter kind, the rule is that the tribunal which first acquires jurisdiction of the cause by the issuance and service of process is entitled to retain it to the end, without interference or hindrance on the part of any other court. And this rule, in its application to federal and state courts, being the outgrowth of necessity, is 'a principle of right and of law,' which leaves nothing to the discretion of a court, and may not be varied to suit the convenience of litigants. Gates v. Bucki, 12 U. S. App. 69, 4 C. C. A. 116, 53 Fed. 961; Chittenden v. Brewster, 2 Wall. 191 [17 L. Ed. 839]; Orton v. Smith, 18 How. 263, 265 [15 L. Ed. 393]; Union Trust Co. v. Rockford, R. I. & St. L. R. Co., 6 Biss. 197, 24 Fed. Cas. 704; Owens v. Railroad Co. (C. C.) 20 Fed. 10; Union Mut. Life Ins. Co. v. University of Chicago (C. C.) 6 Fed. 443."

And see Adams v. Mercantile Trust Co. (5th Cir.) 66 Fed. 617, 620, 15 C. C. A. 1.

And in Farmers' Loan Co. v. Railroad Co., 177 U. S. 51, 61, 20 Sup. Ct. 564, 568 (44 L. Ed. 667) in which it was held that as between the same parties in a proceeding in rem, exclusive jurisdiction must be regarded as attaching when the bill was filed and process had been issued, the court said:

"The possession of the res vests the court which has first acquired jurisdiction with the power to hear and determine all controversies relating thereto, and for the time being disables other courts of co-ordinate jurisdiction from exercising a like power. This rule is essential to the orderly administration of justice, and to prevent unseemly conflicts between courts whose jurisdiction embraces the same subjects and persons. Nor is this rule restricted in its application to cases where property has been actually seized under judicial process before a second suit is instituted in another court, but it often applies as well where suits are brought to enforce liens against specific property, to marshal assets, *administer trusts* or liquidate insolvent estates, and in suits of a similar nature where, in the progress of the litigation, the court may be compelled to assume the possession and control of the property to be affected. The rule has been declared to be of special importance in its application to Federal and State courts. Peck v. Jenness, 7 How. 612 [12 L. Ed. 841]; Freeman v. Howe, 24 How. 450 [16 L. Ed. 749]; Moran v. Sturges, 154 U. S. 256 [14 Sup. Ct. 1019, 38 L. Ed. 981]; Central Bank v. Stevens, 169 U. S. 432 [18 Sup. Ct. 403, 42 L. Ed. 807]; Harkrader v. Wadley, 172 U. S. 148 [19 Sup. Ct. 119, 43 L. Ed. 399]."

Applying the rule laid down in the foregoing authorities, I am of opinion that this suit, being brought to declare and enforce a trust in real property and being one in which the trustees holding title to the property were brought before the court by service of process, and in which in the progress of the litigation the court might be compelled to assume possession and control of the property to be affected, must be deemed a suit in the nature of a suit in rem in such sense that upon the filing of the bill and the issuance and service of the process the exclusive jurisdiction of this court attached, and that it must be held to have retained such exclusive jurisdiction to determine the subject mat-

ter of the controversy until the termination of this litigation. I am therefore constrained to hold that as the exclusive jurisdiction of the subject matter of this controversy was vested in this court there was no jurisdiction in the State courts over the same, and that the decrees entered in the State court in the subsequent suit of Bonham v. Harris must hence be held to be ineffective and unavailing as res judicata as against the right and duty of this court to now pass upon the merits of the controversy. I may add that I reach this conclusion with less reluctance, as I am constrained to conclude upon examining the record in Bonham v. Harris that this question was never directly presented to either the Chancery Court or the Supreme Court of Tennessee, and that the decrees in the said two courts were apparently rendered without having had this matter brought to the attention of either court.

In this connection I have had some slight question in my mind as to whether the failure of the defendants in Bonham v. Harris to properly plead the facts showing the prior jurisdiction of this court and to bring the matter specifically to the attention of the State courts could operate to make the decrees in said cause binding against them, or those whom they represent; but after careful consideration I am constrained to conclude that this question goes deeper than the mere conduct or laches of the parties themselves or those by whom they were represented in the former litigation, and that as the exclusive jurisdiction of this controversy was in this court it cannot be held to have been taken away so as to give another court jurisdiction of a matter in fact withdrawn from its authority, merely because the litigants failed to properly bring the facts to the attention of the State courts, especially as the complainants in the Chancery Court, in invoking the jurisdiction of that court, failed to advise that court of the pendency and character of the prior proceedings in this court.

[4] Upon the merits of the controversy I am of opinion, for the reasons fully stated in the above mentioned opinion in Helm v. Zarecor, that the union between the Cumberland Presbyterian Church and the Presbyterian Church of the United States of America, as effected in 1906, whether termed a union, re-union, merger or absorption, was a valid union, not in conflict with the constitution of the Cumberland Presbyterian Church, rightfully entered into by its General Assembly in the exercise of its implied authority, and not involving any such difference in the doctrine and polity of the two churches as to constitute an inseparable legal barrier to the union, as conclusively determined by its general assembly, its highest legislative and judicial tribunal; and am further of opinion that in consequence of such valid union the complainants, as representatives of the members of Grace Church, recognizing the validity of the union, are entitled to a decree as such representatives adjudging that the church property is to be held for the exclusive use and benefit of its congregation, and to an injunction against interference therewith by the defendants representing the members of the Grace Cumberland Presbyterian Church, who deny the validity of such union.

A decree will accordingly be entered adjudging that the defendants Rhea, Gaut and Hardison as trustees of Grace Church, and their suc-

cessors and associates in office, hold title to the Grace Church property in trust for the exclusive use and benefit of the complainants and other members of the congregation of Grace Church, which adheres to the united church, and that the session of said church has exclusive right to the control, possession and use of the property, and the pastor employed by it, the sole right to occupy its pulpit and conduct its services; and enjoining all the defendants, except the said Rhea, Gaut and Hardison, and all other members of the Grace Cumberland Presbyterian Church, from taking or attempting to take possession of the said house of worship, or other property contained therein or pertaining thereto, and from interfering with the pastor of said Grace Church, or his successor or successors, in the conduct of religious exercises, or other functions as pastor, or from in any manner disturbing or interfering with the complainants and other members of the congregation of Grace Church, its pastors, officers or members, in the possession, use or enjoyment of such property; and adjudging all the costs of the cause against the defendants, except the defendants Rhea, Gaut and Hardison.

THE F. J. LUCKENBACH.

LUCKENBACH v. 500 TONS, MORE OR LESS, OF SCRAP IRON et al.

(District Court, E. D. Pennsylvania. March 16, 1914.)

Nos. 51, 56 of 1909.

1. SHIPPING (§§ 110, 113*)—CONSTRUCTION OF CHARTER PARTY.
   The determination of what constitutes "right delivery" under a contract of affreightment, and the question as to what the duty of stowage is, where the charter party is silent on the subject, depends in each instance on the character of the cargo to be carried.
   [Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 420, 421, 424–439½; Dec. Dig. §§ 110, 113.*]

2. CUSTOMS AND USAGES (§ 15*)—CONSTRUCTION OF CHARTER PARTY—CUSTOM OF THE TRADE.
   In the absence of any express provision in a charter party as to the manner of stowage or of delivery of the cargo, the custom of the trade may be shown as one of the circumstances affecting the subject-matter and surrounding the parties when the contract was made and as presumably intended to be a part of it.
   [Ed. Note.—For other cases, see Customs and Usages, Cent. Dig. §§ 30–33; Dec. Dig. § 15.*]

3. SHIPPING (§ 110*)—CONSTRUCTION OF CHARTER PARTY—MANNER OF STOWING CARGO.
   An agent of the owner in Galveston chartered two steamships for the carriage of cargoes of scrap iron from that port to Philadelphia. Scrap iron is of distinct grades and classes, each of which has its own use and price, and when mixed they lose their character and value. The charter parties contained no provision as to the manner of stowage or delivery of the cargo, but before they were signed there was an understanding and agreement between the shipper and the owner's agent that if the cargoes were tendered in separate lots the lots should be stowed and delivered to the consignees separately, and it was stated by the owner's agent that it was the custom of the port of Galveston to so carry and deliver such car-

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

goes and it was not necessary to provide for it in the charter parties, which representation was true and was relied upon by the shipper. The cargoes were tendered in separate lots according to grade and class with sufficient dunnage for stowing the lots separately, but were in fact mixed on the vessel and so delivered, to the shipper's damage. *Held*, that the custom could be shown to affect the construction of the charter party, and that the owner was bound by it and by the agreement of his agent and was liable for the loss caused the shipper.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 420, 421; Dec. Dig. § 110.*]

In Admiralty. Suits by Joseph Joseph & Bros. Company against the steamship F. J. Luckenbach and by Edgar F. Luckenbach against 500 tons, more or less, of scrap iron, Joseph Joseph & Bros. Company, claimant. Decrees in favor of Joseph Joseph & Bros. Company in each case.

A. S. Weill and L. Stauffer Oliver, both of Philadelphia, Pa., and Julius C. Feder, of New York City, for libelant.

Peter S. Carter, of New York City, and Biddle, Paul & Jayne, of Philadelphia, Pa., for respondent.

THOMPSON, District Judge. In suit No. 51, Joseph Joseph & Bros. Company filed a libel and subsequently an amended libel against the steamship F. J. Luckenbach, claiming damages to the amount of $4,355 arising from the alleged improper loading, stowage, and discharge of a cargo of scrap iron carried by the steamship from Galveston, Tex., to Philadelphia, Pa., under a charter party dated July 29, 1909, between the owner of the steamship and the Phœnix Iron & Steel Company and consigned to the libelant. The libel alleges that on September 27, 1909, the master of the Luckenbach at Galveston, the loading then having been completed, issued three bills of lading to the Phœnix Iron & Steel Company for the scrap iron, one of which was indorsed for delivery to the order of Jos. Joseph & Bros. Company, the libelant; that the scrap iron was delivered to the steamship in good order and condition in separate lots according to the grades and classification which were set out in the bills of lading. It is further alleged that, before and at the time of the execution of the charter party, the agents for Edgar F. Luckenbach, owner of the steamship, in order to induce the Phœnix Iron & Steel Company to sign the charter party, represented, promised, and agreed that, under the charter party as executed, the iron would be loaded, stowed, carried, and delivered by the steamship in separate lots, and that, in consequence of the said representations, promises, and agreements, the Phœnix Iron & Steel Company was induced to and did sign the charter party. The libelant claims damages caused by alleged negligent and improper stowage by the steamship, so that there was an indiscriminate mixture of the lots and classes of scrap iron, and by the discharge of the cargo in such negligent and improper manner as to cause such lots as had been separately stowed to be broken up and become mixed. It is alleged that the entire freight for the cargo was paid under protest, and that in order to prevent further mixing in discharge of the cargo the stevedore

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

was paid extra compensation by the libelant without prejudice to its rights. The owner as claimant denies any contract or agreement to load, stow, carry, or deliver the cargo in separate lots, and claims that the charter party constituted the whole contract between the shipper or its consignee and the steamship, and that no provision for stowage and delivery in separate lots was contained in the charter party. The respondent alleges that the cargo was received, loaded, and discharged according to the terms and conditions of the charter party, and admits the payment of freight under protest and the employment of the stevedore by the shipper without prejudice.

In case No. 56, Edgar Luckenbach, owner of the steamship Jacob Luckenbach (as well as of the F. J. Luckenbach, the subject of libel in suit No. 51), filed a libel for freight in the sum of $5,250 against 500 tons of scrap iron which had been carried from New Orleans and Galveston to Philadelphia on the steamship Jacob Luckenbach as part of a cargo of 2,650 tons of scrap iron at $3.75 per ton under a charter party dated August 15, 1909, and entered into by the libelant through his agent, Arthur H. Page Company, Limited, with the Phœnix Iron & Steel Company. The total freight claimed is $10,500 less $5,250 paid by the Phœnix Iron & Steel Company, charterer. The Phœnix Iron & Steel Company in its answer sets up in defense as to the cargo carried by the Jacob Luckenbach substantially the same facts as are set up in the libel in case No. 51 as to the cargo carried by the F. J. Luckenbach, and further avers that the steamship refused to accept part of the cargo tendered at Galveston amounting to 346 tons of pig iron. The answer sets up that, by reason of the negligent and improper loading, stowage, and delivery of that part of the cargo which was delivered and the refusal to accept 346 tons of scrap iron tendered, the claimant has been damaged in the sum of $5,455.05, being in excess of the amount claimed by the libelant.

I find the following facts from the pleadings and evidence:

(1) The cargoes of scrap iron were tendered and delivered to the boats in separate lots according to grade and classification.

(2) Scrap iron consists of numerous distinct grades and classes each of which has its own use and price, and when the grades or classes of scrap iron are mixed the respective grades and classes lose their character and value as such.

(3) Although the scrap iron carried from Galveston was tendered to the boats in separate lots according to grade and classification, Edgar F. Luckenbach, the owner and claimant in suit No. 51 and the libelant in No. 56, through his stevedore, failed to load, stow, and deliver the cargoes in separate lots according to grade and classification as tendered and delivered to the boats, and mixed the grades and classes in loading and discharging the cargo, whereby the value of the scrap iron was diminished.

(4) Arthur H. Page Company, Limited, was employed by Edgar F. Luckenbach as his agent to conduct the business in relation to the contract for carriage of the scrap iron by the boats and to obtain the execution of the charter parties by the Phœnix Iron & Steel Company, and authority to act in the matter for the owner was delegated to Jules C. L'Hote, vice president of the Page Company.

(5) Prior to the execution of the charter parties by the Phœnix Iron & Steel Company, Mr. L'Hote, as agent for Mr. Luckenbach, was informed by Mr. Leonard Joseph for the shipper that the cargoes of scrap iron consisted of separate lots according to grade and classification and were intended to be delivered by the consignee to purchasers in such separate lots, and Mr. L'Hote, acting for Arthur H. Page Company, Limited, as agent for Mr. Luckenbach, before and at the time of the execution of the respective charter parties, promised and agreed with Mr. Joseph, president of the Phœnix Iron & Steel Company, that the cargoes would be loaded, carried, and delivered in separate lots according to grade and classification if so tendered to the boats, and represented to Mr. Joseph that such stowage and delivery was the custom of the ports of New Orleans and Galveston, which custom rendered it unnecessary that the charter parties should contain a covenant or agreement to that effect. Mr. Luckenbach, prior to the loading of the boats, knew that the cargoes were to be delivered in separate lots for loading and stowage in separate lots and did not then refuse to so load and stow.

(6) The representations, promises, and agreements of Mr. L'Hote made before and at the time of the execution of the charter parties induced Mr. Joseph to sign the name for the Phœnix Iron & Steel Company, and he did sign the same upon the faith of and relying upon the said promises, agreements, and representations.

(7) It is the custom of the Port of Galveston, from which the cargoes were shipped, where merchandise such as scrap iron is tendered and delivered to the boat in separate lots according to grade and classification, to load, stow, and deliver the same in separate lots according to grade and classification.

(8) The shipper supplied the steamships with sufficient dunnage for stowing the cargoes in separate lots as tendered and delivered to the boats.

Counsel for the shipper prior to the hearing, upon notice to counsel for the owner, moved to amend the pleadings so as to set up in the libel in one case and in the answer in the other case the custom of the ports of shipment. It was agreed by the parties at the time that the question of the amendment should be argued at the hearing and passed upon in connection with the decision of the whole case. For the reasons hereinafter stated, it is held that the custom of the port is material in construing the charter party. It does not change the cause of action nor set up a new cause of action. There can be no question of surprise, as testimony as to the custom had been introduced in the depositions long prior to the hearing. The amendments will accordingly be allowed.

The question to be determined in these cases is: "Was the shipowner required to stow, carry, and deliver the cargoes in separate lots as tendered to the vessels?" The charter parties contain no provision as to the manner in which the cargoes shall be loaded or discharged except the single provision: "Freight payable in cash at New York * * * on right delivery of cargo." If in the present case the evidence to show the agreement between the parties on the faith of which

the contract was signed or to show the custom of the trade is admissible, the liability of the shipowner for damages arising from the indiscriminate mixing of the grades and classes of scrap iron follows.

[1] Counsel for the owner relies upon the well-known rule of evidence that a written instrument cannot be contradicted or varied by parol excepting in the cases of fraud, accident, or mistake. It is necessary, however, in order to construe a contract, to take into consideration the circumstances in connection with the subject-matter of the contract in order to explain the meaning of the written instrument as applied to its subject-matter. The determination of the question as to what constitutes "right delivery" under a contract of affreightment, and the question as to what the duty of stowage is where the charter party is silent on the subject, must depend in each instance upon the character of merchandise and goods to be carried. Bradley v. Packet Co., 13 Pet. 89, 10 L. Ed. 72; Thorington v. Smith, 8 Wall. 1, 19 L. Ed. 361; Maryland v. Railroad Co., 22 Wall. 105, 22 L. Ed. 713; Reed v. Insurance Co., 95 U. S. 23, 24 L. Ed. 348; United States v. Peck, 102 U. S. 64, 26 L. Ed. 46; Ogden v. Parsons, 64 U. S. (23 How.) 167, 16 L. Ed. 410.

If there were no custom of the Gulf ports in relation to separation of cargoes, which had been tendered or delivered separated into various grades and classes, and there had been no notice of any sort to the owner prior to delivery, then under the terms of the charter parties there would be some basis for the owner's contention that there was no obligation upon his part to keep the cargoes separate as delivered, although even under those circumstances it is doubtful whether a willful mixture of articles delivered separated according to grade and class would not have been a breach of the implied warranty of reasonable care to carry safely. Star of Hope, 17 Wall. 651, 21 L. Ed. 719.

Under the facts in this case, it appears that, before the charter parties were signed, the owner had notice, through his agent, Mr. L'Hote, vice president of Arthur H. Page Company, Limited, of the grading and classification, and separation, in accordance therewith, of the scrap iron, and that the owner's agent, moreover, was not only familiar with the custom of the ports as to stowage of merchandise so delivered, but expressly represented to the shipper that there was such custom, and that, in view of the custom, it would be unnecessary to insert in the charter parties any reference to separation and that the scrap iron would be loaded in separate lots as required by the shipper. Evidence of custom does not contradict or alter the terms of the contract, but interprets and fixes its meaning.

[2] In the absence of express stipulations, the usage of the trade is admissible where the written contract is silent upon any essential matter, not to contradict or vary its terms, but for the purpose of explaining its meaning and supplying details as to the manner in which it is to be carried out and executed. The custom proved in this case was one of the circumstances affecting the subject-matter and surrounding the parties to the transaction and in their minds when the contract was entered into and, under these circumstances, becomes part of the contract. Lamb v. Parkman, 1 Spr. 343, Fed. Cas. No. 8,020; Continental

Coal Co. v. Birdsall, 108 Fed. 882, 48 C. C. A. 124; Marx v. National S. S. Co. (D. C.) 22 Fed. 680; Ogden v. Parsons, 64 U. S. (23 How.) 167, 16 L. Ed. 410.

[3] It is immaterial whether the knowledge of the custom or the knowledge of the condition in which the scrap iron was to be delivered were known to the shipowner, although it is shown that he was informed of the latter before the loading began and acquiesced in the agreement to load in separate lots. In these transactions the making of the contract was delegated to Arthur H. Page Company, Limited, as his agent, and everything done in connection with the contract was transacted through their vice president, Mr. L'Hote. Mr. L'Hote's knowledge was therefore binding upon his principal. Armstrong v. Ashley, 204 U. S. 272, 27 Sup. Ct. 270, 51 L. Ed. 482. And he is bound by representations made by his agent upon the faith of which the contract was entered into. Cliquot's Champagne, 70 U. S. (3 Wall.) 114, 18 L. Ed. 116; El Paso L. S. C. Co. v. Colorado L. S. C. Co., 171 Fed. 20, 96 C. C. A. 262.

Both parties were familiar with the nature and character of the scrap iron to be carried. It was delivered in separate lots by the shipper, and sufficient dunnage was provided by the shipper for its separation in the hold as delivered. It would be unreasonable to suppose that a shipper of merchandise depending for its value upon its separation into grades and classes, where the various grades and classes are intended and fitted to be used for different purposes and in different kinds of mills, would ship an assorted cargo unless he knew that it would be so loaded as not to become a conglomerate mass unfit to be used by any mill without regrading and reclassification. That Mr. Joseph, representing the Phœnix Iron & Steel Company, did not agree that it should be so carried, is shown by his calling Mr. L'Hote's attention to the condition of the iron and declining to sign the charter parties unless such separation was made as would maintain the value of the goods. It was solely in reliance upon the representations and promises of the owner's agent that he was induced to enter into the charter parties, so that, even if without the representation and agreement the custom of the port did not govern the contract, it would be a fraud upon the shipper to permit the enforcement of the terms of the charter parties in violation of the agreement between the parties made at the time of its execution and upon the faith of which it was entered into.

There is no sufficiently clear and definite evidence to establish a right in the shipper to recover damages for failure upon the part of the Jacob Luckenbach to accept and load part of the stipulated cargo of 3,000 tons nor to sustain the claim for iron alleged to have been lost overboard in loading. Neither are sufficient grounds shown for recovery of damages for failure to discharge the F. J. Luckenbach at the rate of not less than 400 tons a day as provided in the charter party. Counsel for shipper has not pointed out any circumstances rendering the steamship liable for such delay. The shipper, in my opinion, is entitled to damages arising from the improper stowage of the cargoes at Galveston, including damages to the scrap iron caused by mixture of the several grades and classes contained in the cargoes and the expense to

the shipper for employment of the stevedore at Philadelphia to prevent further mixture in unloading.

Decrees will be entered accordingly, and reference made to a commissioner to ascertain the shipper's damages.

In re FOWBLE.

(District Court, D. Maryland. May 6, 1914.)

1. MECHANICS' LIENS (§ 13*)—PROPERTY SUBJECT—PUBLIC PROPERTY.

Notwithstanding Code Pub. Civ. Laws Md. art. 63, § 1, providing that "every building" erected, repaired, etc., shall be subject to a lien for the payment of debts contracted for labor and materials, and section 41 providing that such article shall be construed as laws which are remedial in their nature, no special mention being made of the state, lands or buildings of the state are not subject to mechanics' liens, especially as, in Maryland, municipal property is not liable to be taken on execution; it being the rule that, where this is true, such property is exempt from mechanics' liens.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 14, 15; Dec. Dig. § 13.*]

2. STATES (§ 108½*)—RIGHT TO FUND DUE CONTRACTOR.

Code Pub. Civ. Laws Md. art. 63, § 13, providing that where a contractor or builder of a house shall have purchased materials or contracted for work, and the party with whom such contract is made shall have given notice to the owner of his intention to claim a lien, it shall be lawful for the owner to retain from the cost of the building the amount due such party, and section 20 providing that, where a claim is filed by a contractor or builder who is indebted for work or materials, the persons to whom he may be indebted shall have the benefit of the lien and by petition may claim the amount due them out of the money to be received for such lien, did not entitle parties furnishing materials to a contractor with the state for the construction of a building, who attempted to perfect mechanics' liens, to the fund due the contractor in preference to his general creditors, as they only apply where a lien may be secured.

[Ed. Note.—For other cases, see States, Dec. Dig. § 108½.*]

3. SUBROGATION (§ 21*)—RIGHT TO FUND DUE CONTRACTOR.

Parties furnishing materials to a contractor for use in the construction of a building for the state were not entitled to the fund due the contractor in preference to his general creditors under the doctrine of subrogation, as one seeking the benefits of that doctrine must have paid a debt due a third party from compulsion and not as a mere volunteer, and such materialmen were not compelled to pay a debt due by another and had not paid any such debt by compulsion or otherwise.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. § 47; Dec. Dig. § 21.*]

4. STATES (§ 101*)—CONTRACTOR'S BOND—SURETY—LIABILITY TO MATERIALMEN.

Where a bond given to secure performance of a building contract with the state expressly provided that the surety should not be liable to any one except the owner, it was not liable to parties furnishing materials to the contractor for the amount of their claims.

[Ed. Note.—For other cases, see States, Cent. Dig. § 98; Dec. Dig. § 101.*]

5. SUBROGATION (§§ 8, 33*)—SURETY—PAYMENT FOR MATERIALS.

Where a surety on a bond given to secure performance of a building contract within a specified time, to secure the delivery of materials and

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

prevent loss and delay which might have damaged it, guaranteed the bill to the materialman, who refused otherwise to deliver the materials, it was subrogated to the contractor's rights against the owner, and was entitled to the fund due the contractor in preference to his general creditors.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. §§ 19, 96–98; Dec. Dig. §§ 8, 33.*]

6. ASSIGNMENTS (§ 48*)—BUILDING CONTRACTS—RIGHTS OF MATERIALMEN.
Where a bond given to a state to secure performance of a building contract provided that the surety should not be liable to any one except the state, an agreement between it and the contractor requiring the contractor to deposit payments by the state with a trust company selected by the surety, and not to use them on account of other contracts, until the contract in question was completed and all materials and labor paid, did not amount to an equitable assignment of all funds received from the state in trust for the benefit of laborers and materialmen; the surety not intending to make itself a trustee for materialmen.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 133; Dec. Dig. § 48.*]

7. BANKRUPTCY (§ 345*)—CLAIMS—RIGHT TO FUND DUE CONTRACTOR.
Persons furnishing material to a contractor for use in the construction of a building have no claim to the amount due the contractor in preference to his general creditors, where they are not entitled to a lien under the mechanics' lien laws.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 531, 532, 534, 539, 540; Dec. Dig. § 345.*]

In Bankruptcy. In the matter of John H. Fowble, bankrupt. Proceeding relative to claims of materialmen and others against a fund due the bankrupt under a building contract. Decree in accordance with the opinion.

John Milton Reifsnider, of Westminster, Md., for trustee.

F. Neal Parke, of Westminster, Md., for Springfield State Hospital.

Benjamin A. Stansbury, of Baltimore, Md., for Fidelity & Deposit Co.

German H. H. Emory and C. John Beeuwkes, both of Baltimore, Md., for lien claimants.

ROSE, District Judge. John H. Fowble is a bankrupt. He was a builder. He will be so called. The state of Maryland owns and controls an insane asylum. Its official title is the Springfield State Hospital. It will be referred to as the hospital. The controversy is over a fund of $11,709.93. The builder put up two buildings for the hospital. The fund is the balance due upon the contract price. The Fidelity & Deposit Company went on the builder's bond. It will be called the surety. Certain persons who supplied materials for the buildings are unpaid. As a class they will be described as materialmen. Some of their number have filed mechanic's lien claims against the buildings. When special reference is made to those who have done so, they will be designated as lien claimants. For convenience the state commits the management of the hospital to a board. The latter is made up of the incumbents of certain state offices and of six other

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

persons appointed by the Governor, subject to the confirmation by the Senate. They are declared to be a body corporate. In 1912 the General Assembly appropriated $175,000 for the erection of additional buildings for the hospital. The builder at an aggregate price of $83,220 was the successful bidder for two of these. The contract provided for the protection of the hospital against any liens for which it might become liable. The builder was, of course, required to give bond. He applied to the surety. He was not thought to be financially strong. The chairman of the hospital's building committee had had in his individual capacity a large and successful experience in building operations. The president of the surety asked him what the builder would make out of the contract. He said if the work were carefully and economically done he thought there would be a profit of $6,000 or $7,000. The president of the surety thereupon said his company would furnish the bond. He added that he would require the builder to deposit with the surety all checks received from the hospital on account of the contract. The builder was not present at this interview. Subsequently, out of the presence of any one connected with the hospital, the president of the surety had a talk with him. He was told that the bond would be given, provided he first agreed in writing that all payments received under the contract would be deposited with the Fidelity Trust Company, a trust company with whom the surety's relations were intimate, and that he would not use any of the money for payments on account of other contracts until this was completed and all material and labor men on it had been paid. He assented. The understanding was put in writing and signed by him. It provided that he should have the right to do what he chose with any balance of profit left. Thereafter the bond was executed. Among other things it provided:

"The surety shall not be liable under this bond to any one except the owner, but it is agreed that the owner, in estimating his damage, may include the claims of mechanics and materialmen arising out of the performance of the contract and paid by him only when the same by the statutes of the state where the contract is to be performed are valid liens against his property."

The hospital was required to retain the last payment until the builder had finished the work in accordance with the contract and until all possibility of the properties being legally subject to any lien had passed. Before the last payment was made, the surety was to be notified in writing. No copy of the agreement between the builder and the surety was ever delivered to the hospital or as much as exhibited to any one acting for it. No formal or official action upon its part was ever requested. The surety never asked the hospital to make any payments directly to it, and none ever were so made. All parties recognized that the builder was the only person who had the right to receive or receipt for them. The surety availed itself of the good offices of the chairman of the hospital's building committee to obtain prompt information as to when such payments were likely to be made or when they had in fact been made. More it did not ask. The builder always deposited checks received with the Fidelity Trust Company. He could not withdraw the deposits so made upon his checks unless counter-

signed by one of the surety's employés. No copy of the agreement between the builder and the surety appears ever to have been shown to any materialman. To one of them the employé of the surety, who countersigned the builder's checks and who endeavored to keep in touch with the condition of the builder's affairs, expressed the opinion on at least one occasion that there would be enough money for everybody. He was not authorized by the surety to assume any obligations on its behalf to any of the materialmen, and, in point of fact, he never did so, nor with a single exception did the surety ever in any way bind itself to any of them. The builder had ordered iron work from one of them. It had made up the iron as required. It then refused to make delivery unless the surety guaranteed its bill of $650. The guaranty was given. Since bankruptcy the surety has made it good. For repayment of this sum it here asks. On its own behalf and for its own benefit it makes no other claim.

On the 19th of October, 1913, the builder was upon his own petition adjudicated a bankrupt. At that time the work on both buildings was substantially completed. Only $300 worth of work remained to be done. By agreement among all the parties the hospital had undertaken to do this work, deducting the sum of $300 from what otherwise would have been due by it. Subsequent to the adjudication in bankruptcy, the lien claimants served notices of liens upon the hospital. They took such other steps as would have been sufficient under the state law to have perfected their liens had the property of the state been subject to liens. The other materialmen claimed that the agreement of the builder with the surety amounted to an equitable assignment of all sums due or to become due for the benefit of persons furnishing labor and material. The sum due by the hospital has been paid into the registry of the court. All parties have submitted themselves to its jurisdiction.

If the surety or any of the lien claimants or other materialmen have any claim which, subsequently to the adjudication in bankruptcy, they could have in any form of proceeding successfully asserted against the fund or the property of the hospital, it is to be here held good.

The Mechanic's Lien Claims.

[1] The pretensions set up under the mechanic's lien law cannot be sustained. Lands or buildings belonging to the state are not subject to such liens. In Maryland, municipal property is not liable to be taken on execution. Darling v. Mayor & City Council of Baltimore, 51 Md. 1. By the great weight of authority, where this is true such property is exempt from mechanic's liens. Phillips on Liens, § 179a. There are decisions to the contrary. One of them, handed down in the '70's, was from the pen of Judge, afterwards Mr. Justice, Brewer. Wilson v. School District #2, 17 Kan. 104. They have not been generally followed. In most jurisdictions the law is now clearly settled otherwise. 27 Cyc. 25. The Maryland Code, it is true, provides that "every building * * * shall be subject to a lien," and provides that mechanic's lien laws shall be construed as remedial statutes. Code 1912, art. 63, §§ 1 and 41. In none of these statutory provisions is

special mention made of the state. Upon the general rule applicable to all sovereigns, they are not binding upon it. Guarantee Title & Trust Co. v. Title Guaranty & Surety Co., 224 U. S. 152, 32 Sup. Ct. 457, 56 L. Ed. 706.

[2] Sections 13 and 20 of article 63 do not help the claimants. They apply to property upon which a lien may be secured, and to that only.

Subrogation.

[3-5] The materialmen say that they rely upon the doctrine of subrogation. How it can serve them has not been made clear. He who seeks its benefits must, first, have paid a debt due to a third party before he can be substituted to that party's rights, and, second, in doing this he must not act as a mere volunteer, but on compulsion, to save himself from loss by reason of a superior lien or claim on the part of the person to whom he pays the debt, as in the case of sureties, prior mortgagees, etc. The right is never accorded in equity to one who is a mere volunteer paying a debt of one person to another. Ætna Life Insurance Co. v. Middleport, 124 U. S. 534, 8 Sup. Ct. 625, 31 L. Ed. 537; Prairie State Bank v. United States, 164 U. S. 231, 17 Sup. Ct. 142, 41 L. Ed. 412. These materialmen have not been compelled to pay a debt due by another and, in point of fact, have never paid any such debt, whether by compulsion or otherwise. The bond was not so conditioned as to protect the materialmen. Had it been, the surety would have been bound to pay them. Knapp v. Swaney, 56 Mich. 349, 23 N. W. 162, 56 Am. Rep. 397; St. Louis v. Von Phul, 133 Mo. 561, 34 S. W. 843, 54 Am. St. Rep. 695. Such payments would have been of debts due by the builder. Having made them, the surety would have been, to the extent of the sum so expended by it, subrogated to his rights against the hospital. Prairie State Bank v. United States, supra.

Here the bond expressly disclaimed all liability to the materialmen. They cannot hold the surety liable. The doctrine of subrogation has no application so far as concerns any of their unpaid claims. There is one case in which the surety invokes it. In order to secure the delivery of the iron work, and thus to prevent loss and delay which might have been damaging to all parties and especially to it, it guaranteed the bill therefor. It has been compelled to pay that account out of its own funds. It had bound itself that the builder should finish the work on time. If he failed to do so, it would have been liable. In giving a guaranty to prevent such failure, it was not a mere volunteer. As to the $650, expended in consequence thereof, it is subrogated to the builder's rights against the hospital. For that amount it has a claim upon the fund superior to that of the trustee.

The Trusteeship Theory.

[6] The materialmen contend that the agreement between the builder and the surety amounted to an equitable assignment to the latter of all funds to be received from the hospital in trust for the benefit of those who might furnish labor or material for the buildings. The surety never intended to make itself a trustee for the materialmen. It did not want to assume any responsibility to them. In the bonds

it gave it expressly disclaimed all such liability. If at any time it had seen fit to modify the terms of the agreement with the builder, or to release him from it altogether, they would have had no right to complain.

The Equitable Charge Theory.

[7] The materialmen contend that in any event they had an equity in the fund superior to that of the trustee. Most men feel that one who has contributed to the creation of anything of value stands in a peculiar relation to it. He has a special claim to be paid out of it. The mechanic and other lien laws of so many jurisdictions are the expression of that conviction. The courts, however, have not seen their way clear to make it a generally applicable principle of equitable jurisprudence. It has had its part in shaping many a rule administered in chancery, but complete recognition has been withheld from it. The difficulty, in many, if not in most cases the impossibility, of accurately and justly defining its limits have amply justified the hesitation of the courts. If mechanic's lien laws prove the strength of its appeal to an instinctive sense of natural justice, they demonstrate that it is usually impossible to apply it beyond the limits to which the statutes go.

In this case the materialmen's rights, if any, depend on the effect of the agreement between the surety and the builder. They invoke the well-settled doctrine that a third party, for whose benefit an agreement has been made, may sue upon it. He may not have been a party to it. He may even have for a long while been ignorant of its existence. True, but apparently immaterial. The agreement did not give the materialmen any right to sue the surety. It could not confer upon them any more ample rights to sue the builder than they already had.

The real contention of the materialmen is that by the agreement the builder declared a trust for their benefit in the fund which he was to receive from the hospital. The answer will appear to have been already given.

The builder, with the consent of the surety, could at any time have changed or abrogated the agreement. It follows that it did not create any trust which the materialmen can enforce. It must be borne in mind that even the surety never sought to charge the fund in the hands of the hospital. It was content that the latter should pay the money directly to the builder.

The general rule that, in the distribution of a bankrupt's or insolvent's estate, equality is equity must prevail in the absence of any enforceable special equities in favor of the materialmen.

A decree may be submitted awarding $650 to the surety and the balance of the fund to the trustee in bankruptcy. The materialmen will, of course, have the right to file their claims as unsecured creditors.

In re WAGNER.

(District Court, E. D. Pennsylvania. May 14, 1914.)

No. 4831.

1. MORTGAGES (§ 233*)—ASSIGNMENTS—EQUITABLE ASSIGNMENT.
Where an attorney, who received money from a client to be invested in a mortgage, bought a mortgage therewith which had been executed in his favor, but did not assign the mortgage to the client, and thereafter held it in his own name, he held the legal title only, and the client was in equity the real owner and could have compelled an assignment.
[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 618, 619; Dec. Dig. § 233.*]

2. MORTGAGES (§ 224*)—ASSIGNMENT—NECESSITY OF DELIVERY.
Where an attorney, having possession of a mortgage belonging to a client but standing in his name, executed assignments thereof to himself as trustee of an estate, and by himself as trustee to one of the heirs, but did not record or deliver them to such heir or any one else in her behalf, there was no completed assignment, though the mortgage, after the attorney had disappeared, was found in an envelope bearing an indorsement that it belonged to such heir, assuming that the indorsement was made by the attorney, especially where, subsequent to such assignments, the attorney made an assignment, though defective, to another party as security for an indebtedness, indicating his belief that the assignments in question were not effective.
[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 591–595, 597; Dec. Dig. § 224.*]

3. MORTGAGES (§ 257*)—ASSIGNMENT—CONSIDERATION.
An assignee of a mortgage which, though standing in her assignor's name, belonged to a third person was not an assignee for value, where the only consideration was a past debt owed by the assignor to an estate in which the assignee was interested.
[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 682–687; Dec. Dig. § 257.*]

In Bankruptcy. In the matter of George M. Wagner, bankrupt. On certificate of the referee regarding the ownership of a bond and mortgage. Order of the referee reversed, and trustee directed to deliver the instruments to Elizabeth Mumbower.

George B. Hawkes, of Philadelphia, Pa., for Elizabeth Mumbower.
Ernest L. English, of Philadelphia, Pa., for Annie E. Wilson-Perrigo.

J. B. McPHERSON, Circuit Judge. This controversy has to do with the ownership of a bond and mortgage for $900 that were found among the bankrupt's papers, and are now in the trustee's possession. Three claimants appeared, and each offered some evidence. The referee's report recites most of it, but does not contain findings of fact on several important matters. I have therefore examined the whole record, and from this and from certain notorious circumstances in reference to this bankruptcy about which the court cannot be ignorant, I find the facts to be as follows:

The bankrupt was a member of the Philadelphia bar; his principal business being the management of estates and other trusts, and the in-

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

vestment of money for numerous clients. They trusted his integrity implicitly, but for years he abused their trust and embezzled a great deal of money that came into his hands. About the time he was put into bankruptcy he disappeared, and his whereabouts is still unknown. He left his affairs in much confusion, and the trustee has found little property to answer the many claims, which aggregate a very large sum. Turning to the evidence taken before the referee, the other facts are these:

[1] On April 26, 1899, Mrs. Elizabeth Mumbower intrusted the bankrupt with $1,000 to be invested for her. Two years before she had given him another $1,000 for a similar purpose, and in 1904 she gave him $1,500 more, but the only subject now before the court is the transaction in April, 1899. He gave her a receipt for the money in question, stating that it was to be invested in a mortgage, and he used $900 of it to buy from himself a duly recorded mortgage in that amount executed in his own favor by Benjamin H. Duvall upon 1816 North Eighteenth street in the city of Philadelphia. The bond and mortgage bear the date of April 5th, but the difference in dates is of no importance, and there is no doubt that $900 of Mrs. Mumbower's money was thus lent to Duvall upon this particular security. What became of the other $100 does not appear. She never saw the bond and mortgage, and the bankrupt always kept them in his own possession. In October of the same year he sent her a letter saying that he had invested the whole $1,000 in this mortgage, and inclosing a check for six months' interest. Other payments of interest no doubt followed from time to time. Instead of assigning the security to Mrs. Mumbower, as he should have done, he continued to hold it in his own name as an individual. But of course he now held the legal title only, and Mrs. Mumbower was in equity the real owner and could have compelled him to assign the mortgage to her at any time. She neglected to take that step, however, and (as has been stated) she never saw any of the papers. But her neglect gave him no additional right against her, and impaired no right of hers against him. He held the naked legal title as her trustee, and as the equitable and the real owner she was able to assert her right against him whenever she chose.

[2] But she had been careless enough, or trustful enough, to allow him to continue in possession of the legal title, and thus had clothed him with power to make others believe that he alone was the true owner; and I agree therefore that, if he transferred his title to a bona fide assignee for value without notice, such assignee has the better claim. In that event, the equities of the claimants would be equal, and the legal title would give such an assignee the superior right. And this is the position which Mrs. Annie E. Wilson, now Mrs. Perrigo, claims to occupy, namely, the position of an assignee for value without notice. The referee sustained the claim, but, in my opinion, upon insufficient evidence. I do not think she has proved either that she is an assignee at all with a completed title, or that she is an assignee for value, although it is no doubt true that she had no notice of Mrs. Mumbower's equity until after the bankruptcy. Mrs. Wilson did not testify in her own behalf; her case depends wholly on two papers and a memo-

randum indorsed upon an envelope, all of them found among the bankrupt's effects.

The two papers referred to are in form assignments of the bankrupt's title. The second paper purports to have been signed and sealed by him on January 24, 1908, as substituted trustee of Laurence Shuster's estate, and to have been acknowledged at some unspecified time in the same year, but it was never delivered to Mrs. Wilson (who is named as the assignee) or to any one else in her behalf, and it never was recorded, although this, of course, would have been equivalent to delivery. Why the paper was prepared may be conjectured with much probability, especially because we may fairly infer that the bankrupt was indebted to the estate of Laurence Shuster, deceased, in which Mrs. Wilson was interested as an heir. Two years earlier, on February 1, 1906, the bankrupt had signed, sealed, and acknowledged the first paper, which is in form an assignment of the same mortgage from himself as an individual to himself as "substituted trustee under the will of Laurence Shuster, deceased"; but this assignment also was not recorded, and both papers were retained in his own hands without being made known (so far as appears) to Mrs. Wilson or to any one interested in the estate. These papers, therefore, did not convey his legal title in the mortgage. They were neither delivered nor recorded, and without one of these acts they could not transfer the title. Remaining in his own hands and under his own control, they were susceptible of use upon any occasion that might arise, but until he actually used them they were merely instruments, no doubt in readiness to be employed but as yet wholly ineffective.

That the bankrupt regarded these papers in the light I have indicated is made more plain from what happened a year later. In December, 1909, he was heavily indebted to the estate of Jonathan Fox, of which he was administrator, and in that month he actually assigned this very mortgage (with other securities) to certain persons interested in that estate in order to secure his indebtedness to them. These persons presented the third claim to its ownership before the referee, but, as the assignment of December, 1909, turned out to be defective, the claim was disallowed and is not now insisted on. The bankrupt afterwards repossessed himself surreptitiously of the mortgage, and (as already stated) it was found among his papers after he disappeared. It is clear, therefore, that he did not intend to deliver the two assignments now in question until some need should arise, but merely prepared them for delivery in such an emergency.

[3] Neither was it proved that any value was given for either of the assignments now being considered. On the contrary, the fair inference is that whatever consideration may have existed was a past debt owed by the bankrupt to the Shuster estate, and this would not be sufficient. As I have already stated, Mrs. Wilson did not testify, and her silence makes the inference unavoidable that he received no present consideration.

The memorandum referred to remains to be considered. It is as follows:

"900. Bond and Mortgage. Benjamin H. Duvall et ux. Premises 1816 North 18th, belonging to Mrs. Annie E. Wilson."

These words are indorsed upon a document envelope, in which another envelope was inclosed; the latter containing the mortgage in question, the bond and warrant, and the two formal assignments already described. An indorsement upon the latter envelope states that the mortgage belongs to George M. Wagner. Who made these two indorsements, or when they were made, was not proved. No evidence was offered that they were in the bankrupt's handwriting, and therefore they cannot be regarded even as declarations made by him. All that the evidence establishes is that these memoranda appear upon certain envelopes that came into the trustee's possession; but, as I have just stated, there is nothing to show when or by whom the indorsements were made. But, even if they had been proved to be the bankrupt's own memoranda, I am unable to see how they could add anything of value to the papers themselves. It would still be necessary to show that something equivalent to delivery had taken place, or that they had been recorded, before they could take effect, for, until one or the other should be done, the bankrupt might safely make any written declaration he pleased with regard to the ownership of the mortgage. As long as these declarations and the papers themselves remained entirely within his own power, he was completely the master of the situation.

I am therefore of opinion that sufficient evidence was not offered to show that title to this mortgage had passed to Mrs. Wilson, and I find as a fact that no such title did actually pass. The result is that the earlier equitable title of Mrs. Mumbower must prevail. The order of the referee is reversed, and the trustee is directed to deliver to Mrs. Mumbower all the papers in his possession relating to the mortgage in question.

ST. JOHN v. UNITED STATES FIDELITY & GUARANTY CO.

(District Court, D. Maryland. April 15, 1914.)

1. REMOVAL OF CAUSES (§ 14*)—ACTION BY NONRESIDENT—REMOVAL—OBJECTIONS.

   Where a citizen of Wyoming brought suit in a Montana state court against a Maryland corporation, he could object to defendant's removal of the cause to the federal court sitting in Montana, on the ground that neither plaintiff nor defendant resided in Montana.

   [Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 35; Dec. Dig. § 14.*]

2. REMOVAL OF CAUSES (§ 14*)—DISTRICT TO WHICH CAUSE MAY BE REMOVED—RESIDENCE OF PARTIES—"PROPER DISTRICT."

   Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1094 [U. S. Comp. St. Supp. 1911, p. 140]) § 28, provides for the removal of causes from state to federal courts, declaring that they may be removed to the United States District Court "for the proper district," which, when federal jurisdiction depends solely on diversity of citizenship, is the district of the residence of the plaintiff or of the defendant. Section 29 declares that when a party is entitled to remove, he may make and file a petition for removal of the cause to the district court to be held "in the district where such suit is pending." *Held*, that where a citizen of Wyoming sued a Maryland corporation in a Montana state court, and defendant could not re-

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

move the cause to the federal court sitting in Montana because neither plaintiff nor defendant was a resident of that state, it was not entitled to remove the cause to the federal court sitting in Maryland; that not being the district where the suit was pending within section 29.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 35; Dec. Dig. § 14.*]

At Law. Action by C. C. St. John against the United States Fidelity & Guaranty Company. On petition to remove the cause from the district court of the Thirteenth judicial district of the state of Montana to the United States District Court for the District of Maryland. Denied.

R. E. Lee Marshall, of Baltimore, Md., for defendant.

ROSE, District Judge. This suit was brought in the district court of the Thirteenth judicial district of the state of Montana in and for the county of Rosebud. Defendant seeks to remove it to the United States District Court for the District of Maryland. The plaintiff is a citizen of Wyoming; the defendant a Maryland corporation. At first the defendant supposed that the plaintiff was a citizen of Montana. It accordingly had the case removed to the United States District Court for that district. Plaintiff moved to remand on the ground that he was a citizen of Wyoming. The fact having been established, the motion was granted. The defendant then asked the state court to send the case here. The petition was denied. The defendant caused a transcript of the record to be filed in this court.

Its argument in support of its right to remove may be briefly summarized: The parties to this suit are citizens of different states. The amount in controversy is upwards of $3,000, exclusive of interest and costs. Section 28 of the Judicial Code authorizes the removal of such a suit from the state to the federal courts. It provides that such removal shall be from the state court to the United States District Court "for the proper district." Where the jurisdiction of the United States Court depends solely upon diversity of citizenship, the only proper districts are the districts of the residence of the plaintiff or of the defendant. In this case the district of Montana is not the residence of either plaintiff or defendant. Consequently the case cannot be removed to the United States District Court of that district. The proper districts are the districts of Wyoming and Maryland. The defendant has the right to demand that the case be removed to that one of them which it may prefer. It has selected the district of Maryland, and has taken the other necessary steps required by the statute to perfect the removal.

[1] Put a little more succinctly, defendant says that section 28 gives it the right to remove the case. If it cannot remove it to the district of Maryland it cannot remove it at all. The latter proposition may be conceded. The plaintiff, residing in Wyoming, had the right to object to the removal of its case against a Maryland corporation from a state court in Montana to a District Court of the United States of the last-named state. Western Loan Co. v. Butte & Boston Min.

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

Co., 210 U. S. 368, 28 Sup. Ct. 720, 52 L. Ed. 1101. The plaintiff could have sued the defendant in the United States District Court for the District of Maryland. In that sense the latter district is a proper district for the institution of such a suit.

[2] Defendant's contention as thus summarized ignores the provisions of section 29 of the Judicial Code. That section tells how the right to remove, given by section 28, may be exercised. It says:

"Whenever any party entitled to remove any suit mentioned in the last preceding section * * * may desire to remove such suit from a state court to the District Court of the United States, he may make and file a petition * * * for the removal of such suit into the District Court to be held *in the district where such suit is pending*, and shall make and file therewith a bond with good and sufficient surety, for his or their entering in such District Court, within thirty days from the date of filing said petition, a certified copy of the record in such suit."

That is, he may ask to remove the case to the District Court of the district in which the state court is situated, and must give bond to file the record in that court.

The language that the removal may be made to the federal court of the proper district does not make its appearance for the first time in the Judicial Code. In the original Judiciary Act (Act Sept. 24, 1789, c. 20), section 12 (1 Stat. 79) defined not only the cases which were removable, but specified the procedure by which such removal could be had.

The removal could not be made otherwise than to the Circuit Court of the United States to be held in the district where the suit was pending. Section 639 of the Revised Statutes, as originally enacted in 1873, somewhat recast the phraseology of section 12 of the Judiciary Act, and incorporated certain provisions of later acts. It said:

"Any suit commenced in any state court, wherein, * * * may be removed, for trial, into the Circuit Court, for the *district where such suit is pending.*"

Other paragraphs of the section deal with the procedure by which such removal is to be effected.

The act of March 3, 1875 (18 Stat. 470, c. 137 [U. S. Comp. St. 1901, p. 508]), adopted the plan, which has since been preserved, of defining in one section removable cases and of providing in other sections for the removal procedure. By section 2 of this act it was provided that any suit, etc., may be removed by either party into the "Circuit Court of the United States for the proper district." Section 3 of the act tells how the removal may be made. It provides that the party who wishes to avail himself of the privilege shall file a petition in the state court "for the removal of such suit into the Circuit Court *to be held in the district where such suit is pending.*"

The defendant's contention in this case rests solely upon the assumption that the substitution of the phrase "proper district" for the phrase "district in which such suit is pending," in the section which defines removal of cases, means that Congress intended to include within the districts to which such removal could be had other districts than those in which the suit was pending whenever, because of

the residence of the parties, a suit otherwise removable could not be removed against the objection of either party to the federal court of the local district. If so, Congress in drafting the third section forgot what it had intended to do by the second. In this respect chapter 373 of the act approved March 3, 1887 (24 Stat. 552), and the act of August 13, 1888, chapter 866 (25 Stat. 434 [U. S. Comp. St. 1901, p. 510]), left the law unchanged. Nor does the Judicial Code in any wise alter it.

For 40 years, therefore, persons in like case with the defendant now before the court have had the right which it seeks to exercise. Those who have sought to remove their cases have often been persons or corporations who could command and did command the services of the ablest and most astute counsel. So far as the books disclose, this particular defendant is the first who has ever supposed that the statute gave it the right to remove a case from a state court into a court of the United States for any other district than that in which the state court suit was pending.

The burden of proof rests on one who alleges that Congress intended that a defendant, liable to summons in Montana and there sued, should have the right to remove its case for trial in Maryland. The lawmakers cannot lightly be supposed to have had any such intention. It is, however, unnecessary to further discuss the subject. Indeed it might have been as well to have cited the plain language of section 29 and there rested.

There has been no appearance for the plaintiff in this court. Doubtless it assumed that none was necessary. The absence of jurisdiction here was sufficiently apparent on the face of the record. The counsel who for the defendant in Montana instituted these removal proceedings has not followed the case across the continent. It has here been represented with distinguished ability and industry. No authority in support of its contention has been brought to the attention of the court. Counsel frankly concedes that he can find none.

This court is without jurisdiction, and the case must be remanded to the state court in Montana from whence it came.

UNITED STATES v. OREGON-WASHINGTON R. & NAVIGATION CO.

(District Court, E. D. Washington, N. D. April 23, 1914.)

No. 1751.

1. MASTER AND SERVANT (§ 13*)—STATUTORY REGULATIONS—HOURS OF SERVICE.

Act March 4, 1907, c. 2939, 34 Stat. 1415 (U. S. Comp. St. Supp. 1911, p. 1321), making it unlawful for common carriers by railroad engaged in interstate commerce to require or permit certain employés to remain on duty for longer periods than those therein specified, imposes a positive and absolute duty on the carrier, the nonperformance of which is not excused by the exercise of reasonable diligence or due care on their part.

[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*)—STATUTORY REGULATIONS—HOURS OF SERVICE—"REQUIRE"—"PERMIT."

Under Act March 4, 1907, c. 2939, 34 Stat. 1415 (U. S. Comp. St. Supp. 1911, p. 1321), providing that no telegraph operator shall be required or permitted by any common carrier by railroad engaged in interstate commerce to remain on duty longer than 9 hours in any 24-hour period at stations continuously operated night and day, and providing in section 3 that the carrier shall be deemed to have had knowledge of all acts of all its officers and agents, it was not a defense to an action for a penalty that the operator violated the instructions of his superior officers, or that they did not know that he worked excessive hours, since, while "require" or "permit" in their common significance imply consent or knowledge, "permit" also means a failure to prohibit by one who has the power and authority to do so, and is so used in the statute, and the provision of section 3 is not limited to general officers or agents as their knowledge was imputed to the company by the common law and the statute is not merely declaratory of the common law.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 14; Dec. Dig. § 13.*

For other definitions, see Words and Phrases, vol. 7, pp. 6122–6125; vol. 6, pp. 5315–5318; vol. 8, p. 7752.]

Action for penalties by the United States against the Oregon-Washington Railroad & Navigation Company. Judgment for the United States.

Francis A. Garrecht, U. S. Atty., of Spokane, Wash., and Otis B. Kent, Sp. Asst. U. S. Atty., of Washington, D. C.

Hamblen & Gilbert, of Spokane, Wash., for defendant.

RUDKIN, District Judge. This is an action to recover penalties for violation of the act of Congress of 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), commonly known as the "Hours of Service Act." The complaint contains 10 counts or causes of action in all, the first based on excessive hours of service by an employé named Longabaugh on the 21st day of April, 1913, and the remaining nine on excessive hours of service by the same employé on the nine succeeding days. When the case was called for trial a jury was impaneled and sworn, but the parties thereafter agreed upon the facts, and the jury was discharged by consent, and the cause submitted to the court on a written stipulation. From this stipulation it appears that the defendant corporation is a common carrier by railroad engaged in interstate commerce; that Wallula, an office on its line of railway, is a station continuously operated night and day; that on the 21st day of April, 1913, and on each of the nine succeeding days, the employé, Longabaugh, went on duty as agent at that place at the hour of 7 o'clock a. m., and remained on duty continuously as such agent until the hour of 7 o'clock p. m., and thereafter remained on duty continuously as a telegraph operator, and, by use of the telegraph, dispatched, reported, transmitted, received, and delivered orders pertaining to or affecting train movements until the hour of 12 o'clock midnight; that before the employé, Longabaugh, had performed any excessive hours of service he was instructed by his superi-

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

or officer not to work in excess of 9 hours in any 24-hour period, either as agent or operator, or in both capacities, and that he remained on duty for a longer period than 9 successive hours in violation of such instructions and without the actual knowledge of his superior officers. The sole question presented for decision, therefore, is: Did the instructions to the employé not to violate the law, or want of knowledge of a violation of the law on the part of his superior officers, constitute a defense?

[1] It is now well settled that the Safety Appliance Act and kindred statutes impose positive and absolute duties on carriers, the nonperformance of which is not excused by the exercise of reasonable diligence or due care on their part, and the Hours of Service Act admits of no other rational construction. St. Louis & Iron Mountain Ry. v. Taylor, 210 U. S. 281, 28 Sup. Ct. 616, 52 L. Ed. 1061; C., B. & Q. Ry. v. United States, 220 U. S. 559, 31 Sup. Ct. 612, 55 L. Ed. 582; Delk v. St. Louis & San Francisco R. R., 220 U. S. 580, 31 Sup. Ct. 617, 55 L. Ed. 590.

[2] It is urged that the words "require or permit" imply consent or knowledge on the part of the employer, and this is perhaps their common significance; but the word "permit" also means a failure to prohibit by one who has the power and authority to do so, and in my opinion the term is here used in the latter sense. In the United States v. San Francisco Bridge Co. (D. C.) 88 Fed. 891, cited by the defendant, section 2 of the act under consideration expressly provided:

> That any officer or agent of the government of the United States or of the District of Columbia, or any contractor or subcontractor whose duty it shall be to employ, direct, or control any laborer or mechanic employed upon any of the public works of the United States or of the District of Columbia, who shall intentionally violate any provision of this act, shall be guilty of a misdemeanor.

The criminal intent was there made a part of the offense by express legislative enactment, and the word "permit" was of necessity given the meaning here contended for by the defendant. But the act now under consideration expressly provides in section 3 that "in all prosecutions under this act the common carrier shall be deemed to have had knowledge of all acts of all its officers and agents," and this provision eliminates all questions of knowledge or criminal intent.

Nor can the expression, "all its officers and agents," be limited to general officers and agents, as claimed by the defendant. The knowledge of such general officers or agents is imputed to the company by the common law, and it is very apparent that the statute in question is not merely declaratory of the common law. As said by the court in the Taylor Case, supra:

> In the case before us the liability of the defendant does not grow out of the common-law duty of master to servant. The Congress, not satisfied with the common-law duty and its resulting liability, has prescribed and defined the law by statute. We have nothing to do but to ascertain and declare the meaning of a few simple words in which the duty is described. It is enacted that "no cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with the standard." There is no escape from the meaning of these words. Explanation cannot clarify them, and ought not to be employed to confuse them or lessen their significance. The obvious purpose of the Legislature was to supplant the qualified duty of the common law with an absolute

duty deemed by it more just. If the railroad does, in point of fact, use cars which do not comply with the standard, it violates the plain prohibitions of the law, and there arises from that violation the liability to make compensation to one who is injured by it. It is urged that this is a harsh construction. To this we reply that if it be the true construction, its harshness is no concern of the courts. They have no responsibility for the justice or wisdom of legislation, and no duty except to enforce the law as it is written, unless it is clearly beyond the constitutional power of the lawmaking body. It is said that the liability under the statute, as thus construed, imposes so great a hardship upon the railroads that it ought not to be supposed that Congress intended it. Certainly the statute ought not to be given an absurd or utterly unreasonable interpretation, leading to hardship and injustice, if any other interpretation is reasonably possible. But this argument is a dangerous one, and never should be heeded where the hardship would be occasional and exceptional. It would be better, it was once said by Lord Eldon, to look hardship in the face rather than break down the rules of law. But when applied to the case at bar the argument of hardship is plausible only when the attention is directed to the material interest of the employer, to the exclusion of the interests of the employé and of the public. Where an injury happens through the absence of a safe drawbar, there must be hardship. Such an injury must be an irreparable misfortune to some one. If it must be borne entirely by him who suffers it, that is a hardship to him. If its burden is transferred, as far as it is capable of transfer, to the employer, it is a hardship to him. It is quite conceivable that Congress, contemplating the inevitable hardship of such injuries, and hoping to diminish the economic loss to the community resulting from them, should deem it wise to impose their burdens upon those who could measurably control their causes, instead of upon those who are in the main helpless in that regard. Such a policy would be intelligible, and, to say the least, not so unreasonable as to require us to doubt that it was intended, and to seek some unnatural interpretation of common words.

For these reasons I am of opinion that the knowledge of the agent, Longabaugh, was the knowledge of the company, and that the instructions given by his superior officer not to work excessive hours, or a want of knowledge on the part of his superior officers that he did in fact work excessive hours, is no defense.

I therefore adjudge the defendant guilty on all counts, and impose a fine of $100 and costs for each violation.

BLACK et al. v. MANHATTAN TRUST CO. et al.

(District Court, D. Oregon. May 4, 1914.)

No. 5922.

1. RECEIVERS (§ 69*)—APPOINTMENT—RIGHTS IN PROPERTY.
A receiver by his appointment as such acquires no greater or superior right or interest in the property coming into his hands than the debtor had, and stands in the shoes of the debtor, taking the property in the same plight and subject to the same equities and liens as he finds it in the hands of a person or corporation out of whose hands it has been taken.
[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 124, 125; Dec. Dig. § 69.*]

2. RECEIVERS (§ 142*)—SALE OF PROPERTY—RIGHTS OF PURCHASER.
A purchaser at a receiver's sale takes the property subject to all subsisting paramount liens, which are not divested or affected by the sale as against strangers to the record, where a sale free from incumbrances is not authorized.
[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 248–251; Dec. Dig. § 142.*]

3. MORTGAGES (§ 535*)—FORECLOSURE—PARTIES—SUBSEQUENT MORTGAGEE.
Subsequent mortgagee, though not an indispensable party to a suit to foreclose a prior mortgage, is a necessary party, and if not made a party or brought in by proper service, and makes no appearance, his rights are not disturbed by a foreclosure and sale of the premises thereunder.
[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1556; Dec. Dig. § 535.*]

4. MORTGAGES (§§ 535, 594*)—FORECLOSURE—SHERIFF'S OR MASTER'S DEED—EFFECT—SUBSEQUENT MORTGAGE.
While a sheriff's or master's deed under mortgage foreclosure proceedings may carry the title to the property, it does not divest a subsequent mortgagee, not made a party, of his lien which he may enforce or redeem the property.
[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1556, 1709–1731; Dec. Dig. §§ 535, 594.*]

5. MORTGAGES (§ 535*)—FORECLOSURE—RECEIVER'S SALE.
A decree in mortgage foreclosure proceedings, directing a receiver to sell the property, to pay taxes and the costs of suit, etc., even though it had declared that the sale should be free from incumbrances, would not have cut off the rights of a subsequent mortgagee, which was not served and had not appeared in the suit.
[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1556; Dec. Dig. § 535.*]

Suit by William Black and T. A. Snook against the Manhattan Trust Company and George S. Wood, as trustee of the Oregon Development Company, a corporation, and others. Bill dismissed as to defendant trust company.

George W. Hazen, of Portland, Or., for plaintiffs.
Platt & Platt and Palmer L. Fales, all of Portland, Or., for defendants.

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

WOLVERTON, District Judge. This is a suit to quiet title to certain premises described in the bill of complaint; the real purpose being to remove a cloud, consisting of a certain mortgage now owned by the Bankers' Trust Company, the successor in right, title, and interest to the Manhattan Trust Company, of New York City.

On and prior to February 14, 1890, the Oregon Development Company was the owner of the premises, subject, however, to the lien of a certain mortgage previously given to Jacob Halsted and Bushrod Wilson, trustees. On said date the development company gave a mortgage on the premises, including other premises, to the Manhattan Trust Company. On May 1, 1893, George S. Wood, having succeeded as trustee to the interest of Halsted and Wilson, trustees, instituted a suit in the United States Circuit Court for the District of Oregon to foreclose his mortgage, making the Oregon Development Company and the Manhattan Trust Company parties defendant, in which suit a receiver was appointed. About June 13, 1894, an order was entered in the cause, directing the Manhattan Trust Company to appear, plead, answer, or demur to the bill therein filed by the 25th day of July, 1894, and that such order be served upon such defendant 20 days prior to the latter date. This order was never served, and the Manhattan Trust Company never appeared, so far as the record discloses in said cause. Thereafter property of the development company, including the premises in suit, was sold by the receiver to pay the costs of the suit and certain taxes assessed against the property of the company in Benton and Lincoln counties. The plaintiffs derive their title, through mesne conveyances, from the receiver by virtue of such sale.

[1] The Bankers' Trust Company, the successor to the Manhattan Trust Company, resists the bill on the ground that the Manhattan Trust Company was never served with process in the case of Wood v. Oregon Development Company et al., and never appeared therein, and that therefore it was never foreclosed of its lien upon the property of the development company, including the premises in suit. A receiver by his appointment as such acquires no greater or superior right or interest in the property coming into his hands than the debtor had, and in this relation may be said to stand in the shoes of the debtor; and, furthermore, as a general rule the receiver takes the property in the same plight and condition, and subject to the same equities and liens, as he finds it in the hands of the person or corporation out of whose hands it is taken. 34 Cyc. 191, 193.

[2] So, also, a purchaser at a receiver's sale takes the property subject to all subsisting paramount liens, and such liens are not divested or affected by such sale, as against strangers to the record, where a sale free from incumbrance is not authorized. 34 Cyc. 334.

[3, 4] A subsequent mortgagee is a necessary, but not an indispensable party to a suit on the part of a prior mortgagee to foreclose. But if not made a party or brought into the suit by proper service of summons, and he makes no appearance therein, his rights are not disturbed by a foreclosure and sale of the premises thereunder. While the sheriff's or master's deed under the foreclosure may carry

the title to the property, it does not divest the subsequent mortgagee, not made a party, of his lien, and he has his appropriate remedy to enforce his lien or to redeem the property sold notwithstanding. Besser v. Hawthorn, 3 Or. 512; De Lashmutt v. Sellwood, 10 Or. 319; Sellwood v. Gray & De Lashmutt, 11 Or. 534, 5 Pac. 196; Watson v. Dundee Mortgage & Trust Inv. Co., 12 Or. 474, 8 Pac. 548; Gaines v. Childers, 38 Or. 200, 63 Pac. 487; Williams v. Wilson, 42 Or. 299, 70 Pac. 1031, 95 Am. St. Rep. 745.

[5] The decree directing the receiver to sell the debtor's property in the Wood Case does not declare that the sale shall be made free of incumbrances, and if it had, it could not have operated to cut off the right of the Manhattan Trust Company; it not having been served, and not having appeared in the case. So that, in either event, the Manhattan Trust Company was not foreclosed of its lien in the premises.

It will be noted that the sale was not a tax sale by the proper officer of the counties interested, but a receiver's sale to pay such taxes and the costs of the suit. In such a case the Manhattan Trust Company was not precluded to insist that its lien continued to exist against the premises sold by the receiver. Its successor stands in the same right.

I make no decision as to whether the trust company's lien is superior to the lien of the taxes.

The bill will be dismissed as to the trust company.

In re HAAS.

(District Court, E. D. Pennsylvania. May 11, 1914.)

No. 4906.

BANKRUPTCY (§ 399*)—EXEMPTIONS—SETTING APART—JURISDICTION OF BANKRUPTCY COURT.

Where a lease provided that, if a petition in bankruptcy should be filed against the lessee, the rent, which was payable in installments, should at once become due and payable as if made payable in advance, and a petition was filed at a time when no installment was due, whereupon the lessor entered judgment for the balance of the rent, the bankruptcy court could only set apart to the lessee his exemptions, and had no jurisdiction to determine the lessor's claim under a waiver of exemptions in the lease, though the property of the bankrupt was sold by the receiver prior to the adjudication, and the exemptions were to be set apart in money instead of specific articles, since the court has no jurisdiction to adjudicate claims against exempt property, except such as were acquired by a lien created by agreement of the parties prior to the bankruptcy, and the sale of the property by the receiver did not affect the bankrupt's rights.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 657, 669; Dec. Dig. § 399.*]

In Bankruptcy. In the matter of Louis Haas, bankrupt. On certificate of the referee. Order overruling objections to the trustee's report of exempted property affirmed.

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

Bertram D. Rearick, of Philadelphia, Pa., for bankrupt.
Louis M. Fleisher, of Philadelphia, Pa., for exceptant.

J. B. McPHERSON, Circuit Judge. The subject for consideration is the power of the district court to determine conflicting claims to the property claimed as exempt by the bankrupt. I say "property," because the $300 now in controversy stands in the place of specific articles that the bankrupt could and would have claimed if he had not been prevented from so doing by a receiver's sale. Re Bolinger (D. C.) 6 Am. Bankr. Rep. 172, 108 Fed. 374. The facts will appear in the following report of the referee (D. W. Amram, Esq.):

"The bankrupt occupied the second floor of premises 1425 Walnut street under the lease for the term of one year from the 1st day of May, 1913, at the yearly rental of $1,200, payable monthly in advance in sums of $100 each. The rent to begin on the 1st day of August, 1913. The rent due on the 1st day of August was paid by the bankrupt at the time of the execution of the lease, but, before a further installment of rent became due, a petition in bankruptcy was filed against him, to wit, on August 26, 1913. On August 29, 1913, the landlord entered judgment on the lease and assessed damages at $840 under a clause in the lease which provided, among other things, that, if a petition in bankruptcy shall be filed against the lessee, the rent for the said term, or for whatever portion thereof the lessor may desire, shall at once become due and payable as if, by the terms of this lease, it were all payable in advance, and shall be first paid out of the proceeds of such bankrupt estate, any law, usage, or custom to the contrary notwithstanding.

"An adjudication in bankruptcy was entered on September 17, 1913, but prior to the said adjudication the assets of the bankrupt had been sold under order of court by the receiver. On September 23, 1913, the landlord filed his proof of debt. On October 7th the bankrupt's schedules were filed, wherein he claimed his exemption. On October 11, 1913, the trustee's report of exempted property was filed. The only objection to the trustee's report of exempted property is that filed by the landlord; his reason being that the said bankrupt, Louis Haas, had on May 1, 1913, waived his exemption in the lease executed by him, copy whereof is attached to the proof of claim.

"It appears that under the decisions in Re Caloris Mfg. Co. [D. C.] 24 Am. Bankr. Rep. 609 [179 Fed. 722], and in Re Keith-Gara Co. [D. C.] 29 Am. Bankr. Rep. 466 [203 Fed. 585], the landlord's claim for the balance due under his lease is a claim enforceable in bankruptcy and constitutes a provable debt, and the only question is whether the objection made by the landlord to the trustee's report of exempted property is a valid one and whether the waiver of exemption in the lease is enforceable against the bankrupt's exempted property in the bankruptcy court. Barring the cases in Re Renda [D. C.] 17 Am. Bankr. Rep. 521 [149 Fed. 614], and in Re Highfield [D. C.] 21 Am. Bankr. Rep. 92 [163 Fed. 924], the current of decisions is practically unbroken and uniform to the effect that the bankruptcy court, having set apart the bankrupt's exemption, has no jurisdiction to adjudicate claims made against it, except such as are acquired by a lien created by agreement by the parties prior to the bankruptcy and not in violation of the bankruptcy law. At the time of the bankruptcy in this case, the landlord had no claim whatever against the bankrupt. There was nothing due him under his contract, and it was only by virtue of the bankruptcy that the contingent claim for the balance of the unpaid rent came into being. It is obvious that the judgment entered subsequent to the bankruptcy gave the landlord no higher right in the bankruptcy court than he had enjoyed therebefore. In the cases of In re Renda and In re Highfield, both decided by Judge Archbald of the Middle district, a distinction is drawn between the rights of a claimant against the fund arising from a receiver's sale and specific assets actually set apart. Judge Archbald held that where a receiver sells the bankrupt's assets, including assets out of which the exemption might have been claimed, the entire fund is before the court for distribution, and therefore the court may adjudicate claims against it, although, if the

bankrupt's assets had been set apart by a trustee in bankruptcy subsequent to adjudication, the court would have no such power. Inasmuch as the bankrupt need not claim his exemption until after his adjudication, he cannot be prejudiced in his rights by any sale of the receiver prior to the adjudication. To hold that he loses his right to have the exemption set apart to him by the bankruptcy court free of liens, because the property out of which it might have been claimed was sold by the receiver under an order of the court, at a time when the bankrupt could not have claimed his exemption and when there was no official whose duty it was to set it apart penalizes the bankrupt for no fault of his own. Moreover, in Re Renda there was a distraint by the landlord before the bankruptcy which brought the case under the authority of West Side Paper Co., 20 Am. Bankr. Rep. 660, 162 Fed. 110 [89 C. C. A. 110, 15 Ann. Cas. 384], and In re Highfield simply followed In re Renda, from which, in the words of Judge Archbald, it is not to be distinguished."

The referee thereupon disallowed the landlord's objections to the trustee's report, in which $300 cash was set apart as the bankrupt's exemption.

I agree with the referee's conclusion. When the petition in bankruptcy was filed, there was no rent in arrear, and of course no distraint had been made. Accordingly the bankrupt's goods were free from liens, and, when the receiver sold them by order of court, the bankrupt's right to have the exemption of $300 set apart was transferred to the proceeds of sale. If it were not for the decisions in Re Renda (D. C.) 17 Am. Bankr. Rep. 521, 149 Fed. 614, and Re Highfield, (D. C.) 21 Am. Bankr. Rep. 92, 163 Fed. 924, it would be difficult to find an authority in favor of the court's power to pass upon the conflicting claims of the landlord and the bankrupt. Lockwood v. Bank, 190 U. S. 294, 23 Sup. Ct. 751, 47 L. Ed. 1061; Railroad v. Hall, 30 Am. Bankr. Rep. 619, 229 U. S. 511, 33 Sup. Ct. 885, 57 L. Ed. 1306; Woodruff v. Cheves, 5 Am. Bankr. Rep. 296, 105 Fed. 601, 44 C. C. A. 631; Re Remmerde (D. C.) 30 Am. Bankr. Rep. 701, 206 Fed. 822. But even the two cases referred to may be distinguished on their facts. In Re Renda the landlord had a lien by distraint, as appears from a statement in the opinion at the top of page 523 of 17 Am. Bankr. Rep., 149 Fed. 614, and apparently a similar situation existed in Re Highfield, since the court says (on page 94 of 21 Am. Bankr. Rep., 163 Fed. 924) that the case is not to be distinguished from Re Renda. In both these cases, therefore, the lien of the landlord was superior, under the decision in Re West Side Paper Co., 20 Am. Bankr. Rep. 660, 162 Fed. 110, 89 C. C. A. 110, 15 Ann. Cas. 384.

The referee's order of February 4, 1914, is affirmed.

POTTER v. GENERAL BAKING CO.

(District Court, D. Rhode Island. May 7, 1914.)

No. 1202.

REMOVAL OF CAUSES (§ 84*)—APPLICATION TO REMOVE—NOTICE—SUFFICIENCY.

A notice to plaintiff's attorney that defendant was about to file a petition to remove the cause to the District Court of the United States for the District of Rhode Island and a bond on removal duly executed by defendant as principal and a certain surety company as surety, and that the petition and bond would be presented to a justice of the superior court for action immediately, served on the morning of the day on which the removal papers were presented to the judge of the superior court, was a sufficient compliance with Judicial Code (Act March 3, 1911, c. 231) § 29, 36 Stat. 1095 (U. S. Comp. St. Supp. 1911, p. 142), providing that written notice of a petition and bond for removal shall be given the adverse party or parties prior to filing the same; it not being necessary that the notice should specify the time or place where the petition and bond would be presented, the proceeding for removal being ex parte.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 164; Dec. Dig. § 84.*]

At Law. Action by Frank A. Potter against the General Baking Company. On plaintiff's motion to remand the cause. Denied.

Boss & Barnefield, of Providence, R. I., for plaintiff.

Gardner, Pirce & Thornley, of Providence, R. I., for defendant.

BROWN, District Judge. This is a motion to remand to the state court a removed case, and is based upon the provision of section 29 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1095 [U. S. Comp. St. Supp. 1911, p. 142]), which reads:

"Written notice of said petition and bond for removal shall be given the adverse party or parties prior to filing the same."

The question is as to the sufficiency of the notice. The notice was as follows:

"To Wayne H. Whitman, Attorney for the Plaintiff:

"You are hereby notified that the General Baking Company, defendant in the above entitled cause, is about to file in said superior court a petition that the above entitled cause be removed into the District Court of the United States for the District of Rhode Island, and also a bond on removal duly executed by said General Baking Company as principal and by the American Surety Company of New York as surety, and that said petition and bond will be presented to a justice of said superior court for action thereon immediately. Gardner, Pirce & Thornley, Attys. for Deft."

It was served upon plaintiff's attorney in the forenoon of Wednesday, March 11, 1914. In the afternoon of said day removal papers were presented to a judge of the superior court, and an order for removal to this court was made by said judge and filed with the petition

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

and bond on March 12th, with the clerk of the superior court of Kent county.

It is urged that the notice gave no information as to when or where the petition and bond would be presented to a judge of the superior court, and gave the plaintiff or his attorney no opportunity to be present.

It is contended that the purpose of the provision is that the adverse party shall be advised of the intention to file such a petition and bond, in order that he may have an opportunity to appear in the state court and resist the removal, if he so desires.

It is also urged that since no time is fixed in the federal statute the practice of the state court should govern, as stated in chapter 290, §§ 2 and 4, of the General Laws of Rhode Island, which provide for service of notice at least 48 hours before a motion is called for hearing. The petitioner relies upon Loland v. North Western Stevedore Co. (D. C.) 209 Fed. 626, and Chase v. Erhardt (D. C.) 198 Fed. 305.

This provision was considered in Goins v. Southern Pacific Co. (D. C.) 198 Fed. 432, in United States v. Sessions, 205 Fed. 502, 123 C. C. A. 570, and in Wanner v. Bissinger & Co. (D. C.) 210 Fed. 96.

It is argued that, as the notice is to be given prior to filing, this contemplates a hearing, and therefore a reasonable opportunity to prepare for attendance at the hearing. This, however, is merely inference, and not a necessary inference, and would work a considerable change from the former practice. Such change is not to be inferred unless clearly manifest. Judicial Code, c. 13, § 294.

Ordinarily the sufficiency in point of form of the petition and the sufficiency of the bond for removal have been matters upon which a hearing before the state court has not been required, and it is not necessary to infer, from the provision for "written notice of such petition and bond prior to filing," that notice is also required of the time of presentation of the petition and bond to the judge for the entry of an order for removal. It was doubtless the purpose of the amendment to give the adverse party prompt notice of the exercise of the right of removal, and it does not seem clear that the provision had any other purpose.

The notice in the present case was sufficient to inform the plaintiff of the intention to remove the cause immediately, and meets the literal terms of the statute.

The fact that an order for removal was entered by a judge of the superior court indicates that upon the face of the petition there appeared a proper cause for removal, and that the bond was considered a proper bond. The entry of the order ex parte was in conformity to the long-established practice, and in my opinion there was no irregularity in the entry of such order without hearing the adverse party.

It is not now urged that there was any insufficiency in the petition for removal or bond. As under the former practice there was no right to a hearing, and as this added provision for notice is not for notice of a hearing, and as the amendment can be given due effect as a provision for notice of the exercise of a right of removal, I am of the opinion that there has been a sufficient compliance with the statute.

Furthermore, it does not seem to be consistent with the theory of section 29, which provides a procedure for the exercise of a statutory right, to impose upon the state court any duty additional to that which existed before the insertion of this provision for notice. See Goins v. Southern Pacific Co. (D. C.) 198 Fed. 432.

The motion to remand is denied.

THE PORTLAND.

(District Court, D. Oregon. May 4, 1914.)

No. 6230.

SHIPPING (§ 84*)—LIABILITY OF VESSEL FOR INJURY TO STEVEDORE—DEFECTIVE APPLIANCE.

A steamship *held* liable for an injury to a stevedore while stowing wheat in the hold by reason of the breaking of the rope sling furnished by the vessel and used to hoist the sacks of wheat on board, which had become frayed and weakened by use, and which it was the duty of the ship, delegated to the second mate, to inspect and keep in safe condition.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 342, 349–351; Dec. Dig. § 84.*]

In Admiralty. Suit by Fred Jones against the steamship Portland; the Nymo Line, Incorporated, claimant. Decree for libelant.

Giltner & Sewall, of Portland, Or., for libelant.

Snow & McCamant, of Portland, Or., for respondent and claimant.

WOLVERTON, District Judge. The libelant was injured while at work in the hold of the steamship Portland, by the falling upon him of sacks of wheat that were being taken aboard in slingloads by means of winches and appliances for hoisting the cargo from the wharf and lowering it into the hold of the ship. The winches were carrying a ton of wheat in sacks to the slingload, and the accident was caused by the parting of a rope which, being drawn about the sacks, held them together and operated as a sling for handling the wheat. The rope so used was an inch in diameter, or about three inches in circumference, and the evidence shows that it had been used for a time, had become somewhat worn, and to some extent frayed and attenuated, and undoubtedly weakened. A section of it was very perceptibly attenuated, so that by comparison with the other part its strength must have been materially lessened. The rope did not part at this section, however, but at another. The condition of the section where it parted could not, from the nature of things, be shown. Originally the sling was made up of a good, perhaps first, quality of rope used for the purpose.

The rope for constructing the slings was furnished in new bales by the vessel, and the slings were spliced and made up, under the direction of the second mate, usually while the vessel was on the voy-

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

age between ports, so as to have them in readiness for use in port. The second mate was also charged with the duty of inspecting the slings, to determine their strength and fitness for use. When in port the slings were furnished to the workmen in numbers somewhat beyond what was required for immediate use, so that the men to a limited extent had the choice between slings at hand for use in carrying the loads. In other words, there was a sufficient number of slings at hand so that, had they wished, the men might have selected another sling instead of the one that broke.

The crucial question in the case, and perhaps the only one, is what duty the ship owed to the libelant for his protection against accident and injury through the breaking of the sling.

Doubtless the sling is an appliance, and it was incumbent upon the ship to exercise due and reasonable care and precaution to furnish a safe appliance of the kind. It was furthermore incumbent upon the ship to use like care and precaution to keep the appliance in suitable repair for the use to which it was to be devoted. This includes the duty of making inspections, tests, and examinations at the proper intervals. Union Pacific Ry. Co. v. Daniels, 152 U. S. 684, 14 Sup. Ct. 756, 38 L. Ed. 597.

Nor can this duty be delegated to another so as to escape responsibility for its proper observance and discharge. Hough v. Railway Co., 100 U. S. 213, 25 L. Ed. 612.

Applied in admiralty. In re California Nav. & Imp. Co. (D. C.) 110 Fed. 670.

The second mate testifies that he had certain of the crew make up new slings while on the voyage to this port, and that he himself inspected the slings, both the new and those that had been used, and believed all to be safe for use. In this duty in making up the slings and of inspection, he acted in the stead of the ship, and was therefore vice principal, and the question is resolved into one whether he observed due and reasonable care in the discharge of this duty.

The fact that the rope broke is proof positive that it was defective and not suitable for use. This, coupled with the testimony adduced, which indicated that the sling had beome worn and frayed and attenuated, which condition would have become apparent to one making a careful inspection of the same, impels me to the conclusion that respondent was negligent contributing to the injury of the libelant. This conclusion is borne out by analogous cases. The Rheola (C. C.) 19 Fed. 926; Steel et al. v. McNeil, 60 Fed. 105, 8 C. C. A. 512; Wm. Johnson & Co. v. Johansen, 86 Fed. 886, 30 C. C. A. 675.

A suggestion is made that irregular operation of the winches caused the sling to break, but the evidence does not show that the winchmen were at fault.

As to the damages sustained, libelant has lost in time he was unable to work seven or eight months, during which he would have earned, considering his habit of not working the whole time, from $75 to $80 per month. The services of his physician will cost him $150. To this should be added compensation for the shock received and pain and suffering endured. I am not impressed that his injuries

are at all permanent. Indeed, it is probable that he is now able to perform work substantially as prior to the accident.

I award the libelant therefore $1,200 in gross as the amount of his damages.

In re BROWN et al.

(District Court, S. D. New York. December 3, 1913.)

1. EQUITY (§ 454*)—BILL OF REVIEW—LEAVE TO FILE.
A bill of review may be filed to correct errors apparent on the face of the record, without leave.
[Ed. Note.—For other cases, see Equity, Cent. Dig. § 1110; Dec. Dig. § 454.*]

2. EQUITY (§ 446*)—BILL OF REVIEW—"ERROR OF LAW."
An error of law apparent on the face of the record sufficient to sustain a bill of review is a misconception by the court of what the rule is which will eventually be enforced by the court having the final word.
[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 1079–1090; Dec. Dig. § 446.*
For other definitions, see Words and Phrases, vol. 3, p. 2460; vol. 8, p. 7653.]

3. EQUITY (§ 452*)—BILL OF REVIEW—TIME.
Where a bill of review was not filed until long after the time within which complainants might have appealed from the order sought to be reviewed, it could be sustained only on the theory that the case was out of the jurisdiction of the court, in which the bill was filed, so much of the time that there had not been six months during which the court could have entertained the bill.
[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 1101–1109; Dec. Dig. § 452.*]

4. EQUITY (§ 445*)—BILL OF REVIEW—ISSUES.
Where complainants filed a claim in bankruptcy proceedings for the proceeds of certain securities, and, on being denied, removed the whole claim to the Circuit Court of Appeals, and the assignments of error were sufficient to cover a particular question which was not presented or argued there, such question could not be made the basis of a subsequent bill of review.
[Ed. Note.—For other cases, see Equity, Cent. Dig. § 1078; Dec. Dig. § 445.*]

In Bankruptcy. In the matter of bankruptcy proceedings of Albert O. Brown and others. Application by Samuel C. Scotten and Scotten & Snydacker for leave to file a bill of review. Denied.

Order affirmed in 213 Fed. 705.

Hays, Hershfield & Wolf, of New York City, for appellants.
Thorndike Saunders, of New York City, for appellee.

HAND, District Judge. [1] So far as the order granting leave is concerned, it was not necessary, because the complainant in the bill for review could have filed the bill without any order, if it be a bill of review for errors apparent on the record (Ricker v. Powell, 100 U. S. 104, 109, 25 L. Ed. 527; Davis v. Speiden, 104 U. S. 83, 26 L. Ed.

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

660); the rule goes back to Lord Burke's ordinances. That it is only a bill of review for error apparent on the record appears from Tilghman v. Werk (C. C.) 39 Fed. 680, a decision by Mr. Justice (then Judge) Jackson, who was exceptionally learned in matters of equity procedure. Indeed, the only theory upon which the bill can stand is that the law was misconceived by this court when it signed the order; the fact that this court was then controlled by an authoritative decision of the Circuit Court of Appeals does not change the result.

[2] An error of law is a misconception of what the rule is which will eventually be enforced by the court having the final word. No new fact is now suggested which could have been originally pleaded properly.

This is enough to dispose of the order; but as the question has been thoroughly argued in other respects, and as the decision of the bill of review will be inevitably referred to me, I think it will be the quickest to state my judgment more at large as to the validity of the bill itself on the merits, especially as it seems to me to have some fatal defects which inevitably make it bad.

[3] The time within which an appeal might be taken from the original order is long since passed, and the only theory upon which the complainants can meet the usual rule which limits the time to file such a bill (Thomas v. Brockenbrough, 10 Wheat. 146, 6 L. Ed. 287), is that the case was out of the jurisdiction of this court so much of that time that there have not been six months during which the court could have entertained the bill (Ensminger v. Powers, 108 U. S. 292, 2 Sup. Ct. 643, 27 L. Ed. 732). That case was one in which the appeal was dismissed under circumstances which were held to excuse the appellant. There is no case which I have found where the appellant, who has actually procured the hearing on the merits of one appeal, has been allowed afterwards to take another. However, even if such a bill to review might in some cases be good, it is quite apparent that there would be no equity in permitting it here in view of all the facts, for the following reasons: When the complainants appealed from so much of the order as dismissed these two petitions, they removed the whole proceedings into the Circuit Court of Appeals.

[4] The scope of the review by the Circuit Court of Appeals was limited, however, by the assignment of errors. Now the assignment of errors either included the question now raised, or it did not. If it did include the questions now raised, the Circuit Court of Appeals passed upon them, and, for obvious reasons under the authorities, no bill of review in this court lies (Southard v. Russell, 16 How. 547, 570, 14 L. Ed. 1052; Kimberly v. Arms [C. C.] 40 Fed. 548), at least without leave of the Appellate Court. If, on the other hand, the assignment of errors did not cover the case, it was because the complainants here chose to leave that feature of the order of this court unassailed. If they did, there is no room for the application of the rule in Ensminger v. Powers, supra, for there the appeal attempted to raise the point. Not only might they have originally added an assignment of error upon that point, but they might also have amended their

assignment of errors in the Circuit Court of Appeals to include it, or even, if "a plain error," they might have urged it under rule 11 of the rules of the Circuit Court of Appeals (150 Fed. xxvii, 79 C. C. A. xxvii) without assignment. Nor may they say that they were not aware of the point, for their counsel successfully raised the same point in Gorman's Appeal, 184 Fed. 454, 106 C. C. A. 536, in this very proceeding, the decision in which is the cause of this application. Indeed, in this very case the seventh exception to the master's report challenged the rule of law laid down in the case of Re McIntyre, Ex parte Grace, 181 Fed. 960, 104 C. C. A. 424, which required the particular certificate to be traced, thus showing that at one period this question was raised. The eighth and ninth exceptions to the master's report raised the same question.

The result, therefore, of allowing this bill of review (assuming that the Circuit Court of Appeals had jurisdiction to pass on the point) would be to permit them to split up their appeal, raising some questions, and reserving the rest. There is really no reason why this should not go on for several separate appeals until the aggregate of the separated periods during which this court had jurisdiction of the case amounted to six months. Such a result certainly would be a very pernicious precedent, and would put a premium upon delay. Assuming that the complainants failed to assign the error now complained of, I decide they chose to waive it, and that they may not now by an independent proceeding take it up.

It is true they felt bound by the decision of the Circuit Court of Appeals, but an appeal to the Supreme Court was as open to them in this case, as it was in Gorman's. If they had no appeal to the Supreme Court, there would be much more force in their contention if made before the Circuit Court of Appeals, for they were entitled to assume that the Circuit Court of Appeals would have followed its own decision. That they knew of the possibility of such an appeal Gorman's Case shows, and they must be held definitely to have waived it when they took no steps to press the point. Two courses were open to them: To save the point by assignment, or to procure a stipulation which would cover it in case the Supreme Court reversed Gorman's Case.

All the preceding assumes that the point was reserved from the consideration of the Circuit Court of Appeals, but the record shows the contrary. The two petitions themselves did not claim any securities in specie; they contained no allegation that any such securities were in existence and no prayer for their delivery. They only asserted some right in the proceeds arising from their sale. However, the seventh, eighth, and ninth exceptions to the master's report are broader, and perhaps it is fair to say that they raised the question, in so far as mere exceptions which depart from the pleading can do so. The assignment of errors, especially the first, second, and third, covered every possible theory upon which the recovery might have been given, including anything suggested by these exceptions. In these assignments it was alleged an error to have dismissed the petitions (which included any possible relief under them), and also to have held

that the appellants had no rights "in specie," or in the "properties," as well as in the cash surplus in the hands of the receiver. Such assignments certainly covered any possible claim which the petitions could be stretched to cover by the help of the exceptions and show that the point was raised in the Circuit Court of Appeals which is now sought to be raised by this bill of review; i. e., whether the petitioners had not shown themselves entitled to some specific shares of stock in the hands of the receiver. Hence the petitioners presented to the Circuit Court of Appeals the very point now raised, and this court should not review it. If, on the other hand, the petitions are to be read without the exceptions, there was never any claim for the specific securities and no ground for the recovery at all.

Finally it is at least a question whether the unexpected ruling of a court is ground for a bill of review. Thus in Hoffman v. Knox, 50 Fed. 484, the Circuit Court made its own ruling upon the constitutionality under the state Constitution of a state statute. Later the state court held differently in another case, a decision which is usually as absolutely conclusive as a ruling of the Supreme Court itself. The Court of Appeals for the Sixth Circuit, Chief Justice Fuller presiding, held that such a ruling did not constitute error apparent on the record. It must be conceded, however, that it is not certain that the ground of decision was not in part due to the unwillingness of the court, as matter of substantive law, to make the state decision apply as ex post facto. In Tilghman v. Werk (C. C.) 39 Fed. 680, Judge Jackson declined to regard a change in the decision of the Supreme Court as the ground for a bill on newly discovered evidence; whether he might have held it good as error apparent of the record does not appear.

My conclusion, therefore, is that, if the bill is filed, it would be a subject to be dismissed on motion as being invalid in law on its face.

The motion for leave is denied on the ground that it is unnecessary.

In re A. O. BROWN & CO.

(Circuit Court of Appeals, Second Circuit. March 10, 1914.)

No. 205.

EQUITY (§ 445*)—BILL OF REVIEW—RIGHT TO RELIEF.

Complainants, in bankruptcy proceedings against their brokers, filed a claim for the proceeds of certain corporate stock, pledged by the brokers to a bank, which it had sold, and paid the balance to the bankrupts' receiver. Complainants elected not to argue before the District Court the proposition that they had traced their stock into the shares pledged by the bank, though, many months before claimants' appeal from an adverse judgment was argued in the Circuit Court of Appeals, another case had been disposed of in the Circuit Court of Appeals on an appeal, and an appeal taken from the decision of that court to the United States Supreme Court by complainants' own counsel with reference to the question, on which the decision was reversed. *Held*, that complainants were thereby barred of the right to present such claim by bill of review.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 1078; Dec. Dig. § 445.*]

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

This cause comes here upon appeal from an order of the District Court, Southern District of New York, dismissing a bill of review filed by appellants August 4, 1913, to review a decree entered in this proceeding on April 20, 1911, which decree dismissed the reclamations of appellant. The opinion of Judge Hand will be found in 213 Fed. 701.

Thorndike Saunders, of New York City, for appellants.

Hays, Hershfield & Wolf, of New York City (Ralph Wolf, of New York City, of counsel), for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge. The facts presented on this appeal are as follows:

The firm of A. O. Brown & Co. being in bankruptcy, Scotten on February 13, 1909, filed a claim in reclamation to 100 shares Steel Common and 300 shares Great Northern Ore. He averred ownership; that the securities were held by the bankrupts as security only for certain debit balances against petitioner; that the bankrupts sold part of the securities; and that the rest were sold by a bank with which the bankrupts had pledged them, whereby the bankrupts became unable to redeliver the securities to petitioner but that the proceeds came into the hands of the trustee in bankruptcy. He prayed that the trustee be directed to pay to him the proceeds of the securities so sold. Scotten & Snydacker on the same day (February 13, 1909) filed a similar claim for the proceeds of 200 shares Steel Common and 85 shares Illinois Central.

These two claims, with several others, some of them represented by the same attorney who appeared for the two, including a claim of the First National Bank of Princeton, came before the referee acting

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

as special master. After a report and rehearing upon the same he filed a second report, November 1, 1910, holding that in the Scotten Case the trustee was entitled to an order denying petitioner's claim in reclamation, without prejudice to a part of it, which concerned the 100 shares of Great Northern Ore stock, concerning which last-named stock no contention is now made here. In the case of Scotten & Snydacker he held that the trustee was entitled to an order denying claimant's petition in reclamation.

The report of the special master as to claims of First National Bank of Princeton, Simpson, Bullen, and these two claims of Scotten and Scotten & Snydacker came before the District Court for review and an order was entered April 20, 1911, confirming the special master's report "throughout." On June 29, 1911, the five last-named claimants appealed from that order to this court. The assignments alleged error, in the following particulars (among others):

(1) In dismissing the several petitions.

(2) In deciding that claimants' funds were not traced into or connected with the properties and money delivered by the Hanover National Bank to the receiver on September 5, 1908. It may be noted that it is the contention of these two claimants that 1,000 shares of Steel Common which the bankrupts pledged with the Hanover Bank as collateral to a loan, included their shares of steel, or a like number of shares which had been bought by the bankrupts to replace theirs.

(3) In omitting to decide that claimants' funds or some parts thereof had been traced into or connected with the securities deposited by bankrupts with the Hanover National Bank on August 24 and 25, 1908, and which either in specie or in surplus came into the hands of the receiver in bankruptcy.

(12) In omitting to determine that claimants' funds were a charge upon the mass of securities and moneys delivered by the Hanover National Bank to the receiver in bankruptcy on or about September 5, 1908.

That appeal was argued on December 15, 1911, and decided January 8, 1912. Our opinion will be found reported in 193 Fed. 24, 113 C. C. A. 348. From our decision the five claimants appealed to the Supreme Court, which affirmed the Court of Appeals, 226 U. S. 110, 33 Sup. Ct. 78, 57 L. Ed. 145.

In a separate proceeding instituted by one Gorman to establish a claim in reclamation to some shares of Greene Cananea stock we held on January 9, 1911, that the claimant had not sufficiently identified. 184 Fed. 454, 106 C. C. A. 536. From that decision appeal was taken to the Supreme Court, which held that there was sufficient proof of identity, reversing our decision. Gorman v. Littlefield, 229 U. S. 19, 33 Sup. Ct. 690, 57 L. Ed. 1047.

It is the theory of these claimants that if the rule enunciated in Gorman v. Littlefield had been applied to the facts in their cases it would have been held that as to their steel stock identity had been proved. They therefore bring this bill of review which in substance and effect prays for a retrial of their respective claims. They contend that they did not present any argument to the District Court or to the Court of Appeals or to the Supreme Court as to this part of

their claim and that in their record on appeal they left out some of the testimony that referred to the steel stock; also that the appellate courts did not deal with that question.

It appears then that these claimants originally advanced the claim which is the subject of their bill of review; that they either took all the testimony they could muster in its support, or had full opportunity to do so before the referee. That they elected not to argue before the District Court the proposition that they had traced their steel stock into the block of 1,000 shares which was pledged to the Hanover Bank. That, although many months before their appeal was argued in this court the Gorman Case had been disposed of here and an appeal from our decision therein taken (by their own counsel, who also appeared for Gorman), they elected not to present and argue the question (or at least present and reserve it) that our decision in the Gorman Case was unsound. That before the Supreme Court they elected not to call attention to this same question, although for some reason the appeal in the Princeton Bank and these two cases came on for argument there before the earlier appeal in the Gorman Case.

Their theory seems to be that they may bottle up part of their claim, which was, as originally presented, a single one, during review by three successive courts and then years afterwards bring it forth de novo to be presented for decision.

Such practice would be intolerable and we fully concur with Judge Hand in his disposition of the bill of review.

Order affirmed.

CHARLES v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. February 4, 1914.)

No. 1200.

1. POST OFFICE (§ 35*)—MISUSE OF MAILS—"SCHEME TO DEFRAUD"—NATURE OF SCHEME.

It is not essential, in order to constitute a scheme to defraud to be effectuated by use of the post office establishment in violation of Cr. Code, § 215 (Act March 4, 1909, c. 321, 35 Stat. 1130 [U. S. Comp. St. Supp. 1911, p. 1653]), that the scheme or device is plausible and reasonably adapted to justify a person of ordinary comprehension and prudence in acting to his injury by presenting allurements of a specious and glittering promise, but it is sufficient that the plan discloses any scheme to defraud by which it is sought to obtain the goods of others by false representations as to the thing they are to receive in return for their property, so that, where accused by use of the mails sought to obtain whisky from another by means of checks which accused knew would not be paid for want of funds, his act constituted a scheme to defraud within the statute.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. § 55; Dec. Dig. § 35.*]

2. CRIMINAL LAW (§ 822*)—TRIAL—INSTRUCTIONS—PORTIONS OF CHARGE.

Error cannot be assigned on a single sentence or even a lengthy paragraph in a charge, where the charge, considered as a whole, states the law fairly and impartially and the context affords a clear conception of the law bearing on the testimony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1990, 1991, 1994, 1995, 3158; Dec. Dig. § 822.*]

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

3. POST OFFICE (§ 50*)—USE OF MAILS TO DEFRAUD—INSTRUCTIONS.

Where, in a prosecution for misuse of the mails with intent to defraud by using forged bills of lading to obtain whisky from a carrier, the court charged that, even if accused had not altered or forged the bills, yet if he had written a letter with the hope that a chance would be afforded him to obtain ten drums of whisky by the mistake of the shipper in attaching a draft for a one-drum shipment to a ten-drum bill, and accused obtained possession of ten drums of whisky by reason of such mistake, and he had intended to do that when he adopted the plan of writing the letter to the seller, then he would be guilty of fraud in any event and would be guilty of using the mails for fraud if his intention was formed when the letter was written, another paragraph of the charge, that even if accused had not altered or forged the bills, yet if he wrote a letter asking for separate bills of lading for four separate shipments with the hope that, in sending out the drafts with the bills attached, they would become mixed and those for larger quantities would be attached to drafts for smaller quantities, thus enabling him by such mistakes to get possession of the larger shipments on payment of the smaller drafts, and he took advantage of such mistake, he would be guilty, was not misleading as instructing that it was only necessary for the government to prove that accused used the mails with a hope that an opportunity for fraud might be opened to him.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 87–89; Dec. Dig. § 50.*]

4. POST OFFICE (§ 35*)—MISUSE OF MAILS—SCHEME TO DEFRAUD.

Accused, by means of the post office establishment, ordered 22 drums of liquor to be shipped in four lots with one bill of lading for each lot. Two were for ten drums each and the other two for one drum each. He requested that each bill be attached to a separate draft, and accordingly drafts were attached to the two bills for ten drums each, and a draft also attached to each of the bills for one drum. Accused paid the two drafts on the bills calling for one drum and, obtaining them, altered the figures so as to make them appear to be drafts for the two ten-drum shipments, obtaining one of the ten-drum shipments on the altered bill, and, on the railroad refusing to deliver the other shipment owing to the appearance of the altered bill, accused mailed the same to the shipper with a request that a new bill be sent him by mail for one drum, and on receipt of this he changed it so as to call for ten drums and obtained delivery. *Held* sufficient to show a misuse of the post office establishment in furtherance of a scheme to defraud in violation of Cr. Code, § 215 (Act March 4, 1909, c. 321, 35 Stat. 1130 [U. S. Comp. St. Supp. 1911, p. 1653]).

[Ed. Note.—For other cases, see Post Office, Cent. Dig. § 55; Dec. Dig. § 35.*]

5. POST OFFICE (§ 50*)—OFFENSES AGAINST POSTAL LAWS—INSTRUCTIONS.

Since, in a prosecution for misuse of the mails in furtherance of a scheme to defraud, any plan or scheme with intent to defraud another by use of the post office establishment is prohibited, an instruction that the jury might infer a previous design to defraud from proof of the fraud was not objectionable as tending to withdraw from the jury the question whether accused had devised an artifice or scheme to defraud, or because of accused's theory that, even if a fraud had been committed, it was after the shippers of the goods which it was claimed accused had obtained by fraud by their own mistake had rendered it possible for accused to commit it by an alteration of the bills of lading.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 87–89; Dec. Dig. § 50.*

Nonmailable matter, see notes to Timmons v. United States, 30 C. C. A. 79; McCarthy v. United States, 110 C. C. A. 548.]

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

6. CRIMINAL LAW (§ 782*)—INSTRUCTIONS—WEIGHT OF EVIDENCE.

Where the court charged that the jury were the sole triers of all questions of fact, and as such should give such weight as they deemed proper to the testimony in determining the facts necessary to enable them to reach a correct conclusion, and that accused was presumed innocent until there was sufficient testimony to convince them that he was guilty beyond a reasonable doubt, an instruction that the testimony of the witnesses was undisputed and admitted, and the only question for the jury to decide was whether it was sufficient to convict, was not objectionable, in that there were issues of fact in the testimony, and it was the jury's duty to believe the testimony or not as they decided.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1847, 1849, 1851, 1852, 1877, 1878, 1880–1882, 1906, 1907, 1909–1911, 1960, 1966, 1967; Dec. Dig. § 782.*]

7. CRIMINAL LAW (§ 823*)—MISUSE OF MAILS—GIST OF OFFENSE—CURE OF ERROR IN INSTRUCTION.

Where, in a prosecution for misuse of the mails in furtherance of a scheme to defraud, the court charged that it was necessary, to convict, that the jury should find as a fact that a fraud was intended when accused mailed the letters in question or received letters in reply from the mails, an instruction that the gravamen of the case was the obtaining of the property fraudulently, given in response to an exception by accused's counsel, was not erroneous on the ground that the gravamen of the charge was not the fraudulent obtaining of the property, but the design of a scheme or artifice to defraud.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1992–1995, 3158; Dec. Dig. § 823.*]

In Error to the District Court of the United States for the Western District of South Carolina, at Greenville; Henry A. M. Smith, Judge.

L. Marvin Charles was convicted of using the mails in furtherance of a scheme to defraud, and he brings error. Affirmed.

This is a criminal action tried in the United States District Court for the District of South Carolina. Two indictments were found against the plaintiff in error, hereinafter referred to as "defendant," charging him with using the United States mails for the purpose of fraud in violation of section 215 of the Criminal Code of the United States. Two cases were tried together at the same term the indictments were found and resulted in a verdict of guilty in each. For convenience we will refer to them as Nos. 26 and 27; these being the respective numbers given them on the docket in the lower court.

The indictment No. 26 charged six separate and distinct offenses in separate counts, but the grand jury found no bill on the fifth count. The scheme alleged in each count was, in substance, that the plaintiff in error, using letter paper with the letter head, "City Social Club, L. M. Charles, Proprietor," wrote and mailed an order for a shipment of whisky to be sent to him or the City Social Club, and accompanied the order with his personal check, and thereby represented that he had sufficient funds in the bank to meet the check, when as a matter of fact he had no funds in the bank, intending thereby to induce the shipper to ship the whisky, so that the plaintiff in error could obtain possession of it and convert it to his own use and thereby defraud the shipper.

In case No. 27 the scheme to defraud alleged is that the defendant ordered 22 drums of liquor from E. B. Gibson of Chattanooga, Tenn., to be shipped to Walter Miller at Pride, S. C. (a small railroad station near Union, S. C., at which latter place defendant lived and carried on his business). The whisky was to be shipped in four lots with one bill of lading for each lot. Two were for 10 drums each and the other two for one drum each.

The defendant requested that each bill of lading be attached to a separate draft on him and sent to the Citizens' National Bank of Union, S. C., for collection. Drafts amounting to $284 were attached to the two bills of lading

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

for 10 drums each, and the draft attached to one of the bills of lading for one drum was for $26.50, and the other was for $28.50. Defendant paid the two drafts for $26.50 and $28.50, respectively, thereby obtaining possession of the bills of lading attached thereto.

That the bills of lading attached to the drafts paid contained the number of drums as set out only in figures, to wit, "1"; the weight was only given in figures, to wit, "200"; that defendant obtained these bills of lading and changed them by placing a cipher after the figure "1" so as to make the number "10" and a cipher after the figure "200" so as to make the weight "2,000" pounds; that by this scheme defendant obtained delivery of one of the 10-drum shipments on one of the bills of lading; that, upon refusal of the railroad to deliver the other shipment owing to the appearance of the bill of lading, defendant in furtherance of the scheme to defraud mailed the same to Gibson with the request that a new bill of lading be sent him; that a duplicate bill of lading calling for one drum of liquor was sent to him by mail; that upon receipt of this bill of lading it was changed so as to call for 10 drums and the defendant thereby obtained delivery of the other 10 drums.

This scheme was charged in all three counts of the indictment; the first count being that for the purpose of carrying out the scheme defendant mailed a letter to Gibson inquiring for prices, the second being that he mailed a letter with the torn bill of lading, and third that he received a letter from Gibson relative to the four shipments and drafts.

The jury returned a verdict of guilty in each case.

Defendant was sentenced to imprisonment in the penitentiary for one year and to pay a fine of $500, the sentences to be concurrent, and from which judgment the case now comes here on writ of error.

W. C. Cothran, of Greenville, S. C. (Cothran, Dean & Cothran, of Greenville, S. C., on the brief), for plaintiff in error.

Arthur R. Young, Asst. U. S. Atty., of Charleston, S. C. (Ernest F. Cochran, U. S. Atty., of Anderson, S. C., on the brief), for the United States.

Before PRITCHARD and WOODS, Circuit Judges, and ROSE, District Judge.

PRITCHARD, Circuit Judge (after stating the facts as above). The defendant is indicted under section 215 of the Code, the material part of which, as respects this controversy, is in the following language:

"Whoever, having devised or intended to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, * * * in any post office, * * * of the United States, or shall take or receive any such therefrom, * * * shall be fined not more than $1,000, or imprisoned not more than five years or both."

The first enactment relating to this particular subject is to be found in 5480 of the Revised Statutes (U. S. Comp. St. 1901, p. 3696). This act was amended in 1889, at which time the subject of dealing in counterfeit and spurious money and other articles was included. In 1909 Congress enacted the Criminal Code at which time the scope of the act was still further enlarged, thereby showing that it is the intention of Congress to reach any and all classes of individuals who may form the intention of using the mails for fraudulent purposes.

It was undoubtedly the purpose of Congress in the enactment of this law to prevent the use of the mails by one for the purpose of carrying out any plan or scheme to defraud another.

The assignments of error relate solely to the refusal to grant the

instructions offered by the defendant, and to the charge of the learned judge who tried the case below, there being no motion to quash or demurrer filed to either indictments, nor were there any assignments of error based upon exceptions to evidence offered in the court below.

We will consider the first four assignments together; the first being as follows:

"That the court erred in refusing to instruct the jury that such a scheme or device must have been plausible and reasonably adapted to justify a person of ordinary comprehension and prudence by presenting to them the allurements of a specious and glittering promise."

By the second it is insisted that, notwithstanding the defendant may have conceived and intended to carry out an ingenious artifice or scheme, yet if his correspondence with the parties only disclosed ordinary business propositions, not calculated to deceive the unwary, he could not be convicted under this section.

The third is to the effect that the sending of a check with an order at a time when he knew that the same would not be honored is not the kind of artifice or scheme contemplated by the statute.

Fourth. "That the court erred in charging the jury that the proof of the scheme or artifice referred to in the statute would be supplied if the jury believed from the evidence that in the beginning the defendant intended to defraud and used the mails in effectuating that intention."

[1] In other words, it is contended as respects these assignments that, in order to render the defendant liable under the statute, it is necessary that there must appear more than an intention to defraud and to the use of the mails for such purpose; that the artifice or device must be of such character as to constitute a false representation—that is, such a scheme involving allurements of a specious and glittering promise. In other words, the defendant contends that a simple, ordinary false representation would not subject one to indictment under this section.

The evidence relative to this indictment tended to show that the plaintiff in error sent the various orders and checks as alleged in the first, second, third, fourth, and sixth counts; that the whisky was shipped on the faith of the checks and delivered to him; that the checks were presented and dishonored because he had no funds in the bank; and that he never made any effort to pay for the whisky or explain the transaction. All of these transactions were in close proximity in point of time. Evidence of several similar transactions occurring about the same time was introduced to show intent. There was evidence also which tended to show that there was no such organization as the City Social Club.

In the case of United States v. Loring (D. C.) 91 Fed. 881, Blodgett, District Judge, said:

"The object of the law was to prevent persons having fraudulent designs on others from using the post office as a means of effecting such fraud. It need not, in my opinion, be a fraud either at common law or by statute. It is enough if it was a scheme or purpose to defraud any persons of their money."

In the case of Wilson v. United States, 190 Fed. 427, 111 C. C. A. 231, the Circuit Court of Appeals for the Second Circuit held that:

"The purpose of the statute was broad enough to prevent the use of the mails to despoil the public, either by means of plain falsehoods, or by the most 'glittering, alluring and complicated contrivance.' "

In the case of Evans v. U. S., 153 U. S. 584, 14 Sup. Ct. 934, 38 L. Ed. 830, the defendant was charged with unlawfully procuring the surrender and delivery to himself of the funds of a national bank of which he was a director, and also there was a count of fraudulently aiding in procuring the discount of unsecured paper for the bank. That case is somewhat analogous to the case at bar. Justice Brown, who delivered the opinion of the court, among other things, said:

"While the mere discount of an unsecured note, even if the maker and the officer making the discount knew it was not secured, would not necessarily be a crime, if the maker believed that he would be able to provide for it at maturity; yet if his original intent was to procure the note to be discounted in order to defraud the bank, as charged in the count, every element of criminality is present. The case is not unlike that of purchasing goods or obtaining credit. If a person buy goods on credit in good faith, knowing that he is unable to pay for them at the time, but believing that he will be able to pay for them at the maturity of the bill, he is guilty of no offense even if he be disappointed in making such payment. But if he purchases them, knowing that he will not be able to pay for them, and with an intent to cheat the vendor, this is a plain fraud, and made punishable as such by statutes in many of the states."

In addition to the foregoing, it was held in the case of Harrison v. United States, 200 Fed. 662, 119 C. C. A. 78, that:

"The statutory 'scheme to defraud' may be found in any plan to get the money or property of others by deceiving them as to the substantial identity of the thing which they are to receive in exchange; and this deception may, of course, be by implication as well as by express words."

There are numerous other cases to the same effect; but we do not deem it necessary to refer to them, inasmuch as it seems to be well established that, where a plan discloses any scheme to defraud by which it is sought to obtain the goods of others by false representations as to the thing they are to receive in return for their property, it renders such person liable to indictment under this statute.

We are of the opinion that the learned judge was correct in charging the jury that if they found from the evidence that at the time the defendant mailed the checks accompanying the orders he knew that the same were drawn upon a bank in which he had no funds, and which he himself had no intention of paying, he would be guilty under the statute, provided they also found that at the time he mailed them he intended to defraud the party in whose favor such checks were drawn. In this instance it was clearly shown by the evidence that at the time the defendant drew these checks he was aware of the fact that he did not have any money to his credit in the bank upon which the same were drawn, and it was further shown that he made no effort to protect his checks after they were received at the bank.

The court below very properly submitted these facts together with the other circumstances bearing upon the question as to whether the defendant intended to use the checks as a scheme or artifice with the intention of defrauding the parties with whom he was dealing.

Under the circumstances, it is apparent that it was the intention

of the defendant to obtain the goods from the various parties with whom these transactions were had by inducing them to believe that the checks which he transmitted through the mails were good and that he had to his credit in the bank sufficient funds to pay the same when they were presented. We do not deem it necessary to discuss this question further than to say that in our opinion the learned judge stated the law clearly and gave the defendant the benefit of every instruction to which he was entitled under the circumstances.

The fifth assignment relates to case No. 27, and we will refer to this case as the Gibson case, inasmuch as it was discussed as such in the argument before us.

By the fifth assignment of error it is insisted that the court erred in charging the jury:

"That even if the defendant had not altered or forged the bills of lading, yet if he had written a letter asking for separate bills of lading for four separate shipments, with the hope that in sending out the drafts with the bills of lading attached, the bills of lading would become mixed, those for larger quantities being attached to the drafts for smaller quantities, thus enabling him by such mistakes to get possession of the larger shipments upon payment of the smaller drafts, and that he did take advantage of such mistake, then the defendant would be guilty of a violation of section 215, Penal Code; it being submitted that, in order to convict under said statute, there must appear more than a hope that an opportunity for fraud may be opened up to him, followed by the use of the mails to render the fruit of that hope possible of attainment it must appear that the defendant has devised an artifice or scheme displayed to his intended victim under 'false representations, false coloring, allurements, or embellishments calculated to deceive.'"

A careful consideration of all that part of the charge which relates to this point, in connection with the testimony, leads us to the conclusion that the jury could not have been misled by the same. It is made clear that the gravamen of the offense as charged was the use of the mails after having formed an intention to defraud the shipper.

It is well settled that a single sentence or even a lengthy paragraph in a charge cannot be treated as determining the correctness of the charge in its entirety; the proper method being to consider the charge as a whole, and if, when so considered, it appears that the court has clearly stated the law, a reversal will not be directed, even though it should appear that some portion of the same is subject to criticism.

[3] The charge considered as a whole states the law fairly and impartially, and its context afforded the jury a clear conception of the law bearing upon the facts as testified by the witness. The portion of the charge referred to is in the following language.

"Even if he had not altered or forged these bills, yet if he had written the letter with the hope that the chance would be that the wrong bill of lading would be attached to the wrong draft and when it came he took up the one drum draft, that is, that they handed him a ten drum bill of lading, and he knew that he was not entitled to it, though he did not alter that bill of lading by a stroke, yet, if by pretending to have legally and honestly got possession of it, he went and got possession of the drums of whisky and he had intended to do that when he adopted the plan of writing the letter, then he would be guilty of a fraud in any event, and he would be guilty of using the mails for fraud, if his intention was formed at the time of writing the letters."

The defendant took no exception to this part of the charge. However, he insists that it was erroneous, because the jury was not in-

structed that in order to render the defendant liable the scheme or artifice should be so "displayed to his intended victim under false representations, false colorings, allurements and embellishments calculated to deceive."

[4] We find nothing in the record to show that this matter was called to the attention of the court while the jury was in the box and before it had retired. However, we think that the scheme as shown by the evidence comes clearly within the terms of the statute, and, furthermore, the proof as to this point is overwhelmingly to the effect that the defendant had a fraudulent design to obtain the property of the shipper by fraudulent pretenses.

[5] The sixth assignment of error is to the effect that the court erred in instructing the jury that they might "infer a previous design to defraud from proof of the fraud; for the reasons (a) that such charge was calculated to withdraw the minds of the jury from the real issue in the case, which was not whether the defendant had committed a fraud, but whether he had devised an artifice or scheme to defraud, such as is contemplated by the statute; and (b) the contention of the defendant was that even if a fraud had been committed it was done after the mistake of the shippers had rendered it possible by the alteration of the bills of lading; in neither of which cases could the inference of previous design, that is, that the opening of the correspondence, be properly drawn."

There is nothing in the foregoing that could have misled the jury as to the real issue in this case, and, inasmuch as we have already stated that any plan or scheme with intent to defraud another is a scheme or artifice as contemplated by the section in question, we do not deem it necessary to enter into a further discussion of this point.

It is insisted that even if a fraud was committed it was after the mistake of the shipper had rendered it possible by the alteration of the bill of lading, in neither of which cases could the inference of previous design be drawn from the fact that a fraud had been committed.

It has been repeatedly held that the law "presumes that every man intends the natural and ordinary consequences of his acts," and that, "a wrongful act knowingly or intentionally committed cannot be justified on the ground of innocent intent."

It is also well settled that where there is proof of fraud the jury may infer a previous design to defraud. This phase of the question was fairly presented to the jury by the court below, and the ruling as announced is undoubtedly the law.

This assignment is apparently directed to the second and third counts in the indictment now under consideration, and is untenable inasmuch as it is shown by undisputed testimony that, prior to the mailing of the letters as alleged in those counts, one of the bills of lading had already been altered by the defendant, and upon which a shipment of 10 drums of liquor had been delivered to him, and it further appears that, after failing to secure the other 10 drums of whisky on the bill of lading which he presented, he transmitted the defective bill of lading and secured a duplicate which was for one drum only and by changing this to 10 drums got possession of the remaining 10 drums.

It is shown by undisputed evidence that the defendant transmitted a letter through the mails to the shipper in order to secure a duplicate bill of lading and thus he was enabled to secure the remaining package of liquor. This shows that the defendant in this instance was determined at all hazards to consummate the fraud which he had originally intended, to wit, to secure all the whisky shipped to him at this point without paying for the same. He not only violated the statute in question, but he also rendered himself liable to indictment in the state court on the charge of forgery, and all of these circumstances were properly submitted to the jury as tending to show that he had an intent to defraud.

Under the circumstances, the court gave the defendant the benefit of every instruction to which he was entitled.

[6] It is further insisted by the seventh assignment of error that:

The court erred "in charging the jury that the testimony of the witness was undisputed and admitted, and that the only question for them to decide was as to whether it was sufficient to convict; for the reason that there were issues of fact in such testimony, particularly as to the alleged alterations in the bills of lading and in other respects; and it was the province of the jury to believe such testimony or not as they decided; the defendant not putting up any evidence rendered such testimony neither undisputed nor admitted."

A careful consideration of the charge as respects this assignment fails to show that this assignment is well founded. On this point the court charged the jury as follows:

"In this case the testimony is all one-sided; the defense has interposed no testimony; there is no conflict, therefore, of testimony for you to consider. The only question for the jury is upon the admitted testimony, the undisputed testimony put in by the prosecution alone. If the prosecution have established in your minds by sufficient evidence, conclusions of fact from the testimony, sufficient for you to draw such a conclusion of fact as to justify the inference that this man was guilty, and guilty beyond a reasonable doubt as I have defined it, that is all; no question of balancing contradictory testimony; the only question is as to the sufficiency of the testimony put in by the prosecution to establish in your minds the guilt of this defendant beyond a reasonable doubt. * * *

"So, gentlemen, it is entirely for you to consider whether or not the testimony satisfied you that these letters were written and Charles got possession of those bills of lading, and if was his intention by so wording his order to have one drum sent to get possession of bills of lading that he might obtain from the railroad drums that he was not entitled to unless forged, it is for you to say whether the intention existed before mailing, I charge you that you have a right to infer that it was a device or scheme to defraud. * * *

"Mr. Cothran: I mean we have got a right to dispute every inconsistency, every fact that is testified to by the government witnesses; we don't admit anything.

"Court: I rule that you have no right to dispute any testimony given by the government's witnesses, although you may dispute the inference to be drawn therefrom."

However, there could have been no misunderstanding as to what the court intended to charge the jury after the district attorney directed the court's attention to that portion of the charge as follows:

Mr. Cothran, District Attorney, said:

"We call attention to that part of your honor's charge that the defendant would not be allowed to dispute the testimony; I did not so understand that your honor meant that the jury were not the triers of the credibility of the witnesses."

In response to this the court charged the jury as follows:

"I have already charged the jury that they are the sole judges of the credibility of the witnesses. I say that there is no disputed testimony in this case, and that the jury should give to the witnesses who testified such credibility as by law the ordinary witness of ordinary capacities, ordinary sanity, ordinary reason is entitled to, where his character is not impeached or attacked—his character for veracity; that there has been no attack on the veracity of these witnesses, and they are entitled therefore to be believed by the jury, unless there are other circumstances in the case which, in the opinion of the jury, might impeach their credibility, they stand with their testimony undisputed."

A glance at the foregoing will show that the jury were fully instructed that they were the sole triers of all questions of fact, and that as such they should give such weight as they deemed proper to the testimony of the witnesses in determining the facts necessary to enable them to reach a correct conclusion as to the verdict they should render.

The court also very properly told the jury that the defendant was presumed to be innocent, and that this presumption remained in his favor until there was sufficient testimony offered to convince them that he was guilty beyond a reasonable doubt.

[7] It is insisted by the eighth assignment of error that:

The court erred "in charging the jury that the gravamen of this case is the obtaining of this property fraudulently. The gravamen of the charge was not the fraudulent obtaining of the property, but the design of a scheme or artifice to defraud."

It appears that, in addition to the regular charge, the court made the statement to which this assignment relates in response to an exception that was made by counsel for the defendant while the jury was still in the box.

It would be manifestly unfair, as we have already stated, to take a single statement made by the court, as in this instance, as a basis for determining as to whether the law was correctly stated in the charge when considered as a whole.

The court at the beginning of its charge used the following language, which effectually disposes of this assignment:

"Now gentlemen, we don't sit here to try the primary fraud in this matter. The act under which he is tried is called the Post Office Fraud Act, and was passed for these reasons: This great country has built up an enormous machine called the Post Office Department. * * * The government has therefore determined that this great machine belongs to the people and is for their benefit, is supported by them, and is not to be turned from its beneficial purpose by malicious men, and that evil people are not to use this machine, which was built up for the beneficial purposes of the community, for purposes of fraud, and therefore to inhibit that they have passed the statute which punish people who make use of the mails for the purpose of perpetrating by any scheme or device, any method or plan by which their fellow citizens may be defrauded. It is true that fraud must exist. The question in the case is, that fraud existed, were the mails used for the purpose of fraud? The issues in these two cases are: Were the mails in any way used by this man in pursuance of a device or scheme, or intention to commit fraud by procuring money or property of value from anybody by false pretenses or false representations?"

That it was necessary in order to return a verdict of guilty in this instance that the jury should find as a fact that a fraud was intended at the time the letters were mailed or received from the mails was made perfectly clear by the court below as respects each count in these indictments.

A careful review of the charge as to the law when considered in connection with the evidence bearing upon the same impels us to the conclusion that the rulings of the lower court relative to the questions presented were eminently proper, and that the defendant has had a fair and impartial trial.

Under the circumstances, the judgment of the lower court should be affirmed.

Affirmed.

CHARLES v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. March 6, 1914.)

No. 1238.

1. OBSTRUCTING JUSTICE (§ 16*)—INTIMIDATING WITNESSES—SUFFICIENCY OF EVIDENCE.

On a trial for endeavoring by threats and force to influence and intimidate witnesses before a United States commissioner, evidence *held* to support the verdict of guilty as to each count.

[Ed. Note.—For other cases, see Obstructing Justice, Cent. Dig. § 32; Dec. Dig. § 16.*]

2. CRIMINAL LAW (§ 1144*)—APPEAL—PRESUMPTIONS IN SUPPORT OF JUDGMENT.

Where the charge as a whole was not brought up by a bill of exceptions, it would be presumed correct as to all questions other than that involved in the portion of the charge assigned as error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2736–2764, 2766–2771, 2774–2781, 2901, 3016–3037; Dec. Dig. § 1144.*]

3. OBSTRUCTING JUSTICE (§ 18*)—INTIMIDATING WITNESSES—INSTRUCTIONS.

Where, on a trial for endeavoring by threats and force to influence and intimidate a witness before a United States commissioner, the evidence for the government showed that defendant assaulted the witness while he was on the stand and before he had been discharged as a witness, while defendant's witnesses denied the assault, an instruction that, if defendant struck the witness after he had testified to punish him for testifying, a verdict of guilty would be justified, could not be construed as meaning that the jury might find defendant guilty for acts committed after the witness had left the stand and was no longer a witness.

[Ed. Note.—For other cases, see Obstructing Justice, Cent. Dig. § 33; Dec. Dig. § 18.*]

4. CRIMINAL LAW (§ 1172*)—APPEAL—HARMLESS ERROR—INSTRUCTIONS.

On a trial under an indictment charging accused in two counts with endeavoring by threats and force to influence and intimidate witnesses before a United States commissioner, where the evidence for the government showed an assault on the witness named in the first count while on the stand and showed that the acts of intimidation as to the witness named in the second count occurred after he was sworn and before he had testified, and a general verdict of guilty as to both counts was returned under which a sentence was imposed within the limit which might be imposed under one count, an instruction that, if defendant struck the wit-

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

nesses after they had testified to punish them for testifying a verdict of guilty would be justified, if erroneous, as authorizing a conviction for acts committed after the witness left the stand, was harmless, since it manifestly had no bearing whatever on the second count and the verdict and sentence might be referred to that count.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3128, 3154–3157, 3159–3163, 3169; Dec. Dig. § 1172.*]

In Error to the District Court of the United States for the Western District of South Carolina, at Greenville; Henry A. M. Smith, Judge.

L. Marvin Charles was convicted of an offense, and he brings error. Affirmed.

James H. Price, of Bennettsville, S. C., for plaintiff in error.

Ernest F. Cochran, U. S. Atty., of Anderson, S. C., and Arthur R. Young, Asst. U. S. Atty., of Charleston, S. C.

Before PRITCHARD and WOODS, Circuit Judges, and DAYTON, District Judge.

PRITCHARD, Circuit Judge. The plaintiff in error (being the defendant below, will be referred to as such) was indicted for violation of section 135 of the Criminal Code (Act March 4, 1909, c. 321, 35 Stat. 1113 [U. S. Comp. St. Supp. 1911, p. 1628]). There were two counts in the indictment; the first charged him with endeavoring by threats and force to influence and intimidate one G. L. Blackwood in the discharge of his duty as a witness before a United States commissioner. The second count charged him with similar conduct towards Forest Blackwood, another witness before the same commissioner and at the same time. The defendant was found guilty and was sentenced to serve six months in jail and pay a fine of $2,000. To the judgment an exception was taken, and the case comes here on writ of error.

The section of the Criminal Code under which the defendant is indicted is in the following language:

"Section 135. Whoever corruptly, or by threats or force, or by any threatening letter or communication, shall endeavor to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or officer acting as such commissioner, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or officer acting as such commissioner, in the discharge of his duty, or who corruptly or by threats or force, or by any threatening letter or communication, shall influence, obstruct, or impede, or endeavor to influence, obstruct or impede, the due administration of justice therein, shall be fined not more than one thousand dollars, or imprisoned not more than one year, or both."

The learned judge who tried the case in the court below charged the jury generally as to the law applicable under this section, but there is only one assignment of error which is to the effect that the court erred in charging the jury as follows:

"That if the defendant struck the witnesses after they had testified with the intent of punishing them for having testified, the jury would be justified in finding the defendant guilty."

It is insisted by counsel for defendant that this part of the charge was improper and calculated to mislead the jury, inasmuch as the defendant was not charged with assault and battery nor for losing his temper and committing a breach of the peace.

The statute under which the defendant is indicted is intended for the protection of witnesses, jurors, and officials of the court while in the discharge of their respective duties. It was clearly the intention of Congress in the enactment of this statute to provide, among other things, for the punishment of one who by threats or otherwise might attempt to influence, intimidate, or impede one who had been called as a witness to testify as to facts within his knowledge bearing upon the guilt or innocence of the party arraigned before a United States commissioner.

It is, however, insisted by counsel that it was not the purpose of the defendant in this instance to prevent the witness from testifying against him, nor to impede the due administration of justice, but that he was actuated solely by malice and upon the impulse of the moment in committing the act with which he is charged, that the alleged assault, referred to in the first count, was committed after Blackwood had testified and was no longer a witness.

[1] It appears from the evidence of the commissioner before whom the preliminary examination was held that, while Blackwood was on the stand and before his testimony was concluded, witness heard a scuffle and saw Blackwood go out of the door after staggering from his chair; that he did not hear defendant say anything before Blackwood was struck, but immediately thereafter he heard the defendant curse the witness in his presence and saw him attempt to follow him as he left the court room; that he attempted to find Blackwood in order to have him finish his testimony, but he could not be found; that later Blackwood came back reluctantly and signed his testimony and the pay roll; that when the the second witness, Forest Blackwood, came on the stand, the defendant said:

"I know what you are here for. I am not going to have any d—n lies sworn on me. I will kill you if you do."

G. L. Blackwood, who was assaulted, testified that he appeared before the commissioner as a witness, and, among other things, testified that on that occasion he had bought two pints or a quart of liquor from the defendant at Union, S. C., in January, 1913; that, the first thing he knew, defendant hit him in the face while he was on the stand testifying; and that he heard defendant say that he would "learn" some of these people at Jonesville how to swear or he would kill some one; that he got up and went out because he thought defendant was going to shoot him; that the defendant stepped back and put his hand on his hip pocket, at which time his attorney interfered and stopped him.

Forest Blackwood, to whom reference is made in the second count, testified that he was a witness on the same occasion before the commissioners' court, and that when he went upon the stand the defendant told him that he had better be sure that he was swearing the truth and not a lie; that the defendant also told him before he went on the

stand that he was going to kill him; that he was afraid the defendant would carry out his threats; that before he went upon the stand defendant cursed him and used abusive language.

H. F. Floyd, deputy United States marshal, testified: That he was present. That he heard a scuffle while G. L. Blackwood was upon the stand, and that when he looked he saw that Blackwood had gone out of the door. That he heard the defendant tell some one, "I am not going to have any d—n lies told on me." That after the defendant struck Blackwood he put his hand behind him and that he caught him. That the commissioner ordered him to search defendant, but the defendant replied, "You can't search me without a search warrant." He heard the defendant also say to Forest Blackwood: "I know what you are here for. If you swear a d—n lie, I will kill you." That defendant picked up a picket outside and attempted to follow Blackwood. That he then came in with a stick under his coat. That this was just before the witness went on the stand.

The defendant introduced three witnesses besides himself. They testified that they were present at the hearing before the commissioner, but denied that defendant struck the witness Blackwood, but admitted that defendant did curse G. L. Blackwood while he was on the witness stand and at the conclusion of his direct testimony and before he had signed any testimony. They also admitted that the defendant told G. L. Blackwood that he had sworn a "damn lie," but testified that no blow was struck. All of the defendant's witnesses, as well as the defendant, denied positively that anything was said to the second witness, Forest Blackwood. They also testified that no words were spoken to either of the witnesses before the trial opened.

According to the evidence offered by the government, the witness G. L. Blackwood was assaulted while on the witness stand and before he had concluded his testimony. It is true that this is denied by those who testified in behalf of the defendant. However, this question was submitted to the jury and they found in favor of the government's contention.

In this connection it should be borne in mind that counsel for the government contend, in their brief, as we have already stated, that the court below charged the jury generally as to the law applicable under this section. While this does not appear in the transcript of the record, yet it is not denied by counsel for defendant, and for the purpose of disposing of this point we will assume that the contention of counsel for the government is true as respects this matter.

[2] The defendant not having brought up the charge as a whole by a bill of exception, the presumption is that the charge as to the law relating to the other questions involved was correct, and this is especially true as to the second count of the indictment; it being manifest that this paragraph of the judge's charge does not relate to that count.

[3] It should be remembered that, contrary to the rules of this court, there is no ground stated upon which to base this assignment of error. We think that the language employed by the judge in this part of his charge, when considered in the light of the facts of the

case, cannot be construed to mean that the jury might find the defendant guilty for only such acts as were committed after G. L. Blackwood had left the witness stand and was no longer a witness; it appearing that when the assault was committed on G. L. Blackwood, as charged in the first count, he was on the witness stand, and it is obvious that he was then and there assaulted for the purpose of influencing, intimidating, and impeding him while a witness, as contemplated by the section under which defendant is indicted. Blackwood had not been discharged as witness, but was still in attendance as such, and under these circumstances the conduct of the defendant was in utter defiance of the law, and from the circumstances attending the conduct of the defendant the jury had a right to infer that it was the intention of the defendant to influence, intimidate, and impede Blackwood in the discharge of the duty imposed upon him as a witness in the case then pending before the commissioner.

It is significant that the witnesses for the defendant did not deny that he cursed Blackwood at the conclusion of his direct testimony while he was still on the witness stand, and before he had been cross-examined.

[4] These witnesses, while testifying that the defendant did not strike Blackwood, admit that he told Blackwood that he had sworn a lie. Even if the court below had erred, as contended by counsel, it would be harmless error, inasmuch as this assignment only relates to the first count and does not refer to the charge made in the second count. There being a general verdict of guilty as to both counts, and it appearing that the sentence imposed in this instance does not exceed the limit which might be imposed under either of the counts, the verdict and sentence should be referred to the second count, and the judgment should be affirmed as to that count. Snyder v. United States, 112 U. S. 216, 5 Sup. Ct. 118, 28 L. Ed. 697.

As we have stated, that portion of the charge to which objection is made, in view of the evidence, has no bearing whatever upon the second count. In the second count it is alleged that an assault was made upon Forest Blackwood, and as to this count it is shown by the testimony that the acts of intimidation on the part of the defendant occurred after he was sworn and before he had testified. It is true that the defendant's witnesses deny that defendant said or did anything to Forest Blackwood; but there was a conflict of evidence as to this count, and the court therefore very properly submitted the issue thus raised to the jury for its determination, and under the circumstances the jury could not have been influenced by that portion of the charge to which objection is made in determining the guilt or innocence of the defendant for the reasons stated.

The questions of fact involved in this controversy were submitted to the jury. A careful consideration of the same leads us to the conclusion that the jury was justified in returning a verdict of guilty as to both counts.

For the reasons stated, we are of opinion that the judgment of the lower court should be affirmed.

Affirmed.

DAVEY et al. v. DODGE et al.

(Circuit Court of Appeals, Eighth Circuit. March 25, 1914.)

No. 4056.

1. LIMITATION OF ACTIONS (§ 37*)—STATUTES APPLICABLE—"ACTIONS FOR RELIEF ON THE GROUND OF FRAUD."

A creditor's suit to set aside conveyances by the debtor as having been made to cheat and defraud his creditors is an action for relief on the ground of fraud, within the meaning of Cobbey's Ann. St. Neb. 1911, § 1004, by which such an action is barred in four years after discovery of the fraud.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 182–186, 477; Dec. Dig. § 37.*]

2. COURTS (§ 375*)—FEDERAL COURTS—FOLLOWING STATE STATUTE—LACHES.

While, in the application of the doctrine of laches in an equity suit, a federal court is not bound by a state statute of limitations, it will usually act or refuse to act in analogy to the state statute limiting actions at law of like character.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 983; Dec. Dig. § 375.

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.]

3. FRAUDULENT CONVEYANCES (§ 249*)—CREDITOR'S SUIT—LACHES.

Defendants, in a creditor's suit to enforce collection of judgments 17 years old against property alleged to have been fraudulently transferred to them by, or at the instance of, the judgment debtor, had been in the peaceable possession of such property for many years longer than sufficient to bar an action for its recovery under the state statute, and the transfers of most of the property to them were matters of record. The decisions of the Supreme Court of the state required due diligence to discover fraud in order to prevent the running of the statute of limitations against an action based on that ground, and under Cobbey's Ann. St. Neb. 1911, §§ 1538, 1541, and 1543, complainants were entitled, at any time after return of execution unsatisfied, to an order for the examination of defendants and the judgment debtor with respect to such transfers. The suit was not commenced until after the death of the judgment debtor and others of the persons concerned in the transfers. *Held* that, under all the facts, it was barred by laches.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 735–737; Dec. Dig. § 249.*]

Appeal from the District Court of the United States for the District of Nebraska; William H. Munger, Judge.

Suit in equity by Mary Davey, executrix of the will of John M. Davey, deceased, and Henry Harney, against Charles F. Dodge, administrator of the estate of George W. E. Dorsey, deceased, and others. Decree for defendants, and complainants appeal. Affirmed.

H. C. Brome and Daniel L. Johnson, both of Omaha, Neb. (J. J. McCarthy, of Ponca, Neb., Frank Dolezal, of Fremont, Neb., and S. O. Cotner, of Omaha, Neb., on the brief), for appellants.

E. F. Gray, of Fremont, Neb. (George L. Loomis, of Fremont, Neb., on the brief), for appellees.

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

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

CARLAND, Circuit Judge. This is a creditors' bill filed May 31, 1912, by John M. Davey and Henry Harney, as the owners of three judgments, against one George W. E. Dorsey, amounting in round numbers at the time the bill was filed to $69,900. The judgments were rendered by the United States Circuit Court for the District of Nebraska in 1894 and 1895, in suits brought by Watkins, as receiver of the First National Bank of Ponca, and were purchased by Davey and Harney in February, 1898, for $600.

Davey died after decree, and Mary Davey, as executrix, has been substituted. The trial court on final hearing dismissed the bill. Before the filing of the same George W. E. Dorsey, the judgment debtor and chief conspirator, Emma E. Dorsey, his first wife, Emeline Benton and Cornelia Bunnett, co-conspirators, had died. Laura H. Dorsey and Maria Louise Dorsey, who now claim to be the owners of the property in controversy, are, respectively, the widow and sister-in-law of George W. E. Dorsey. As the defense of laches and, in connection therewith, the statute of limitations of Nebraska are pleaded, it becomes necessary to examine the bill in order to ascertain the character of the action. After describing the property sought to be reached, which is situated in Dodge county, Neb., the bill alleges as set out in the margin.[1]

[1] "Your orators further allege and show that on or about the 2d day of May, 1893, the said Dorsey, contriving and intending and designing to cheat and defraud persons out of their money and property, and make himself then and thenceforth secure against each and all persons to whom he was then and to whom thereafter he should become indebted for moneys borrowed and for property purchased on credit from them, formed and contrived the following fraudulent scheme, plan, and design, to wit, to place his property then owned by him, and such property as he might thereafter acquire, and which he desired to hold and retain for his own purposes in secret trust in the names of other persons and corporations to hold for him in secret trust, so that thereby his ownership thereof would be concealed from the courts and from his creditors, and so that he might exercise his control over the same and so keep the same in secret trust under the false guise and appearance as acting as agent of such persons so holding said property in secret trust for him; that, pursuant to his aforesaid plan and design of secret trust, said Dorsey began the purchase of various properties and had the title thereto direct from the sellers thereof placed in the name of his then wife, Emma E. Dorsey, thus creating the false appearance of said Emma E. Dorsey being the purchaser thereof, when in truth and fact said Emma E. Dorsey had no property and was not engaged in any gainful occupation, but remained a housewife dependent upon said Dorsey for her support and had no business experience or training and was unable and incompetent to engage in the business of acquiring property; that said Dorsey, when he placed said fraudulent design and scheme into operation, was engaged in prosperous business, making much money, and had acquired much property, and to make the aforesaid secret trust and scheme falsely appear the better concealed, worked the placing of said property into the hands of said Emma E. Dorsey gradually and slowly and in discreetly small amounts at one time, and caused himself to be indebted in a large amount to the defendant Farmers' & Merchants' National Bank, and to secure such indebtedness gave a mortgage upon a large part of the property then in his name, and defaulted in payment, and got said mortgage thereby foreclosed and said property sold in such foreclosure and bought in by said bank, and thereafter contracted to purchase said real estate from said bank in the name of the Fremont Realty Company, a corporation managed, controlled, and organized by the said Dorsey for that purpose, and then, such as he desired to be kept in secret trust, he procured said bank in small pieces

After allegations in regard to the transfer of specific property, the following general allegation is made:

"That all of the property above described was either owned by the said Dorsey, after the debt due to these plaintiffs had been incurred and by him fraudulently conveyed to his relatives and the relatives of his wife, for the purpose of hindering, delaying, and defrauding his creditors, or the same was purchased and paid for by him out of his own funds and the title thereto taken in the name of his first wife, Emma E. Dorsey, her sister Maria Louise Dorsey or Laura H. Dorsey, now and that the same are now held in trust for the estate of said George W. E. Dorsey."

The prayer of the bill, so far as material, is as follows:

"That the deeds of conveyance from the said George W. E. Dorsey to the aforesaid parties for the premises above named and all thereof, and that the will of the said Emma E. Dorsey, in so far as the same affects the property above described, and the deeds of conveyance from the said Maria Louise Dorsey, may each and all be set aside and held for naught, and the above-described real estate be decreed to be the property of the estate of the said George W. E. Dorsey, and that the transfer of the shares of capital stock of the Farmers' & Merchants' National Bank above described may be decreed to be fraudulent and void, and that the said stock is the property of the estate of said George W. E. Dorsey."

There was an amendment to the bill which set forth in substance: That, in the years 1869, 1870, and 1874, George W. E. Dorsey obtain-

to deed the same to the said Emma E. Dorsey and some to the Western Realty & Investment Company, a corporation managed, controlled, and organized by the said Dorsey for that purpose, and then to the defendant Maria Louise Dorsey, and also deeded certain of the aforesaid property to the defendant Jennie A. Gibson in the name of Jennie Christa Benton, all of which said property was the property of the said Dorsey, and fraudulently as aforesaid by the aforesaid persons held in secret trust for him and controlled and managed by him under the false guise and appearance as agent of the aforesaid parties, and that the same Emma E. Dorsey becoming in failing health, the said Dorsey to keep and continue said secret trust for himself and the operation and working of his said fraudulent scheme and plan, the said Emma E. Dorsey aiding him therein, said Dorsey fraudulently caused the said Emma E. Dorsey to make an instrument in writing for that purpose in the form of a last will and testament, purporting to devise all of the property aforesaid, and all property so by her held in secret trust for the said Dorsey, to the defendant Maria Louise Dorsey, providing, however that said Dorsey should be sole executor, so as to have and retain control and management of said property, and fraudulently, upon the death of said Emma E. Dorsey, caused the said fraudulent instrument in the form of a last will and testament as aforesaid to be probated in the county court of said Dodge county, and the falsely apparent estate of said Emma E. Dorsey to be administered for the fraudulent purpose of thereby causing, in form of law, the transfer of the apparent legal title of said property, so held in secret trust for him by the said Emma E. Dorsey at the time of her death, to said Maria Louise Dorsey, and to have the same concealed, and to appear under the false guise of having passed by devise from said Emma E. Dorsey, deceased, to said Maria Louise Dorsey, and to make it falsely appear that said Maria Louise Dorsey was the real owner thereof, and to conceal the more effectually the said secret trust; that said Maria Louise Dorsey, who is the sister of said Emma E. Dorsey, deceased, and a confidant of said Dorsey, conspired and confederated with the said Dorsey to so as aforesaid aid said Dorsey in the carrying on of his aforesaid fraudulent scheme and device and plan to cheat and defraud his creditors, and who was the wife of the brother of said Dorsey and agreed with said Dorsey to so appear and act as such devisee of said property from her sister, the said Emma E. Dorsey, and to hold said property in secret trust for said Dorsey, and, in consideration of her said services and the use of her said name, the said Dorsey paid said

ed three policies of insurance on his life from the Mutual Life Insurance Company of New York, aggregating $10,000, and in which policies Emma E. Dorsey was named as the beneficiary, with the proviso that, if she died before the insured, then the amount of the policies should be payable to her children, their guardian, executor, or administrator. That George W. E. Dorsey paid the premiums on said policies down to the date of his death, June 12, 1911. That Emma E. Dorsey died in 1903, leaving no children nor issue of any deceased children.

"That said George W. E. Dorsey, for the purpose of hindering, delaying, and defrauding his creditors, including these plaintiffs, caused Maria Louise Dorsey to be named in each and all of said life insurance policies, as beneficiary thereof, and later, and after the marriage of the said George W. E. Dorsey to Laura H. Dorsey, the above-named defendant, said Maria Louise Dorsey and George W. E. Dorsey, on the 9th day of June, 1905, by an instrument in writing by them signed, made a pretended assignment and conveyance of said policies of life insurance, and each of them, to Laura H. Dorsey, and, after the death of the said George W. E. Dorsey, said Laura H. Dorsey collected from said Mutual Life Insurance Company the full amount of the money named in each and all of said policies of life insurance, together with the accumulations thereon, in an amount to these plaintiffs unknown. That, at the time of the death of the said Emma E. Dorsey, each and all of the said life insurance policies had large cash surrender values, and that the same was the property

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Maria Louise Dorsey a regular monthly stipend as his employé, and the said Dorsey remained in the actual control and enjoyment of said property under the false guise and appearance of agent and attorney in fact of said Maria Louise Dorsey, and so remained up to the time of his death, as to all of the said property now in the hands of said Maria Louise Dorsey, using said Maria Louise Dorsey as apparent purchaser in conveyances of property bought or acquired by him and which he desired to be kept in secret trust for him; that said Jennie A. Gibson is the sister of said Emma E. Dorsey and a confidant of said Dorsey, and with whom said Dorsey made his home after the death of said Emma E. Dorsey, and the maiden name of said Jennie A. Gibson was Jennie Christa Benton, and the said property so conveyed to said Jennie A. Gibson in the name of Jennie Christa Benton by said Emma E. Dorsey and said Dorsey was taken by said Jennie A. Gibson under a secret trust and under the aforesaid fraudulent plan and scheme of said Dorsey, and is held by said Jennie A. Gibson in her said maiden name in secret trust for the use and benefit of said Dorsey, and was managed and controlled by him; that thereafter, to wit, some years after the death of said Emma E. Dorsey, the said Dorsey married the defendant Laura H. Dorsey, who, after her marriage, joined the said Dorsey in the aforesaid fraudulent scheme and plan of keeping his said property concealed and to be held in secret trust for him, and, pursuant to her said aiding and abetting said Dorsey in his said fraudulent scheme and plan and to more effectually conceal the trust, the said property of said Dorsey so held for him in secret trust by said Maria Louise Dorsey was by the direction of said Dorsey, and is being now by his direction on the working of his aforesaid fraudulent scheme and design, fraudulently transferred and conveyed from said Maria Louise Dorsey to said Laura H. Dorsey, and that all the said conveyances of aforesaid property from said Maria Louise Dorsey to said Laura H. Dorsey are without any consideration paid by said Laura H. Dorsey to said Maria Louise Dorsey and are taken and accepted and held by the said Laura H. Dorsey in secret trust as the property of and for the use and benefit of said Dorsey, and all the aforesaid property so levied on which now stands in different parts and parcels, respectively, in the names of Maria Louise Dorsey, Laura H. Dorsey, and Jennie A. Gibson, in her maiden name of Jennie Christa Benton, is the property of said Dorsey held for him in secret trust and so placed by him in the execution and operation of his aforesaid fraudulent plan and design."

of and belonged to the said George W. E. Dorsey, and that the change of beneficiary in said policies to Maria Louise Dorsey and the assignment from said Maria Louise Dorsey and George W. E. Dorsey to said Laura H. Dorsey was done with the intent to hinder, delay, and defraud the creditors of the said George W. E. Dorsey, all of which was unknown to these plaintiffs until the year 1912."

With reference to this amendment, the bill prayed that the pretended change of beneficiary and assignment of said policies of insurance be declared null and void, and that the proceeds of the policies be declared to be a part of the estate of George W. E. Dorsey. Without ruling upon the application to amend the bill to correspond with the proof, made after decree, we will take into consideration all testimony in the record bearing upon the question of laches, as there was no objection thereto upon the ground that the matter was not pleaded.

[1] We think an examination of the bill conclusively shows that the action was brought by appellants to set aside transfers of property by Dorsey, for the reason that they were made by him in order to cheat and defraud his creditors, or, in other words, that the action is one for relief on the ground of fraud. Cobbey's Annotated Statutes of Nebraska 1911, §§ 1004, 1011, provides as follows:

"Civil actions can only be commenced within the time prescribed in this title, after the cause of action shall have accrued. * * * Within four years, * * * an action for relief on the ground of fraud, but the cause of action in such case shall not [be] deemed to have accrued until the discovery of the fraud."

[2] In the application of the doctrine of laches, the federal courts in equitable actions are not bound by the statute of limitations of Nebraska, but they will act or refuse to act in analogy to such statute. Judge Sanborn, in delivering the opinion of this court in Kelley v. Boettcher, 85 Fed. 55, 29 C. C. A. 14, stated the rule as follows:

"In the application of the doctrine of laches, the settled rule is that courts of equity are not bound by, but that they usually act or refuse to act in analogy to, the statute or limitations relating to actions at law of like character. Rugan v. Sabin, 10 U. S. App. 519, 534, 3 C. C. A. 578, 582, 53 Fed. 415, 420; Billings v. Smelting Co., 10 U. S. App. 1, 62, 2 C. C. A. 252, 262, 263, 51 Fed. 338, 349; Bogan v. Mortgage Co., 27 U. S. App. 346, 357, 11 C. C. A. 128, 135, 63 Fed. 192, 199; Kinne v. Webb, 12 U. S. App. 137, 148, 4 C. C. A. 170, 177, 54 Fed. 34, 40; Scheftel v. Hays, 19 U. S. App. 220, 226, 7 C. C. A. 308, 312, 58 Fed. 457, 460; Wagner v. Baird, 7 How. 234, 258 [12 L. Ed. 681]; Godden v. Kimmell, 99 U. S. 201, 210 [25 L. Ed. 431]; Wood v. Carpenter, 101 U. S. 135, 139 [25 L. Ed. 807]. The meaning of this rule is that, under ordinary circumstances, a suit in equity will not be stayed for laches before, and will be stayed after, the time fixed by the analogous statute of limitations at law; but, if unusual conditions or extraordinary circumstances make it inequitable to allow the prosecution of a suit after a briefer, or to forbid its maintenance after a longer, period than that fixed by the statute, the chancellor will not be bound by the statute, but will determine the extraordinary case in accordance with the equities which condition it. * * * When a suit is brought within the time fixed by the analogous statute, the burden is on the defendant to show, either from the face of the bill or by his answer, that extraordinary circumstances exist which require the application of the doctrine of laches; and, when such a suit is brought after the statutory time has elapsed, the burden is on the complainant to show, by suitable averments in his bill, that it would be inequitable to apply it to his case."

The above rule has been uniformly applied in the following cases: Boynton v. Haggart, 120 Fed. 821, 57 C. C. A. 301; Wyman v. Bowman, 127 Fed. 257, 62 C. C. A. 189; Wilson v. Plutus Mining Co., 174 Fed. 317, 98 C. C. A. 189; Broatch v. Boysen, 175 Fed. 702, 99 C. C. A. 278; Burgess v. Hillman, 200 Fed. 929, 119 C. C. A. 225.

[3] It appears from the record that about 17 years elapsed after the rendition of the judgments which appellants own before the bill in this case was filed. During about 14 years of this time, appellants were the owners thereof. For a period much longer than the statute of limitations of Nebraska, Laura H. Dorsey and Maria Louise Dorsey were in the peaceable possession of the property in controversy. At any time after the rendition of the judgments and return of execution unsatisfied, Dorsey and the parties to whom he had conveyed property could have been examined with reference thereto under the following statute of Nebraska:

"When an execution against the property of a judgment debtor * * * is returned unsatisfied * * * the judgment creditor is entitled to an order from a probate judge or a judge of the district court * * * requiring such debtor to appear and answer concerning his property. * * * No person shall, on examination * * * be excused from answering any question on the ground that his examination will tend to convict him of fraud. * * * Proof by affidavit * * * that any person or corporation has property of such judgment debtor, or is indebted to him, the judge may, by an order, require such person or corporation, or any officer or member thereof, to appear * * * and answer concerning the same." Cobbey's Ann. St. 1911, §§ 1538, 1541, and 1543.

See, also, In re Estate of Holden, 37 Wis. 98, in reference to the duty of a judgment creditor under such a statute.

The conveyances of real estate made by Dorsey were all on record: the transfer of bank stock was matter of record; the will of Emma E. Dorsey was probated in Dodge county, Neb. Dorsey was supposed to be insolvent at least as early as the date of the judgments. Appellants had notice of these facts and the means to discover any fraud in relation thereto which might exist. No records were ever examined, nor in fact was anything done to discover fraud except to ask people, including Dorsey, if he (Dorsey) had any property with which to satisfy his debts; and the record justifies the assertion that the bill in the present case would not have been filed except for a statement relative to the Coad Case, which appeared in a newspaper.

The Supreme Court of Nebraska has construed the statute of limitations, herein quoted, as requiring due diligence to discover fraud, and that one having knowledge of a fraud or of such facts in connection therewith as would put a person of ordinary intelligence and prudence upon inquiry that would have led to such knowledge is barred by the statute. Parker v. Kuhn, 21 Neb. 413, 32 N. W. 74, 59 Am. Rep. 838; Gillispie v. Cooper, 36 Neb. 776, 55 N. W. 302; State Bank of Pender v. Frey, 2 Neb. (Unof.) 83, 91 N. W. 239; Wright v. Davis, 28 Neb. 479, 44 N. W. 490, 26 Am. St. Rep. 347. Such is the law generally. E. B. Pickenbrock & Sons v. Knoer, 136 Iowa, 534, 114 N. W. 200; Wood v. Carpenter, 101 U. S. 135, 25 L. Ed. 807; In re Estate of Holden, supra; Woodfold v. Marley, 98 Tenn. 467, 40 S. W. 479; Redford v. Clark, 100 Va. 115, 40 S. E. 630; Redd v. Brun,

157 Fed. 190, 84 C. C. A. 638 (8th Cir.); Hammon v. Hopkins, 143 U. S. 250, 12 Sup. Ct. 418, 36 L. Ed. 134; Foster v. M. C. & L. M. R. Co., 146 U. S. 100, 13 Sup. Ct. 28, 36 L. Ed. 899; Godder v. Kimmel, 99 U. S. 201, 25 L. Ed. 431; Burling v. Newland (Cal.) 39 Pac. 49; Preston v. Horwitz, 85 Md. 164, 36 Atl. 710; Johnson v. Dunn (N. J. Ch.) 29 Atl. 361; German American Seminary v. Kuefer, 43 Mich. 105, 4 N. W. 636; First National Bank v. Strait, 71 Minn. 69, 73 N. W. 645; Bargamin v. Clarke, 20 Grat. (Va.) 544; Streitz v. Hartman, 35 Neb. 406, 53 N. W. 215; Howley v. Von Lankin, 75 Neb. 597, 106 N. W. 456.

In determining whether a suit is barred by laches, time and circumstance are both material. In addition to the long elapse of time in this case is the circumstance that Dorsey, the alleged fraudulent debtor, is dead, two of the persons who were parties to the transfers are also dead, and the real estate has largely increased in value.

It was argued at bar and in the brief, however, that this is not an action for relief on the ground of fraud, but that it is an action to subject property belonging to George W. E. Dorsey to the payment of the judgments; said property now being in the possession of the appellees. Certain cases are cited by counsel for appellants in support of this theory; the principal case being Martin v. Smith, 1 Dill. 85, Fed. Cas. No. 9,164. This was a suit brought by Martin, as the assignee of Woodward, a bankrupt, to recover personal property in the possession of a copartnership, doing business under the name of Smith & Gray. It was claimed by the assignee that, although the name of the firm was Smith & Gray, Smith had no interest in the same, and that Woodward, whose name did not appear, was the real owner of the interest represented by Smith. It was alleged in the bill that Woodward had conveyed the property to Smith in 1861, with intent to defraud his creditors. The statute of limitations of Missouri, in actions for relief on the ground of fraud, was pleaded as a defense to the action brought by Martin. The Missouri statute was practically the same as that of Nebraska, except the period of limitations after the discovery of the fraud was five years instead of four. It appeared at the hearing that Woodward had repaid to Smith all moneys advanced by the latter as a consideration for the conveyance of 1861.

The learned judge in the above case seems to have assumed that, as there was but one civil action in Missouri under the Code Procedure, the statute of limitations of that state was binding both in actions at law and in equity in Missouri; and, in the absence of any legislation by Congress, that it was binding upon the federal courts in equitable actions. He decided that, if the action was one to set aside the conveyance made by Woodward in 1861, the statute barred the action; but he avoided what he thought was the effect of the statute by holding that the action was not one to set aside the conveyance of 1861 for fraud, but to reach assets belonging to Woodward, now in the possession of Smith & Gray, and sustained the bill on that ground. It was further decided in this case that the allegation, in regard to the fraudulent conveyance from Woodward to Smith in 1861, was merely matter of inducement. With great respect for the opinion of the learned judge, we cannot see how Woodward could be held to be the owner

of the property in the possession of Smith & Gray, if the conveyance of 1861 was to stand. The necessary effect of the ruling made, which was to allow the assignee to take the property, was to set aside the conveyance made by Woodward to Smith in 1861. We fail to see how the case cited is authority for the proposition that the present suit is not an action for relief, on the ground of fraud. Weckerly v. Taylor, 74 Neb. 84, 103 N. W. 1065, is cited in support of the proposition that a creditor can reach, with the aid of equity, any property which the debtor might reach with the same aid. The rule laid down is undoubtedly true if the action has not been barred by the statute or laches.

Burke v. Tewkesbury, 3 Neb. (Unof.) 739, 92 N. W. 726, was an action to subject property held in trust to the payment of debts. It was not an action to set aside a fraudulent conveyance. No question in regard to the statute of limitations or laches was considered in the case. It was objected to the right of Burke to maintain the action that he was not a creditor at the time of the conveyance from the debtor to the trustee. It was held that the action was not one to set aside a fraudulent conveyance, and therefore it was not necessary that Burke should have been a creditor at the time the conveyance was made.

O'Connell v. Taney, 16 Colo. 353, 27 Pac. 888, 25 Am. St. Rep. 275, was an action to subject property held in the name of the wife to pay the debts of the husband. It was decided that it was not necessary that the bill should allege that O'Connell was insolvent at the time he made the conveyance to his wife, for the reason that the bill did not seek to set aside the conveyance on the ground of fraud. We see nothing in any of the cases cited to support the proposition that laches cannot be pleaded as a defense to the present action.

We are further of the opinion that, taking the time that has elapsed and the circumstances surrounding the case, justice requires that the claim of appellants be held as barred by laches.

The decree of the trial court is therefore affirmed.

UNITED STATES v. DOULLUT.

(Circuit Court of Appeals, Fifth Circuit. April 15, 1914.)

No. 2495.

UNITED STATES (§ 60*) — EXECUTIVE DEPARTMENTS — POWER TO MAKE CONTRACTS.

Under the provisions of Rev. St. § 3732 (U. S. Comp. St. 1901, p. 2504), that "no contract or purchase on behalf of the United States shall be made unless the same is authorized by law or is under an appropriation adequate to its fulfillment," with certain exceptions as to the War and Navy Departments, and of section 3679 (U. S. Comp. St. 1901, p. 2454) that "no department of the government shall expend, in any one fiscal year any sum in excess of appropriations made by Congress for that fiscal year, or involve the government in any contract for the future payment of money in excess of such appropriations," in the absence of statutory authority the Secretary of the Treasury has no power to make for the United States a contract to lease for five years a building for the use of

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

the customs service, and such a contract is not binding on the United States.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 43; Dec. Dig. § 60.*]

In Error to the District Court of the United States for the Eastern District of Louisiana; Rufus E. Foster, Judge.

Action by Paul Doullut against the United States. Judgment for plaintiff, and defendant brings error. Reversed.

This suit was commenced under the provisions of Tucker Act March 3, 1887, c. 359, 24 Stat. L. 505 (U. S. Comp. St. 1901, p. 752), by filing the following petition on May 26, 1911:

"To the Honorable the Judges of the Circuit Court of the United States for the Eastern District of Louisiana.

"Paul Doullut, of New Orleans, a citizen of the state of Louisiana, brings this, his bill against the United States of America, and thereupon your plaintiff complains and says: That defendant herein, the United States of America, is justly indebted unto your petitioner in the full sum of $5,570 actual damages caused petitioner by the said defendant herein, and which said damages occurred, and the cause thereof, your petitioner specifically complains of, and recites as follows:

"Petitioner complains that on the 13th day of January, 1911, he proposed to the defendant herein to build at Quarantine, La., on the government reservation, a building under plans approved and made by Capt. H. G. Richey, superintendent of construction of United States public buildings, same to be completed and ready for occupancy six weeks after acceptance; that the defendant herein was to pay to petitioner a rental of $35 per month for five years, and at the expiration of said term, said defendant, the United States government, had the option to renew the said rental for a like term, or to purchase said building for $2,800, and all of which is fully set out in the exhibit marked 'P. A.' and made part of this, your petitioner's, bill of complaint.

"Your petitioner further complains and shows that, on the 18th day of February, 1911, the United States of America, through Henry McCall, collector of customs for the port of New Orleans, in this state of Louisiana, advised your complainant that the defendant would lease the building when completed at $25 per month instead of $35 as first proposed under and in Exhibit P. A., hereinabove set out, and attached as part of this bill of complainant's, and instructed your petitioner to proceed at once with the erection and construction of the said building, and your complainant attaches, and also makes part of this his bill, said acceptance and order to erect said building, and marks same as 'Exhibit P. B.' and avers that he accepted the said offer.

"And your petitioner further shows, avers, and says that after his acceptance of the proposal by the defendant herein on the said 18th day of February, 1911, he purchased the necessary material for the erection of said building at the Quarantine Station, and chartered a barge to convey the said material for the erection of said building, and loaded said barge with said material at the foot of Egania street in this city, ready to proceed to Quarantine, La., and erect the said building on the plot of ground to be designated by the defendant at Quarantine Station, La., in accordance therewith.

"Your petitioner further says and complains that on the 1st day of March, 1911, he visited with the surveyor of the port of New Orleans, the Quarantine Station, to learn and ascertain upon what particular spot of ground said building was to be erected, but was informed by Dr. Corput, surgeon in charge of said Quarantine Station in Louisiana, that said officer was without authority to designate any spot or place for the erection of said building for the use of defendant; that upon the 4th day of March, 1911, your petitioner called upon the defendant to designate the location for the building to be erected, and notified said defendant that he, petitioner, was under the expense of $10 per day for the rental of the barge to transport said material.

"Now your petitioner shows and avers that on the 21st day of April the

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

defendant, the United States government, through C. S. Hebert, collector of customs for the port of New Orleans, notified your petitioner that a new building would not be required at Quarantine Station, La., as agreed, and complainant says and avers that he had complied with every contractual obligation imposed upon him, under a contract had in good faith, and refused to permit the abrogation thereof, or relinquish his right in said agreement, and that the defendant, the United States government in equity cannot inflict loss upon an innocent party who enters into a contract with the government of the United States of its own seeking, making, and in which it prescribes the conditions, and which your complainant accepted in good faith, and thereof and therefore so informed them, insisting upon his right to carry out his contract in every detail.

"Now your petitioner says and complains that, relying upon defendant's agreement, he completed all arrangements and purchased all material to comply with the agreement had; the United States of America, through C. S. Hebert, collector of customs for the port of New Orleans, notified your petitioner and complainant herein on the 29th day of April, 1911, that said building your petitioner had bound himself to erect under Exhibit P. A. would not be required, and petitioner annexes as part of this his bill, said document, and marks same 'P. C.'

"Now, your petitioner says and specifically shows that he has suffered damages, and that said damages were caused by and through the acts and action of the defendant herein, and that the damages caused him by the defendant herein, and specifically hereinbelow set out, are as follows: First, the loss of rental of Barge he engaged to transport material for said building, to be erected by petitioner for defendant at and on Quarantine Station, La., the said rental being $10 per day, beginning on the 4th day of March, 1911, until the 19th day of May, 1911, being 77 days, at $10 per day and for which plaintiff is liable, $770; second, the loss of the rental of said building as agreed for a period of five years at $25 per month, 60 months, and which plaintiff has been deprived of by the acts of defendant, $1,500; third, the time and services of your petitioner given from February 18, 1911, to May 19, 1911, under said agreement, $500; fourth, the value of said building to be purchased by the defendant at the expiration of the term of five years $2,800—thus making a total amount due and equitably owing to petitioner of $5,570.

"And petitioner further shows and complains that all the material purchased by him for the erection of said building and loaded on said barge had been cut, all openings made and prepared, and the roof shingles cut of special size, under and in accordance with the plans and specifications furnished by the defendant herein and hereinabove referred to, and further complains that same is of no value to him, and he holds same at risk of defendant, and here tenders same to the defendant.

"Therefore, your petitioner prays that the defendant herein, the United States of America, may be decreed to pay unto your plaintiff, Paul Doullut, $5,570 for the causes hereinabove enumerated and specifically charged, and that your plaintiff may have such further or other relief in the premises as the nature of the circumstances of this case may require and that to your honors shall seem meet.

"And, may it please your honors, that the district attorney for the Eastern district of Louisiana, on being attended with a copy of this bill, may appear and put in his answer thereto, and may stand to and abide by such order, direction, and decree in the premises as to your honors shall seem meet, and your petitioner shall ever pray," etc.

On August 4, 1911, the United States filed the following demurrer: "Now into this court come the defendants herein by Charlton R. Beattie, United States attorney, who prosecutes in their behalf and by way of general demurrer say: That the bill herein filed by the plaintiff and the matters therein contained in the manner and form as therein alleged show no equity, and show no cause or right of action cognizable either in equity or at law, and are not sufficient in law to require the defendants to answer same, and this the

United States are ready to verify. Wherefore, for the reasons alleged, defendants pray for judgment dismissing the bill and for all general and equitable relief."

On August 23, 1911, by consent an order of court was entered permitting the plaintiff to erase the words "in equity" appearing on the petition, and ordering the case to be thereafter treated as an action at law without rewriting the petition or filing any additional pleadings or requiring other service. Thereafter, on February 23, 1912, the aforesaid demurrer was heard and submitted, and on February 27, 1912, the same was overruled, and thereupon the following answer was filed:

"United States District Court, Eastern District of Louisiana, New Orleans Division.

"Paul Doullut v. United States.

"No. 13,896.

"And now into this honorable court comes the defendants herein through Charlton R. Beattie, United States attorney, reserving all rights under the exception and demurrer hereinbefore filed and overruled, and for answer to the petition herein filed against the United States, they say that they deny all and singular the allegations of plaintiff's petition, save those that may be hereinafter specially admitted.

"Respondents further particularly aver that there was no authority on their behalf to make such contract as is alleged in the petition, and particularly that there was no one authorized to make a contract binding upon the government of the United States to pay rent for any period whatever, and especially for the period of time alleged in the petition, and that there was no one authorized to contract on behalf of the government and to bind the government to either buy or rent the building referred to in the petition, and that if there were any contract which respondents deny, made by the officers of the government named in the petition, said contract is not binding and effective against the government, because said officers were not authorized to make any such contract, and no officers whatever of the government had authority to make any such contract and bind the government. And, even if the officers referred to in the petition or any other officers of the government had authority to make the contract mentioned in the petition, so as to bind the government, respondents deny that any such contract was ever made by them, or any of them, on behalf of the government, and especially deny that there was ever any final conclusion and meeting of minds and contract relative to the matters set out in the petition.

"And should this court hold that there was ever any authority on behalf of any of the officers of the government to make such a contract as alleged in the petition, and that the contract therein alleged was duly made and perfected, all of which respondents deny, respondents deny all the items of damages claimed in the petition, and especially aver that the rental of the barge referred to in the petition was unnecessary and useless, and that the barge was rented at a time before the selection of the point where the building was to be placed, and at a time when the plaintiff in this case well knew that the quarantine officer at the mouth of the Mississippi river had refused to allow him to erect a building at any point on that reservation.

"And respondents aver that the erection of the buildings referred to in the petition upon the quarantine reservation would have interfered with the administration of the United States quarantine laws and regulations, and would have been detrimental to the public health and marine hospital service and against the interest and public policy of the United States, and for these reasons said building could not be permitted upon said reservation, and any pretended agreement for the erection of such building on said reservation was null and void. Wherefore, considering the premises, respondents pray that the demand of the plaintiff herein be rejected at his costs, and for all and general relief. [Signed] Charlton R. Beattie, U. S. Atty."

The case was heard and submitted upon evidence on July 23, 1912, and of that date counsel for the United States filed a request for special findings of

fact and supplemented the same on August 1, 1912; and on October 12, 1912, the trial judge entered the following findings of fact:

"In this matter I find the facts to be as follows:

"(1) I find that the plaintiff, Paul Doullut, on January 13, 1910, offered, in writing, to erect a building at Quarantine Station, La., on the government reservation, to be used by the United States customs inspectors, and to rent said building to the United States for a period of five years, at $35 per month, with the option to the government of purchasing the building at the end of the lease term, as appears by his letter of said date to the surveyor of customs of the port of New Orleans. A copy of said letter is annexed and made part hereof, marked 'P. A.'

"(2) I find that the plans and specifications of the proposed building were approved, as showing proper construction, by H. G. Richey, a competent and experienced man, holding the position of superintendent of construction of United States public buildings under the supervising architect, on January 16, 1911, as appears by a letter of said date from H. G. Richey to Louis P. Bryant, surveyor of customs of the port of New Orleans. A copy of said letter is annexed and made part hereof, marked 'X.'

"(3) I find that subsequently plaintiff amended his proposal of offering to accept $25 per month rental, instead of $35 per month.

"(4) I find that this amended offer was accepted by the Secretary of the Treasury; that Doullut was notified of its acceptance by Henry McCall, collector of customs of the port of New Orleans; that Doullut was instructed to proceed with the construction of the proposed building—all as will appear by a letter of February 18, 1911, from Henry McCall, collector of customs at New Orleans. Said letter is annexed and made part hereof marked 'P. B.'

"(5) I find that plaintiff hired labor, bought and prepared lumber and other material, for the purpose of erecting said building, and loaded a barge with the said material, and by direction of the surveyor of customs of the port of New Orleans, transported said material to Quarantine Station, La., on the Mississippi river and in company with said official proceeded to Quarantine Station, on the 1st day of March, 1911, for the purpose of erecting the said building.

"(6) I find that plaintiff was arbitrarily denied permission to unload his material, and was prohibited to erect the building by the doctor in charge of said Quarantine Station.

"(7) I find that on March 4, 1911, plaintiff notified the United States in writing, through Henry McCall, collector of customs of the port of New Orleans, that all of said materials were loaded on the barge at New Orleans and requested that the United States designate to him the exact location at the Quarantine Station upon which the building was to be erected, and notified the United States that he was under the expense of $10 per day for the use of said barge until unloaded, as appears by the letter of March 4, 1911, from Paul Doullut to Henry McCall. A copy of said letter is annexed hereto and made part hereof, marked 'XX.'

"(8) I find that plaintiff was never permitted to erect said building.

"(9) I find that plaintiff was not notified the building would not be erected until April 29, 1911, some 52 days after he had attempted to comply with his agreement, as appears by a letter from C. S. Hebert, collector of customs of the port of New Orleans, to Capt. Paul Doullut, of said date. Said letter is annexed and made part hereof and marked 'P C.'

"(10) I find that the government reservation at Quarantine Station has a frontage of over one mile on the Mississippi river, and is large enough to permit of the erection of a separate building for the accommodation of the customs inspectors; that theretofore customs inspectors had been accommodated with quarters at the said Quarantine Station, and that they are now accommodated with quarters at the Quarantine Station; that there is no good reason why the proposed building should not have been erected; and that its occupation by the customs inspectors would not have interfered in any way with the administration and proper management of the government quarantine station.

"(11) I find that the actual location of the proposed building at Quarantine Station was a mere detail, similar to the laying out of the actual ground plan

of any building to be erected according to plans and specifications, and that plaintiff was justified in preparing to erect the building, and was directed to do so by the United States, through its proper officers.

"(12) I find that the Secretary of the Treasury was authorized, on behalf of the United States, to negotiate with the plaintiff for the erection of said building, and that he was authorized to enter into a lease for same for a period of at least one year. I further find that, as a matter of fair dealing, he would have renewed the lease from year to year, actually or impliedly, until the expiration of the full term contemplated, had the building been erected.

"(13) I find that the minds of the parties had fully met as to the character of the building, the place where it was to be erected, and the rent that the government was to pay for it; that there was a complete contract between the United States and the plaintiff to enter into a lease of said building when completed, in so far as the Secretary of the Treasury was authorized to enter into such a lease.

"(14) I find that there was a complete agreement between the plaintiff and the United States for the erection of the said building at Quarantine Station, and that said agreement was breached by the United States without fault on the part of plaintiff, and the United States was properly and regularly put in default.

"(15) I find that plaintiff was justified in believing he had a complete and binding contract with the United States for the erection of the said building, because of his dealings with the highest officials of the Treasury Department of the United States.

"(16) I find the lumber and other material bought by plaintiff for the erection of said building cost him $1,074.45, and by being cut and manufactured to dimensions especially for the erection of said building same were depreciated in value at least 25 per cent., and plaintiff incurred a loss thereby of $268.61.

"(17) I find that in addition it cost plaintiff the sum of $114 for the cutting and framing of the said timber.

"(18) I find that it was proper for him to keep the barge loaded and ready to transport said material to Quarantine Station for a reasonable time, not exceeding 30 days; that it cost him $10 per day for said period, or $300.

"(19) I find that said three items amount in the aggregate to $682.61, that this loss of the plaintiff was induced and caused solely by the fault of the United States, acting through its properly accredited officials, and that plaintiff is entitled to recover judgment for that amount against the United States."

To which findings of fact the counsel for the United States entered special exceptions which in due course were overruled.

On October 12, 1912, the trial court rendered and entered the following judgment:

"This cause came on at a former day to be heard upon the pleadings, exhibits, and oral testimony, and was argued by counsel for the respective parties and submitted to the court, whereupon, on due consideration thereof, and for the written reasons of the court on file, it is now ordered, adjudged, and decreed that the plaintiff, Paul Doullut, do have and recover of and from the defendant, the United States of America, the sum of $682.61.

"Judgment rendered October 12, 1912.

"Judgment signed October 22, 1912."

In due season the United States sued out this writ of error.

Walter Guion, U. S. Atty., of New Orleans, La.

Fernando Estopinal and Conrad G. Collins, both of New Orleans, La., for defendant in error.

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

PARDEE, Circuit Judge (after stating the facts as above). Assuming that the findings of fact made by the trial judge substantially cover the issues made by the pleadings, the effect thereof, properly construed, is that the contract of lease as alleged was entered into between Doullut and the United States in so far as the Secretary of the Treasury was authorized to enter into such a lease, and the question is presented whether Doullut is entitled to have judgment against the United States for damages as found resulting from breach of the contract. By demurrer, and in the answer, contention is made that the contract upon which the plaintiff below bases his suit was unauthorized by law, and that the United States is not bound thereby nor liable for any damages growing out of the breach thereof. No law authorizing the Secretary of the Treasury to make any contract of lease for a period of five years is pointed out or even suggested.

Section 3732 of the Revised Statutes (U. S. Comp. St. 1901, p. 2504) provides:

"Sec. 3732. No contract or purchase on behalf of the United States shall be made, unless the same is authorized by law or is under an appropriation adequate to its fulfillment, except in the War and Navy Departments, for clothing, subsistence, forage, fuel, quarters, or transportation, which, however, shall not exceed the necessities of the current year."

Section 3679 of the Revised Statutes (U. S. Comp. St. 1901, p. 2454) provides:

"Sec. 3679. No department of the government shall expend, in any one fiscal year, any sum in excess of appropriations made by Congress for that fiscal year, or involve the government in any contract for the future payment of money in excess of such appropriations."

In the act approved June 17, 1910, making appropriations for the executive, legislative, and judicial expenses of the government for the fiscal year ending June 30, 1911, there was appropriated as follows: "For rent of buildings, $59,286.00." See 36 St. L. pt. 1, 468–493, c. 297.

In the act approved March 4, 1911, there was appropriated to the expenses of the Treasury Department, for the fiscal year ending June 30, 1912, as follows: "And for rent of buildings $52,486.00." See Act March 4, 1911, c. 237, 36 Stat. p. 1195. And we do not find, nor are we referred to, any law authorizing the Secretary of the Treasury to make for the United States any contract for a lease, for a term of five years, of any building for the United States customs service.

In Chase v. United States, 155 U. S. 489, 15 Sup. Ct. 174, 39 L. Ed. 234, the Supreme Court held a contract with the Postmaster General for a lease of a post office for a term of 20 years was without authority, and created no liability against the United States. In the opinion of the court Mr. Justice Harlan said:

"By the law in force when the lease sued on was executed, it was made the duty of the Postmaster General 'to establish post offices.' By section 3732 of the Revised Statutes it is provided, as did, substantially, the statutes in force when the lease was made, that 'no contract or purchase on behalf of the United States shall be made unless the same is authorized by law, or is under an appropriation adequate to its fulfillment, except in the War and Navy Departments, for clothing, subsistence, forage, fuel, quarters, or transportation,

which, however, shall not exceed the necessities of the current year.' Act March 3, 1825, c. 64, § 1, 4 Stat. 102; Act March 2, 1861, c. 84, § 10, 12 Stat. 220.

"Much stress is placed by counsel for the plaintiff upon the clause making it the duty of the Postmaster General to establish post offices; the contention being that the power to establish a post office carries with it authority to lease rooms or a building in which the postmaster may conduct the business of his office. In support of this position Ware v. United States, 4 Wall. 617 [18 L. Ed. 389] is cited. But that case does not justify any such interpretation of the act of Congress. The question there was as to the power of the Postmaster General to discontinue a post office that had once been established by him under the authority conferred by the act of 1825 (4 Stat. 102) 'to establish post offices.' This court, observing that the power to discontinue post offices is incident to the power to establish them, unless there was some provision in the acts of Congress restraining its exercise, said: 'Undoubtedly, Congress might discontinue a post office which they had previously established by law, and it is difficult to see why the Postmaster General may not do the same thing when acting under an act of Congress, expressed in the very words of the Constitution from which Congress derives its power.' Again: 'Power to establish post offices and post roads is conferred upon Congress, but the policy of the government from the time the general post office was established has been to delegate the power to designate the places where the mail shall be received and delivered to the Postmaster General.' P. 632.

"There was no issue in that case as to the extent of the authority of the Postmaster General to bind the government by contract for the payment of money or for the lease of a building for a post office. That * * * did not call for any consideration of the general question, whether the words in the statute, 'to establish post offices,' had the full meaning of the same words found in the section of the Constitution enumerating the powers of Congress.

"Nor is it necessary to determine all that may be done by the Postmaster General under the power 'to establish post offices' conferred upon that officer; for those words are to be interpreted in connection with the above statutory provision forbidding the making, except in the War and Navy Departments, and in those departments only for certain things and under specified conditions, of any contract or purchase on behalf of the United States unless the same be authorized by law, or is under an appropriation adequate to its fulfillment. There is no claim that the lease in question was made under any appropriation whatever, much less one adequate to its fulfillment. So that the only inquiry is, whether the contract of lease was 'authorized by law' within the meaning of the statute relating to contracts or purchases on behalf of the government.

* * * * * * * * * * * * *

"We have considered the case in the light of the statutes in force when the lease of May 1, 1870, was executed. Shortly after that date, by Act July 12, 1870, c. 251, § 7, 16 Stat. 251, it was provided that no department of the government should expend, in any one year, any sum in excess of appropriations made by Congress for that fiscal year, or involve the government in any contract for the future payment of money in excess of such appropriations. And that provision is reproduced in section 3679 of the Revised Statutes."

In Abbott v. United States (C. C.) 66 Fed. 448, Chase v. United States, supra, was followed and a contract to lease a post office to be erected, for a term of five years, entered into by the Postmaster General, was held to be without authority, and not binding upon the United States.

In Hooe v. United States, 218 U. S. 322, 334, 31 Sup. Ct. 85, 88 (54 L. Ed. 1055), a case involving the same question the Supreme Court said:

"If an officer, upon his own responsibility and without the authority of Congress, assumes to bind the government, by express or implied contract, to

pay a sum in excess of that limited by Congress for the purposes of such a contract, the contract is a nullity, so far as the government is concerned, and no legal obligation arises upon its part to meet its provisions. If the circumstances justify such a course, Congress in its discretion can intervene and do justice to the owner of private property used by officers of the government in good faith for public purposes, although without direct legislative authority. The plaintiffs' remedy is in that direction."

Following these decisions, we are constrained to hold that the contract sued on in this case was without authority of law and not binding upon the United States.

The judgment of the District Court is reversed, and the cause is remanded, with instructions to dismiss the suit.

CONNELL BROS. CO. v. H. DIEDERICHSEN & CO.†

(Circuit Court of Appeals, Ninth Circuit. May 18, 1914.)

No. 2361.

1. STIPULATIONS (§ 14*)—EFFECT—NECESSITY OF PROOF.

In an action for breach of contract, though defendant, for want of knowledge or information, denied the allegation of the complaint that plaintiff was a firm or company, proof that plaintiff was a firm or company was waived by a stipulation that the trial should be confined in the first instance to the issue of whether defendant had broken the contract, and, if the court should find that defendant had committed a breach, it should be set for hearing on the issue of damages.

[Ed. Note.—For other cases, see Stipulations, Cent. Dig. §§ 24–37; Dec. Dig. § 14.*]

2. APPEAL AND ERROR (§§ 197, 719*)—RESERVATION OF GROUNDS OF REVIEW—MATTERS NOT RAISED BELOW.

In an action by H. D. & Co., which the complaint alleged was a firm or company, the failure to prove such allegation was not jurisdictional, and, where objection was not raised in the lower court or covered by any assignment of error, it was raised too late in the brief.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2968–2982, 3490; Dec. Dig. §§ 197, 719;* Pleading, Cent. Dig. § 1428.]

3. APPEAL AND ERROR (§ 193*)—PARTIES—DEFECT OR WANT OF CAPACITY TO SUE—MANNER OF RAISING OBJECTION.

In an action by H. D. & Co., alleged to be a firm or company, if defendant desired an allegation as to the names of the persons other than H. D., who composed the firm or company, the objection should have been made by demurrer for defect of parties plaintiff or want of capacity to sue.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1226–1238, 1240; Dec. Dig. § 193.*]

4. SALES (§ 81*)—TIME FOR PERFORMANCE—TIME OF THE ESSENCE.

A contract for the sale of flour to be shipped by a steamer sailing, during the month of February was broken where, although the flour was delivered at the wharf ready for shipment during February, it was not fully loaded until March 3d, and the steamer sailed on March 8th, as ordinarily, in contracts of merchants, time is of the essence, since the time of shipment is the usual and convenient means of fixing the probable time of arrival with a view to providing funds or fulfilling contracts with third persons.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 217–223; Dec. Dig. § 81.*]

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

† Rehearing denied July 6, 1914.

5. SALES (§ 181*)—ACTIONS FOR BREACH OF CONTRACT—SUFFICIENCY OF EVIDENCE.

In an action for breach of a contract for the sale of flour to be shipped from the United States to China by a steamer sailing during February, contingent upon strikes, accidents, and other delays unavoidable or beyond the seller's control, evidence *held* to show that the delay in shipping was not due to an unavoidable cause beyond the seller's control.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 473–491; Dec. Dig. § 181.*]

6. SALES (§ 176*)—TIME FOR PERFORMANCE OF CONTRACT—WAIVER OF BREACH.

Where a buyer of flour, to be shipped to China by a steamer sailing during the month of February, established a credit with a bank at San Francisco and advised the seller that, upon presentation to a Seattle bank of the invoice, policy of marine insurance, and bill of lading, its drafts upon the buyer would be paid, and upon February 28th, the flour being then on the wharf, but supposed by the seller and the bank to have been actually shipped, the requisite papers were presented and credit given the seller for the full amount, the delay in shipment was not thereby waived, as even, if the Seattle bank had authority to waive the delay, there was no intent to make a waiver, and the facts did not constitute an estoppel.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 436–444; Dec. Dig. § 176.*]

7. SALES (§ 391*)—BREACH OF CONTRACT—MEASURE OF DAMAGES—PURCHASE PRICE WITH INTEREST.

Where a buyer of flour, upon learning of a delay in shipment, notified the seller that its customers would refuse to receive the flour, and it would hold the seller responsible, and the seller declined to recognize its responsibility, the buyer had a right to receive the cargo, sell it at the highest obtainable price, and, where the proceeds after making proper deductions for necessary expenses of handling, storage, etc., were insufficient to cover the purchase price with legal interest, it was entitled to recover the deficit from the seller.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1110–1127; Dec. Dig. § 391.*]

In Error to the United States Court for China; Rufus H. Thayer, Judge.

Action by H. Diederichsen & Co. against the Connell Bros. Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Kerr & McCord and C. H. Hanford, all of Seattle, Wash., and Fleming & Davies, of Shanghai, China, for plaintiff in error.

George H. Whipple, Allen L. Chickering, and Chickering & Gregory, all of San Francisco, Cal., and Jernigan & Fessenden, of Shanghai, China, for defendant in error.

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

DIETRICH, District Judge. This case comes here by writ of error from the United States Court for China, for the review of a judgment against the plaintiff in error, hereinafter referred to as the defendant, for the amount of $3,830.89 and costs. The pleadings are the petition or complaint and the defendant's answer thereto. The petition alleges that the plaintiff, H. Diederichsen & Co., is a German firm or company, doing business at Chefoo and Shanghai, China, and elsewhere; that

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

on or about the 17th day of October, 1911, it entered into a written contract, whereby it purchased from the defendant 80,000 sacks of flour, to be consigned to plaintiff at Chefoo, China, and to be shipped from Seattle, Tacoma, Portland, San Francisco, or Vancouver, "by a steamer sailing from any of said ports during the month of February, 1912." It is further alleged that the flour was not shipped until about the 14th day of March, and that, upon the arrival of the cargo at Chefoo, the plaintiff accepted it under protest only for the purpose of mitigating the loss which might follow a refusal to receive it. The prayer is for damages alleged to have been sustained by reason of the delay. In its answer the defendant, for want of sufficient knowledge or information, denies that the plaintiff is a German firm or company. It expressly admits "that on or about the 17th day of October, 1911, at Chefoo, China, the plaintiffs and the defendant entered into a written agreement, whereby the plaintiffs purchased from the defendant 80,000 sacks of flour." And it further admits that by the terms of the contract it agreed to ship the flour "by a steamer sailing from any of said ports (the ports named in the complaint) during the month of February, 1912, and consigned to the plaintiffs at Chefoo, China." But it alleges that its obligation in this respect was, by the contract, made "contingent upon strikes, accidents, and other delays unavoidable or beyond the control of the defendant." It further alleges that it chartered the steamship Harpagus for the shipment of the cargo, and that the flour was delivered to Messrs. Dodwell & Co., agents for the Harpagus, upon the wharf at Tacoma, Wash., not later than the 28th day of February, 1912, and that bills of lading covering the shipment were issued to the defendant by such agents prior to or on February 28, 1912. It also denies that the plaintiff sustained any damage.

There was a preliminary hearing for the determination of the question as to whether or not there had been any breach of the contract, and, the decision of the court being favorable to the plaintiff, a subsequent trial was had for the determination of the amount of damages to be awarded; both trials were without a jury. This mode of procedure was in accordance with a written stipulation entered into by the parties and filed in the cause, and, inasmuch as this stipulation is relied upon as a waiver of certain objections, we quote the substantive parts thereof in full:

"(1) That the hearing and trial of said action be confined in the first instance as to the issue whether or not the defendant herein has committed a breach of the contract mentioned in the pleadings herein as to shipment or has committed such a breach of the contract as to shipment as will render it liable in damages to the plaintiffs if damages have in fact been sustained by the plaintiffs. And that if said court should hold, find, and decide that the defendant had not committed a breach of said contract, or such a breach of the same as would render it liable in damages to the plaintiffs, then that such judgment be made final.

"(2) That, in event the court should hold, find, and decide that the defendant had committed such a breach of the said contract as would render it liable if damages had in fact been sustained by the plaintiffs herein by reason thereof, then the above-entitled matter shall be again set for hearing on the issue of damages, and that evidence in relation thereto, both on behalf of the plaintiffs and on behalf of the defendant, may be offered and introduced by the

respective parties, and, after a full hearing and argument thereon, the final judgment and finding of the court be made and entered herein."

[1-3] The first proposition argued involves the question of the identification of the plaintiff or its capacity to sue. It is alleged to be a "German firm or company." In the answer, as we have seen, this averment is denied for want of sufficient knowledge or information. The question was not raised in the lower court, and is not covered by any assignment of error; it is suggested in the brief for the first time. Clearly, if it involves nothing more than absence of proof, we cannot consider it, for, even were there a sufficient assignment, proof upon all but two general issues, which do not include this question, was waived by the written stipulation. It is argued, however, that the point involves something more than a want of proof, and that, it appearing upon the face of the pleadings that the plaintiff is without legal entity, we should take cognizance of the alleged error, even though not assigned. The suggestion that the question is jurisdictional is thought to be without merit, and, that being the case, the objection comes entirely too late. Bort v. McCutcheon, 187 Fed. 798, 109 C. C. A. 558. In its answer the defendant expressly admitted making the contract with the "plaintiffs," and, by waiving proof as to the character of H. Diederichsen & Co., it admitted that it is a German firm or company. If it desired an averment of the names of the persons, other than H. Diederichsen, who compose such firm or company, the objection should have been made by demurrer, on the ground of defect of parties plaintiff or want of capacity to sue. A. M. Gilman & Co. v. Cosgrove, 22 Cal. 356.

It is next argued that the memorandum signed by the defendant upon October 17, 1911, does not constitute the contract or agreement between the parties. The contention is directly in the face of the express admissions and averments of the answer, where it is referred to, and a copy exhibited, as "a copy of said contract." By its answer the defendant also expressly admits that by the terms and conditions of the memorandum the defendant undertook to ship the flour "by a steamer sailing from any of said ports (the ports already named) during the month of February, 1912." The only defenses pleaded are that there is a provision in the memorandum exempting the defendant from liability in case of strikes, accidents, or other delays unavoidable or beyond the control of the defendant; and that the flour was in fact delivered at the wharf, ready for shipment, and a bill of lading covering the same was issued, during the month of February, 1912.

We come now to the two general questions which were reserved by the stipulation and upon which the lower court passed. The first of these is whether or not there was a breach of the contract. The substance of the memorandum of October 17th is substantially as admitted and set forth in the answer. By its terms, the flour was "to be shipped by steamer sailing from either of the following ports: Seattle, Tacoma, Portland, San Francisco, Vancouver, during the month of February, 1912." The memorandum also contains this clause: "All agreements herein contained or implied are contingent upon strikes,

accidents, and other delays unavoidable or beyond" the control of the defendant.

[4, 5] As a matter of fact, the Harpagus, the steamer upon which the shipment was made, did not sail in the month of February. The flour was not fully loaded until March 3d, and the steamer sailed on March 8th. It will thus be seen that there was a breach of the contract in respect to the date of the shipment, unless the delay was due to one or more of the excepted causes specified in the clause of the contract last above quoted. As a general rule of law it is well settled that:

"In the contracts of merchants time is of the essence. The time of shipment is the usual and convenient means of fixing the probable time of arrival, with the view to providing funds to pay for the goods or of fulfilling contracts with third persons." Norrington v. Wright, 115 U. S. 188, 6 Sup. Ct. 12, 29 L. Ed. 366; Cleveland Rolling Mill v. Rhodes, 121 U. S. 255, 7 Sup. Ct. 882, 30 L. Ed. 920; Mechem on Sales, vol. 1, § 746.

It follows that, unless the case falls within one of the exceptions referred to, Diederichsen & Co. had the right to rescind. The defendant urges that the general clause, "other delays unavoidable or beyond its control," is to be construed as including all delays which, for any cause, were unavoidable or beyond its control, while the plaintiff contends that, under the principle of *ejusdem generis,* it is to be limited to causes of the character of "strikes and accidents." If we assume, without deciding, that its position is well taken, in what light does the defendant stand? By the exercise of reasonable diligence, could it have avoided the delay? It was well known to both parties, when the agreement was entered into, that there was no regular line of transportation between Tacoma or any other one of the specified ports and Chefoo. It was doubtless contemplated that a vessel would be chartered to carry the cargo, and such was the practical construction placed upon the agreement by the defendant itself, for, as we shall see, it depended upon that means of transportation, and undertook to charter a vessel for the purpose. To say the least, therefore, it was its duty to use reasonable diligence to provide suitable means of transportation within the specified time. While the contract was entered into on October 17, 1911, and the shipment was to be made during the following February, apparently no effort was made to charter a vessel until December, and no serious effort until after the middle of that month. At that time, through regular shipping channels, the defendant arranged for the charter of the Indien, a ship which was then in the South Atlantic waters, and which was reported to be due in San Francisco the middle or latter part of January. By letter dated December 30th, the agents for the Indien advised the defendant as follows:

"The steamer is expected to have left Buenos Ayres to-day for San Francisco, via Coronal, and eventually a nitrate port, and we expect her discharge at San Francisco about the 15th/20th February."

It will thus be seen that, if we make a reasonable allowance for the time required for the vessel to reach Tacoma from San Francisco, the margin for loading and sailing in the month of February was very

narrow, and, upon the whole, we agree with the lower court in holding:

"That there was not such a factor of safety as would have been insisted upon by a prudent business man who stood to commit a serious breach of contract in the event of the failure of the ship to reach Tacoma and load and sail during the month."

It is true that apparently the letter of December 30th did not reach the defendant until about the middle of January, but the cables were available to it, and in so important a transaction it is thought that it should either have fully protected its contract with the plaintiff by appropriate guaranties in the charter party, or, if that was impracticable, it should have kept itself advised of the whereabouts of the Indien. And, when it became apparent that her arrival in time to receive the cargo in February was doubtful, it should have sought another vessel. As a matter of fact, it waited until almost the 1st of February before abandoning the Indien, at which late date it may be conceded there was no ship more available than the Harpagus. But diligence at this late hour cannot be regarded as excusing or expiating the earlier negligence. The record contains no direct or satisfactory proof of any accident to which the delay can be reasonably attributed. There is hearsay evidence to the effect that the Indien was detained a short time at Buenos Ayres for repairs, but to relieve the defendant from liability upon such a showing would be to trifle with an important obligation of the contract.

[6] It is next contended that the default was waived. The facts upon which this defense is based, briefly stated, are: Through a bank at Shanghai, the plaintiff established a credit with the Wells Fargo Nevada Bank at San Francisco for the payment of the purchase price of the flour. Defendant was thereupon advised that upon presentation to the Seattle National Bank, at Seattle, of the invoice, policy of marine insurance, and the bill of lading, properly indorsed, its drafts upon the plaintiff would be paid. Upon February 28th the defendant presented to the Seattle bank the requisite papers, and received credit for the full amount. At the time apparently both parties were under the impression that the flour had been actually shipped, whereas the fact was that it was still on the wharf. On April 8th, eight days before the arrival of the Harpagus at Chefoo, the plaintiffs cabled to the defendant that they had learned of the delay in shipment; that their buyers would refuse to receive the goods; and that therefore they would hold defendant responsible for nonperformance.

Even were it assumed that the Seattle bank had the authority to waive the provision of the contract, which we do not decide, it is manifest that there was no intent to make the waiver, and the facts are insufficient to constitute an estoppel. The bank paid the money without knowledge that the flour had not been loaded; nor did it act negligently in proceeding upon such an assumption. Surely, if the defendant inferred from the delivery of the bill of lading that the flour had been loaded, the bank may be excused for so doing. Primarily it was the duty of the defendant to see that the Harpagus sailed before the 1st of March, and of this obligation it is not to be relieved merely because it did not intentionally deceive or mislead the bank.

[7] Upon discovering the error, the plaintiff acted with reasonable promptness in giving notice of rescission. The defendant having thereupon declined to recognize its responsibility, it was the right of the plaintiff to receive the cargo, sell it at the highest obtainable price, and credit the proceeds thereof upon the purchase price paid to the defendant, after making proper deductions for the necessary expenses of handling, storage, interest, etc. Upon an accounting the lower court found that the proceeds, when so credited, were insufficient to cover the purchase price, together with legal interest, and accordingly gave judgment for the deficit. Story on Sales, § 409. The rule adopted was correct, and it is therefore unnecessary to consider evidence touching the relative prices of flour at Chefoo at different times, and the rates of exchange. Such evidence is relevant only to a measure of damages which the lower court properly rejected.

We find no substantial error in the record, and the judgment will therefore be affirmed.

JACKSON PHOSPHATE CO. v. CARALEIGH PHOSPHATE & FERTILIZER WORKS.

(Circuit Court of Appeals, Fourth Circuit. February 4, 1914.)

No. 1180.

SALES (§ 81*)—CONTRACT—CONSTRUCTION—PROVISION FOR DELAY—CAR FAMINE.

Plaintiff contracted to sell defendant 2,000 tons of phosphate rock, shipment to begin September 1, 1907, at the rate of 100 or 200 tons weekly, buyer's option, until the entire quantity is completed, all to be subject to railroad furnishing equipment, etc., no responsibility to accrue to the seller if prevented from the delivery of any portion by destruction of the plant, strikes, labor desertions, or other hindrances of like character not under the seller's control, and for a like cause the buyer shall not be required to take rock not in transit; but, when a reasonable time shall have elapsed in which to overcome such hindrances, the party on whom the disability rests shall be required to carry out the conditions thereof. There was a car famine during September and October and until the middle of November, 1907, and plaintiff was able to ship but a small portion of the requirements of those months, and wrote defendant thereof, stating that the rock was not shipped the previous week because the railroad itself was unable to furnish cars, but that plaintiff would send the rock as soon as possible. No reply was made to such letter, and on November 12th defendant canceled the contract. After November 15th plaintiff was able and willing to ship the rock in accordance with the contract but its tender thereof was refused. *Held*, that the proviso as to shipments should be construed as relating to the time of delivery and not as to the life of the contract, and hence plaintiff, after the termination of the car famine, was entitled to a reasonable time to deliver the rock, and defendant's cancellation of the contract and refusal to receive further shipments in accordance with the tender constituted a breach thereof.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 217-223; Dec. Dig. § 81.*]

In Error to the District Court of the United States for the Eastern District of North Carolina, at Raleigh; H. G. Connor, Judge.

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

Action by the Jackson Phosphate Company against the Caraleigh Phosphate & Fertilizer Works. Judgment for defendant, and plaintiff brings error. Reversed.

The plaintiff firm is a copartnership engaged in mining and manufacturing phosphate rock at Mt. Pleasant, Tenn., and the defendant is a North Carolina corporation engaged in manufacturing fertilizer at Raleigh, N. C. The plaintiff in error will be referred to as "plaintiff" and the defendant in error will be referred to as "defendant"; such being the respective positions they occupied in the court below.

A contract was entered into on the 15th day of July, 1907, between plaintiff and the defendant, by which it was agreed that the plaintiff was to sell to defendant 2,000 tons (10 per cent. more or less, seller's option) of Tennessee phosphate rock at $6 per ton of 2,240 pounds f. o. b. cars at mines. It was also provided that sampling should be done as to the quality of the rock, and the weighing of the same, the terms of payment and liability, and for other contingencies not involved in this appeal. Among other things, the contract contained the following stipulations, to wit:

"Shipments.—Shipments shall be made as follows: Beginning September 1, 1907, at rate of one or two hundred tons weekly, buyer's option, until the entire quantity is completed, but all to be subject to railroad furnishing equipment and to weather working days at point of shipment.

"General Conditions.—Existing Mt. Pleasant, Tenn., tariff rate, $3.01 per ton of 2,000 pounds, will be inserted in the bill of lading when so instructed, but will not be guaranteed by seller. Routing will be inserted in bill of lading when so instructed, but seller will not be responsible for diversion of cars in transit. No responsibility to accrue to seller if prevented from delivery of any portion of this contract by destruction of plant, strikes, labor desertions or other hindrances of like character not under seller's control; and for like cause buyer shall not be required to take rock not in transit; but when a reasonable time shall have elapsed in which to overcome said hindrances the party upon whom the disability rests shall be required to carry out the conditions hereof."

It appears from the evidence that there was a car famine throughout the country during the months of September, October, and until the middle of November, 1907, and that this condition existed at Mt. Pleasant, Tenn., the place of shipment. It further appears that the plaintiff made diligent efforts to get cars in which to ship the phosphate rock in pursuance of this contract, but was unable to do so. It further appears that every car that could be procured by plaintiff from the railroad was put into requisition to convey the phosphate rock to the defendant. Owing to the car famine, it appears that during the month of September, 1907, the plaintiff was only able to ship six cars to the defendant, and that only three were shipped during October, and that up to the 12th of November only three cars could be shipped. There was a total of 12 cars of 310.8 tons of phosphate shipped during the time, leaving a balance of 1,889.2 tons unshipped. The plaintiff wrote the defendant on the 16th day of September, 1907, stating that the rock was not shipped the previous week, "because the railroad itself was unable to furnish us cars. We will send you rock as fast as possible." The defendant made no reply to this letter. On the 12th day of November the defendant wrote a letter canceling the contract. There was much correspondence between the parties subsequent thereto to the effect that plaintiff was able, ready, and willing at all times, to ship the rock; that it had caused the rock to be dug from its mines and to be manufactured for shipment; and that the delay was due to causes entirely beyond its control, which it contends was provided for in the contract, to wit, the failure of the railroads to furnish necessary equipment.

It is also shown by the evidence that there was a money panic during the fall of 1907 and that the price of phosphate rock greatly declined, which enabled fertilizer factories to procure a cheaper phosphate rock from the Florida beds. It also appears that the car famine began to subside about the middle of November and that the plaintiff could have supplied all the phosphate rock called for in the contract during the months of November and December. It

also was shown that the plaintiff had rock on hand to ship, but the defendant positively refused to accept this rock and treated the contract as broken by the plaintiff.

As to the amount of damages to which plaintiff was entitled to recover, it was shown that the seller's contract price to the defendant was $6 per ton; that the cost of manufacturing was $3.50 per ton; that after the car famine in November, 1907, the market price was $3.50 per ton; that this was about equal to the cost of manufacturing; that the difference between the contract price and the cost of manufacturing under the contract would entitle plaintiff to a profit of $2.50 per ton; that, there being 1,889.2 tons undelivered, the damages which plaintiff sustained would be $4,722 and interest.

The defendant offered no evidence, and the testimony of the plaintiff was undisputed. At the close of plaintiff's testimony, the court below directed a nonsuit, and a writ of error was sued out to this court.

Robert W. Winston, of Raleigh, N. C. (John W. Hinsdale and Winston & Biggs, of Raleigh, N. C., on the brief), for plaintiff in error.

R. N. Simms, of Raleigh, N. C. (James H. Pou, of Raleigh, N. C., on the brief), for defendant in error.

Before PRITCHARD and WOODS, Circuit Judges, and ROSE, District Judge.

PRITCHARD, Circuit Judge (after stating the facts as above). The principal question involved herein is as to the proper construction of that portion of the contract which relates to shipments. Counsel for the respective parties differ widely as to the construction to be placed upon this clause.

It is contended by counsel for plaintiff that by this contract the defendant agreed to purchase 2,000 tons of phosphate rock, 10 per cent. more or less at the seller's option, at the price of $6 per ton, 2,240 pounds f. o. b. cars at mines of plaintiff; that, while there was no arbitrary date fixed on or before which all this material was to be shipped, nevertheless it was agreed that the rock was to be shipped at the rate of 200 tons per week unless hindered or delayed by either shortage of cars or the weather; that the proviso contained in this clause of the agreement was intended to protect plaintiff in the event either of the contingencies enumerated should happen and thus prevent delivery at the rate of 200 tons per week; that under this clause defendant could have on the 12th day of November or as soon thereafter as the car famine subsided required plaintiff to continue weekly shipments until the entire amount of rock called for in the contract had been delivered; that this being so, it would be manifestly unjust to permit defendant to cancel the contract when it clearly appears that the rock was only to be shipped at the rate of 200 tons a week in the event that the shipper was not delayed by lack of cars; that this is a valid proviso and is as much a part of the contract as any other clause contained therein; and that to construe the same so as to do equal and exact justice between the parties it means that under the evidence in this case the plaintiff was entitled to a reasonable time after it could obtain cars within which to ship the balance of the rock called for in the contract. In other words, that the plaintiff entered into a contract by which it was agreed that 200 tons of rock should be shipped each week for ten successive weeks from the 1st day of September, 1907,

until the amount of rock was delivered to the defendant. If plaintiff was not able to obtain cars to make these shipments, it would not be liable for damages for failure so to do, but it could not require the defendant to accept any of the rock which had not been shipped in time, and at the end of the full period of ten weeks plaintiff's right to deliver any more rock ceased. The failure to deliver in full within that time constituted such a breach as entitled the defendant to declare the contract as at an end, although, as the failure was the result of the plaintiff's inability to obtain cars, it did not justify a suit by the defendant against the plaintiff.

The defendant, however, insists that, as respects this clause, time is the essence of the contract, and a failure on the part of the seller to deliver within the time specified justified the defendant in rescinding the same and refusing to accept the rock. In other words, that the plaintiff entered into an unconditional contract by which it was agreed that 200 tons of rock should be shipped each week from the 1st of September, 1907, until the amount of rock was delivered to the defendant; that there was to be no interruption of shipments; and that any interruption so as to prevent the same being made within the time contemplated by the contract constituted a breach of the same by the plaintiff so as to entitle defendant to rescind the contract and thus avoid taking the remainder of the rock that might be shipped after that date.

It is further insisted by the defendant that as it had only shipped a small portion of the order (about 232 tons) while the same was needed by the defendant company at the rate specified, to wit, 200 tons a week, that the defendant company had been able to supply itself with rock on account of the nonshipment of this contract, and that therefore it was justified in canceling the contract on the 12th day of November, 1907.

The defendant also contends that the evidence tends to show that during the months of September and October the plaintiff shipped out a great many cars to their customers; that in September they shipped out 35 cars and only 6 of these went to the defendant company; that in October they shipped out 30 cars, and only 3 of these went to the defendant company; that in November they shipped out 29 cars, and only 3 of which went to the defendant company.

In order to correctly determine the intention of the parties to a contract, it is necessary to consider its purpose, its subject-matter, and the situation of the parties at the time it was executed.

The evidence in this case shows that at the time this contract was entered into by the parties the plaintiff was engaged in shipping phosphate rock and the defendant was engaged in using the same for the manufacture of chemical fertilizer. It is to be presumed that the parties thereto were fully aware of the fact that there might be more or less delay in making the shipments due to the causes therein enumerated.

Undoubtedly the defendant desired the shipments made as promptly as possible, and no doubt the plaintiff was anxious to make the shipments as specified unless the unforeseen contingencies provided against should happen, and it was but natural that the plaintiff should take the precaution to insert the proviso that the shipments should be made

in the manner agreed upon unless the plaintiff, as in this instance, should be prevented from doing so by the failure on the part of the railroad to furnish cars promptly.

Inasmuch as this proviso was inserted and the defendant acquiesced in the same, we are forced to the conclusion that it was the intention of the parties that if the plaintiff was not delayed on account of the causes mentioned that the shipments should be made continuously until the entire amount was shipped, but if, on the other hand, there should be any delay caused by car shortage or bad weather, the plaintiff would be entitled to deliver the rock within a reasonable length of time after the car service had assumed its normal condition.

Among other things, it appears from the testimony, as we have stated, that on the 16th day of September, 1907, the plaintiff wrote a letter in which defendant was informed that rock could not be shipped during the previous week, "because the railroad itself was unable to furnish us cars. We will send you rock as fast as possible."

Not receiving any reply, plaintiff was in a sense justified in inferring that defendant acquiesced in the situation. If the defendant at that time intended to place the construction upon the contract which it now insists upon, it should have promptly notified plaintiff that, unless shipments were made within the time limit for which defendant now contends, it would promptly cancel the contract. Under the circumstances, it was but natural that plaintiff should have continued mining operations with a view of fulfilling the contract in accordance with its understanding of the same.

The proviso as to shipments from the very nature of things must have been intended to relate to the time of delivery, and we cannot understand upon what theory it could be construed to relate to the life of the contract. To give it this interpretation places the parties upon a footing where the rights of each are safeguarded and protected. In this instance it must be observed that the promise of the seller is conditional.

In the case of Coal Co. v. Ice Co., 134 N. C. 574, 47 S. E. 116, the Supreme Court of that state said:

"But there was one, and only one, limitation upon this otherwise absolute undertaking, and that limitation is found in the clause of dispensation, as it may be called, which exempted the plaintiff from liability for nonperformance, if by strike or other uncontrollable causes it should become unable to comply with its contract."

In the case of Cottrell v. Smokeless Fuel Co., 148 Fed. 594, 78 C. C. A. 366, 9 L. R. A. (N. S.) 1187, this court held that where one charges himself with an obligation possible to be performed he must make it good, and that unforeseen difficulties, however great, will not excuse him. It was also stated by the court that the rule as announced was subject to the qualification that, where a contract contains a limitation upon an otherwise absolute undertaking, one will be relieved from such obligation "to the extent that such conditions rendered it unable to perform the contract fully, and to this extent only."

The case of Fish v. Hamilton, 112 Fed. 742, 50 C. C. A. 509, was an action for a breach of contract. The contract contained a strike

provision, and it is insisted that a strike terminated the life of the contract. In disposing of the matter the court said:

"We concur in the opinion of the court below that the provision effects the terms of delivery only, and that the seller was bound to deliver within a reasonable time after the termination of the strike."

In 35 Cyc. 249, the rule announced is as follows:

"Where the contract provided that delivery shall be subject to strikes, the existence of a strike merely suspends deliveries during the strike and does not terminate the contract, and the seller is therefore bound to resume deliveries after a reasonable time after the strike has ceased."

Indeed, the rule is so well established that we do not deem it necessary to cite further authorities.

A careful consideration of the authorities relied upon by defendant leads us to the conclusion that they do not apply to the case at bar.

As we have stated, under this provision of the contract the defendant could have required the plaintiff to make the balance of the shipments within a reasonable time, and, such being the case, we think that such provision likewise inures to the benefit of the plaintiff, and that therefore the plaintiff was entitled to deliver the rock within a reasonable length of time after cars were to be had, and that the effort of the defendant to cancel the contract and its refusal to accept further deliveries under the same entitles the plaintiff to recover the amount sued for in this action.

In view of what we have said, it follows that the court below erred in holding that the plaintiff was not entitled to recover.

For the reasons stated, the judgment of the lower court is reversed, and the case will be remanded for further proceeding in accordance with the views herein expressed.

Reversed.

UNITED STATES v. CHESAPEAKE & O. RY. CO.

(Circuit Court of Appeals, Fourth Circuit. February 27, 1914.)

No. 1228.

1. RAILROADS (§ 229*)—REGULATION OF RAILROADS—EQUIPMENT.

The amendment of Act April 14, 1910, c. 160, 36 Stat. 298 (U. S. Comp. St. Supp. 1911, p. 1327), to the Safety Appliance Act, providing that, where any railroad car has been properly equipped and the equipment shall become defective while the car is being used by the carrier on its line of railroad, it may be hauled from the place where the defect was first discovered to the nearest available point where it can be repaired, does not allow cars with defective equipment to be moved on side tracks or in switching yards except for the purpose of hauling them to the nearest available point for the purpose of making repairs, and hence the statute was violated by moving a car from one yard to another placing it on a side track, where it was required to be moved frequently and by failing to make repairs until it was moved back to the first yard 12 days after the discovery of the defect in the equipment.

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

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

2. RAILROADS (§ 229*)—REGULATION OF RAILROADS—EQUIPMENT.

Under amendment of Act April 14, 1910, c. 160, 36 Stat. 298 (U. S. Comp. St. Supp. 1911, p. 1327), to the Safety Appliance Act, relative to repairing the equipment of a railroad car which becomes defective while being used, if the repairs can be made at the point where the defect in the equipment is discovered, it is incumbent on the carrier to repair the defect as soon as the services of a repairman can be had, but, if not, the car may be hauled to the nearest available point and not used in the meantime on its lines between stations or in the yards.

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

In Error to the District Court of the United States for the Eastern District of Virginia, at Richmond; Edmund Waddill, Judge.

Action for a penalty by the United States against the Chesapeake & Ohio Railway Company. Judgment was rendered for defendant on a directed verdict, and the United States brings error. Reversed.

D. Lawrence Groner, U. S. Atty., of Norfolk, Va., and Philip J. Doherty, Sp. Asst. U. S. Atty., of Washington, D. C. (Hiram M. Smith, Asst. U. S. Atty., of Richmond, Va., on the brief), for the United States.

David H. Leake, of Richmond, Va. (D. H. and Walter Leake, both of Richmond, Va., on the brief), for defendant in error.

Before PRITCHARD and WOODS, Circuit Judges, and DAYTON, District Judge.

PRITCHARD, Circuit Judge. This action was begun by the United States on August 6, 1912, to recover $200 from the defendant in error, the Chesapeake & Ohio Railway Company, for violation of the Safety Appliance Act. The declaration contained two counts, the first count relating to a violation of the act in the use by the railway company of a New York, New Haven & Hartford Railroad car, No. 75,653, while the same was in a defective condition, and the second count relating to a Southern Railway car, as to which there is no controversy on this writ of error. The jury, by direction of the court, found against the United States as to the first count and for the United States as to the second count. A motion was made by the United States to set aside the verdict, which was overruled. (The interstate character of the railway and the cars in question is admitted.)

The evidence, so far as it relates to the first count of the declaration, as to which, as just stated, the jury found against the United States, briefly, is as follows:

[1] Car No. 75,653 of the New York, New Haven & Hartford Railroad Company was brought into the Seventeenth Street yard of the Chesapeake & Ohio Railway Company at Richmond, Va., on February 29, 1912. This car formed part of a train which arrived at the yard about 3:15 p. m., and, on its arrival, was inspected by government inspectors, who found the chain at the "B" end of the car connecting the lock and Climax Coupler broken, so that there was no connection between the uncoupling lever and the uncoupling mechanism, and, in its then condition, it was impossible to couple the car or open the coupler otherwise than by going in between the cars.

Shortly after this discovery by the inspectors the car was inspected by the railroad inspector located at the Seventeenth Street yard, and a bad order mark was placed on it, and it was thereupon switched from point to point several times, with a number of other cars and placed on different tracks. Late in the afternoon while it was standing on the track near the scales, Brakeman John Scott went in between the end of the defective car and another car for the purpose of raising the mechanism and separating it from the other car, shortly after which engine 44 was coupled to the car and pushed it down from the Seventeenth Street yard onto track No. 9, in the Broad Street yard; the trip consuming about ten minutes, the distance being about three-quarters of a mile. The car, both when it arrived at the Seventeenth Street yard and later in the day when it arrived at the Broad Street yard, was loaded with corn and sealed, and remained at the Broad Street yard from the 29th day of February until the 12th day of March, without having the repairs made, and on the latter date it was returned to the Seventeenth Street yard and shifted almost to the identical point which it had occupied when it was removed from there to the Broad Street yard, 12 days before, and was then and there repaired.

The witness for the railroad testified that a lock block and a new lock chain were required to make the repairs, and that such repairs could have been and were eventually made in about ten minutes; that it was not necessary to take the car to the shops; that there were more facilities for repairing the defects at the Seventeenth Street yard than at the Broad Street yard; and that the inspector who actually made the repairs, to wit, W. J. Gibson, intended, when he put the bad order mark on it, that it should be, as later it was, repaired at the Seventeenth Street yard.

At the conclusion of the evidence, both plaintiff and defendant moved for an instructed verdict, and the court instructed the jury to find a verdict for the defendant on the first count, and the case now comes here on writ of error.

It is contended by the defendant below that the following proviso in the amendment of 1910 exempts it from liability in this instance:

"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."

It is manifestly the purpose of this statute in cases where equipment on any car may become defective to permit the railroad company to haul the same to the nearest available point where the proper repairs can be speedily made.

Any movement of a defective car was held to be a violation of the act as originally passed. It was undoubtedly the purpose of Congress in adopting the amendment of 1910 to somewhat relax the rigid rule which had theretofore been announced as to the time within which repairs of defective cars should be made. While this is true, Did Congress by this proviso intend to afford no protection to the employés while cars were being operated within the yard limits?

It is a matter of common knowledge that the danger incident to coupling cars is as great, if not greater, in switching yards than on the line between stations. The fact that the statute provides that "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" clearly shows that it was the purpose of Congress not to permit unnecessary delay in making repairs of defective equipment by keeping such cars on side tracks and moving them from place to place unless it should be for the purpose of hauling them to the nearest available point for the purpose of making needed repairs.

It cannot be reasonably contended that the movements of the car in question from Seventeenth Street to Broad Street, and from Broad Street back to Seventeenth Street, was for the purpose of repairing the same, inasmuch as it appears by the evidence that the repairs could have been made when discovered, and at all events could have been made at Seventeenth Street before it was moved from that point. Even if it were not the duty of the inspector to make the repairs, he certainly was charged with the duty of reporting the defective condition of the equipment, and this he must have done in making his report of the day's work. Therefore it is but fair to assume that the company had full knowledge of the defective condition of this equipment within at least 12 hours from the time the inspector made the discovery. But, notwithstanding this fact, the equipment was permitted to remain in a defective condition while the car was being shifted from point to point at Broad Street and finally to Seventeenth Street, and was not taken back for repairs until 12 days thereafter. During this time the employés of the company whose duty it was to couple and uncouple the cars were continually subjected to the dangers incident to the defective condition of the equipment. Under this evidence can it be said that the defendant hauled this car after it discovered its condition "to the nearest available point where such car could be repaired"?

District Judge Sessions, in the case of United States v. Pere Marquette Railroad Co. (D. C.) 211 Fed. 220, in referring to the contention that in that case the movement of the train in question was what is known as a "switching movement," and that under this proviso did not apply, said:

> "The name given to the movement is of no importance, and its character is not controlling. 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."

To hold that this proviso applies only to trains operated on lines between stations would in a large measure deny protection to those for whose benefit the law was passed and give a narrow and artificial construction to the statute.

We do not deem it necessary to review the many authorities cited by counsel for the government, as well as those cited by defendant, further than to say that we have carefully considered the case of Erie Railroad Co. v. United States, 197 Fed. 287, 116 C. C. A. 649, decided by the Circuit Court of Appeals for the Third Circuit. That

case supports the defendant's contention, notwithstanding the facts upon which it is based differ somewhat from the case at bar. While we have the greatest respect for that court in its decision, yet a careful consideration of the statute impels us to dissent from the views therein expressed.

To hold that the words "while such car was being used by such carrier upon its line of railroad" are intended to limit the statute in its application to the main line would, in a large degree, nullify the act. When we consider the statute in regard to safety appliances, we are forced to the conclusion that it must have been the intention of Congress that the same should apply to side tracks and yard tracks as well as the main lines.

[2] The requirement that a car with defective equipment may be hauled from where such equipment is first discovered to be defective or insecure "to the nearest available point where such car can be repaired" was evidently designed for the purpose of giving the railroad company sufficient time within which to make such repairs as could only be made at the shops of the company, or at a point where material and appliances were kept for that purpose. However, in this instance, it is admitted by the railroad that it was not necessary to haul the car in question to the shops or to any particular point in order to repair the defective equipment. It could have been repaired at the Seventeenth Street yard where the defect was discovered, or it could have been repaired at the Broad Street yard, and no excuse is shown for not making the repairs while the car was kept at either of these places. In other words, we think the statute contemplates that if, when the defective equipment is discovered, it can be repaired at the point where the discovery is first made, then it is incumbent upon the railroad company to repair the same as soon as the services of a repairman can be had; but, if the defect is of such character that it cannot be repaired at the point where discovered, such car may be hauled to the nearest available point for that purpose, and not used in the meantime on its lines between stations or in its yards.

The failure on the part of a railroad company, as in this instance, to repair defective equipment, as to the existence of which the company had had knowledge for the space of 12 days, during which time such car had been moved from one place to another, from time to time, on its tracks, indicates that it was unmindful of the duty imposed upon it by the statute.

We are therefore of the opinion that the conduct of the railroad in moving its car from Seventeenth Street to Broad Street and placing it on the side track where, from the very nature of things, it was required to be moved frequently; and this, coupled with the failure on the part of the railroad company to make the needed repairs until it was moved back to Seventeenth Street, 12 days thereafter, was a violation of the act under which this suit was instituted.

For the reasons stated, we are of opinion that the court below erred in directing a verdict in favor of the defendant on the first count. Therefore the judgment of the lower court is reversed.

Reversed.

In re KAPLAN BROS.

(Circuit Court of Appeals, Third Circuit. May 22, 1914. Writ of Certiorari Denied by Supreme Court June 22, 1914.)

No. 1826.

1. BANKRUPTCY (§ 241*)—EXAMINATION OF BANKRUPT—USE OF TESTIMONY.
Bankr. Act July 1, 1898, c. 541, § 7, cl. "a" (9), 30 Stat. 548 (U. S. Comp. St. 1901, p. 3425), providing that the bankrupt when present at the first meeting of his creditors, and at such other times as the court shall order, shall submit to an examination concerning the conduct of his business, etc., but that no testimony given by him shall be offered in evidence against him in any criminal proceeding, refers to past transactions concerning which the bankrupt may be charged with criminal conduct, and does not render his testimony inadmissible in a proceeding to punish him for contempt in giving evasive answers upon such examination.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 398, 402–404, 408, 409; Dec. Dig. § 241.*]

2. BANKRUPTCY (§ 241*)—EXAMINATION OF BANKRUPT—USE OF TESTIMONY.
General Order in Bankruptcy No. 22 (89 Fed. x, 32 C. C. A. xxv), requiring the deposition of witnesses to be taken in writing and, when completed, read over to the witness and signed by him in the presence of the referee, did not render the bankrupt's testimony inadmissible in a proceeding to punish him for contempt in giving evasive answers, though it was not signed by him, where his examination was not complete but was still in progress when suspended, because, in the referee's opinion, it would be useless to go on with it.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 398, 402–404, 408, 409; Dec. Dig. § 241.*]

3. BANKRUPTCY (§ 241*)—EXAMINATION OF BANKRUPT—USE OF TESTIMONY.
Where, in a proceeding to punish the bankrupt for contempt in giving evasive answers, the accuracy of the notes of his testimony was proved by the stenographer who made them, no further proof was required.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 398, 402–404, 408, 409; Dec. Dig. § 241.*]

4. BANKRUPTCY (§ 241*)—CONTEMPT—PUNISHMENT—IMPRISONMENT FOR DEFINITE TERM.
Where, though the papers in a proceeding to punish bankrupts for contempt in giving evasive answers were entitled in the bankruptcy proceeding, the referee officially and of his own motion certified that the bankrupts were in contempt, the district judge acted upon his own initiative in entering a rule to show cause, the government, through the United States attorney, appeared and took charge of the proceedings, and the declared object of the referee, judge, and the government was to punish the bankrupts, and there was no prayer for civil relief, imprisonment for a fixed term was justified.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 398, 402–404, 408, 409; Dec. Dig. § 241.*]

In Error to the District Court of the United States for the Eastern District of Pennsylvania; J. Whitaker Thompson, Judge.

In the matter of Kaplan Bros., bankrupt. To review an order adjudging Charles Kaplan and another guilty of contempt, and sentencing them to imprisonment, they bring error. Affirmed.

Alfred Aarons, of Philadelphia, for plaintiffs in error.

J. Howard Reber and Francis Fisher Kane, U. S. Atty., both of Philadelphia, for defendants in error.

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

Before BUFFINGTON, HUNT, and McPHERSON, Circuit Judges.

J. B. McPHERSON, Circuit Judge. The plaintiffs in error, Charles Kaplan and Max Kaplan, were sentenced to imprisonment as a punishment for contempt of court. They were members of the bankrupt firm of Kaplan Bros. (no proceeding was taken against the third partner), and were called before the referee on May 13, 1913, for examination at the first meeting of creditors. Their answers and demeanor were so unsatisfactory that the referee (Joseph Mellors, Esq.) officially and of his own motion certified as follows:

"That in the course of the proceedings in this cause the said bankrupts were called for examination before me, and their answers to pertinent questions put to them showed that their whole testimony was practically a perfectly transparent case of intentional and willful evasion and refusal to make any explanation of the facts connected with their bankruptcy under the pretense of defective memory, ignorance, and stupidity, and a manifest and deliberate determination to conceal all material facts within their knowledge.

"The bankrupts are intelligent and have an average acquaintance with the English language and have been engaged in business many years.

"Their recollection, when they desired to exercise it, convinced the referee, as he watched them, that, when they desired to give facts, they could.

"The testimony taken before the referee shows to his mind a determination to refuse to give the trustee and the creditors any information whatever as to the disposition of their property. They pretended to be ignorant of facts which could have been known to any one who had sufficient intelligence to perform the most ordinary business affairs.

"Although the bankrupts failed, owing about $56,000 to creditors, with tangible assets not much more than nominal, yet their manner on the witness stand was anything but serious, but, on the contrary, they were sometimes flippant and at other times defiant.

"During the examination the bankrupts repeatedly and continually testified (as the reading of their testimony will show) in a vague, unsatisfactory, ambiguous, and contradictory manner, with the intention of obstructing the administration of justice and preventing the collection and distribution of their property and the discovery of the whereabouts of the same.

"When they were asked regarding transactions directly within their knowledge, and facts which they must have known, they expressed ignorance or lack of recollection.

"Charles Kaplan, during an examination covering only 48 pages of testimony, answered to pertinent and important questions, 'I don't know,' and 'I don't remember,' 118 times. His brother, Max Kaplan, in an examination covering only 29 pages, answered to pertinent questions, 'I don't remember,' and 'I don't know,' 117 times.

"Even with the aid of the referee, counsel were unable to elicit proper and truthful answers to all of the pertinent questions put to these witnesses, and were therefore obliged to suspend the examination.

"From the foregoing facts the referee finds that the said bankrupts have refused to submit themselves to 'an examination according to law.'

"The referee therefore finds that the said bankrupts, in refusing to submit themselves to 'an examination according to law,' are now in contempt before him."

It will be observed that the plaintiffs in error were not charged with perjury, so that the case of Magen v. Campbell, 26 Am. Bankr. Rep. 594, 186 Fed. 675, 108 C. C. A. 531, does not apply. A recent decision on the same subject is U. S. v. Appel (D. C.) 211 Fed. 495. After the referee's certificate had been filed, the trustee petitioned the district

court for a rule on the bankrupts to show cause why they should not be punished for contempt, and the rule was granted, returnable on October 29th. Thereupon they filed an answer, setting up inter alia that the trustee's petition was "insufficient to support any order whatsoever, in that it is beyond the power of a private citizen to petition for the infliction of criminal penalties, such as are sought to be inflicted by the said petition." Apparently this objection was regarded as well founded, and the proceedings upon that petition were abandoned.

But, as the referee's certificate had been brought to the attention of the District Court, Judge Thompson himself took action thereon, and on October 31st entered a new rule on the bankrupts requiring them to appear on November 3d "to show cause why they should not be held in contempt." No objection was made to the regularity of this order, and the bankrupts appeared and filed answers thereto. An oral hearing also was held, and the bankrupts were further examined at their own request; the final result being that the court adjudged them to be guilty of contempt and sentenced them to imprisonment for 60 days. This order is now complained of on several grounds, all of which call for consideration.

[1] 1. The first objection is, that the stenographer's notes of the bankrupts' testimony at the creditors' meeting were received in evidence; the argument being that this was in violation of section 7, cl. "a" (9), of the Bankruptcy Act. That clause requires a bankrupt to submit himself to examination concerning the conduct of his business, etc., but protects him by providing that "no testimony given by him shall be offered in evidence against him in any criminal proceeding." It is only necessary to reply that this provision has been declared by the Supreme Court to refer to past transactions concerning which the bankrupt may be charged with criminal conduct. Glickstein v. United States, 222 U. S. 139, 32 Sup. Ct. 71, 56 L. Ed. 128; Cameron v. U. S., 231 U. S. 710, 34 Sup. Ct. 244, 58 L. Ed. ——, decided January 5, 1914. But, if he should be charged with having committed perjury in the course of such examination, the necessities of the case require that his testimony may be proved in order to show in what particulars the asserted false swearing consists; and for a like reason, whenever he is charged with a punishable contempt in refusing to submit to the examination required by the act, the necessities of the case also require that his testimony be examined in order to ascertain whether in point of fact he has so refused.

[2, 3] 2. A second objection is because the notes of testimony were neither read over to the bankrupts nor signed by them. It is argued that the notes were therefore incompetent, because general order 22 (89 Fed. x, 32 C. C. A. xxv) provides inter alia as follows:

"The examination of witnesses before the referee may be conducted by the party in person or by his counsel or attorney, and the witnesses shall be subject to examination and cross-examination, which shall be had in conformity with the mode now adopted in courts of law. A deposition taken upon an examination before a referee shall be taken down in writing by him, or under his direction, in the form of a narrative, unless he determines that the examination shall be by question and answer. *When completed it shall be read over to the witness and signed by him in the presence of the referee.*"

In our opinion the italicized portion of this order does not now apply. The depositions of the bankrupts were not "completed," and were therefore not ready to be submitted or signed. The examination was still in progress, but was suspended because, in the opinion of the referee, it would have been useless to go on with it. Assuming for the present that he was right in this opinion, he was not obliged to continue the examination in order that additional questions might receive additional evasive answers. We agree with what was said upon this subject by the Court of Appeals of the Second Circuit in Re Schulman, 177 Fed. 193, 101 C. C. A. 363:

"Criticism is made because these proceedings were commenced before the bankrupt's examination was concluded and before he was 'cross-examined.' When it is remembered that this is a proceeding to punish the witness for contempt for refusing to be examined according to law, it will be seen that this complaint is not well founded. When the examination was concluded on January 7th, the offense had been finally and irrevocably committed, and the trustee was justified in presenting it to the court. He was not required to continue an examination which was absolutely abortive. It will hardly be pretended that a witness who, during his direct examination, makes an assault upon the presiding judge cannot be punished for contempt until his cross-examination is concluded. In other words, if the acts complained of amount to a contempt, they can be punished immediately; if they do not amount to a contempt they cannot be punished at all."

In the present case, if the bankrupts were guilty of contempt at all, the offense must have been complete at some point in the proceeding. If the referee was right, it had been fully committed when he intervened and certified the question to the District Court, and there was no necessity that the notes of testimony should be read over and signed. We may add that the accuracy of the notes was duly proved at the hearing before the District Court by the stenographer who made them, and nothing more was required.

[4] 3. It is further objected that this was not a criminal proceeding for contempt so as to justify the imposition of a fixed term of imprisonment. Little need be said upon this subject; the facts do not support the argument. The record shows that the referee certified the question "officially and of my own motion"; and that the district judge also acted upon his own initiative in entering the rule to show cause. Moreover, the government subsequently took charge of the proceedings, and the United States Attorney for this district appeared and defended in this court the action that had been taken below. The declared object of the referee, of the judge, and of the government, is to punish the contumacious conduct of the bankrupts as witnesses, in order to vindicate the authority of the law. The proceeding was not remedial in its nature but wholly punitive, and in our opinion, therefore, the contempt was properly punished by imposing a definite term of imprisonment. Gompers v. Stove Co., 221 U. S. 418, 32 Sup. Ct. 492, 55 L. Ed. 797, 34 L. R. A. (N. S.) 874.

We do not think Re Kahn, 30 Am. Bankr. Rep. 322, 204 Fed. 581, 123 C. C. A. 107, is in point. The present case did not include a prayer for civil relief, and there was no effort to obtain it. The sole object of the proceeding was punishment for contempt committed before a bankruptcy tribunal, and the action was begun and carried on against

the defendants by and before officials representing the public. The mere entitling of the papers in the bankruptcy proceeding cannot be decisive; courts look at the real nature of the thing done, and not merely at the name it may bear.

4. The remaining objection is that the facts do not justify the conclusions of the referee and of the district judge. We have therefore read the whole record with care, including the explanations offered by the bankrupts at the hearing before Judge Thompson, and we see no reason to disagree with the decisions below. What was said in Re Schulman, supra, is applicable to the examination now in question:

"In the case at bar we know nothing of the bankrupt, * * * except as he is portrayed in the printed record. The referee, on the contrary, had an opportunity to see and hear the bankrupt and observe his manner while testifying, which is an inestimable advantage in cases of this character. The testimony of a witness may sound plausible when read afterwards from a printed book, and yet his conduct on the stand may have been such that no one who heard him testify believed that he was telling the truth. * * * Disingenuous and evasive as his testimony appears when read, it is obvious that the opportunity to 'watch' the bankrupt gave the referee a very marked advantage in determining whether he was acting honestly. His answers, 'I don't remember,' and 'What do you mean?' so often given might in some instances have been the result of a defective memory or an honest inability to understand. An appellate court may be unable to detect, under such conditions, the false from the true, the honest from the fraudulent, but any intelligent person, after observing the witness for hours on the stand, could not be deceived as to his purpose."

See, also, Epstein v. Steinfeld, 210 Fed. 236, 127 C. C. A. 54.

We should hesitate long before we disagreed with the conclusions of two competent and impartial judicial officers, each of whom enjoyed the opportunity of hearing and seeing the witnesses.

The lapse of time will require the order in question to be slightly modified. The term of imprisonment should of course begin at a future date instead of on November 3, 1913, and the District Court will be at liberty to make the necessary change. In other respects the order is affirmed.

SCHEINBERG v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. April 7, 1914.)

No. 66.

1. POST OFFICE (§ 35*)—MISUSE OF MAILS—SCHEME TO DEFRAUD—STATUTE—SCOPE—"SCHEME OR ARTIFICE."

Criminal Code, § 215 (Act March 4, 1909, c. 321, 35 Stat. 1130 [U. S. Comp. St. Supp. 1911, p. 1653]), provides that whoever, having devised or intended to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, etc., shall for the purpose of executing such scheme or artifice, or attempting to do so, place or cause to be placed any letter, etc., in any post office to be sent or delivered by the post office establishment of the United States, shall be fined, etc. *Held*, that the use of the words "scheme or artifice" to defraud did not limit the offense to a predetermined plan or contrivance to mislead or seduce the public into parting with their money or property similar to several swindles expressly designated in the statute, but prohibited the

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

use of the mails for the transmission of a false financial statement by defendant to commercial agencies with intent that the same should be used as a basis for the purchase of goods by defendant on credit to which he was not entitled.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. § 55; Dec. Dig. § 35.*]

2. POST OFFICE (§ 49*)—MISUSE OF MAILS—SCHEME TO DEFRAUD—INTENT.

Where defendant mailed a false financial statement to a commercial agency with knowledge that it was false, and that it would be used as a basis for the sale of goods to him on credit, such proof was sufficient to warrant a finding that the statement was sent through the mails to execute a scheme to defraud in violation of Criminal Code, § 215 (Act March 4, 1909, c. 321, 35 Stat. 1130 [U. S. Comp. St. Supp. 1911, p. 1653]).

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 84–86; Dec. Dig. § 49.*]

3. POST OFFICE (§ 49*)—MISUSE OF MAILS—SCHEME TO DEFRAUD—OTHER OFFENSES.

In a prosecution for using the post office in furtherance of a scheme to defraud, in violation of Criminal Code, § 215 (Act March 4, 1909, c. 321, 35 Stat. 1130 [U. S. Comp. St. Supp. 1911, p. 1653]), evidence of other offenses having no relation to the offense charged, but indicating that defendant was not averse to fraudulent methods in business, was inadmissible to show intent.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 84–86; Dec. Dig. § 49.*

Nonmailable matter, see notes to Timmons v. United States, 30 C. C. A. 79; McCarthy v. United States, 110 C. C. A. 548.]

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, convicting the plaintiff in error on the first count of an indictment charging him in four counts with violations of section 215 of the United States Criminal Code in causing writings to be placed in the post office for the purpose of executing a scheme or artifice to defraud by obtaining property by means of false and fraudulent pretenses and representations.

W. Rand, Jr., of New York City, for plaintiff in error.

H. Harper, Asst. U. S. Atty., of New York City.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge. The indictment charged: That defendant was in business with his brother, as jobbers in woolen goods. That he devised a scheme and artifice to defraud divers persons then engaged in selling woolen goods at wholesale. That the object of the scheme was to induce the persons intended to be defrauded to sell and deliver on credit to defendants certain woolen goods. That for the purpose of securing the extension of such credit and the obtaining of said property it was part of the scheme that defendant should knowingly and willfully make divers false and fraudulent representations concerning the business and financial condition of the firm. That these false representations were made to three different mercantile agencies (naming them), in order that the agencies might communicate said statements to the persons intended to be defrauded. Details of the false

statements are set forth in the indictment, but need not be quoted. That on January 7, 1910, defendant willfully and feloniously for the purpose of executing said scheme and artifice, and attempting to do so, placed or caused to be placed in the mail a certain writing addressed to Woods Dry Goods agency. The writing was a statement of assets and liabilities alleged to be false. A second count charged the mailing on May 10, 1910, of a similar writing to R. G. Dun & Co. A third count charged the mailing on August 23, 1910, of a similar writing to M. D. Howell & Co. A fourth count charged the mailing on September 16, 1910, of a similar writing to Lewis & Co. At the close of the government's case the fourth count was abandoned. The jury found defendant not guilty under the second and third counts. There was a verdict of guilty, with recommendation to mercy on the first count, and to review the judgment thereon this writ of error was taken.

[1, 2] As will be seen from the above epitome of the indictment the case was a simple one. Defendant was not charged with having obtained property on false pretenses; such an offense is not one with which the federal government is concerned. What goods he may have obtained on credit as a result of the written statements and what he may have done with those goods are immaterial matters. The offense charged is, under section 215 of the Criminal Code, the mailing of the written statement for the purpose of executing the alleged scheme to defraud. As to the alleged scheme itself, manifestly a written statement showing the firm to be abundantly solvent would tend to induce the extension of credit to it. Manifestly the sending of such a statement to a commercial agency, or to a person from whom defendant's firm was seeking to buy goods itself, proved the purpose of its sending. If the statement were proved to be false and it were also proved that the defendant knew it to be false when he mailed it, there was sufficient to warrant the finding that the statement was sent for the purpose of executing a scheme to defraud.

The first proposition submitted on behalf of the plaintiff in error is that the testimony does not establish "a scheme or artifice" to defraud within the terms of the statute. His brief thus stated the facts, to which the government introduced evidence and which it asked the jury to find.

"Responding to a request by a mercantile agency, defendant, a member of a firm of woolen jobbers, mailed to the agency a statement purporting to show the financial condition of his firm. This statement was false to defendant's knowledge, in that it grossly exaggerated the firm's assets and understated its liabilities. From previous experience, being himself a subscriber to the agency, defendant knew that the request for the statement was made because some other subscriber of whom he wished to buy merchandise had made inquiry as to the firm's credit; and in sending the false statement he intended to obtain, from that subscriber and from other subscribers to whom the contents of the statement might be communicated, credit for merchandise purchased which would not have been extended had the true state of the firm's finances been disclosed, and thus to commit fraud."

The court charged that if the jury were satisfied that these were the facts they might find him guilty of the offense charged. Such charge is assigned as error.

The contention is that the statute, by its use of the words "scheme and artifice" to defraud, was directed against something more than a single transaction, or even a series of single transactions, provided they are not part of a common plan or purpose, that Congress had in mind the fleecing of ignorant or gullible people, not by an isolated fraudulent transaction, or even by a series of them, but by the execution of a predetermined plan or contrivance to mislead and seduce them into parting with their money or property, and that on the principle of noscitur a sociis such intent is evidenced by the specific schemes set forth in the statute, viz., the "sawdust swindle," the dealing in "green goods," etc. It is urged that the statute was not intended to invest the federal government with the duty and power to punish frauds by debtors upon creditors in every case in which the debtor has, in carrying out his fraud, mailed a single letter to the creditor; the contents of such letter being devised to carry out the fraud. No doubt such a construction of the statute goes far beyond its scope when originally enacted, and apparently bids fair enormously to increase the business of the federal criminal courts. But the old statute (section 5480, U. S. Rev. Stat.) has been many times amended, and in its latest form, as found in section 215, U. S. Criminal Code, it has undoubtedly been broadened very much. Section 5480 provided that the "scheme or artifice" must be one which, as originally planned, contemplated that it was to "be effected * * * by means of the post office establishment of the United States." It further provided that in sentencing a convicted defendant the court should "proportion the punishment especially to the degree in which the abuse of the post office establishment *enters as an instrument into* such fraudulent scheme and device." Under that section, if the scheme did not contemplate the use of the mails, if it were carefully planned so as to avoid their use, contemplating that all written or printed communications should be sent by express or delivered by hand, it might not be brought within the statute by reason of the circumstance that on one particular occasion the defendant incautiously mailed a single letter in furtherance of his scheme. But the section has been radically changed; the provisions above quoted, indicating that the scheme must contemplate the use of the mails to effect its purpose, have been cut out. The acts charged and proved are within the text of the act as it now stands, and it is fairly to be inferred that Congress intended that the act should have this broader scope. This is the construction which has been given to section 215 by the Supreme Court in U. S. v. Young, 232 U. S. 155, 34 Sup. Ct. 303, 58 L. Ed. —— (January 26, 1914). The assignments of error covering this part of the cause are without merit.

[3] The record in this case is voluminous; it was tried shortly before the decision of this court in Marshal v. U. S., 197 Fed. 511, 117 C. C. A. 65. Evidence of other offenses was admitted over objection and exception, and, since we cannot be sure that such evidence did not prejudice the jury against the defendant, there must be a reversal. It is sufficient to refer to the following instances:

1. Hyman Baron was a woolen jobber of Philadelphia. There was no evidence that he ever received a financial statement—false or true—

from defendant's firm, or that he ever sold them goods on credit. On June 17, 1910, he was in defendant's store and bought from one of the Scheinbergs (he could not remember whether or not it was defendant, but thinks defendant was in the store) some goods for $400. The person with whom he dealt promised that the goods would be packed and sent at once to Philadelphia, and Baron gave two notes for them. The goods did not come; correspondence followed, the firm writing that the goods had been shipped. Baron testified that he went to the store and was told by one of the Scheinbergs that they were suing the railroad; that he asked to have his notes returned, and was told that the person he was talking with could not open the safe, not knowing the combination; that three or four weeks later he called again, and was told that one of the brothers had gone to Philadelphia, carrying the notes with him, and would deliver them to Baron there. No one came to Baron's place in Philadelphia, the notes were never returned to him and a week later the firm failed. If the jury believed that the Scheinberg with whom Baron had these transactions was the defendant, the circumstance was calculated to prejudice him. We cannot see, however, that these transactions had any relation to the offense charged in the indictment, which was a scheme to obtain credit, not to sell goods and fail to deliver them.

2. Defendant, wishing to obtain credit from the concern of W. Stroosberg, applied on September 12, 1910, to its credit man, who said to him that he had heard reports regarding the connection of defendant's firm with the failure of his brother Moses Scheinberg, and asked how that was. The witness testified that defendant replied that his firm "had no connection with the brother at all at any time, before or after the failure, and that they were not interested in the failure in any way whatsoever," furthermore that they "had no dealings with him, were not on speaking terms with him, and that they had ostracized him from the family." This evidence was admitted on the district attorney's promise to show that the defendant was "connected with Moses Scheinberg in business." He wholly failed to show this, although it appeared that after his bankruptcy Moses was employed by defendant's firm as salesman, and that defendant had paid a stenographer's bill of about $200 incurred by Moses in connection with his bankruptcy. All that this amounted to was that apparently defendant's exaggerated statement as to his brother's ostracism was a gratuitous falsehood; to the specific question put to him by the credit man he did not reply falsely. The testimony, not being connected as promised, should have been stricken out. We do not find in the voluminous record any motion to strike out after the failure to connect became apparent. It was for the defendant to make such a motion; it is no part of the duty of the judge presiding at a long trial to keep track of all the items of testimony, which he may admit on promise so to connect it with other testimony as to make it proper, in order himself to discover whether or not such connection has been made. Although technically defendant may not be in a position to assert that it was error to admit this testimony about Moses Scheinberg, attention is called to it

here, because by doing so possibly its presentation at the new trial may be avoided.

3. Evidence was introduced to show that late in September, 1910, defendant's brother sold two bills of goods and received therefor two checks of the purchaser to the order of defendant's firm. These checks were indorsed with the firm name impressed from a rubber stamp, were deposited in bank to the firm's credit, and were collected; but apparently the transactions were not entered in the books.

There is no evidence to show that defendant knew of these sales, or of the checks, or what entries were or were not made in the books. Moreover, if he did know of these things in September, 1910, when they took place, it is not perceived what bearing that would have on the issues in the case. The testimony does not tend to show that defendant mailed the statement to the commercial agency in January, 1910, on which he was convicted, or indeed that he mailed any other statement. Nor does it tend to show that the statement so made seven months before was false, nor that defendant knew it was false when he mailed it. Much is made in argument as to proving defendant's intent and purpose in mailing the statement. Surely something may be left to the common sense of a jury, who are not likely to be misled as to the purpose and intent with which a business man sends a statement of his assets and liabilities to a commercial agency by any sworn testimony of his that it was *not* for the purpose of securing the degree of credit which the statement might reasonably call for. When it is proved that a defendant did send such a statement, that the statement was false, showing an insolvent concern to be abundantly solvent, and that he knew the statement to be false when he sent it, it is a waste of time to undertake to introduce other testimony to prove that he intended to avail of the false statement as a means to defraud somebody.

The only possible effect of testimony such as that above set forth as to falsification of books shortly before bankruptcy, etc., is to create an atmosphere, to impress the jury with the belief that defendant is a bad man. But, as we held in the Marshal Case, that cannot be done by showing that he has committed offenses, unrelated to the subject-matter of the indictment, and which he was not summoned into court to meet.

There are many other similar errors assigned, but they need not be considered; probably the record on the new trial will be materially different from the one now before us.

The judgment is reversed.

BENN v. FORREST.

(Circuit Court of Appeals, First Circuit. May 22, 1914.)

No. 1043.

1. MASTER AND SERVANT (§ 332*)—INJURIES TO THIRD PERSON—OPERATION OF AUTOMOBILE—RELATION—QUESTION FOR JURY.

In an action for injuries to plaintiff by being struck by an automobile operated by a chauffeur, whether the car was being used at the time for the purposes of a corporation of which defendant was president or for his own purposes or by the chauffeur for purposes authorized by neither the corporation nor defendant *held* for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1274–1277; Dec. Dig. § 332.*]

2. MASTER AND SERVANT (§ 332*)—INJURIES TO THIRD PERSON—OPERATION OF AUTOMOBILE—INSTRUCTIONS.

Where, in an action for injuries to plaintiff by being struck by defendant's automobile in charge of a chauffeur, the court charged that plaintiff was required to prove that the chauffeur was defendant's servant and engaged in the duties incident to his employment at the time, it was not error to refuse to charge that defendant's ownership of the car, the chauffeur's general employment by defendant, if so found, and the fact of his having been alone in the car at the time of the accident were insufficient to warrant a finding that he was then engaged in the duties of such employment; defendant's ownership of the car and the chauffeur's general employment being at least sufficient, in the absence of evidence to the contrary, to warrant an inference that he was running the car as defendant's servant at the time of the accident.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1274–1277; Dec. Dig. § 332.*]

3. MASTER AND SERVANT (§ 330*)—INJURIES TO THIRD PERSON—BURDEN OF PROOF.

Where plaintiff was injured by the operation of defendant's automobile in charge of a chauffeur, the burden was on defendant to establish that the chauffeur, at the time of the accident, was operating the machine for a purpose of his own.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1270–1272; Dec. Dig. § 330.*]

4. EVIDENCE (§ 220*)—ADMISSIONS—STATEMENTS IN LETTER—FAILURE TO ANSWER.

A portion of a letter, written by plaintiff to defendant in correspondence concerning plaintiff's claim for damages against defendant for injuries sustained by his being struck by defendant's automobile, that the chauffeur operating the machine at the time asked for a license to run the car and was in defendant's employ to run the same, to which defendant did not reply, was properly admitted as an admission.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 771–785; Dec. Dig. § 220.*]

5. MASTER AND SERVANT (§ 332*)—INJURIES TO THIRD PERSON—OPERATION OF AUTOMOBILE—LAST CLEAR CHANCE.

Where, in an action for injuries to plaintiff while attempting to cross a street between crossings by being struck by defendant's automobile operated by a chauffeur, the court could not have ruled that there was no evidence of negligence on the part of the chauffeur as well as plaintiff, the court properly charged that, in order to sustain a verdict for plaintiff, the jury must find that, after discovering the plaintiff in the street, the

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

chauffeur had a fair opportunity to avoid him and negligently failed to do so.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1274–1277; Dec. Dig. § 332.*]

In Error to the District Court of the United States for the District of Rhode Island; Arthur L. Brown, Judge.

Action by Andrew Forrest against Harrison Benn. Judgment for plaintiff, and defendant brings error. Affirmed.

C. M. Van Slyck, of Providence, R. I., for plaintiff in error.

Nathan W. Littlefield, of Providence, R. I., for defendant in error.

Before PUTNAM, DODGE, and BINGHAM, Circuit Judges.

DODGE, Circuit Judge. The plaintiff in error (hereinafter called defendant) has not insisted at the argument upon the first two of his assignments of error, being those based upon the overruling of his demurrer to the declaration.

The declaration was in trespass on the case for personal injuries sustained by the defendant in error (hereinafter called plaintiff) on October 31, 1910, on Union street, in Providence, R. I., through being run into by an automobile while himself exercising due care. According to the declaration, the car was the defendant's, operated at the time by his servant or agent, and so negligently operated as to run into the plaintiff. The case went to trial on the defendant's plea of not guilty. The jury found him guilty, and assessed $3,500 damages.

It was not disputed that the plaintiff was run into and injured at the above time and place by a car registered in the defendant's name in Rhode Island, and driven at the time by one Stuart Angell, since deceased before the trial, who was its only occupant at the time. The defendant denied in his testimony that Angell was in his employ.

There was uncontradicted testimony by the defendant, or on his behalf, in substance as follows:

[1] Having bought the car on October 14, 1910, he arranged with the directors of Joseph Benn & Sons, Incorporated, a Rhode Island corporation, operating mills at Greystone in that state, of whom he was one, that the car should be maintained and its running expenses paid by the corporation; that it was thereafter used for the convenience of the corporation and its officers, and for anything belonging to the corporation; that Angell was engaged by the directors to drive it soon after October 14th, and did drive it for four or five weeks thereafter; and that Angell was paid by the defendant, but out of the corporation's funds. The defendant lived in England; most of the stock in the corporation belonged to him or members of his family; he was its president and treasurer; he had come to Rhode Island with some of his family not long before the accident, and returned to England after it with them, early in the following December. While here they lived at the Crown Hotel, in Providence. He bought the car because he wanted to go in it to and from the mills, the bank, etc. It was agreed upon as fair, between him and the other directors, that he should use

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

the car to take his family about when it was not in use for the corporation, and it was used, while Angell drove it, sometimes for the purposes of the corporation, and sometimes, when not so used, by him or his family for other purposes.

[2, 3] Upon this part of the case the most favorable view for the defendant which could have been taken was that it was for the jury to determine whether the car was being used at the time for the corporation's purposes or for his own private purposes, or by Angell for purposes authorized by neither. There was no direct evidence on this question, Angell having died before the trial; but there was evidence relating to the direction in which the car was going, its distance from the hotel above mentioned or from the garage at which it was kept, and the time of day at which the accident happened, or to other circumstances which might have been taken as indications that it was coming from the direction of the hotel, or as otherwise having some bearing upon the question which of the above uses was more probably then being made of it. We cannot say that the District Court was wrong in refusing the defendant's request to rule that there was no evidence to support a finding that the car was then being used for the defendant's purposes and Angell then acting as his servant. Instructions requested by him were given (1) that the plaintiff must prove Angell to have been his servant, and (2) not only in his general employ, but also to have been engaged in the performance of duties incident to that employment. A requested instruction that the defendant's ownership of the car, Angell's general employment by the defendant, if found by the jury, and the fact of his having been alone in the car were insufficient to warrant a finding that he was then engaged in the duty of such employment was, in our opinion, properly refused. The defendant's ownership of the car and Angell's general employment as his servant for the special purpose of operating it, at least warranted the inference that Angell was running it as his servant at the time in question, in the absence of evidence to the contrary. If, as a matter of fact, Angell was not then so running it, the fact should be peculiarly within the defendant's knowledge and the burden on him to establish it. As to this we agree with the view of the District Court in its opinion overruling a motion for a new trial.

[4] Against the defendant's objection, a portion of a letter sent by the plaintiff to the defendant December 5, 1910, claiming to have received injuries from his car, was admitted in evidence, as follows:

"That Stuart Angell asked for a license to run the car, and that said Angell was in your employ, was hired by you to run your car No. 6261."

The plaintiff was also permitted, against the defendant's objection, to testify that neither the defendant nor any one acting for him ever denied to him either that this was the defendant's car, or that Angell was in his employ as chauffeur at the time, as stated in the above letter. Of the admission of this letter and testimony the defendant complains as error.

The defendant's objection is based upon the contention that because the passage above quoted from the letter was part of a statement of

facts upon which the plaintiff was making a claim for damages, and either expressly or by implication threatening a suit, the idea that a reply might naturally be expected from the defendant is wholly precluded. But whether it was so precluded or not was clearly for the jury, in view of all the circumstances disclosed by the evidence. We cannot say that it would be so unreasonable to expect the defendant to reply as to forbid any inference whatever from his silence. The instructions given the jury regarding the inferences they might or might not draw are not before us; the exceptions not embodying the judge's charge. Presuming, as we must, that they were proper instructions and not excepted to, we are unable to sustain the third, fourth, and fifth assignments of error complaining of the admission of the above letter and testimony.

[5] When struck by the car the plaintiff, according to his own testimony, was walking across Union street, from the easterly toward the westerly side thereof, not on the regular crosswalk nor directly across, but diagonally; and he had got a little more than halfway across. The car came from behind him. The street is in a busy section of the city, and he testified that there were a good many people on the street, about 200 in a short distance. He testified further that he did not see the car until after he was struck, and that he saw no other cars, carriages, horses, or wagons on the street. He testified that as he stepped from the sidewalk to the part of the street used by vehicles he looked directly in front of him. To the question, "Now, you say there were no carriages; did you look?" he answered, "I looked in front of me." The defendant requested the following instruction, which was given:

"If the jury believes the testimony of the plaintiff as to his actions immediately prior to the occurrence of the accident (that is, that he started across a crowded street, in a busy section of the city, without looking to see whether a vehicle was approaching which might be likely to strike him), the plaintiff was guilty of negligence, which will prevent him from recovering in this action, unless it can be found from the testimony that the driver saw, or in the exercise of due care might have seen, the plaintiff in time to avoid striking him."

The court refused to instruct, as requested by the defendant, that, if the jury believed the plaintiff's testimony recited in the instruction just quoted, the plaintiff was guilty of negligence which resulted in his injury, and could not recover.

The court also refused to instruct, as requested by the defendant, that there was no evidence that Angell saw the plaintiff in time to avoid him, or might have done so had he exercised due care, or that Angell did not appear from the testimony to have been guilty of any negligence, or to rule that the verdict should be for the defendant. On the above requests are based the remaining assignments of error.

There was evidence from which the jury might have found that Angell did not blow his horn when the car turned in to Union street, nor from that time until it struck the plaintiff, and from which they might also have found that instead of keeping on the westerly or left-hand side of Union street, and thus passing behind the plaintiff, he attempted to cross from the left to the right side of the street, and to pass between the plaintiff and the right curb, toward which the plaintiff was

walking, without attempting to stop. The car kept on for some distance after striking the plaintiff before it stopped, and it was the left-hand guard which struck him. In view of all this, the court could not have ruled that there was no evidence of any negligence on Angell's part. Indeed, the instruction given at the defendant's own request, and quoted above, would seem to involve the assumption that there had been such negligence, although (as contended) the plaintiff's contributory negligence had prevented him from recovering because of it, unless he could show that, notwithstanding it, Angell saw or might have seen him, in the position where his own negligence had brought him, in time to avoid him.

Whether Angell might thus have seen him in time or not appears, at any rate, to have been the only issue submitted to the jury on this part of the case. The opinion of the District Court referred to states as follows:

"The jury was definitely instructed that the plaintiff was negligent in stepping into the street, looking only ahead of him, and that, in order to hold the defendant liable, they must find that, after discovering the plaintiff in the street, the chauffeur had a fair opportunity to avoid him, and negligently failed to do so."

We agree with the District Court in what immediately follows the above in its opinion:

"It seems to me that the question, though perhaps close, was purely one of fact and within the province of the jury to decide, and that it cannot be said, as matter of law, that the evidence was insufficient to support the verdict in this respect."

The defendant has relied here upon a calculation claimed by him to show that the plaintiff could not have been more than 26 feet in front of the car when he stepped from the sidewalk, and that the time which Angell had for thinking and acting was "extremely short, only three seconds, more or less." The District Court assumes in its opinion that the jury might have found 26 feet at least to be the distance from the point where the car turned from the left to the right side of the street to the point where the defendant was struck; that its rate of speed was reasonable under the circumstances, and therefore a low rate, under which stopping would have been easier than at a high rate. The distance, the rate of speed, and the opportunity for avoiding the plaintiff were all matters for the jury in their bearing upon the question submitted to them, and we can find no error on the part of the court in submitting it under the proper instructions which we must assume to have been given.

The defendant has contended here that the "doctrine of 'last chance' is not applicable to the undisputed facts of the case." But he appears by the record to have invoked it himself.

It follows from what has been said that there was no error in refusing to direct a verdict on the whole case for the defendant. We are therefore unable to sustain any of the exceptions.

The judgment of the District Court is affirmed, with interest, and the defendant in error recovers costs in this court.

WHITE, Immigration Com'r, v. GREGORY et al.

(Circuit Court of Appeals for the Ninth Circuit. May 18, 1914.)

No. 2378.

ALIENS (§ 54*)—EXCLUSION OF ALIENS—REVIEW BY COURT.

Under Act Feb. 20, 1907, c. 1134, § 2, 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. 736, providing that aliens likely to become a public charge shall be excluded from admission to the United States, and section 25, providing that where an alien is excluded under any law or treaty, the decision of the appropriate immigration officer, if adverse to his admission, shall be final, unless reversed on appeal to the Secretary of Labor, where a board of special inquiry convened in the manner provided by law decided that aliens were likely to become a public charge, and its decision was approved by the Secretary of Commerce and Labor, the court could only determine whether the aliens were given the hearing provided by statute, and could not inquire into the sufficiency of probative facts, or consider the reasons for the conclusion reached by the officers.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 112; Dec. Dig. § 54.*]

Appeal from the District Court of the United States for the Northern Division of the Western District of Washington; Jeremiah Neterer, Judge.

Habeas corpus by K. Gregory and others against Henry M. White, Commissioner of Immigration at Seattle, Wash. From an order discharging petitioners, the commissioner appeals. Reversed, with instructions.

Clay Allen, U. S. Atty., of Seattle, Wash., and G. P. Fishburne, Asst. U. S. Atty., of Tacoma, Wash., for appellant.

John R. Parker and Jacob Kalina, both of Seattle, Wash., for appellees.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge. This was a petition by the appellees to the District Court of the United States for the Western District of Washington, Northern Division, for a writ of habeas corpus. It was alleged in the petition that the petitioners were born in Russia; that they left Russia with their own free will; that they were seeking to enter the United States of their free will and good faith, intending to make the United States their permanent residence and home, and fully intending to obey and comply with all the laws of the United States; that they were being detained at the United States Detention Station in the city of Seattle, Wash., by the United States Commissioner of Immigration, contrary to the statutes in such cases made and provided. The court thereupon issued the writ, to which, and to the petition, Henry M. White, Commissioner of Immigration, made return that the petitioners were aliens and Russians; that they arrived at the port of Seattle, Wash., on December 19, 1913, and made application for admission to the United States; that they were held for special

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

inquiry by the Immigrant Inspector, and a board of special inquiry was appointed in accordance with the provisions of section 25 of the Immigration Act of February 20, 1907; that the board of special inquiry conveyed in the manner provided by law on December 23, 1913, and after a full hearing the board decided to reject the aliens on the ground that they were persons who were likely to become a public charge for the following reasons:

"First, because they are common farm laborers, and there is not work for them in the United States; second, because they have but a limited amount of money, insufficient to maintain them during the winter; third, because there are 800 to 1,000 Russians unemployed in Seattle and thousands of other nationalities in the same condition, and reports from the interior are to the effect that the supply of common labor is far in excess of the demand; fourth, that any addition to the unemployed should be guarded against and alien laborers should not be permitted to enter the United States at this time."

From the decision of the board of special inquiry the petitioners appealed to the Secretary of Commerce and Labor, and the Secretary approved the decision of the board of special inquiry. Upon a hearing before the court the facts set forth in the return of the Commissioner of Immigration were established substantially as alleged in the return. It appeared, further, that the last permanent residence of the petitioners was in Sinnbirsk, Krasnoie, Russia; that their port of departure from Russia was Vladivostock, where passports were issued to them permitting them to leave Russia; thence they took passage to Yokohoma, Japan; thence from Yokohoma to Vancouver, British Columbia, on the steamship "Tamba Maru"; that they were refused landing at the latter port, and thereupon they continued on board of the same vessel to Seattle. The board of special inquiry found that the petitioners were persons likely to become a public charge for the reasons stated in the return of the Commissioner of Immigration. The court thereupon ordered the discharge of the petitioners. From the order of discharge, the appellant brings the case to this court.

Section 2 of the act of February 20, 1907 (34 Stat. 898), as amended by the acts of March 26, 1910 (36 Stat. 263), and March 4, 1913 (37 Stat. 736), provides that certain classes of aliens shall be excluded from admission to the United States. Among these are "persons likely to become a public charge." In section 25 of the same act it is provided—

"that in every case where an alien is excluded from admission into the United States under any law or treaty now existing or hereafter made, the decision of the appropriate immigration officer, if adverse to the admission of such alien, shall be final unless reversed on appeal to the Secretary of Labor."

In the case of Nishimura Ekiu v. United States, 142 U. S. 651, 12 Sup. Ct. 336, 35 L. Ed. 1146, the Inspector of Immigration at the Port of San Francisco, after making the inspection of the alien immigrant, Nishimura Ekiu, as required by the act of March 3, 1891, c. 551 (26 Stat. 1084 [U. S. Comp. St. 1901, p. 1294]), refused to allow her to land, and made a report to the Collector of Customs, stating the facts, which tended to show, and which the inspector decided did show, that she was "a person likely to become a public charge," and was within one of the classes of aliens excluded from admission into the United

States by the first section of the act of March 3, 1891. Section 8 of that act provided that:

"All decisions made by the inspection officers or their assistants touching the right of any alien to land, when adverse to such right, shall be final unless an appeal be taken to the Superintendent of Immigration, whose action shall be subject to review by the Secretary of the Treasury."

The question before the Supreme Court was whether the action of the Inspector of Immigration at San Francisco, refusing to allow the alien immigrant to land, was final. The court held that it was—

"an accepted maxim of international law that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe. * * * In the United States this power is vested in the national government, to which the Constitution has committed the entire control of international relations, in peace as well as in war. It belongs to the political department of the government, and may be exercised, either through treaties made by the President and Senate, or through statutes enacted through Congress, upon whom the Constitution has conferred power to regulate commerce with foreign nations, including the entrance of ships, the importation of goods, and the bringing of persons into the ports of the United States."

The court held, further, that the admission of aliens into the country under the act of 1891 had been intrusted to the supervision of executive officers of the government, and that:

"In such a case, as in all others in which a statute gives a discretionary power to an officer, to be exercised by him upon his own opinion of certain facts, he is made the sole and exclusive judge of the existence of those facts, and no other tribunal, unless expressly authorized by law to do so, is at liberty to re-examine or controvert the sufficiency of the evidence on which he acted."

The court accordingly held that the decision of the inspector that the alien immigrant should not be permitted to land because within one of the classes specified in that act was final and conclusive.

The finality of the decision of the political department of the government respecting the right of an alien to be admitted into the United States, as provided in the act of 1907, is identical with that of the act of 1891, and Congress must be held to have adopted the provision with full knowledge of the construction placed upon it by the judicial department of the government. Furthermore, the substitution in the later act of a board of special inquiry, composed of three officers, at the port of arrival, for the inquiry of a single officer, that of the Superintendent of Immigration, provided in the earlier act, with an appeal to the Commissioner of Immigration at the port of arrival, and from the Commissioner of Immigration to the Secretary of Labor, in place of review by the Secretary of the Treasury, indicates the purpose of Congress to give to the alien every opportunity to present to the political department of the government his claim of right to be admitted into the United States, and to that department full authority to finally and conclusively determine such right.

In the present case the executive officers found that the aliens were persons likely to become a public charge. This is a ground of exclusion provide by law. In reaching this conclusion the officers gave the

aliens the hearing provided by the statute. This is as far as the court can go in examining such proceedings. It will not inquire into the sufficiency of probative facts, or consider the reasons for the conclusion reached by the officers. As said by the Supreme Court:

"Unless and until it is proved to the satisfaction of the judge that a hearing, properly so called, was denied, the merits of the case are not open, and, we may add, the denial of a hearing cannot be established by proving that the decision was wrong." Chin Yow v. United States, 208 U. S. 8, 13, 28 Sup. Ct. 201 (52 L. Ed. 369).

The order and judgment of the court below are reversed, with instructions to dismiss the writ of habeas corpus.

REID v. FARGO et al.

(Circuit Court of Appeals, Second Circuit. April 7, 1914.)

No. 162.

1. ADMIRALTY (§ 117*)—APPEAL—REVIEW—SCOPE.
An appeal in admiralty vacates the decree below, and the cause is tried anew, and parties other than those appealing may have new relief.
[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 748–757; Dec. Dig. § 117.*]

2. SHIPPING (§ 143*)—CARRIAGE OF GOODS—LIABILITY FOR INJURIES.
Stevedores employed by a steamship company to discharge the cargo of a steamship were not liable to the shipper of an automobile injured through the breaking of a rope used in hoisting it from the steamer to the pier, except for negligence.
[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 489; Dec. Dig. § 143.*]

3. SHIPPING (§ 132*)—CARRIAGE OF GOODS—NEGLIGENCE—EVIDENCE—RES IPSA LOQUITUR.
The breaking of a rope used by stevedores employed in unloading a vessel did not in itself establish negligence, but, where the whole operation and the apparatus used was in their exclusive control, it required them to give an explanation.
[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 471–487; Dec. Dig. § 132.*]

4. SHIPPING (§ 132*) — CARRIAGE OF GOODS — NEGLIGENCE — EVIDENCE — WEIGHT AND SUFFICIENCY.
Evidence that a rope used by stevedores in unloading a vessel, and which broke, permitting an automobile to fall into the river, was furnished by the steamship company and was new, free from external defects, of a size sufficient for the load and slung in the usual way, and that the case containing the automobile was raised in the usual manner without jerk or sudden strain, showed that the accident was not due to their negligence.
[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 471–487; Dec. Dig. § 132.*]

5. CARRIERS (§ 178*)—CARRIAGE OF GOODS—LIABILITY FOR INJURIES.
An express company to which an automobile was delivered to be packed and forwarded to a sea port by rail and there delivered to a steamship for transportation, which did so deliver it, and received the steamship company's usual bill of lading to its order, was not an insurer nor a car-

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

rier, but a mere forwarding agent, and was not liable for the negligence of the steamship company or of stevedores employed by it to unload the steamship.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 804–812; Dec. Dig. § 178.*]

6. CARRIERS (§ 180*)—CARRIAGE OF GOODS—LIABILITY FOR INJURIES.

Where an express company, to which an automobile was delivered to be packed and forwarded to a sea port and there delivered to the steamship company for transportation, received the steamship company's usual bill of lading containing a stipulation that the value of the shipment did not exceed $100, on which basis the freight was adjusted, and that the carrier's liability should not exceed that sum unless a value in excess thereof was specially declared and extra freight paid, though it had notice that the car was worth £800, it was not liable to the shipper for its failure to arrange with the steamship company to carry it at that value.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 815–828; Dec. Dig. § 180.*]

7. CARRIERS (§ 180*)—CARRIAGE OF GOODS—LIMITATION OF LIABILITY.

An agreement, in a bill of lading issued by a steamship company for an automobile, that the value of the shipment did not exceed $100, on which basis the freight was adjusted, and that the carrier's liability should not exceed that sum unless a value in excess thereof was specially declared and extra freight paid, was binding and limited its liability for damages to the automobile to $100, though the freight was calculated on measurement and not on value.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 815–828; Dec. Dig. § 180.*]

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

Libel by Ogden M. Reid against James C. Fargo, president of the Adams Express Company. The International Mercantile Marine Company and T. Hogan & Sons, Incorporated, were interpleaded. Decree for libelant, and T. Hogan & Sons appeal. Reversed, with directions.

F. H. Platt, of New York City, for appellant.

W. F. Taylor, of New York City, for Fargo.

N. B. Beecher, of New York City, for International Mercantile Marine Co.

H. S. Harrington, of New York City, for libelant.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

WARD, Circuit Judge. Ogden M. Reid delivered an automobile to the American Express Company at London to be packed and forwarded by it to Southampton by rail, and there delivered to the steamship Minnetonka of the International Mercantile Marine Company for transportation to New York. The express company did so and received the company's usual bill of lading to its order. Upon arrival of the steamer, T. Hogan & Sons, stevedores, under contract with the steamship company, discharged the cargo. The case in the hold was put in a rope sling and hoisted to the deck of the steamer, and, while being carried off to the pier by a Burton fall, the sling broke, and the case fell into the river. Reid filed a libel against the express company, an unincorporated association, of which the respondent Fargo is pres-

ident, to recover the damages. The express company, by petitions under the fifty-ninth rule in admiralty, brought in the steamship company and T. Hogan & Sons as parties.

The District Judge filed no opinion but directed a decree in favor of the libelant against T. Hogan & Sons in the first instance, and, for any deficiency not collected of them, against the American Express Company, and dismissed the petition against the steamship company. T. Hogan & Sons alone appeal from the decree.

[1] New parties brought into a suit under the fifty-ninth rule are treated as if they had been originally proceeded against and must answer the libel. It is the law of this circuit that an appeal in admiralty vacates the decree below, and the cause is tried anew in this court. Other parties without appealing may have new relief. Munson Line v. Miramar Steamship Co., 167 Fed. 960, 93 C. C. A. 360.

[2-4] T. Hogan & Sons had no contract with the libelant and are only liable for negligence. The mere breaking of the rope does not establish negligence, but it does require them to give an explanation which will discharge them of negligence because the case and the steam winches and the whole operation were in their exclusive control. They have shown that the rope was furnished to them by the steamship company; that it was new, free from any external defects, of a size sufficient for the load, was slung in the usual way; and that the case was raised in the usual manner and without any jerk or sudden strain. We think it follows that the accident was not caused by their negligence, but must have been due to a latent defect. The rope belonged to the steamship company and went back into its possession after the accident. It has not been produced because it has been lost. We think that T. Hogan & Sons are not liable to the libelant.

[5, 6] We have next to inquire whether the express company is liable. It was not an insurer nor a carrier, but a mere forwarding agent. It was not liable for any negligence of the steamship company or of the stevedores. The libelant suggests as a ground of liability that, having notice that the car was worth £800, it should have arranged with the steamship company to carry it at that value. No such ground of liability is charged in the libel. On the contrary, it proceeds upon an allegation that the express company agreed to safely carry the car to New York and there deliver it to the libelant. No such agreement or relation has been proved. Shippers almost invariably accept the carrier's ordinary bill of lading, and, in the absence of any evidence, we are not disposed to imply as matter of law a duty on the part of the express company to do otherwise.

[7] Finally we come to the steamship company. It did stand in relation to the libelant of carrier of his car and was an insurer except as to the act of God, the public enemy, and causes excepted in the bill of lading. As we find no exception covering this loss, the steamship company must be held liable. Its bill of lading, however, contained the following clause:

"(1) It is also mutually agreed that the value of each package shipped hereunder does not exceed $100, or its equivalent in English currency on which basis the freight is adjusted, and the carrier's liability shall in no case exceed that sum, unless a value in excess thereof be specially declared, and stat-

ed herein, and extra freight as may be agreed on paid. The carrier is further entitled to the full benefit of all exemptions from liability provided in sections 4281 and 4282 of the United States Revised Statutes [U. S. Comp. St. 1901, pp. 2942, 2943]."

Similar stipulations are held binding in this court. George N. Pierce Co. v. Wells Fargo Co., 189 Fed. 561, 110 C. C. A. 645. But the proctors for the express company contend that, as the freight on the car was calculated on measurement and not on value, this stipulation does not apply. Freight rates on a package and the amount an owner may recover in case of loss are two entirely different things. The parties may agree that for a higher freight the package shall be valued for purposes of recovery at over $100. In this case they have agreed that the value of the car is $100, and that must be taken to be its true value for purposes of the contract of carriage. Of course the stipulation would not apply if the car had been charged an ad valorem freight on a value over that amount. But in this case the freight was charged on measurement.

The decree is reversed, and the court below directed to enter a decree dismissing the libel against the American Express Company, with costs of both courts, and dismissing the petition bringing in T. Hogan & Sons, with costs of both courts against the American Express Company, and awarding the libelant the sum of $100 to be paid by the steamship company, with costs of both courts to the express company.

In re BOYD.

(Circuit Court of Appeals, Second Circuit. April 28, 1914.)

No. 213.

BANKRUPTCY (§ 161*)—VOIDABLE PREFERENCES—COMPUTATION OF TIME—"REQUIRE"—"PERMIT."

Bankr. Act July 1, 1898, c. 541, § 3b, 30 Stat. 546 (U. S. Comp. St. 1901, p. 3422), provides that involuntary petitions may be filed within four months after any act of bankruptcy, and that such time shall not expire until four months after the date of recording or registering a preferential transfer, if by law such recording is "required or permitted." Section 60 relative to avoiding preferences, provides that, where the preference consists in a transfer, the period of four months shall not expire until four months after the day of the recording or registering thereof, if by law such recording or registering is "required." *Held*, that "required," in section 60, does not mean the same as "required or permitted," in section 3b, and hence, where a mortgage given more than four months before bankruptcy, but recorded within that time, was under the state law valid as to judgment and general creditors without recording, it could not be avoided; the words "require" and "permit" expressing different ideas, and the one not ordinarily including the other.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 261–263; Dec. Dig. § 161.*

For other definitions, see Words and Phrases, vol. 7, pp. 6122–6125; vol. 6, pp. 5315–5318; vol. 8, p. 7725.]

Petition to Revise Order of the District Court of the United States for the Eastern 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

This cause comes here on petition by the trustee under a mortgage of real estate located in the city of New York to revise an order of the District Court, Eastern District of New York. The order held that the mortgage constituted a preference under section 60 of the Bankrupt Act and that it was null and void as against the trustee in bankruptcy and the creditors he represents. Reversed.

M. L. Borland, of New York City, for petitioner.

O. A. Lewis, of Brooklyn, N. Y., for respondent.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge. The special commissioner held that the transaction, the giving of the mortgage, was actually fraudulent. Judge Veeder did not concur in this conclusion and on that branch of the case we agree with him. The only question left is one of law, involving the construction of one section of the Bankruptcy Act.

The mortgage was executed in December, 1909; it was recorded September 27, 1911. Boyd filed his petition in voluntary bankruptcy November 1, 1911, on that date there were no creditors other than those who were creditors when the mortgage was executed. Section 3a (2) makes it an act of bankruptcy when a person, while insolvent, transfers any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors. The mortgage in question, upon the proofs was such a transfer. Section 3b provides that petition in involuntary bankruptcy may be filed within four months after the commission of the act of bankruptcy. It further provides that such time shall not expire until four months after date of the recording or registering of the transfer, "if by law such recording is *required or permitted,* or if it is not, from the date when the beneficiary takes notorious, exclusive or continuous possession of the property."

Section 60, however, which deals with the subject of preferential transfers and their avoidance by the trustee in bankruptcy, states the four months period as running "after the date of the recording and registering of the transfer, if by law such recording or registering is required." It is the contention of the trustee in bankruptcy that the phrase last above quoted from section 60 is to be construed as if it were expressed in the same language as the phrase above quoted from section 3. This contention was adopted by the District Judge.

The question then is this: When Congress in section 60 allowed a preferential transfer to be set aside, with a time provision which ran from the date of recording, if the law (of the state where the property was located) *required* recording, did it use the word "required" as meaning both "required" and "permitted"? There have been so very many conflicting decisions in answer to this question that a brief statement of our own opinion will be sufficient. The question was first considered in this circuit in Re Hunt, 139 Fed. 283, where Judge Ray referred to the proceedings in Congress, when the House passed an amendment to section 60 which would make the phrase in question in full accord with the phrase in section 3.

The words "require" and "permit" express different ideas; in the ordinary use of the English language the one does not include the

other. Presumably Congress knew what these words meant and used them to express such meaning. Presumably, also, when it used the one word in part of the act and both the words in another part of the act, it did this intentionally and not by some oversight. We have not here a case where the literal interpretation of the word in a statute will produce absurd, unreasonable, or inequitable results. When the only person to be affected is the bankrupt himself, they use both words, and therefore increase the number of instances in which an insolvent who tries to prefer some creditor may be thrown into bankruptcy. In the other section, however, when under the constitutional power to enact uniform statutes of bankruptcy they are taking away from third parties property to which, under the law of some particular state, they are entitled, it is not surprising that they used only one of the words, thereby decreasing the number of instances in which the title to such property would be disturbed.

It is usually a safe rule in interpreting legislative enactments to assume that the Legislature understood the meaning of the words it used, and intended them to be taken in their ordinary meaning. As to this act, however, we have additional information which, in our opinion, makes the intent of Congress entirely clear. As pointed out in Re Hunt, supra, the attention of Congress was expressly called to the situation; it was advised that, as the act read, the language of section 60 was not as broad as that of section 3. Adopting the report of its judiciary committee, the House passed an amendment for the express purpose of making both sections of equal breadth. The amendment proposed by the House did not fail of concurrence by the Senate merely because the subject was not taken up by that body and disposed of. The House amendments were considered, some of them were adopted and became law, but this one was rejected by the Senate—surely we must assume because the Senate was not willing to broaden section 60 to the extent to which the House sought to broaden it.

We are therefore of the opinion that the four months period of section 60 runs from the date of transfer, except when the state law requires recording, which the statute of New York does not do in the case of a mortgage such as this. It is valid as to judgment creditors and general creditors without recording.

In accordance with the views above expressed are decisions of the Court of Appeals, Fifth Circuit: Little v. Hardware Co., 133 Fed. 874, 67 C. C. A. 46; Meyer Drug Co. v. Pipkin Drug Co., 136 Fed. 396, 69 C. C. A. 240. A different conclusion has been reached in the Sixth Circuit C. C. A., Loeser v. Savings Dep. Bank, 148 Fed. 975, 78 C. C. A. 597, 18 L. R. A. (N. S.) 1233; Carey v. Donohue, 209 Fed. 328, 126 C. C. A. 254; in the Seventh Circuit C. C. A., In re Beckhaus, 177 Fed. 141, 100 C. C. A. 561; in the Eighth Circuit C. C. A., Mattley v. Giesler, 187 Fed. 970, 110 C. C. A. 90. If this were a mere point of practice, we should follow the weight of authority in Circuit Courts of Appeal; but it involves a question of substantive law, and, in the absence of controlling authority, the petitioner is entitled to our own opinion. It would seem desirable that the question be brought before the Supreme Court.

The order is reversed.

ANDERSON, Internal Revenue Collector, v. FORTY-TWO BROADWAY CO.

(Circuit Court of Appeals, Second Circuit. April 28, 1914.)

No. 221.

INTERNAL REVENUE (§ 9*)—CORPORATION TAX ACT—INCOME—INTEREST ON BONDED INDEBTEDNESS.

Corporation Tax Act Aug. 5, 1909, c. 6, § 38, 36 Stat. 112 (U. S. Comp. St. Supp. 1911, p. 946), imposing a tax on the net income of corporations, declares in subdivision 1 of paragraph 2, that the net income shall be ascertained by deducting from the gross income all necessary expense actually paid within the year out of the income of the business, including charges such as rentals or franchise payments required as a condition to the continued use of the property, and provides in subdivision 3 that interest actually paid within the year on bonded or other indebtedness, not exceeding the paid-up capital stock of the corporation outstanding at the close of the year, shall also be deducted. A corporation engaging in the business of buying, mortgaging, selling, and improving real property and letting of buildings erected thereon had a paid-up capital stock of $600, and had a bonded indebtedness of several millions of dollars secured by a mortgage on its realty. *Held*, that subdivisions 1 and 3 must be construed together by construing the indebtedness in subdivision 3 to be the usual corporate indebtedness which is not an ordinary expense of maintenance, nor a charge, payment of which is a condition of the continued use or possession of property, and payments of interest on the bonds essential to the continued use and possession of the property were ordinary and necessary expenses within subdivision 1, and the interest, including interest actually paid within the year, though previously accruing, must be deducted in determining the liability of the corporation.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 13–28; Dec. Dig. § 9.*]

In Error to the District Court of the United States for the Southern District of New York.

Suit by the Forty-Two Broadway Company against Charles W. Anderson, Collector of Internal Revenue of the United States for the Second District of New York. There was a decree of the District Court for complainant (209 Fed. 991), and defendant brings error. Affirmed.

A. S. Pratt, Asst. U. S. Atty., of New York City, for plaintiff in error.

R. S. Baldwin, of New York City, for defendant in error.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. The Forty-Two Broadway Company is a corporation of the state of New York engaged in the buying, mortgaging, selling, and improving of real property and letting of buildings erected thereon. Its capital stock consists of six shares of $100 each. The only business it has ever done was the purchasing of the land and the erection of an office building thereon known as No. 42 Broadway. It executed first and second mortgages on the premises to secure its bonds. The business has always been conducted at a loss. By contract dated April 8, 1910, it sold the premises, and they were actually con-

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

veyed to the purchaser December 30th and settlement made as of September 30, 1910.

February 27, 1911, it filed a return of net income for the year 1910 under section 38 of the Act of August 5, 1909, 36 Stat. 112, c. 6 (U. S. Comp. St. Supp. 1911, p. 946) known as the United States Corporation Tax Law. April 10, 1911, it filed under protest an amended return made out in accordance with the requirements of the Commissioner of Internal Revenue, showing a gross income of $306,817.21 and a net income of $178,136, the assessment upon which of $1,781.36 it paid under protest to the defendant, Collector of Internal Revenue for the Second District of New York. April 15th it appealed from the assessment to the Commissioner of Internal Revenue and demanded a refund. June 5th the Commissioner denied the appeal, and November 4th it brought this action against Anderson to recover the amount paid.

The second paragraph of section 38 describes how net income shall be ascertained:

"Second. Such net income shall be ascertained by deducting from the gross amount of the income of such corporation, joint-stock company or association, or insurance company, received within the year from all sources (first) all the ordinary and necessary expenses actually paid within the year out of income in the maintenance and operation of its business and properties, including all charges such as rentals or franchise payments, required to be made as a condition to the continued use or possession of property; * * * (third) interest actually paid within the year on its bonded or other indebtedness to an amount of such bonded and other indebtedness not exceeding the paid-up capital stock of such corporation, joint-stock company or association, or insurance company, outstanding at the close of the year. * * *"

The company claims that there should have been deducted from the gross income interest paid in the year 1910 as follows:

Interest on first mortgage, a lien on real property of company, securing bond of the company, accrued and paid in 1910.....	$135,000 00
Interest on second mortgage, a lien on real property of company, securing bond of company, accrued and paid in 1910.....	25,000 00
Interest on second mortgage, a lien on real property of company, securing bond of company, accrued prior to 1910, but paid in 1910	76,527 77
Other interest on bonded and other indebtedness of the company, contracted in the maintenance and operation of the business and properties of the company, such interest being a liability incurred or paid as a necessary expense in the maintenance of the business and properties of the company.	
Total of such interest accrued and paid in 1910.....	47,715 16
Total of such interest accrued prior to 1910 but paid in 1910.....	55,274 00
	$339,516 93

The commissioner allowed only interest on so much of the mortgage indebtedness as equaled the paid-up capital stock of $600, viz., $36. If the interest on the company's bonds secured by mortgage on its property accruing and paid in 1910, $160,000, should have been deducted from the gross income, the net income would be $23,171.75 and the tax $231.71, and if the interest accruing in 1909, but paid in 1910, $76,527.77 should also have been deducted, there would be no net income at all, and the whole tax should be refunded.

The government admits that if the interest had not been paid the mortgages would by their terms have fallen due, and if foreclosed the

company would have lost its property. It seems to us that these payments of interest on bonds of a corporation engaged in the realty business secured on its realty were ordinary and necessary expenses in the "maintenance and operation" of such business, and were also charges required to be paid as a "condition of the continued use or possession" of its property within subdivision 1 of paragraph 2 of section 38. As subdivision 3 relates specifically to interest, it should, on accepted principles of construction, control and take interest out of subdivision 1 unless both subdivisions can be construed together consistently so as to leave it in. We think this can be done by construing indebtedness in subdivision 3 to be the usual corporate indebtedness which is not an ordinary expense of maintenance nor a charge, payment of which is a condition of the continued use or possession of property. The bonds of a company like this, engaged in realty business secured by mortgages on its realty, we think is not such an indebtedness. Our conclusion does not depend upon the circumstance that there was in point of fact no net income at all, the business having been conducted at a loss. Corporations in similar case may be taxable when net income is ascertained in the manner provided in the act.

Furthermore, we think that such interest actually paid within the year though previously accruing should be deducted. The act expressly defines both the maintenance expenses and the interest on indebtedness to be such as is "actually paid within the year." This seems to us reasonable because the net income which measures the tax is the income received during the year, and the deductions should be of sums paid during the year. Otherwise there will never be a credit for interest not paid within the year in which it accrued.

The judgment is affirmed.

SLOAN et al. v. HERNDON et al.

(Circuit Court of Appeals, Fifth Circuit. April 14, 1914.)

No. 2586.

1. TRIAL (§ 139*)—TAKING CASE FROM JURY—DIRECTED VERDICT.

A verdict should not be directed unless the conclusion follows, as a matter of law, that the opposite party is not entitled to a verdict upon any view which could be properly taken of the facts which the evidence tends to establish.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 338–341, 365; Dec. Dig. § 139.*]

2. TRESPASS TO TRY TITLE (§ 44*)—SUFFICIENCY OF EVIDENCE—TITLE OF DEFENDANTS.

In trespass to try title, where plaintiffs had established a prima facie case as remote grantees from the patentee, evidence, on the part of defendants, *held* sufficient to warrant an inference that the patentee had transferred the scrip, which was located upon the land in controversy, to the defendants' ancestor prior to its location, and therefore to render a directed verdict for the plaintiffs erroneous.

[Ed. Note.—For other cases, see Trespass to Try Title, Cent. Dig. § 66; Dec. Dig. § 44.*]

*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 District of Texas; Gordon Russell, Judge.

Action by J. H. Herndon and others against T. S. Sloan and others. Judgment for the plaintiffs upon a verdict directed in their favor, and defendants bring error. Reversed and remanded.

Suit was brought in trespass to try title to recover a tract of 573 acres of land situated in Newton county, Tex. Both parties claim to trace their title to W. H. Chambers, the Herndons as vendees by mesne conveyances from the heirs of Chambers, to whom the patent was issued, and the Sloans through their ancestors as purchasers of the Toby scrip, by virtue of which the land was located and patented. This scrip, entitling the holder to 640 acres of land, was issued by Thomas Toby October 10, 1836, to Almonzon Huston and by the latter transferred to William H. Chambers November 12, 1836. The patent, embracing the land in controversy, was issued to "Wm. H. Chambers, his heirs or assigns," on May 13, 1885; the scrip or certificate having been located between September, 1874, and January, 1875. The following statement taken from the record is deemed pertinent: "The uncontradicted evidence in this case established that W. S. Herndon died prior to the institution of this suit, leaving a will. That, under the provisions of the will, J. H. Herndon was named as executor, and duly qualified as such. Plaintiffs introduced in evidence a deed from said J. H. Herndon, executor, to W. Sidney Herndon, for the land in controversy, dated January 6, 1905, duly executed, filed, and recorded. That W. Sidney Herndon died pending this suit, leaving the present plaintiffs as his only heirs. The uncontradicted evidence further established that Mrs. E. S. Sloan was the daughter and only child and heir of Dr. Jos. Taylor; that both she and her husband died pending this suit, in 1907, leaving the defendants as her only heirs. It was agreed between the parties to this suit that the defendants have a witness, who, if present and testifying, would state that he was well acquainted with Dr. Joseph Taylor during his lifetime; that Dr. Taylor resided at Shreveport, La., and was agent for and locator of lands for himself and others; that he dealt in Texas lands; that the witness would further testify that he made search among the papers of Dr. Taylor and among the papers of the daughter of Dr. Taylor after his death, and has been unable to find the land certificate in controversy herein."

Testimony was offered by both parties in support of their respective claims, and upon the conclusion of the evidence, the court peremptorily instructed the jury to return a verdict for the plaintiffs. Pursuant to the instruction, the verdict was rendered and judgment entered in accordance therewith. The defendants below duly excepted to the peremptory instruction and prosecute error to reverse the judgment.

W. D. Gordon and Thos. J. Baten, both of Beaumont, Tex., for plaintiffs in error.

Ben B. Cain, of Dallas, Tex., and H. E. Lasseter, of Tyler, Tex., for defendants in error.

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

MAXEY, District Judge. [1] The question requiring consideration is whether the trial court erred in taking the case from the jury, and in giving a peremptory instruction in favor of the defendants in error. Upon this subject, the Supreme Court, in the case of Texas & Pacific Railway Co. v. Cox, 145 U. S. at page 606, 12 Sup. Ct. at page 909, 36 L. Ed. 829, has announced the following rule:

"The case should not have been withdrawn from the jury unless the conclusion followed, as matter of law, that no recovery could be had upon any view which could be properly taken of the facts the evidence tended to es-

tablish. Dunlap v. Northeastern Railroad, 130 U. S. 649, 652 [9 Sup. Ct. 647, 32 L. Ed. 1058]; Kane v. Northern Central Railway, 128 U. S. 91 [9 Sup. Ct. 16, 32 L. Ed. 339]; Jones v. East Tennessee, Virginia & Georgia Railroad, 128 U. S. 443 [9 Sup. Ct. 118, 32 L. Ed. 478]."

Applying the foregoing rule to the present suit, it seems to us that the case should have gone to the jury upon the facts. After the defendants in error had established a prima facie case, by showing that they stood in the attitude of purchasers, through mesne conveyances from the heirs of W. H. Chambers, the plaintiffs in error introduced evidence tending to show: (1) That their ancestor, Dr. Joseph Taylor, was agent and locator of lands for himself and others; (2) that he owned several tracts of land in Newton county; (3) that Dr. Taylor employed the county surveyor of Newton county to locate the scrip in question, and that it was located on the land in controversy between September, 1874, and January, 1875; (4) that Dr. Taylor claimed to own the scrip at the time of its location; (5) that the patent was issued in 1885, and, when this suit was instituted, it was in the possession of the Sloans; (6) that taxes were paid on the land by the Sloans for a number of years; (7) that there was correspondence between Dr. Taylor and others, and after his death in 1881, between the Sloans and others, tending to show that Dr. Taylor claimed to own the land; (8) that by common repute in the neighborhood where the land is situated, although the evidence on this point is conflicting, the land was regarded as belonging to the Taylor heirs; and (9) that the heirs of Chambers, nonresidents of Texas, asserted no claim of ownership by payment of taxes or otherwise until they executed a power of attorney to McFarland in 1886, which was not recorded until 1899, about the time the Chambers heirs, by their agent, McFarland, conveyed to W. S. Herndon November 18, 1899.

In view of the foregoing and the lapse of time intervening between the location of the Toby scrip and the institution of the present suit, we are of the opinion that the cause, under proper instructions, should have been submitted to the jury.

[2] We neither express nor intimate an opinion touching the facts, except to say there was sufficient evidence tending to warrant the presumption, which is one of fact, that Chambers had transferred, or might have transferred, the Toby scrip to Taylor prior to its location. See Fletcher v. Fuller, 120 U. S. 534, 7 Sup. Ct. 667, 30 L. Ed. 759; Le Blanc v. Jackson (Tex. Civ. App.) 161 S. W. 60. If a transfer by Chambers had been made, whether orally or in writing, it would necessarily follow his heirs were without title to the land, and hence that W. S. Herndon took nothing as their vendee. To avoid possible misconception, it may be said that the question of innocent purchaser has not been considered by us in the decision of this case.

For the error of the court in giving the peremptory instruction complained of, the judgment is reversed, and the cause remanded for a new trial.

WILSON v. KNOWLES.

(Circuit Court of Appeals, Second Circuit. April 28, 1914.)

No. 26.

1. APPEAL AND ERROR (§ 997*)—PRESUMPTIONS TO SUPPORT JUDGMENT—DIRECTED VERDICT.

Where both parties moved for a directed verdict, and, upon a direction for plaintiff, defendant made no further motion, they were concluded by the finding of any facts supporting the direction.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4023, 4024; Dec. Dig. § 997.*]

2. CORPORATIONS (§§ 252, 261*)—STOCKHOLDERS—LIABILITY AS GUARANTORS—CONDITIONS PRECEDENT.

The three organizers and sole stockholders in a corporation, one of whom was plaintiff's brother, in consideration of plaintiff's indorsement of the corporation's note for the amount borrowed from a bank as working capital, guaranteed to hold him harmless to the extent of one-third each of the amount borrowed; the instrument further providing that the entire capital stock was delivered to plaintiff, and was to be returned when he was relieved of his obligation as an indorser. *Held* that, construing the agreement in the light which the situation afforded as to the intent of the parties, plaintiff was not required to exhaust his remedies against the corporation or against the collateral before suing on the guaranty, and the fact that subsequent to the agreement the other stockholders assigned their stock to plaintiff's brother in consideration of his agreement to relieve them from liability under the guaranty imposed upon plaintiff no duty of resorting to the corporation or the collateral.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1016–1023, 1068–1075, 2268–2271; Dec. Dig. §§ 252, 261.*]

In Error to the District Court of the United States for the Southern District of New York.

This cause comes here upon a writ of error to review a judgment of the District Court, Southern District of New York, in favor of defendant in error, who was plaintiff below. The action was brought upon a written contract executed by defendant Henry H. Wilson, by his brother, and by H. H. Knowles, a brother of the plaintiff. This agreement provided that:

"In return for [plaintiff's] indorsement on a note of the Santo Sales Company of New York for $25,000 for six months received by [them] this day they guarantee to hold [plaintiff] harmless to the extent of one-third each of the above amount; the understanding being that he will again indorse a note for a like amount, or less, as they may desire, at the expiration of said six months for another like period, their guaranty under this paper to be continued in that event."

The document further states that there is handed plaintiff by the three duly indorsed certificates for the entire capital stock of the Santo Sales Company, which are to be returned when plaintiff is relieved of his obligation as an indorser. Affirmed.

J. McG. Goodale, of New York City, for plaintiff in error.

G. N. Hamlin, of New York City, for defendant in error.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

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

LACOMBE, Circuit Judge. [1] Both sides, at the close of the case, asked the court to direct a verdict, and, upon direction in favor of plaintiff, defendant made no further motion. They are therefore concluded by the finding of any facts which support the direction. Sena v. American Turquoise Co., 220 U. S. 497, 31 Sup. Ct. 488, 55 L. Ed. 559.

[2] The three persons signing the contract organized the Santo Company to carry on the business of selling vacuum cleaners. Plaintiff was in no way connected with that business or interested therein. The note made by the Santo Company was duly indorsed by plaintiff, and was discounted at the National Copper Bank; the proceeds going to the company. About three months thereafter the three disagreed as to the conduct of the business. Defendant and his brother withdrew and assigned their stock to H. H. Knowles, in consideration of his agreeing to relieve the Wilsons from liability to his brother under the guarantee in suit. Of this disagreement, withdrawal, and assignment plaintiff was not at the time informed. The company failed to take up the note when it came due on April 26, 1910, whereupon it was taken up by plaintiff, who gave the bank $12,500 in cash and his personal note at six months for $12,500.

The contention of plaintiff in error is that the court erred in directing a verdict because plaintiff did not prove that he had exhausted whatever remedies he might have against the maker of the note (the Santo Company) and against the stock which had been deposited as collateral. The theory is that the words "hold harmless" imported merely a guaranty against loss and not a guaranty that the note would be paid at maturity. Standing alone they might be thus construed, under the authorities; but they do not stand alone, and this written instrument, like most written instruments, must be interpreted in the light which the situation affords as to the intent of the parties who executed it. The respective rights and obligations of the parties to this action were settled by the contract, and were not changed by any subsequent agreement between the two Wilsons and plaintiff's brother, not entered into with plaintiff's assent, or even with his knowledge.

The contract to hold harmless was quite well described in one of defendant's letters (October 26, 1909) as "a personal matter" between plaintiff and the three, in which the Santo Company was not concerned. The three wished to go into business, and decided to do so as the Santo Company, of which they were sole stockholders. They could not do so without money ($25,000) as working capital. The bank apparently would not lend them that sum on what they had to offer, viz., the Santo Company note, their stock as collateral, and their individual credits. To obtain this money they got the plaintiff to indorse a note of the company for that amount, on which note, when thus indorsed, the bank was willing to loan the money. Plaintiff got nothing by the transaction; he merely obliged them by so doing. Under these circumstances we think the words "guarantee to hold harmless" should be given the broadest construction of which they are susceptible. What was meant was that his indorsement, given merely as a friendly act to accommodate the three, should not come back to trouble him; that they would so provide for the note which he had indorsed that

such indorsement would not harm him in any way. It was not the intention of the parties that, in return for his kindness, he should first be put to the trouble of suing the company to get back the money he had to pay, and to the further trouble of selling the collateral to try and realize something on it. The promise that the collateral was to be returned to the persons who put it up, "when he was relieved of his obligation as an indorser," seems to indicate that the true construction of the contract is that by it this defendant was obligated to see to it that one-third of the note was taken care of. When he shall have done this he will be entitled to receive from plaintiff the one-third of the stock which he put up as collateral to secure such obligation.

The judgment is affirmed.

SPEARS v. FRENCHTON & B. R. CO.

(Circuit Court of Appeals, Fourth Circuit. February 13, 1914.)

No. 1205.

BANKRUPTCY (§ 210*)—RECOVERY OF PROPERTY—ADVERSE CLAIMS.

Where a bankrupt's trustee filed a petition for delivery to him of the property of a railroad corporation, alleged to belong to the bankrupt, but the railroad company as a corporation claimed the property adversely and denied the jurisdiction of the bankruptcy court to determine such claim in a summary proceeding, the referee was without jurisdiction to hear and determine the claim.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 321–323; Dec. Dig. § 210.*]

Appeal from the District Court of the United States for the Northern District of West Virginia, at Philippi; Alston G. Dayton, Judge.

In Bankruptcy. Petition by Samuel T. Spears, as trustee in bankruptcy of Newell Brothers Lumber Company, against the Frenchton & Burnsville Railroad Company to compel defendant to deliver its assets to petitioner as a part of the bankrupt's estate. From a decree setting aside a referee's order granting the relief prayed, petitioner appeals. Affirmed.

B. M. Hoover, of Elkins, W. Va., for appellant.

H. Roy Waugh, of Buckhannon, W. Va., and Langfitt & McIntosh, of Pittsburgh, Pa., for appellee.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

PRITCHARD, Circuit Judge. On the 28th day of December, 1912. S. T. Spears, special receiver in the matter of Newell Brothers Lumber Company, a corporation, bankrupt, in bankruptcy, in the District Court of the United States for the Northern District of West Virginia, filed his petition before M. H. King, referee, before whom said bankruptcy proceedings were pending. The petition alleged that the said Newell Brothers Lumber Company was the owner of a certain railroad together with certain equipment connected therewith, being the same property formerly owned by the Frenchton & Arlington Railway Com-

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

pany and conveyed by C. E. Specht to the Newell Brothers Lumber Company; that the Frenchton & Burnsville Railroad Company claimed to be the owners of this property, but the petition denied that it had ever acquired any title thereto, and asked that a copy of said petition be served upon said railroad company in order that the title to said property be determined and that possession thereto might be acquired for the receiver or a trustee in case one should thereafter be appointed.

The referee directed that a copy of the petition, together with a copy of the amended petition, filed by the creditors of said bankrupt on the 5th day of October, 1912, be served on the Frenchton & Burnsville Railroad Company, returnable on the 14th day of January, 1913.

The appellee filed an answer to the petition, appearing specially for the purpose of denying the jurisdiction of the referee on the petition and for no other purpose, and among other things alleged that the property in question was not the property of the bankrupt; that the bankrupt had no interest therein; that the property was and is the sole property of the Frenchton & Burnsville Railroad Company; that the same was and is in the sole and exclusive possession of the said railroad company; that it was not amenable to the jurisdiction of the court of bankruptcy; and that if any claim was made to the ownership of said property by any person or corporation the railroad company was entitled to the usual process of law in defense of its rights, and it denied the right of the petitioner to proceed upon motion and rule in a summary manner.

Copies of said petition were served, and on the 14th day of January the matter came on for hearing upon answer of the said railroad company, and depositions of F. A. Holsberry, H. C. Clark, Samuel T. Spears, E. C. Young, and H. B. Young, and after considering the same the referee directed that Samuel T. Spears take possession of all the property, real, personal, and mixed, appertaining to the Frenchton & Burnsville Railroad Company, or claimed by it or by the Newell Brothers Lumber Company, and the question of title of said property was reserved for the future order therein.

From this order the Frenchton & Burnsville Railroad Company appealed to the District Court, and on the 7th day of June, 1913, that court entered an order setting aside the order made by the referee on the 14th day of January, 1913.

The trustee took an appeal from the order of the District Court, and the matter now comes here on appeal.

In disposing of this matter the court below, after referring to the contention of the parties, said:

"They have secured from the reference a summary order, entered upon notice however, directing the receiver of the bankrupt to take possession of and operate it and are further praying the referee to direct sale thereof as the property of the bankrupt liable for its debts. The prayer for, and the summary order directing the taking possession of the road, in effect, admits that such possession was in the railroad company. A railroad company, duly incorporated, is not subject to the bankrupt law. It may be true that a bankrupt may be the owner of its stock; it may have the same officers as the bankrupt, and yet it is a corporation, having a separate identity from the bankrupt one. Under such conditions, I think the referee erred in assuming jurisdiction over it by summary proceeding; that the extent he could go was to author-

ize the trustee, when appointed, to institute, either in this or a state court, under authority of section 702, an independent suit to assert title to the property and to set aside any transfer or lease thereof by the bankrupt company to the railroad company, and this because of the claim made by the latter to the property and its admitted possession thereof. Collier on Bankruptcy (9th Ed.) 957. A receiver cannot maintain such suit. Frost v. Latham & Co. (C. C.) 181 Fed. 866, 25 Am. Bankr. Rep. 313."

It appearing, as we have stated, that appellee, in its answer, among other things, avers that it is the owner of said property, "adverse to all persons and in possession of the same," we are of the opinion that the ruling of the lower court was proper.

It is well settled that, where one seeks to recover property from an adverse claimant for the estate of the bankrupt, such is not a proceeding in bankruptcy, and that the referee is without jurisdiction to hear and determine any questions arising thereunder. Loveland on Bankruptcy, vol. 2, § 540; Louisville Trust Co. v. Comingor, 184 U. S. 18, 22 Sup. Ct. 293, 46 L. Ed. 413; In re Hayden (D. C.) 172 Fed. 623; First National Bank of Chicago v. Chicago Title & Trust Co., 198 U. S. 280, 25 Sup. Ct. 693, 49 L. Ed. 1051.

For the reasons stated, the decree of the lower court is affirmed.

Affirmed.

AUGUSTA GROCERY CO. v. SOUTHERN MOLINE PLOW CO.

In re RUTLAND-PERRY CO.

(Circuit Court of Appeals, Fourth Circuit. February 5, 1914.)

No. 1192.

BANKRUPTCY (§ 140*)—PROPERTY VESTING IN TRUSTEE—VOID LIENS.

Under Civ. Code S. C. 1912, § 3740, providing that agreements by which a vendor or bailor reserves any interest shall be null and void as to subsequent creditors, unless in writing and recorded, where a contract by which a vendor reserved title was not recorded and the vendee became bankrupt, the property was held by the trustee for the benefit of all the creditors of the bankrupt, whether subsequent or antecedent creditors.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 198, 199, 219, 225; Dec. Dig. § 140.*]

Petition for Revision of Proceedings of the District Court of the United States for the Eastern District of South Carolina, at Columbia, in bankruptcy; Henry A. M. Smith, Judge.

In the matter of the Rutland-Perry Company, bankrupt. On petition by the Augusta Grocery Company to review an order reversing an order of the referee relative to the disposition of the proceeds of property sold the bankrupt by the Southern Moline Plow Company. Reversed.

J. Fraser Lyon, of Columbia, S. C., for petitioner.

T. C. Callison, of Lexington, S. C. (Thurmond, Timmerman & Callison, of Lexington, S. C., on the brief), for respondent.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

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

PRITCHARD, Circuit Judge. This is a petition to superintend and revise, in matter of law, proceedings of the District Court of the United States for the Eastern District of South Carolina.

On the 18th day of January, 1913, the Rutland-Perry Company, a corporation organized under the laws of South Carolina, was adjudged bankrupt, and thereafter a trustee was duly appointed who, with other chattels, took into his custody certain vehicles which were conditionally sold by the Southern Moline Plow Company, to the bankrupt. The terms and conditions under which the sale was made were in writing and the petitioner bases its claim upon the following provisions of the contract:

"All goods shipped under this contract and the proceeds of sale thereof, shall be and remain the property of Southern Moline Plow Company and subject to their order, at any time they may deem themselves insecure and until all the conditions of this contract are complied with, including the final payment in full of said goods."

Section 3740 of the Code of Laws of South Carolina, 1912, vol. 1, provides that every agreement between the vendor and vendee, bailor or bailee of personal property, whereby the vendor or bailor, shall reserve to himself any interest in the same, shall be null and void as to subsequent creditors (whether lien creditors or simple contract creditors), unless the same be reduced to writing and recorded in the manner now provided by law for the recording of mortgages, and,

Section 3542 of the Code of Laws of South Carolina, 1912, vol. 1, provides that mortgages shall be valid, so as to affect from the time of delivery or execution the rights of subsequent creditors, only when recorded within ten days from the time of such delivery or execution.

It is contended by counsel for respondent that under the law in this case "the antecedent creditors of Rutland-Perry Company cannot participate in the proceeds realized from the sale of the property sold by, and mortgaged to, the Southern Moline Plow Company, although the said mortgage was never recorded."

It is admitted that the mortgage in question was not recorded in accordance with the laws of South Carolina.

Under these circumstances, the only question involved in this controversy is as to whether the trustee is the owner of the vehicles in question for the benefit of all creditors of the Rutland-Perry Company, bankrupt.

In the case of Millikin v. Second National Bank of Baltimore, 30 Am. Bankr. Rep. 477, 206 Fed. 14, 124 C. C. A. 148, this court decided the question involved in this controversy adversely to the contention of the respondent.

Also the following cases are to the same effect: Williamsburg Knitting Mills Co. (D. C.) 27 Am. Bankr. Rep. 178, 190 Fed. 871; In re Kreuger (D. C.) 27 Am. Bankr. Rep. 623, 199 Fed. 367; In re Farmers' Supply Co., 28 Am. Bankr. Rep. 535, 196 Fed. 990.

We are therefore of the opinion that the court below erred in reversing the order of the referee, wherein it was held that the trustee held the property in question for the benefit of all the creditors of the bankrupt.

We deem it proper to say in this connection that the opinion of this court in the case of Millikin v. Second National Bank of Baltimore had not been announced at the time the decree was entered in the court below.

For the reasons stated, the judgment of the lower court is reversed.

Reversed.

HILDRETH v. LAUER & SUTER CO.

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

No. 1208.

PATENTS (§ 328*)—VALIDITY—CANDY-PULLING MACHINE.

The Hildreth patent, No. 832,384, for a candy-pulling machine, claim 4, construed literally and according to its natural import, is void as covering more than complainant actually invented.

Appeal from the District Court of the United States for the District of Maryland, at Baltimore; John C. Rose, Judge.

Suit in equity by Herbert L. Hildreth against the Lauer & Suter Company. Decree for defendant (204 Fed. 792), and complainant appeals. Affirmed.

Geo. P. Dike, of Boston, Mass. (MacLeod, Calver, Copeland & Dike, of Boston, Mass., on the brief), for appellant.

Geo. W. Lindsay and J. Royall Tippett, both of Baltimore, Md. (R. B. Tippett & Son and E. Walton Brewington, all of Baltimore, Md., on the brief), for appellee.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

PER CURIAM. This suit involves the validity and alleged infringement of claim 4 of appellant's patent, No. 832,384, issued October 2, 1906, for a candy-pulling machine, which claim reads as follows:

"4. A candy-pulling machine comprising means for supporting the candy against gravity, means for pulling the candy, and means for producing a relative in-and-out motion of said supporting and pulling means."

The trial court reached the conclusion that this claim, construed literally and according to the natural import of its terms, must be declared invalid because it covers much more than appellant has actually invented, even if it be not invalid as describing a mere function or operation of a machine, and that, if so construed as to sustain its validity, it is not shown to be infringed by appellee's machine.

We are satisfied, after full consideration, of the correctness of this conclusion, and deem it unnecessary to add anything to the reasons assigned in the clear and careful opinion of Judge Rose. 204 Fed. 792.

The decree appealed from should be affirmed.

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

RAILROAD SUPPLY CO. v. ELYRIA IRON & STEEL CO.

(Circuit Court of Appeals, Sixth Circuit. April 7, 1914.)

No. 2322.

PATENTS (§ 328*)—INVENTION—RAILWAY TIE PLATES.

The Wolhaupter patents No. 538,809, claim 8, No. 691,332, claims 1, 2, and 3, and No. 721,644, claims 7 and 9, all for railway tie plates, are void for lack of invention, in view of the prior art.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Ohio; William R. Day, Judge.

Suit in equity by the Railroad Supply Company against the Elyria Iron & Steel Company. Decree for defendant, and complainant appeals. Affirmed.

T. E. Brown, of Chicago, Ill. (C. C. Linthicum and Clarence E. Mehlhope, both of Chicago, Ill., of counsel), for appellant.

F. F. Reed and Edward S. Rogers, both of Chicago, Ill., and James Negley Cooke, of Pittsburgh, Pa. (F. P. Fish, of Boston, Mass., of counsel), for appellee.

Before WARRINGTON and DENISON, Circuit Judges, and SATER, District Judge.

SATER, District Judge. The plaintiff is the owner of the three Wolhaupter patents numbered 538,809, 691,332, and 721,644, issued May 7, 1895, January 14, 1902, and February 24, 1903, respectively. The evidence before us is said to be the same as that on which the case was heard not only in the District Court, but previously by Judge Kohlsaat, in Railroad Supply Co. v. Hart Steel Co , 193 Fed. 418. The trial court, as the result of an independent study, concurred in the conclusion reached in such reported case and dismissed the bill. The case stands for decision on appeal.

The plaintiff charges that the defendant, by its manufacture of certain tie plates and its sale of the same through a selling agent, the Hart Steel Company, to the Atchison, Topeka & Santa Fé Railroad Company, infringed claim 8 of the plaintiff's first patent, claims 1, 2, and 3 of its second patent, and claims 7 and 9 of its third patent. The respective claims so alleged to be infringed are as follows:

"(8) A railway tie plate formed on the under side with devices more or less sharpened adapted to penetrate and engage the tie, and on its upper side with a series of flanges on which the rail rests, substantially as described."

"(1) A railway tie plate provided on its upper side with one or more flanges on which the rail may rest or by which it is directly sustained, and on the under side with one or more tie-engaging flanges extending parallel with the upper flanges and directly beneath the latter, substantially as described."

Claim 2 is the same as claim 1, excepting it specifies by insertion after the word "latter" that the lower flanges are "sharpened to permit them to readily enter the tie."

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

Claim 3 is made different from claim 2 by adding before the words "substantially as described" the further element:

"And on the upper side with an additional flange or flanges extending above the plane of the rail sustaining flanges and adapted to receive the lateral thrust of the rail."

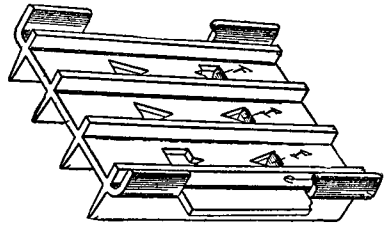
"(7) A tie plate provided in its rail supporting surface with transverse grooves or channels, and at one margin of said supporting surface with a transverse rail-abutting shoulder."

Excepting the limiting phrase, "reaching to the edge of the plate," added after the words "grooves or channels," claim 9 is the same as claim 7.

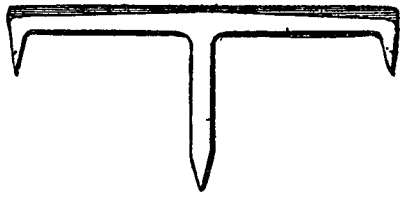
In support of its defense of noninfringement, the defendant avers: (1) That the state of the art and of tie plate manufacturing on the respective dates on which the three letters patent were issued was such that each and all of them are void for want of novelty or invention; (2) that if, however, any patentable invention is disclosed in any one or more of the letters patent, the claims must be limited to the specific devices therein set forth, and cannot be so broadened as to include the defendant's tie plate; and (3) that there is no patentable combination shown in the specifications and claims of any of the letters patent, in that the different elements or parts which are claimed to be in combination are all old individually and collectively, and are mere aggregations, having no correlative or modified functions or action upon each other or any joint contributive action in producing any new result, either originally or in Wolhaupter's devices.

A cross-section or end view of the tie plate covered by the first of the patents in suit and drawings of the tie plates delineated and described in the second and third of such patents, respectively, are successively shown as follows:

Wolhaupter Device, First Patent.



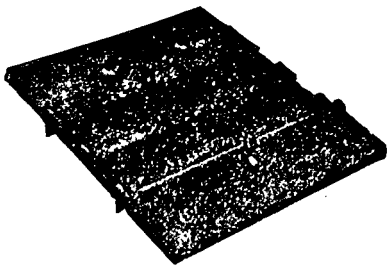
Wolhaupter Device, Second Patent.



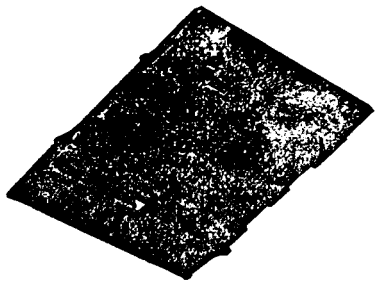
Wolhaupter Device, Third Patent.

The modified forms of the T-shaped plates appearing in the third patent, on account of their general resemblance to the form above shown, need not be reproduced.

The first of the next following illustrations represents a form of tie plate manufactured by the plaintiff for commercial use, and claimed by it to be within the terms of the patents and to be infringed; the second, that made by the defendant:



Plaintiff's Tie Plate.



Defendant's Tie Plate.

The form of plaintiff's commercial plate may be varied by the use of additional top surface grooves and rail sustaining flanges.

The primary question is the validity of the patents in suit. It is not necessarily the only question for decision, nor will the correspondence of defendant's device with some one or more of the claims in suit conclusively settle the question of infringement. Westinghouse v. Boyden Power-Brake Co., 170 U. S. 537, 568, 569, 18 Sup. Ct. 707, 42 L. Ed. 1136. In view, however, of the resemblance between the tie plates last above shown and of the manifest dissimilarity in appearance between the plaintiff's tie plates in commercial use and those shown and described in the drawings and specifications, the construction, whether broad or narrow, to be placed on the patents, if valid, becomes determinative of the rights of the litigants. The two questions are so related and so dependent on the prior state of the art that a consideration of the one necessarily runs into that of the other. The transition from the relatively small and lightweight engines and cars which characterized early railroading to the larger, weightier, and speedier engines and heavier, more capacious, and more heavily loaded cars provoked activity among inventors in devising means, including railway chairs and tie plates, to prevent the spreading of the track, due to lateral strain, and the destruction of the tie from abrading and cutting action of the rail. Before Wolhaupter applied for the first of the patents in suit, tie plates had assumed, as regards their lower portions, two well-known styles or forms: (1) Those whose downward-extending ribs or flanges were adapted to enter the tie longitudinally and parallel with its grain, so as to separate, but not to cut, the fiber; and (2) those whose downward-projecting devices were so disposed as to extend transversely of the grain of the fiber, and, in consequence, to cut into and sever the same. The distinctive character of each of the forms and the theory of which it is expressive are recognized by Wolhaupter in his patent No. 530,738, issued in 1894, as well as by his predecessors, Reece and Servis, in their respective patents, No. 488,662, 1892, and No. 524,868, 1894. Those of the second form have, with substantial uniformity, employed but two shallow continuous lower ribs, excluding from con-

sideration those on which mere projections are used. The apparent reason for adopting that form of construction is the relatively greater resistance of the transverse ribs not only to the force applied to imbed them in the ties, but also, on account of their pressure throughout their entire length against the compressed or severed fiber, to the outward or lateral thrust of the rail. With equal uniformity, patentees of plates of the first form have called for more than two (i. e., a series of) lower flanges with comparatively sharp lower edges and of greater length in comparison with both the lower ribs of those of the first form and also the thickness of the body of the tie plate. Their greater number and greater length are designed to increase their resistance to the lateral pressure of the rail, such resistance being restricted to the friction of the fiber against their sides and its compression by their blunt ends. For his patent of 1894, and for each of those in suit, Wolhaupter chose a device of the first above-mentioned form. In that of 1895 he alludes to the further well-known classification of plates (whatever direction or character their flanges may assume) with reference to their top surfaces —those having such surfaces smooth and those having flanges to receive the outward thrust of the rail. As his patent betrays a knowledge of variously constructed plates then on the market, he might well have further recognized and specifically named those whose upper surface is grooved or channeled. Experience taught that the lateral thrust of the rail against the outer top flange of tie plates, having such, caused the under flanges engaging the tie lengthwise to compress the wood fiber, and that such compression permitted the plates to creep toward the end of the tie, thus widening the gauge and increasing the pressure and abrading action on the spike. On account of thus lengthening the depression or indentation made in the tie by the lower flanges, it was, he says, practically impossible, when the plates had once moved, to return them to their original and proper position. He therefore, in such patent—the first in suit—provided a preferably truss-shaped, or, as distinguished from a flat or plain top surface, a "corrugated" or ridged plate on which to rest the rail between two upward-projecting flanges against which the rail abuts, and blunt or square-ended, regularly stepped, lower flanges, supplementary to the spikes, which lower flanges are cut on a line diagonal with the rail, are preferably made with comparatively sharp lower edges, and extend downward directly below the grooves or valleys on the top of the plate sufficiently to become rather deeply imbedded in the tie. If preferred, the plate, instead of the flanges, may be cut diagonally to the rail. The distinguishing feature of his device is not a series of relatively narrow, flat-topped, supporting surfaces suitably spaced apart, i. e., a corrugated top surface for the plate, as distinguished from a flat or plain top surface; for, in alluding to the permissible variations in construction, none of which was to depart from the prime object of his invention, which is the stepped flanges or lower stepped projections, he states that the flanges may be divided; that instead of flanges stepped projections may be used; that a square, instead of a beveled, plate may be employed, and the under flanges alone be stepped; that but one end of the plate need be stepped; or that flanges having one or more of their ends stepped

might be applied to a flat plate or to the numerous other constructions of plates then on the market. His top surface construction may be entirely omitted. Disregarding his thirteenth claim, which relates wholly to spike holes, each of his remaining 13 claims covers his lower flanges, and but 4 of them mention his upper flanges. The body of his plate may be changed, or may assume the form shown in some prior invention, but his stepped form of lower flanges or projections must be used, else his purpose to prolong the life of the tie cannot be attained. The language employed in his patent precludes the substitution for them of any alternative form. To locate his flanges parallel with the rail necessitates an abandonment of the "prime object" and "essential idea" of his invention, which he declared to consist in providing a plate having on its under side a series of stepped flanges or projections arranged in a diagonal line with respect to the rail flange. The purpose of his peculiar form of construction is that the plate, after it has by lateral pressure been longitudinally displaced, may, for the purpose of prolonging the use of the tie, be taken up and the original gauge restored and the spikes relieved of undue pressure by so placing the plate on the tie that one of its flanges will, by pressure make a new indentation and each succeeding flange will fit into a previously formed depression, with its blunt end abutting against the previously compressed fiber, whose power to resist the outward thrust of the rail is enhanced by the depth of the indentations produced by his necessarily somewhat lengthened flanges. He contemplated two adjustments of the character mentioned, and, if stepped flanges be placed at both ends of the plate, additional readjustments to continue the life of the tie may be made by turning it end for end. If this last form of construction be adopted, it would seem there must necessarily be, to accomplish fully the inventor's purpose, an upward-projecting flange at each side of the plate, to receive the lateral thrust of the rail. It should be said, however, that there is no call in his eighth claim for such flanges. The prominence which he gives to the adjustable feature of his plate and the means of securing the same, as evinced by his later patent, No. 579,509, 1897, convinces us that the thought of a tie plate with other than somewhat lengthy, blunt-ended, stepped flanges or projections to engage the ties parallel with the fiber was not present when the first patent in question was issued, or when he obtained his patent No. 542,787, in 1895; and in his last two patents in suit the expressed preference for flanges of that character declared in 1894 still persisted.

The leading purpose of his second patent, which is conceded to be an improvement upon, and a carrying forward of, the invention shown in the first patent in suit, is to locate his four preferably long, sharp, narrow, longitudinal, tie-engaging flanges directly or substantially beneath his four narrow, preferably flat-topped, rail-sustaining flanges, whose parallel sides are perpendicular to the intervening flat-bottomed top grooves or channels, that the weight may be sustained at points where the pressure on the plate is greatest and buckling thereby minimized. At each side of the top of the plate is a turned up portion to form abutting flanges to receive the thrust of the rail. The only element in his device whose omission was deemed unimportant is the

punched out triangular teeth. His rail abutting flanges and lower ribs are substantially those shown in the patent to Reece, No. 494,692, 1893.

The dominant thought in the patentee's mind, as disclosed by his third patent in suit, was, aside from his purposed economy in the use of old rails, a T-shaped tie plate whose principal flange shall conform somewhat closely to the shape of the upper portion of the rail out of which it is to be made, and whose top surface configuration shall be such that water, sand, and other deleterious substances, such as brine dripping from cars, will drain off or away from the plate. He therefore provided downward-sloping grooves on the top of his plate, which may run parallel with, but are preferably transverse or diagonal, to the tie, and longitudinal tie-engaging flanges projecting from its lower surface, that the suction of the train, which, in passing, is transverse to the plate, may be utilized in clearing the plate of any material that may find lodgment on it. His main holding flange of unusual length, on which he lays stress, is central of the plate. It is therefore made much longer than those at the edge, whose office is to force the wood of the tie inward to a firm and close contact with the central flange, to prevent the lifting of the outer edges of the plate, and to exclude moisture and sand from its under surface. He suggested no substitute for this particular shaped flange, which, as he understood, had in practice been abandoned. On the contrary, he intended to restore it to use and good repute. His other lower flanges are but auxiliary.

All of the flanges and grooves, both upper and lower, of the defendant's commercial tie plate run transversely of the tie. The lower ones are sunk into the tie by the pressure of the loads passing over them, and, by reason of the lateral thrust, compress the wood fiber outwardly throughout their entire length. As compared with the device shown in Wolhaupter's first patent, they are not stepped or given an arched effect to support the tie plate, and do not project immediately below the bottom of the valleys of the upper grooves, but are V-shaped, and extend from a flat under surface at points directly or substantially beneath, but not between, the upper rail-bearing flanges. The defendant's plate has an upward extending flange, like that of Wells, No. 203,570, 1878, and of Goldie, No. 485,030, 1892, against which the rail bears by reason of the lateral thrust. No such element is called for in any of the claims in question, excepting 3, 7, and 9. It has no long, narrow, sharpened flanges, nor a central flange of that character, because they are not necessary to insure efficiency. They extend, like those shown in Wolhaupter's second patent and that of Goldie, No. 485,030, Fig. 1, from directly or substantially beneath rail-bearing flanges, but not to afford means for sustaining the weight "at the points where there is the greatest pressure on the plates." The weight of the passing loads is sustained by the bottom of defendant's plate, and not by its lower flanges. Were it otherwise, in the absence of a central flange, its plates would probably break at the middle. The use, in connection with defendant's device, of a central flange like that shown in Wolhaupter's third patent, or of one approximating it in length, is impracticable. The defendant depends wholly on flanges placed well toward the outer edges of its plate to hold it in position, excepting, of

course, spikes, of which both avail themselves. The use of its plate by defendant has demonstrated that it does not require a central lower flange.

The field of tie plate invention had, at the time Wolhaupter entered it, been so assiduously cultivated as to offer many suggestions to and impose many limitations upon him. The great usefulness of tie plates to so important an industry as that of railroading has apparently induced great, if not excessive, liberality in awarding patents for even slight advances in the prior art. This appears by a comparison, for instance, of Goldie's patent No. 610,179, 1898, with Wolhaupter's patent of 1902, applications for both of which were pending at the same time. If the plaintiff's patents are valid, they are narrow, and entitled to but a limited range of equivalents, whether considered separately or as conjointly used. Invention in tie plates having been sought by so many minds, it is not wonderful that they were developed in many different and independent forms, all more or less original, and yet all having a somewhat general resemblance to each other. No one inventor preceding all the rest hit upon something which underlaid and included all that they produced, and thus acquired a monopoly and subjected them to tribute. The advance in the art was gradual, and proceeded step by step, so that no one acquired an exclusive monopoly, and therefore each patentee acquiring a valid patent became entitled only to his own specific form of device. Railway Co. v. Sayles, 97 U. S. 554, 556, 557, 24 L. Ed. 1053. The extent to which Wolhaupter was indebted to his predecessors in the art will appear from the disclosures made by a few of the many patents in evidence. In all of his devices in question he sought to combine, with strength, lightness of weight and economy in production; but the same intent, sometimes affirmatively expressed, and sometimes not noted, because obvious, is manifested by others whose patents antedate his. The use of an upward-extending flange on one or both sides of tie plates to restrain the rail and receive its lateral thrust was so common prior to 1895 that a citation of earlier patents to show such element is unnecessary. The use of grooves or channels on the upper surface of his plate to serve as a receptacle for sand, grit, and other hurtful substances, and to facilitate their removal and the evaporation of moisture, had been expressly mentioned in the patents of Wells, No. 203,570, 1878, and Dockstader, No. 462,399, 1891, and are seen transversely of the rail in that of Wilson, No. 522,867, 1894. Dunham's device, patent No. 469,386, 1892, performs the same service, and, in addition, by reason of air spaces beneath the plate, facilitates the evaporation of moisture that may get between the plate and the tie. As the grooves in the Wells patent are parallel with the rail and in the line of the suction caused by the passing trains, they ought, it would seem, to be more effective in freeing the plate or chair of foreign substances than the grooves transverse to the rail shown in Wolhaupter's first and second patents. Dunham, among others, preceded Wolhaupter in the use of a "corrugated" or ridged plate of a truss nature, placed parallel with the tie, and alluded to the fact that a corrugated plate or chair in a groove or recess in the tie had been proposed, probably referring to the Ashcroft patent No. 388,240, 1888.

His plate does not have sharpened lower flanges to enter the tie, or a flat-topped projection extending above the concave surfaces to receive the rail, but the lower contacting portions of his plate must necessarily, to some extent, be depressed into the tie, and, if the top surface of the plate devised by Dunham (Fig. 4) and Wolhaupter, respectively, be made flat, which each of them says is permissible as regards his own device, their plates do not substantially differ, save in the degree of bluntness and the length of their lower flanges. The assistance in sustaining the weight put upon the plate and the exclusion of moisture from beneath it, attributed by Wolhaupter to the sloping or truss nature of the approaching sides of the lower flanges in his first patent, were also secured by the earlier devices of Churchward, No. 508,086, 1893, Worthington, No. 506,963, 1893, Holmes, Nos. 514,465 and 514,466, 1894, and Gabel, No. 530,175, 1894. Blunt or square-ended lower flanges engaging the tie lengthwise and necessarily compressing the wood fiber as the lateral pressure of the rail forces them toward the end of the tie were not original with Wolhaupter but are found in the two early patents of Servis, Nos. 249,407, 1881, and 294,816, 1884, of Holmes, Nos. 495,807, 1893, and 514,465, 1894, the patent of Worthington, and also of Reece, No. 494,692, 1893. Excepting that of Servis (No. 249,407, Figs. 3 and 4), all of the last-named patents show, as does Wolhaupter's, the lower edges of the flanges to be somewhat sharpened. The location of the lower tie-engaging flanges immediately or substantially beneath the shoulders or flanges sustaining the rail, which is the primary thought embodied in Wolhaupter's second patent in suit, is found in the patent of Goldie, No. 485,030, 1892, and, if there be but one upper rail-supporting flange or surface, as claims 1, 2, and 3 permit, in those of Worthington, and of Servis, No. 524,868, 1894. Sellers, by his patent No. 684,466, 1901, preceded Wolhaupter in the thought expressed in the third patent in suit, of manufacturing tie plates from old rails, and in the use of a long, central holding, lower flange and a grooved top surface. Wolhaupter flanked his central holding lower flange with two shorter side flanges, but Wilson had previously done the same thing. Sellers' grooves, like those in the Wilson patent, run parallel with the tie; whereas those in the Wells run parallel with the rail, and those of Wolhaupter may be located either parallel with or transversely of it.

The production of either defendant's device or that of complainant in commercial use necessitates a complete reorganization of the Wolhaupter devices, whether they be considered separately or conjointly. It is clear that, if the patents and claims in question are valid, they must necessarily be so narrowly construed as to relieve the defendant from the charge of infringement. But we prefer to rest our conclusion on other grounds.

The plaintiff rightfully contends that claim 8 is so broad as to embrace any tie plate having on its under side more or less sharpened tie-penetrating and engaging devices and on its upper side a series of flanges on which the rail may rest. No limitation by the drawings or the specific form of description can be imported into it without making it identical with some one or more of the other claims. It was in-

tended and granted as a monopoly upon the broad generic idea of which the form shown in the drawings and description was a species. Wolhaupter endeavored to cover a field of invention far wider than he was entitled to occupy, and the claim must be held void, because it is broader than the real invention. Edison v. American Mutoscope Co., 114 Fed. 926, 934, 52 C. C. A. 546 (C. C. A. 2); National Enameling & Stamping Co. v. New England Enameling Co., 151 Fed. 19, 23, 80 C. C. A. 485 (C. C. A. 2). By like reasoning, each and every of the other claims involved must also be held invalid.

In view of the prior state of the art, which will not be further considered except to illustrate our views, no device constructed according to any of the claims in question involves invention. Wells' patent calls for two projecting lateral flanges to restrain and receive the thrust of the rail and three rail-sustaining bearings or top flanges located in the same horizontal plane. On each side of the central flange is a groove to lighten the structure without impairing its strength, and to care for sand and grit. Directly below the central rib or flange is a square-bottomed rib to prevent longitudinal and lateral displacement. He does not provide for spike holes; neither does claim 8 call for them. His patent does not suggest that his lower rib may be more or less sharpened; but so old a patent as that of Hudson, No. 142,020, 1873, taught that a V-shaped or other suitably shaped flange might be used instead of a square-bottomed one, and those of Gould, No. 280,030, 1883, Goldie, No. 485,030, Worthington and Holmes, No. 495,807, that the use of two or more sharpened lower flanges was a well-known expedient. Plaintiff's commercial plates show a reduction to two or more, as convenience suggests, of the multiplicity of top grooves disclosed in the Wolhaupter patents, and their top surfaces are thus assimilated to that of Wells. In such commercial plates the plaintiff also reduces to two the multiplicity of lower flanges shown in Wolhaupter's patent in question, and places them transversely of, instead of parallel with, the tie. Neither the plaintiff nor Wolhaupter deemed such reduction as to grooves or flanges or the change in the course or form of both from a position parallel to the fiber to one transverse of the same to be without the terms of the patent. If a reduction in the number of flanges and a change in their form does not involve invention (and we think it does not), and is but an authorized application of the rule of equivalents, then to increase the number of flanges (in the Wells patent, for instance) and modify the form must also fall within the same rule; but this makes the Wells patent anticipatory not only of the first, but of all three, of Wolhaupter's devices, as claimed in this case. The fact that Wells' device spans two or more ties and is a railway chair does not preclude consideration of it as anticipatory. Sectioned or reduced in length so as to span a single tie, as does that of Goldie, it assumes the form of a tie plate. Railway chairs are a species of railway plates or track fastenings, and possess the essentials of a tie plate, in that they maintain the alignment of the rails and the gauge of the track, and are so closely allied to tie plates that both inventors and the patent office have applied the name of the one to the other, as appears from the patent of Goldie, No. 426,530, 1890, and Parsons, No. 465,492, 1891.

Reece and Holmes in their respective patents, Nos. 494,692 and 495,807, 1893, each wished to provide a series of stops, or abutments, or flanges on the upper surface of their respective devices to receive the outward bearing of the foot flange of the rail. Wolhaupter carried this same idea into his second patent. Wells had employed a lower flange extending from a flat under surface and directly beneath an upper rail-bearing flange located between grooves or valleys. A series of rail-bearing flanges extending above the adjoining top surface grooves or depressions are found in Wolhaupter's first patent in suit. Such a modification of any one of the devices shown in the last four named patents as would make it conform to the device claimed in the second patent in suit would not involve the exercise of the creative faculty.

The Hart patent, No. 696,964, 1902, provides for lower flanges parallel with the fiber of the tie and for grooves on the upper surface reaching from the middle of the plate to its outer edges, parallel with the rail. This is one of the forms permitted by the third Wolhaupter patent. The only difference between the two is that Hart's patent shows four lower flanges, instead of three; his outer flanges being longer than those centrally located. Figures 10 and 11 in Wolhaupter's patent No. 691,037, 1902, both show a series of upper surface grooves. Figure 11 further shows that one long central lower flange is deemed by him a modification of the two lower flanges shown in figure 5. There can be no originality, in view of the prior art, in the use by Wolhaupter of a multiplicity of lower flanges, as compared with the patent of Sellers, nor an avoidance of the rule of equivalents by his use of three flanges instead of the four found in the Hart patent. In view of the Goldie patent, No. 610,179, 1898, which has two lateral lower flanges (Fig. 1) (but may have a third at the center of the plate) and a top surface groove, all of which grooves and flanges run parallel with the tie, the recognition by plaintiff and Wolhaupter that a variation in the direction given the grooves and flanges and in the number of each falls legitimately within the rule of equivalents, places the patents of both Goldie and Sellers, and especially that of Sellers, in the anticipatory class, and robs of patentability Wolhaupter's third device as herein claimed. The use of the long lower central flange, as we have heretofore seen, was anticipated by both Sellers and Wilson.

Other questions discussed need not be considered. In view of the conclusion reached, the trial court must be affirmed, and it is so ordered.

STEIGER et al. v. WAITE GRASS CARPET CO.

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

No. 1981.

1. PATENTS (§ 328*) — VALIDITY AND INFRINGEMENT — FEEDING DEVICE FOR GRASS TWINE MACHINE.

The Jerrems patents No. 745,625, claim 1, for a feeding device for a machine making grass twine, and No. 824,871, claim 1, for an improvement thereon, were not anticipated and are valid, but, in view of the prior

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

art, are limited to the mechanism described and shown; as so construed, *held* not infringed.

2. PATENTS (§ 246*)—INFRINGEMENT—COMBINATION PATENT.

In a combination patent all the elements are material, and all or their equivalents must be found in another device to constitute it an infringement.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 387; Dec. Dig. § 246.*]

Appeal from the District Court of the United States for the Eastern District of Wisconsin; A. L. Sanborn, Judge.

Suit in equity by Emil H. Steiger and Thomas W. Jerrems against the Waite Grass Carpet Company. Decree for defendant, and complainants appeal. Affirmed.

For opinion below, see 194 Fed. 878.

James F. Williamson, of Minneapolis, Minn., for appellants.

Samuel W. Banning, of Chicago, Ill. (Thomas A. Banning, Thomas A. Banning, Jr., and Ephraim Banning, all of Chicago, Ill., of counsel), for appellee.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

KOHLSAAT, Circuit Judge. This appeal involves the alleged infringement of the feeding devices of claim 1 of patent No. 745,625, for a machine for making grass twine, granted to T. W. Jerrems December 1, 1903, and of claim 1 of patent No. 824,871, for grass feeding mechanism for twine machines, granted July 3, 1906. Said claims read as follows:

"A feeding device for a machine of the character described, comprising opposing blades or bars having co-operating serrated edges, and means for vibrating one or more of said blades or bars to produce the feeding action, substantially as described."

"In a feed device of the character described, the combination with opposing blades or bars having co-operating serrated edges, of means for vibrating one or more of the said blades to produce a feeding action, and a vibratory agitating arm arranged to act upon the grass blades in the vicinity of the point where said blades make their entrance between the said serrations of said blades or bars, substantially as described."

The District Court found against the appellants on the question of infringement, and dismissed the bill for want of equity.

"The principal feature of my invention," says the specification of the first-named patent, "resides in the grass feeding device for feeding, in an even order of succession, the long wiry grass stems to the twisting devices or to other devices which are to receive them. This grass-feeding device involves co-operating blades or bars having serrated edges—that is, teeth or similar projections which co-operate to feed the grass stems one or more at a time—one or more of the said feed bars or blades having a vibrating movement to produce the feeding action."

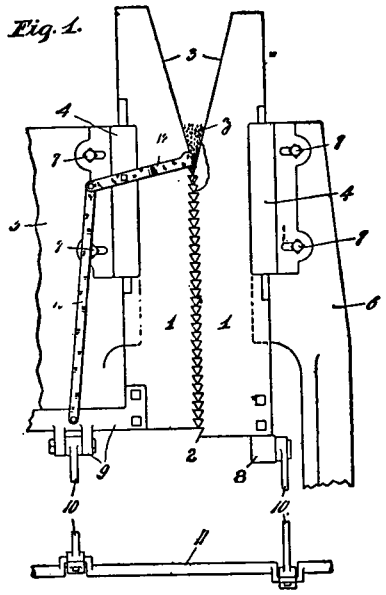
In the specification of the second above-named patent, the patentee says:

"In my present invention I combine with these serrated blades or bars a vibratory agitating arm or member which acts to stir and prevent clogging of

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

the grass blades at a point where they make their entrance between the serrations of the opposing blades" (of the first-named patent).

The later patent by reference to the former covers the former so far as here involved, and adds the vibrating agitating arm. It is shown diagrammatically in figure 1 of the drawings of the second patent, and is here reproduced:



The device consists of a pair of blades or bars having their edges in parallelism, close together, and having downwardly extending serrations on their several edges. Opposing these serrated bars is a single blade or bar with serrated edge, so located as to operate between the opposing parallel bars. These opposing bars have a reverse reciprocation; i. e., the single bar moves upwardly as the opposite parallel bars move down, and vice versa. The movement is sufficient to cause the teeth of one opposing bar or blade to move past the teeth of its opposite blades or bars, whereby the grass in the grasp of the rising member is pushed by the teeth of the rising arm into the teeth of the descending or stationary arm, and seized by the teeth of the descending or stationary bar or blade and carried downward. By the rapid movement of these jaws, a stream of descending wisps of grass is passed on to the advancing rolls. The trial judge describes the downward movement as a "step by step movement." Were the machine operated slowly, such must appear plainly to be the case. It is none the less so because it occurs in too rapid succession to be detected by the eye. In operation, the grass to be treated rests between the diverging upper edges of the blades and bears largely against the upper part of the serrated edges of the jaws, at which point the reciprocating blades or jaws seize mouthfuls of them, one or more, and start them downward. Thus, by zigzag movement between the jaws, the grass is finally worked down to the advancing or feed rolls. Evidently one of the opposing bars might be stationary, but this would result in a reduction of the amount of grass carried down. The patentee says:

"It will of course be understood that the machine above described is capable of a large range of modification within the scope of my invention as herein set forth and claimed."

There seems to be nothing in the patent limiting the co-operating serrated edges to any particular linear form. The appellants claim they may be either straight or curved, or otherwise, as may be desirable. Nor is the vibration limited, appellant insists, to the means

shown. All that is required is that vibration be provided. Appellants' expert defines the "vibrating" called for by the claims as "any back and forth movement of one blade or bar relatively to another or others or of all the bars back and forth relatively to each other or one another." The grass at times becomes wedged or packed in the crotch of the beveled guiding arms or hopper so that the serrated teeth of the jaws fail at times to seize the proper number of strands. In order to meet this difficulty, the device of the second patent was provided. It is the agitating arm *12* shown in the above reproduction of figure 1 of the second patent.

"This agitating arm," says the patentee, "therefore stirs up the grass blades at the bottom of the gathering crotch and prevents clogging of the grass blades at this point, and, furthermore, positively forces downward certain of the grass blades, so that they will be positively sought by the teeth of the single blade. The grass blades are thus positively started on their way downward between the serrations of the opposing blades, and will be moved downward in regular order of succession under the alternate reciprocations of the opposing blades."

The result is, as stated by appellee's expert, that "as the blades of grass drop from the lower ends of the toothed edges they are carried away in overlapping order to the other portions of the twine making machine which twist up the stranded grass," etc. The commercial form of appellants' device is considerably modified. The reciprocation of the opposing blades is abandoned. The two parallel blades are made stationary and the opposing blade is vibrated toward and away therefrom; the serrated portion of the vibrating blade is made semicircular-convex, while the serrated portions of the stationary parallel blades are made semicircular-concave. The serrated edges of the three blades are thus brought into such close proximity that they select the grass and carry it downward rapidly and with due regularity, aided by the antipacking movement of the agitating arm *12*.

It is claimed by appellee that the device of said claims is not novel; that it is found in the prior art, as represented by patent No. 430,650, granted to Howe June 24, 1890, for grass binding harvesting machines, and patent No. 701,183, granted to Ellis May 27, 1902, for a method of preparing flax fiber for spinning. Some reliance is also placed by appellee upon the disclosures of patent No. 485,146, granted to Bazerque October 25, 1892, for a machine to feed prepared tobacco-granular, straight cut or other form from a hopper to a carrier, patent No. 93,165 granted to Behel August 3, 1869, for use in connection with grain-binding harvesters, and patent No. 369,479, granted to Stephens & Carter September 6, 1887, for a machine for making straw ropes for grain-binding harvesters.

The pioneer in feeders for grass twine machines was Lowry, who secured two patents, one numbered 451,496 and the other 451,497, dated May 5, 1891, for automatic feeders for twine making machines. He employed fingers which selected small wisps of grass from the hopper and advanced them longitudinally toward the feed rolls. Counsel for appellants contends that:

"Jerrems was the first to provide any sort of device adapted to engage with the butt ends of wisps of grass while that grass remains commingled with the

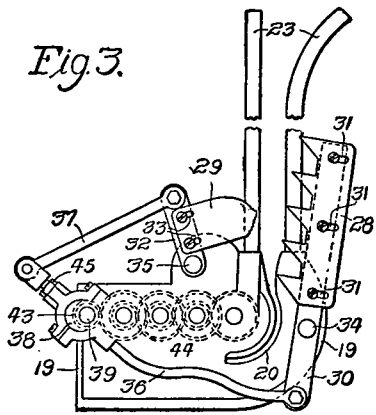
supply mass thereof contained in the grass holder, to deflect the said butt ends of said grass laterally downward and into the bite of advancing rollers, while the top ends of said same wisps of grass still remain in the grass holder commingled with the mass of grass held thereby, and doing this in timed succession," etc.

This may not be conceded, save only as to Jerrems' specific method. A withdrawal by deflection sidewise is, appellee claims, shown in the Howe and Ellis patents. The selector in these patents is an oscillating notched disc, which operates through practically 90 degrees, assisted in the Howe device by a straw carrier *L* with its sheet iron wing l^5, which agitates a disc l^9, which in turn agitates the straw in the hopper. The Howe disc has ten feed notches, and the Ellis device has but two, the latter diametrically opposite each other. These carry their wisps of straw and flax fiber respectively in one movement from the time they seize it to the point of discharge, as would also be the case if the discs rotated. In this respect they seem to resemble appellee's device. The Ellis patent makes no provision for agitating or otherwise assisting the flax into the notches of the selecting disc, that, seemingly, being accomplished by gravity.

The remaining patents above noted are not deemed of value in arriving at the true scope of the claims in suit. We find nothing in the prior art which anticipates the claims under consideration when properly limited. When thus construed, they present a new and useful means of feeding straw to the twine twisting device, and are, for the purpose of this proceeding, entitled to be upheld as valid.

Appellee's device employs the common grass holder. Its selector is a notched wheel or disc extending into the curvilinear throat between the disc and its opposing jaw, as shown in figure 4 of sheet 2 of drawings of appellee's stipulated structure, Complainants' Exhibit No. 10½, herewith shown:

Fig. 3.



Its opposing member is serrated and concave. The arms of the grass holder converge toward the point where the notched wheel or disc comes in contact with the stalks of grass in a throated passage formed in a casing numbered 19, extending downwardly. At that point the notches on the disc seize or select from the volume of grass such portions of the butt ends thereof as is desired and deflect those ends downwardly through the lower end, not shown in the drawing, to the secondary feed rolls, which in turn grasp it and draw it forward into the twisting devices. To prevent wedging or packing at the base of the grass holder, appellee provides: First, a so-called toothed oscillating packer bar *28*, which has upwardly pointing large teeth; second, a smaller so-called oscillating packer plate having a slightly serrated edge. Both packer bars, as will be seen from

the drawing of figure 3 of sheet 1 of Complainants' Exhibit 10½, here reproduced in reduced form, are located and operate above the foot of the hopper or holders, and act upon the mass of grass, so as to cause it to be prepared to feed into the notches of the rotating disc. These packers are on opposite sides of the body of grass; the larger one being above and some distance from the smaller one. The teeth on the upper one, marked *28*, are wedge-shaped. This bar is constructed so as to oscillate in such manner as to cause these teeth to enter and agitate the mass as they move transversely of the line of downward movement of the grass. Their lower beveled sides rest upon the grass and bear down upon it as they enter the mass. This larger packer is supplemented by the action of the smaller oscillating bar or packer, marked *29*, the teeth of which are much smaller than those of the bar *28*, and which has a downward thrust in a circular path to prevent wedging of the grass in coming into contact with the notched edge of the disc, which extends into the feedway or throated passage. This oscillating bar *29* moves mostly transversely to the direction of movement of the grass, and thus its action differs from the up and down movement of complainants' agitator arm *12*. Its purpose, however, seems to have been the same.

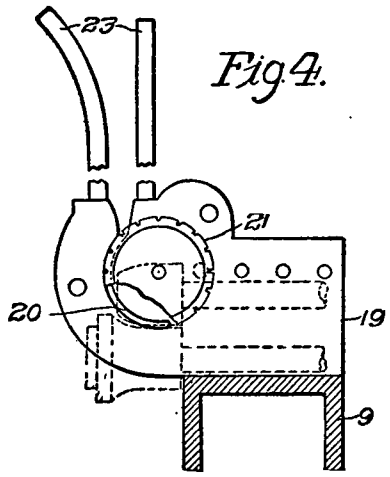


Fig 4.

Comparing the Jerrems and the alleged infringing devices, it is apparent that they are dissimilar in principle of operation, construction of details, in arrangement of details, in operation and in result. True, they are alike in that: (1) Each is designed to deal with grass twine manufacture; (2) each is designed to select from the mass of grass and feed definite quantities thereof transversely to other parts of the machine, and provides moving and other mechanism to that end; and (3) each, except the first patent, provides vibrating devices for agitating and otherwise assisting the grass into contact with the selector. Further than these, resemblances are wanting. Appellee's machine has no opposing blades with co-operating serrated edges. Nor has it the blades with serrated edges standing parallel with each other, nor is the grass, as it descends in the feed throat, seized first by the teeth of one jaw of the serrated blade and then by those of the other, but it is carried down in one movement to the point of delivery to the advancing rolls. Nor is its downward movement of a jerky, zigzag character, resembling a step by step descent as in the patent ir suit, but, on the contrary, it is swung by a rotary, even, smooth, and single movement from its first seizure by the notch to the point of delivery to the forwarding rolls. Nor is there co-operation between

the notched selecting and forwarding disc and the agitating or packing arms *28* and *29*. These act entirely upon the mass of grass, keeping it in condition to be fed downwardly. Their relation to the selecting notched wheel is that of mere aggregation. The arm or packer *29* is very similar to and suggestive of the wing l^5 and reciprocating disc l^9 of the Howe patent. These, the Howe patent says, are provided "to agitate the straws h^1 in the hopper, so that the picker disc may always be in contact with them." It will thus be seen that appellee's device lacks many of the elements of the claims in suit. In a combination patent, all the elements are material. Water Meter Co. v. Desper, 101 U. S. 337, 25 L. Ed. 1024.

"The language by which the comprehensive boundaries of a claim are to be made descriptive and clear lies wholly within the selection of the inventor. He alone may choose the words to describe and particularize his invention. When chosen and used, such words must be held to be binding upon him." Duff Mfg. Co. v. Forgie, 59 Fed. 773, 8 C. C. A. 261.

See, also, Electric Co. v. Boston, 139 U. S. 481, 11 Sup. Ct. 586, 35 L. Ed. 250; Keystone Bridge Co. v. Phœnix Iron Co., 95 U. S. 279, 24 L. Ed. 344.

Were Jerrems in any proper sense a pioneer in the art to which the claims in suit belong, he might claim some of the features covered by appellee's device above enumerated as equivalents, though it is not clear that he could in any case claim the notched disc and the rotary movement thereof as coming within the principle of his serrated oscillating arms or jaws. In view, however, of the condition of the prior art, as disclosed in analogous arts, we are of the opinion that the Jerrems invention in suit must be construed as limited to the devices shown in his said two claims, and that, so construed, they do not cover the device of appellee, and that the latter, therefore, does not infringe the claims in suit.

The decree of the District Court is accordingly affirmed.

VAN NESS v. LAYNE et al.

(Circuit Court of Appeals, Fifth Circuit. April 16, 1914.)

No. 2553.

1. PATENTS (§ 167*)—CONSTRUCTION OF CLAIMS—REFERENCE TO SPECIFICATION.
   Broad language of a claim may be limited to the disclosure of the specification when necessary to sustain the patent.
   [Ed. Note.—For other cases, see Patents, Cent. Dig. § 243; Dec. Dig. § 167.*]

2. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—ROTARY PUMP.
   The Layne patent, No. 821,653, for a rotary pump, *held* valid and infringed as to claim 20 and not infringed as to claims 4 and 13.

3. WORDS AND PHRASES—"CLOSED CASING."
   The words "closed casing," as used in the invention of a rotary pump, mean a closure only against what is necessary for the successful operation of the invention.

*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 Louisiana; Aleck Boarman, Judge.

Suit in equity by Mahlon E. Layne and others against Marvin B. Van Ness. Decree for complainants, and defendant appeals. Modified and affirmed.

Albert E. Dieterich, of Washington, D. C., and Leland H. Moss, of Lake Charles, La., for appellant.

Coke K. Burns, of Houston, Tex., and Paul Synnestvedt, of Pittsburgh, Pa., for appellees.

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

GRUBB, District Judge. The only claims relied on by the complainant (appellee) are those numbered 4, 9, 13, and 20. In the El Campo Case, 195 Fed. 83, 115 C. C. A. 115, the court held the patent valid as to claim 13, and that that claim had been infringed. As we understand, the validity of claims 4, 9, and 20 were not passed upon by the court, but were held not to have been infringed. In the present case we are satisfied that claim 13 is not infringed by the Van Ness pump. The last clause of claim 13 reads, "the casing being closed at the top and provided with an air vent." While the Van Ness pump is closed at the top, it is not contended that the pump has an air vent such as the patented pump had and such as the El Campo pump had. One function of this air vent is to force any water or spent lubricant remaining in the casing, out of it, through an aperture in the top, by forcing air through the air vent into the casing, for the purpose of substituting clean liquid or oil. It seems clear that the Van Ness pump had no such member with a corresponding function as the air vent of the patented pump or that of the El Campo pump, and so cannot be said to infringe claim 13. This, if correct, would prevent complainant from relying upon claim 13 in this case, as a ground of recovery.

Claim 4 includes, in combination with a rotary pump: (1) An extensible pump shaft; (2) a protecting casing for the shaft; and (3) means for supporting the pump, shaft, and casing at any desired point within the well. The last element may be attributed (1) either to a system of wedges in complainant's pump by which the entire apparatus can be fixed, after being raised or lowered in the well, at any point, or (2) to the fact that the shaft and its casing is in sections and can be added to or taken from by the addition or subtraction of sections, and thus, by lengthening or shortening the shaft, the position of the apparatus in the well may be changed. The defendant's pump can be altered in position and there supported by means similar to the second method, since its shaft and casing is also in sections, but the same result cannot be accomplished in defendant's pump by the first method, since it has no system of wedges for that purpose, as are disclosed in the specifications of the complainant's patent. So the question is whether the last clause of claim 4 relates to the supporting of the pump, well, and casing by the system of wedges or by the addition or taking away of sections. If the former,

the claim may be infringed by defendant's pump; if the latter, it cannot be.

We are satisfied, after reading the specifications and the other claims of complainant's patent, that the reference in the concluding element of this claim is to the system of wedges and not to the adding and subtracting of sections. Claim 6 expressly designates the system of wedges as the "means for fixing the pump in position at any desired point of the well casing," by the use of the final words "for the purposes specified," referring to the purposes declared in the preceding claim as quoted. Then the addition or withdrawal of sections does not accomplish the fixing of the pump casing and shaft at any desired point in the well, but only at certain points where the joints between sections are located, whereas by the wedge system the apparatus can be fixed at any point whatever in the well.

For these reasons we do not find that defendant's pump infringes claim 4, since it admittedly has no system of wedges.

This would eliminate all claims relied upon but those numbered 9 and 20.

The elements relied upon in claim 9 are: (1) A jointed pump shaft; and (2) a closed casing surrounding the pump shaft from the pump to the top of the well, in combination with the pump casing of a rotary pump. The sole element in claim 20 is "a line shaft for the pump entirely closed off from the water in the well," in combination with a well casing and a rotary pump therein.

As to claim 9, it is claimed there is no infringement because defendant says that its pump shaft is not a jointed shaft. The contention is that the words "jointed pump shaft" in this claim are identical in meaning with the words "extensible pump shaft," in claim 4, and that the latter words mean a union of sections through a slip joint, so as to give each section play, as to its neighbor, and so to take care of expansion and contraction in the shaft sections, and also to provide, in a limited way, for adjustment in position of the apparatus in the well. It is conceded that defendant's shaft has no slip joints and that when the sections are jointed together they form a rigid whole, which acts as a unit. If the words "extensible pump shaft" and "jointed pump shaft" relate only to a slip joint of the kind described, then it is clear that defendant's apparatus does not infringe claims 4 and 9, since the sections of its pump shaft are jointed together rigidly. It is unimportant to determine the meaning of the words "extensible pump shaft" in this respect, since they are found only in the fourth claim and it has also the element of wedges for fixing the casing and shaft and pump in position, which defendant's apparatus does not contain, so that claim 4 is not infringed regardless of the meaning to be attributed to the words "extensible pump shaft."

It seems that the words "jointed pump shaft" should not be confined in their meaning to a shaft, the sections of which are coupled together with a slip joint which affords room for play between the adjoining sections, but should be construed to include, as well, sections joined together with a rigid joint, like a steel fishing rod, as defendant's shaft admittedly is. If this be the true construction of

these words, then defendant's shaft would be a "jointed pump shaft," within the meaning of these words in claim 4, and would correspond to the disclosure of the claim so far as that feature is concerned. The remaining element of claim 4 is "a closed casing surrounding the pump shaft from the pump to the top of the well." This corresponds substantially with the sole element in claim 20, which is "a line shaft for the pump entirely closed off from the water in the well." It is true that defendant asserts the invalidity of claim 20 of the patent, because he says that the line shaft covers the shaft from the point where power is applied to it to where it is connected with the impeller of the pump, including the stub shaft, which connects with the impellers and which admittedly is not closed off from the water in the well but is always and altogether exposed to it, and that in this respect the disclosure of the claim does not correspond with the complainant's apparatus, and hence the claim falls. However, as it is conceded that the so-called stub shaft must always be outside the closed casing and exposed to the water of the well, it seems reasonable to construe the words "line shaft" as referring only to the part of the pump shaft which, alone, can be inclosed in practice; and which, alone, is in fact inclosed in complainant's apparatus.

[3] Giving claim 20 this interpretation, it seems that it is substantially like claim 9, except in the omission of the element of jointure or extensibility of the shaft sections, which adds nothing to the novelty and patentability of the device; and that the element common to each claim, viz., the protective or closed casing surrounding the pump shaft from the pump to the top of the well and entirely closing off the water in the well from the shaft and its bearings, is the only element in any one of the claims as to which there is persuasive evidence in the record both as to patentability and infringement. The word "closed" in claim 9 seems to mean as much as the words "entirely closed" in claim 20. So it seems that complainant's case must rest on claims 9 and 20 and on the element mentioned which is contained in each of these claims. If this is true, it seems quite unimportant what construction is given to the words "jointed pump shaft" of claim 9, since there are no such words in claim 20. So the only question to be decided is whether complainant's protecting casing for a pump shaft which entirely incloses the shaft from water from the well is a patentable device and is infringed by defendant's pump shaft and casing. If it is, then recovery could be had under claim 20 in any event, if not under claim 9 also. If it is not, then no recovery could be had under any one of the four claims relied upon.

[1] It seems quite clear that the idea of a protected casing for a pump shaft without restrictive interpretation would contain no novelty and would not be patentable, and, if this element in the patent is given the unrestricted meaning that its language admits of, it would destroy the claim. The contention of the defendant is that it should be given the unrestricted generic meaning suggested by its broad language, and that of complainant, that the specifications should be looked to to interpret the claim, and that it should be held to mean only a protective casing of the kind and with the functions set out in the specifications. It seems that the complainant's contention is sup-

ported by the authorities cited in his supplemental memorandum and that the argument that the patent granted by the government should be construed so as to prevail rather than be forfeited, since that must have been the intention of the Patent Office, is a sound one, for limiting the breadth of the language of the claim to the disclosure of the specifications of the patent, if necessary to sustain the patent. If so limited, it would seem that the protective casing intended to be covered by the claim was one of the kind described in the specifications and having the three functions attributed to it by the specifications, namely: (1) To exclude water and detritus from the shaft and its bearings; (2) to provide a means of lubricating the bearings of each section of the shaft from the top of the well without removing the apparatus from it; and (3) to align the bearings and the shaft so as to prevent lateral displacement in the well and keep the shaft in a vertical position.

[2] Giving the claim this significance, it fairly appears from the record, as we see it, that there was no protective casing in the prior art of the kind and with the functions of that of the patent in suit. It also seems fairly to appear from the record that such a protective casing as that set out in the specifications contained novelty enough to constitute invention. The fact that the record shows that there was for some time an unfilled want for some such apparatus as that disclosed by the patent in the deep well irrigating industry is persuasive that the idea involved invention. In this respect the cross-examination of the witness W. B. St. John, a witness for the defendant, especially that part of it after page 572 of the record, is convincing that Layne filled a long-felt need in the deep well irrigating business by his protective casing, and had invented a practicable and valuable improvement in that art and one entitled to protection for that reason, though theoretically its novelty and patentability may admit of doubt.

If the idea is considered patentable, the last question is whether the defendant's pump infringes; that is, whether his pump contains the element of a closed shaft casing in the sense to be attributed to that element in the claim of the patent in suit, i. e., one of a kind described in the specifications of the patent and having the same three functions. The defendant denies that his pump shaft casing performs any one of the three functions attributed to that of the patent in suit. He denies that it is a closed casing in any true sense. It seems not to be closed so far as concerns the entrance of air. However, the proper interpretation of the words "closed casing" is a closure only against what is necessary to be excluded for the successful operation of the invention, and that, in this case, as we understand it, is water and sand, because when not excluded the first corrodes and the second wears the shaft and its bearings. It seems also true that the closure against water is only partial, since the lower bearing of defendant's apparatus is not within the inclosing casing, though the intermediate and top bearings are. So it seems doubtful whether the defendant's pump casing keeps the water from the shaft and bearings when it is not in operation, and the argument is that in the rice country, where it is principally used, it remains out of service

nine months of the year. For these reasons, it is argued that the defendant's casing is not a closed one, even against water and sand. However, the record shows that protection against water and sand is afforded by defendant's casing to all but one of the bearings and to the shaft in the same degree as by that of the patented casing, at least during the period of the pump's operation, and that the protection afforded by defendant's casing is different only in degree from that afforded by the patented casing. The closure in the patented casing is effected by stuffing boxes as well as by the presence and downward pressure of the oil between the bearings and the shaft, which serves to keep the water from pressing upward into the shaft casing between the bearings and the shaft. The closure in defendant's casing is effected by the last method only, and without the use of packing or stuffing boxes. Each casing serves to effect at least a partial closure against the water and sand. The difference is one of method and degree only, and for that reason it seems that the defendant's casing infringes this element of the patent, at least to some extent.

The second function of the patented casing is that of providing lubrication for the bearings. In both casings, that of defendant as well as that of complainant, the oil is put in the apparatus at the top and passes through the bearings from the top through the intermediate to the lower bearing, being retained for a time above each bearing and serving in this way not only to lubricate each bearing, but also to help close the shaft casing against the ingress of water and detritus. The defendant's casing and that of the patent in suit perform this function to substantially the same extent, though the respective bearings as to the means for the flow of the oil through them are somewhat differently constructed.

The third function performed by the shaft casing of the patent in suit is that of aligning the bearings and the pump shaft so as to keep the latter in a vertical position in the well. In the absence of intermediate support, the tendency of the shaft, if suspended only from the top, would be to swing laterally in the well, and so get out of alignment. This is corrected by taking advantage of the downward pressure of the shaft due to gravity, in connection with the intermediate bearings through which the shaft passes. The defendant contends that his casing, after the pump is in operation, is suspended from the top bearing exlusively, and that the lower bearing performs no function after the casing is fixed in position in the well, and that the intermediate bearings are functionally different from those of the patent in suit. We must confess that we are not mechanics enough to determine with any assurance from the record the merits of these respective contentions, and it seems that the question of infringement, like that of patentability, is a close one. However, the cross-examination of the defendant's witness St. John has convinced us that as a practical matter Layne has invented something new and valuable in the art of deep well pumping for irrigation, and that the Van Ness pump appropriated, at least in part, the invention of Layne in respect to the advantages of the closed pump casing, as to protection and lubrication. On the other side, the evidence of the defend-

ant's witness Leroy Parker is persuasive that from a technical point of view Layne's pump shaft casing was not patentable, and that, if it was, it was not infringed by Van Ness' casing.

Comparing the conceded practical benefit that has been derived from Layne's patented pump with the theoretical argument of the defendant, we have come to the conclusion that the former should prevail, and that claim 20 of the complainant's patent should be sustained, and that the defendant's apparatus should be held to infringe it in the one respect of a closed casing for the pump shaft of the design and with the triple function attributed to it in the specifications of Layne's patent.

The decree appealed from is correct in so far as it recognizes the validity of the patent and finds the appellee infringing the twentieth claim thereof. It is therefore amended so that the first, second, fifth, sixth, and seventh paragraphs shall read as follows:

"(1) That the letters patent of the United States, issued to Mahlon E. Layne, on May 29, 1906, bearing the number 821,653, are good and valid in law as to the claim 20, which is as follows: (20) The combination of a well casing, a rotary pump therein, and a line shaft for the pump entirely closed off from the water in the well.

"(2) That the said Mahlon E. Layne was the first, true, and original inventor of the invention and improvement described in said letters patent, and particularly recited in said claim 20."

"(5) That the defendant Marvin B. Van Ness has infringed upon said letters patent No. 821,653, and particularly the said claim 20, and upon the exclusive rights of the complainants under the same.

"(6) That the complainants recover of the defendant the profits, gains, and advantages which the said defendant has received or made or which have accrued to him by the manufacture, use, or sale of apparatus in violation of said claim 20 of said letters patent No. 821,653, and that the complainants do recover the damages resulting from said infringement.

"(7) That a perpetual injunction issue out of and under the seal of this court directed to the said defendant Marvin B. Van Ness, perpetually enjoining and restraining him, his servants, agents, attorneys, employés, workmen, and confederates, and each and every one of them, as well as all other persons acting by, through, or under him, or any of them, from directly or indirectly making, using, or selling apparatus containing the invention covered in and by the said claim 20 of said letters patent No. 821,653."

And as thus amended is affirmed; appellee to pay the costs of this court.

BASSETT v. ERICKSON CONST. CO.

(Circuit Court of Appeals, Ninth Circuit. May 4, 1914.)

No. 2333.

1. WITNESSES (§ 268*)—CROSS-EXAMINATION.

Where the plaintiff, in an action for infringement of a patent, introduced a model as the model of his invention, it was not error to permit the defendant on his cross-examination to inquire as to all the details of the structure and the use thereof.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 931–948, 959; Dec. Dig. § 268.*]

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

2. APPEAL AND ERROR (§ 1056*)—REVIEW—HARMLESS ERROR.
The exclusion of evidence offered by a plaintiff on the question of damages was not reversible error, where the jury returned a verdict for defendant.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4187–4193, 4207; Dec. Dig. § 1056.*]

3. PATENTS (§ 70*)—ACTION FOR INFRINGEMENT—EVIDENCE.
In an action for infringement of a patent, a printed book relating to the subject-matter of the patent, and shown to have been in plaintiff's possession prior to the making of his application, was admissible to show the prior art.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 82, 85; Dec. Dig. § 70.*]

4. APPEAL AND ERROR (§ 175*)—REVIEW—CONSTRUCTION OF PLEADINGS.
In an action for infringement of a patent, where the case was tried on the theory that infringement was denied and no claim otherwise was made in the trial court, the answer will not be construed in the appellate court as admitting infringement.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1137–1140; Dec. Dig. § 175.*]

5. TRIAL (§ 253*)—INSTRUCTIONS—REFUSAL OF REQUESTS.
It was not error to refuse a requested instruction where a part of it would have withdrawn from the jury a question of fact which, under the evidence, was properly for their determination.
[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613–623; Dec. Dig. § 253.*]

6. PATENTS (§ 276*)—ACTION FOR INFRINGEMENT—INSTRUCTIONS.
Instructions given in an action for infringement of a patent considered and approved.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 240, 432–434; Dec. Dig. § 276.*]

In Error to the District Court of the United States for the Northern Division of the Western District of Washington; Jeremiah Neterer, Judge.

Action at law by Henry W. Bassett against the Erickson Construction Company. Judgment for defendant, and plaintiff brings error. Affirmed.

The plaintiff in error brought an action against the defendant in error to recover damages for infringement of letters patent, No. 990,417, issued to the plaintiff on April 25, 1911, for improvements in forms for molded conduits, an invention which relates to forms or molds which may be used to shape the inner surface of conduits made of cement and concrete. The parties will be designated herein plaintiff and defendant, as they were in the court below. The plaintiff alleged in his complaint that he made the invention for his own exclusive use and benefit, and did not manufacture the same for sale, and that the defendant had infringed the same, whereby the plaintiff was injured and deprived of profits he otherwise would have derived, and sustained actual damages in the sum of $30,000. The answer denied that the plaintiff was the original or first inventor of the patent sued upon; denied that the same was not described in any printed publication before his alleged invention, or that the same had not, at the time of the application for the patent, been in public use for more than two years; alleged that the same had been in public use and on sale in this country prior to the alleged invention; alleged the patent was invalid for want of patentable invention; denied that the patent sued upon is of any utility, and denied that the plaintiff had sustained damages by any of defendant's acts. The answer alleged affirmatively that the forms

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

used by defendant at the time of the suit were forms for molded conduits which had been in common use in the city of Seattle and elsewhere long prior to the date of plaintiff's application for his patent; that the plaintiff made his original application, describing in his specification therefor the form of molded conduits in exact manner and substance covering in detail the form of molded conduits now used and at all times heretofore used by the defendant; that the application was denied in toto by the Commissioner of Patents, and thereafter the plaintiff amended his specifications and claims, and finally procured letters patent limited to a certain construction, which construction is not embodied in the form for molded conduits now being used by the defendant. The jury returned a verdict for the defendant.

Joseph L. Reed, of Valdez, Alaska, and Richard J. Cook, of Seattle, Wash., for plaintiff in error.

Corwin S. Shank and Horatio C. Belt, both of Seattle, Wash., for defendant in error.

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

GILBERT, Circuit Judge (after stating the facts as above). [1] The plaintiff assigns error to the admission of certain evidence during his cross-examination. The evidence so admitted related to a model which he had stated was the model of his invention. On direct examination he was asked to explain to the jury by the aid of the model the essential elements of his invention. Later he claimed that the model was merely illustrative of his patent, and for that reason his counsel objected to certain questions which were asked him on cross-examination concerning the details of the construction of the model. It is said that it was error to admit this testimony for the reason that the model was one that had been used experimentally prior to filing the application, and that the cross-examination related to elements used therein which had no relation to the elements of the combination which were claimed in the patent. The plaintiff, having introduced the model in evidence as the model of his invention, cannot be heard to complain that the court permitted the defendant on cross-examination to inquire as to all the details of the structure and the use thereof, and if, indeed, the model did contain details which were not essential to or different from the invention as patented, the plaintiff had the opportunity to explain, as he did, the points wherein the difference consisted. Nor was it error to require the witness on cross-examination to answer such questions as these:

"What particular portion of the description of claim 1 is infringed by the defendant?"

"Don't you know, as a matter of fact, upon your first application, every claim you asked for was rejected by the Commissioner of Patents?"

To some of the items of evidence admitted on cross-examination, to which the plaintiff assigns error, it does not appear that exception was reserved in the court below.

Error is assigned to testimony admitted on cross-examination of the patent attorney, Reynolds, a witness for the plaintiff. He had prepared the application for the patent and the amendments thereto. On his cross-examination he was asked to state what change was made in the specifications from the original form thereof. This is said to

be error because the witness was not examined as to those matters on his direct examination. But it is impossible to see that any prejudice was sustained by the plaintiff by reason of such cross-examination.

There are other assignments of error to the reception of testimony which are equally without merit with those which have been considered, and it is unnecessary to discuss them here.

[2] It is contended that the court erred in striking from the record certain evidence offered by the plaintiff to show the extent of the use of the plaintiff's forms by the defendant, and to prove what would be a reasonable royalty therefor. That ruling of the court was based upon the allegation of the complaint that the plaintiff made and used said patented invention for his own exclusive use and benefit, and did not manufacture the same for sale, and upon the proof that the plaintiff had not been able to establish a royalty or to license the use of his patent. It is contended that the ruling was error for the reason that, notwithstanding the allegations of the complaint and the absence of proof of an established royalty, the plaintiff was entitled to prove damages, measured in part at least by the reasonable value of the use of the invention to the defendant. The question so presented need not be considered here, for the jury returned a verdict for the defendant, and thereby found, either that the patent was void, or that there had been no infringement, for the court had instructed the jury to return a verdict for nominal damages in case they found for the plaintiff.

[3] Error is assigned to the admission in evidence of the book entitled Reid on Concrete and Reinforced Concrete Construction, and to the instruction of the court to the jury concerning the same. It is said that it was error to admit the book in evidence, for the reasons: First, that the steps were not taken to authorize its admission under section 4920 of the Revised Statutes (U. S. Comp. St. 1901, p. 3394); and, second, that it was shown to have come into the possession of the plaintiff only about 18 months prior to the date of his application for patent. The objection which was made to its introduction in evidence specified no reason for its exclusion, and the court, expressly on that ground, overruled the objection. It was not offered under the provisions of sections 4886 and 4920 (U. S. Comp. St. 1901, pp. 3382, 3394) and the amendment thereto of March 3, 1897, c. 391, §§ 1, 2, 29 Stat. 692, for the purpose of showing that the patent had been described in some printed publication for more than two years prior to the plaintiff's application for a patent, and that therefore the plaintiff was not entitled to a patent for his invention, but for the purpose of showing the prior art, and that the plaintiff had the particular volume in question in his possession and examined the same, and acquired therefrom a knowledge of the prior art. For that purpose it was admissible (French v. Carter, 137 U. S. 239, 11 Sup. Ct. 90, 34 L. Ed. 664), and the court properly instructed the jury in effect that, although the defendant had not taken the steps necessary to introduce the book under section 4920, the publication referred to had been admitted under the testimony of the plaintiff to the effect that he had had that publication in his possession prior to making his application for a patent. We find no error in that instruction.

[4] It is assigned as error that the court denied the plaintiff's motion at the close of the testimony to instruct the jury to return a verdict in his favor. In support of this assignment the plaintiff presents a ground for the motion which was not suggested in the court below. It is that the answer admitted the infringement. The admission in the answer is that the defendant had used forms for molded conduits identical with those described in the plaintiff's application for patent, but that the said application was denied in toto by the Commissioner of Patents, and was thereafter so amended that upon the amendments a patent was issued to him to cover a combination and a particular construction different from those used by the defendant. The plaintiff argues that the amendments did not in fact substantially depart from the original application, and that the claims as allowed differed only in minor particulars from those which were embodied in the original application. But it distinctly appears from the pleadings that the defendant denied that it used the combination which is described in the plaintiff's patent. The case went to trial on the issue so raised, and nowhere in the court below was it suggested that there was an admission of infringement. In view of that fact, it is clear that the answer should not in this court be given a meaning which the defendant never intended. But in any view of the alleged admissions of the answer, it was not error to refuse the motion for an instructed verdict, for there were other issues to go to the jury aside from the question of infringement.

[5] Error is assigned to the refusal of the court to instruct the jury that:

"The issuance of letters patent is of itself presumptive and prima facie evidence that the invention patented is new and useful, and that the patentee is the first and true inventor. The defendant has not produced any evidence that overthrows this presumption, and the jury is therefore charged to find for the plaintiff on those issues; that is, that the plaintiff was the true and first inventor, and the combinations described in the first, fifth, and sixth claims were and are new and useful."

While the first portion of the requested instruction might properly have been given, the remainder thereof would have taken from the jury questions that were properly submitted to them, in view of evidence that tended to show that the plaintiff was not the inventor and that the combination was not new and was not patentable.

[6] While the thirty-ninth assignment of error as it is set forth might indicate that the court incorrectly charged the jury by instructing them that the plaintiff's patent was limited to the precise form of his device, and denied the doctrine of equivalents, an examination of the record shows that it omits in vital particulars to state what the court actually said. What the court did say was that, in determining the question whether or not the device patented was a pioneer device, the jury should take into consideration the prior state of the art, and:

"If you find from the evidence that plaintiff's patented device was a pioneer device, and you should further find from the evidence that the device made and used by the defendant operated on the same principle, and performed the same functions by the same means, or by analogous means or by equivalent combinations, then you are instructed that the device of the defendant would

constitute an infringement on the patented device of the plaintiff. If, on the other hand, you should find from the evidence that the patented device of the plaintiff was not a pioneer device, but that it consisted merely of an improvement or improvements upon prior devices, and that all of the elements contained in the plaintiff's device were old elements, and that the claim of the plaintiff consisted merely of a combination of old elements, in such case the plaintiff would be limited to the precise device and combination shown and claimed in his patent. * * * In this connection, you are entitled to consider the admission of the plaintiff, repeatedly made during the trial, that all of the elements contained in his patent are old; his claim being that the only new feature therein is the combination of the old elements."

There was no error in the instruction as it was given.

It would serve no useful purpose to review all the numerous assignments of error as to instructions given and refused. Many of the requested instructions which were denied express abstract principles of law which, while they are correctly stated, it was not error to refuse, since the court, in careful and proper instructions, submitted to the jury all the questions necessary to be considered.

The judgment is affirmed.

MARCONI WIRELESS TELEGRAPH CO. OF AMERICA v. NATIONAL ELECTRIC SIGNALING CO. (two cases).

(District Court, E. D. New York. March 17, 1914. On Reargument, April 6, 1914.)

1. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—WIRELESS TELEGRAPH APPARATUS.

   The Marconi reissue patent, No. 11,913 (original No. 586,193), for improvements in transmitting electrical impulses and signals and in apparatus therefor, claim 3, was not anticipated and is valid. While the patentee did not discover the principles upon which the transmission of electromagnetic waves is based, nor invent the primary appliances therefor, he was, as claimed in his specification, the first to discover and use any practical means for effective telegraphic transmission, and intelligible reception of signals produced by artificially formed Hertz oscillations. Such claim, however, has for one of its elements an imperfect electrical contact at the receiving station, consisting, as shown in the specification, of a glass filings tube or coherer, the function of which is to close a local battery circuit, so that it may operate a relay, and an earth connection to one end of the contact, and is not infringed by an apparatus which has no coherer, nor anything acting as a local circuit closer, but employs an electrolytic or crystal detector, having no earth connection, and in which the indicator is moved directly by the received oscillating current.

2. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—WIRELESS TELEGRAPH APPARATUS.

   The Lodge patent, No. 609,154, for improvements in electrical telegraphy, the basic purpose of which is to utilize in a system of wireless telegraphy the principle of sympathetic resonance through the cumulative effect of a series of waves, as distinguished from a single wave of great amplitude, discloses patentable novelty and is valid; also *held* infringed.

3. PATENTS (§ 328*) — VALIDITY AND INFRINGEMENT — WIRELESS TELEGRAPH APPARATUS.

   The Marconi patent, No. 763,772, for apparatus for wireless telegraphy, the stated object of which is to increase the efficiency of the system and to provide new and simple means whereby oscillations or electric waves

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

from a transmitting station may be localized, when desired, at any selected receiving station or stations, which object is accomplished by the use of oscillation transformers at both the transmitting and receiving stations, consisting of an open and closed circuit in each, linked through a transformer, the four circuits being tuned together, was not anticipated in the art, and discloses patentable invention; the apparatus shown being a distinct advance over that of the patentee's prior patent, and the Lodge patent, No. 609,154; also *held* infringed.

4. PATENTS (§ 289*)—SUIT FOR INFRINGEMENT—LACHES.

A suit for infringement *held* not barred by laches, because of mere lapse of time after the issuance of the patent before its commencement; it appearing that during most of that time defendant was not making commercial use of the alleged infringing device, and that there was no ground for equitable estoppel.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 467–469; Dec. Dig. § 289.*]

On Reargument.

5. PATENTS (§ 318*)—SUIT FOR INFRINGEMENT—RECOVERY OF DAMAGES AND PROFITS—LACHES.

Where the owner of a patent has for years permitted its infringement without taking action, in a subsequent suit against another infringer he is not entitled to recover profits and damages.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 566–576; Dec. Dig. § 318.*]

In Equity. Two suits by the Marconi Wireless Telegraph Company of America against the National Electric Signaling Company. The first suit involves reissued letters patent No. 11,913 (original No. 586,193, dated July 13, 1897), for improvements in transmitting electrical impulses and signals and in apparatus therefor, issued to Guglielmo Marconi on June 4, 1901, and letters patent No. 609,154, for improvements in electrical telegraphy, issued to Oliver Joseph Lodge on August 16, 1898, now owned by complainant. The second suit involves letters patent No. 763,772, for improvements in apparatus for wireless telegraphy, issued to Guglielmo Marconi on June 28, 1904. Decree for complainant.

Sheffield, Bentley & Betts, of New York City (Livingston Gifford, L. F. H. Betts, and John W. Peters, all of New York City, of counsel), for complainant.

F. W. H. Clay, of Pittsburgh, Pa., and H. G. Ogden, of New York City (F. W. H. Clay and Frederick W. Winter, both of Pittsburgh, Pa., and Melville Church, of Washington, D. C., of counsel), for defendant.

VEEDER, District Judge. The patents in issue relate to the communication of intelligible signals by means of the radiation and detection of waves in the ether of space. In the popular imagination radio-telegraphy is coextensive with wireless telegraphy, but it is in fact only the culmination of successive efforts, beginning apparently in ancient Egypt, to transmit intelligence without the aid of any formal connecting medium. The earlier visual and auditory methods—the beacon fire, the semaphore, the heliograph, the cannonade—were subject to such obvious limitations that they have given way to electri-

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

cal transmission. The need for wireless telegraphy became apparent as soon as the advantages of wire telegraphy were apprehended, because it was apparent that there were places where it was not practicable to stretch wires. The system of wireless telegraphy by radiation, with which these actions are directly concerned, is, in fact, only one, although the latest and most successful, of various methods by means of which the electrical problem has been approached. It is to be distinguished, therefore, at the outset, from other methods of electrical wireless communication, which operate upon entirely different principles.

First in order of time was the conduction system, the essential feature of which is that some other form of material conductor is substituted for wires. These substitutes have been in all cases either the earth or bodies of water, since they are the only natural conductors that are sufficiently common and extensive for use. In practice it was preferably employed on the banks of bodies of water. Wires stretched along opposite banks, constituting primary and secondary circuits, were grounded at both ends. Currents of electricity generated by a battery in the primary circuit on one bank leak over to the wire in the secondary circuit on the other bank. By means of circuit making and breaking signals were thus transmitted from one bank to the other. It appears that Prof. Morse discovered this method of communication as early as 1842. While giving in this city a public demonstration of the practicability of his wire telegraphy, a passing vessel parted the wires which he had stretched from Governors Island to Castle Garden. In his discomfiture he immediately devised a plan for avoiding such accidents in the future by so arranging wires along the banks of the river as to cause the water itself to conduct the electricity across. Sir William Preece, the engineer of the British postal service, subsequently worked out more extensive methods of operation upon this principle. But the distance covered did not exceed two or three miles, and the large amount of wire required was a curious feature of this system of so-called "wireless" telegraphy.

The inductive system furnished a wider field of experiment. Of this there are two types: Electromagnetic induction, and electrostatic induction. Electromagnetic induction operates through the production of a magnetic field in one complete circuit, which induces a current in another complete circuit in virtue of the stretching of magnetic lines from the transmitting to the receiving circuit. This method was successfully employed for short distances in England by Sir William Preece. The Smith patent, No. 247,127, and the Phelps patent, No. 312,506, show this inductive type as applied to railroad telegraphy. Impulses produced in a wire extending along the track were communicated to a moving train carrying a circuit, which was connected through the wheels to the rails at opposite ends of the car.

Electrostatic induction differs from electromagnetic in that it does not make use of a magnetic field, but depends upon high voltage or pressure for the purpose of charging the earth, so to speak. An early and conspicuous illustration of this type is shown in patent No. 350,299, granted to Prof. Dolbear, of Tufts College, in 1886. It operates

by variation of potential in two circuits. The transmitting circuit consists of a battery connected through a carbon transmitter to the primary winding of an induction coil, the secondary terminals of which are connected respectively with an elevated wire and the ground. In the receiving circuit there is a similar elevated wire connected to one terminal of a telephone receiver, the other terminal of which is connected directly with the earth. To increase the distance through which signals could be transmitted, Dolbear subsequently attached the wires to kites.

Of the same type is patent No. 465,971, granted to Thomas A. Edison in 1891, for a signaling system having elevated induction plates, supported on masts and connected with the earth. Edison states that he had discovered that:

"If sufficient elevation be obtained to overcome the curvature of the earth's surface and to reduce to the minimum the earth's absorption, electric telegraphing or signaling between distant points can be carried on by induction without the use of wires connecting such distant points."

He deemed this discovery especially applicable to telegraphing across bodies of water, between ships at sea, and between ships and shore. The method of operation was described as the variation of electrical tension in the two circuits.

These systems of wireless telegraphy by conduction and induction are of historical rather than practical value. Their utility was very limited, and the cost of installation was often greatly in excess of the cost of wire telegraphy. Distance being the vital consideration in any system of communication, they have given way to a system which operates upon an entirely different principle, that of electromagnetic radiation.

The patents in suit relate, then, to wireless telegraphy through the propagation, control, and detection of ether waves, commonly called "Hertzian waves," after the German scientist who first demonstrated their existence. Briefly, they disclose ways of organizing and operating electrical apparatus so as to constitute sending and receiving telegraph stations, whereby electromagnetic waves, effected by the production of an electric spark between charged conductors, and capable of traveling long distances before becoming dissipated, may be limited or radiated in definitely related trains, corresponding to an intelligible code of signals, and thereby detected at a distant station. The invisible electric waves, running at tremendous speed over the surface of the globe, produce definitely detectable electric currents in conductors that obstruct their path. By timing the impulses electrically emitted from the sending station to produce the dots and dashes, or short and long intervals, of the Morse alphabet, the succession of the correspondingly received electric currents set up in the receiving station by the impact of the outspreading waves become interpretable as dots and dashes, so as to convey messages to the receiving operator.

All signaling at a distance, whether with or without wires, requires three fundamental factors: A device to produce the signal, a medium to carry it, and a device to receive or detect it. The transmitter, in its simplest form, may be briefly described. Radiation is produced by

the sudden discharge of a Leyden jar or other condenser. This discharge is secured by arranging a circuit commencing in one plate and ending in the other plate of the condenser, and containing a spark gap of such a length that when, in process of charging, the pressure in the condenser has reached a certain point, the air between the balls of the gap is broken down and a spark passes across the gap. Until the spark passes the circuit is incomplete and no discharge takes place, but the spark renders the air between the balls of the gap a conductor, and by suddenly completing the circuit causes the condenser to discharge instantaneously through the gap. The charge in the condenser rushes from the positive plate through the spark gap to the negative plate, overcharging that plate and then rushing back again; the process being repeated until by loss of energy an equilibrium is finally established. The operation is analogous to the plucking of a spring in a vice. Pull aside one end, and its elasticity tends to make it recoil; let it go, and its inertia causes it to overshoot its normal position; both its elasticity and inertia cause it to swing to and fro until its energy is exhausted. The elastic displacement of the spring corresponds to electrostatic charge, or, roughly speaking, to electricity; its inertia corresponds to magnetism. The nature of the oscillatory discharge was investigated by Henry as early as 1839, and the conditions of capacity and inductance necessary to produce such a discharge were subsequently established by Kelvin and Helmholtz.

The connecting medium by means of which this energy is carried on in the form of waves is the all-pervading ether of space. The theory that action is possible at a distance across empty space is now exploded. Matter cannot act where it is not, but only where it is. Waves we cannot have, unless they be waves in something. The waves do not exist in ponderable matter—solid, liquid, or gaseous—but in that imponderable, not directly detectable, and therefore hypothetical, universal medium called the ether, which is assumed to fill all space, whether occupied by ponderable matter or not. The terms in which these ether waves are described are largely based on analogy, and are really a cover for ignorance rather than an exposition of fact.

A wave is a disturbance periodic in both time and space. The essential properties of a medium capable of transmitting wave motion are elasticity and inertia—elasticity in some form, in order to store up energy and effect recoil; inertia, in order to enable the disturbed substance to overshoot the mark and oscillate to and fro. Various forms of wave motion in matter are familiar. When the wind disturbs the surface of a body of water, since water has mass, and hence inertia and momentum, and a restoring force in gravity, waves result. Similarly, the motion of a line in still water sets up ripples which travel outward in widening circles. Sound is the sensation produced in our ears by waves of condensation and rarefaction set up by the expenditure of sudden energy upon the air. Where the medium in which the expenditure of energy sets up waves is matter, there is no insuperable difficulty in comprehending them. The hypothesis of the universal ether was originated largely to afford some sort of basis for a theory which would account for the transmission of light and radiant heat energy. Our eyes are in fact detectors of ether waves, since we ex-

perience the sensation of light by the abstraction of energy from such ether waves. Since we cannot conceive of the transfer of energy otherwise than directly or by wave motion, this hypothesis of the universal ether was devised to afford a vehicle for thought and expression regarding phenomena the precise nature of which was unknown.

The theory of the luminiferous ether had long been well known. It was demonstrable that light, consisting of waves of some sort, travels at the rate of 186,000 miles per second, thus taking eight minutes on the journey from the sun to the earth. Hence there must necessarily be in space some medium in which the waves exist and which conveys them. This medium was called the "luminiferous ether." The kinship between the luminiferous ether and the medium by means of which an oscillatory discharge of energy is transmitted, first suggested by Faraday in 1845, was theoretically demonstrated by the English physicist, James Clerk Maxwell, in 1864. While investigating the phenomena of light and the medium by which it travels, he examined the theoretic effect which the oscillatory discharge of electricity would have on the ether, and arrived at the conclusion that each complete oscillation would create an etheric disturbance or wave, which would travel in all directions through space with the velocity of 186,000 miles a second. He pointed out that this velocity is so nearly that of light that there was strong reason to conclude that light itself and other forms of radiant energy are in reality electromagnetic disturbances propagated in the form of waves. That is to say, the entire material universe lies in one all-pervading electromagnetic field, called for convenience the ether, and if this field be disturbed at any point the disturbance is propagated throughout the field in the form of waves. Just as a tuning fork vibration in the air excites aerial waves or sound, so an electromagnetic discharge excites ether waves. It is like light in that it travels at the same pace, and is reflected and refracted according to the same laws. Yet it cannot be seen. Physically such waves have attributes of light waves, but physiologically they are not light waves, because they do not affect the retina. The vibrations of the Leyden jar were too slow to enable the eye to respond. Yet they were too rapid for the ear. A great gap remained between the highest audible and the lowest visible vibrations.

Although Clerk Maxwell demonstrated scientifically that from the known properties of electricity and magnetism such waves should exist, he did not demonstrate physically their existence. It was a quarter of a century later that the presence of electric waves was detected. It remained for Heinrich Hertz, professor of physics in the University of Bonn, to give experimental verification to Clerk Maxwell's theory. It was in 1888 that Hertz carried on the epoch-making series of experiments which have made radio-telegraphy possible. He published his researches in Germany, but his papers were collected, translated, and published in England by D. E. Jones in 1893. Hertz's apparatus was of the simplest construction. To generate electric waves he employed an oscillator or radiator composed of two horizontal metallic conductors in the shape of plates attached to small rods terminating in polished metal balls. These rods were connected to the secondary terminals of an induction coil, and the two balls brought into close proximity to

form a small spark gap. The interruption of the current in the primary of the coil causes a discharge across the spark gap, producing the spark in the ether which results in the radiation of a wave. During the passage of this spark the air gap between the balls becomes highly conductive, but the potential difference between the charged plates immediately begins to equalize itself by a series of rapidly damped surges.

The most important contribution of Hertz was the discovery of a simple means for detecting the presence of such radiation. This device consisted simply of a single turn of wire, forming a ring, provided with a minute spark gap between two metallic knobs. When this ring or loop was held near an active oscillator, electric impulses were set up which revealed themselves by minute sparks at the gap between the balls. This, the first wireless detector, is known as a "resonator." By a series of experiments Hertz proved that such waves possessed characteristics of light, and he determined their length by direct tests. But inasmuch as he never succeeded in producing waves which were detectable at more than a score of meters or so, it is not surprising that he did not realize that he had disclosed the elements of a system of wireless telegraphy.

Hertz's disclosures excited widespread interest in the scientific world, and his experiments were repeated and extended by others. In 1889 Sir Oliver (then Professor) Lodge published an article on "Electrical Radiation and its Concentration by Lenses," in which he describes a number of experiments carried on by him with Hertz oscillators. One was with a gigantic Hertz oscillator, consisting of a pair of copper plates hung from a high gallery. By exciting this oscillator he found that extraordinary surgings were experienced in all parts of the building, and that sparks could be drawn from the water pipes by simply holding a pen knife close to them.

"Out of doors some wire fencing gave off sparks, and an iron roof shed experienced disturbances which were easily detected when a telephone terminal was joined to it; the other terminal being lightly earthed. (Sometimes I utilized wire fencing as one of the plates of the oscillator, and thus got still bigger and further spreading waves.)"

Prof. Righi, of Bologna, overcame the oxidization of the spark balls by partly inclosing two metal spheres in oil, and ranging in line with them two smaller spheres which form the secondary terminals of the induction coil.

Sir Oliver Lodge and Edouard Branly improved upon Hertz's simple resonator by devising the coherer detector. The coherer, as it was named by Lodge, is based upon the discovery that the enormous resistance offered to the passage of an electric current by powders and metal filings is greatly reduced under the influence of electric oscillations, which cause the filings to cohere and to become a conductor. In 1890 Branly described a variety of substances which he had found to be sensitive enough to detect Hertzian waves. Lodge employed a device consisting of a glass tube in the ends of which were sealed terminal wires connected to metallic electrodes, between which was placed a small quantity of iron filings. Upon subjecting this tube to an electric

current he caused the deflection of a galvanometer. Inasmuch, however, as the filings, when once they have been made to cohere, continue to cohere until their contact is mechanically destroyed, it was necessary, in order to detect a succession of waves, that some mechanical appliance should be provided whereby the contact should be destroyed and the tube rendered nonconductive as soon as the galvanometer was moved.

While these disclosures of the properties of waves generated in the ether after Hertzian methods excited general interest among scientists, no suggestion had been made of any practical application. In 1892 Sir William Crookes, an eminent English scientist, published an article in the Fortnightly Review on "Some Possibilities of Electricity," which drew attention for the first time to the practical aspect of Hertz's discovery. This remarkable forecast is one of the landmarks in the history of radio-telegraphy. Among other things, he said:

"Whether vibrations of the ether, longer than those which affect us as light, may not be constantly at work around us, we have, until lately, never seriously inquired. But the researches of Lodge in England and of Hertz in Germany give us an almost infinite range of ethereal vibrations or electrical rays, from wave lengths of thousands of miles down to a few feet. Here is unfolded to us a new and astonishing world—one which it is hard to conceive should contain no possibilities of transmitting and receiving intelligence. Rays of light will not pierce through a wall, nor, as we know only too well, through a London fog. But the electrical vibrations of a yard or more in wave length of which I have spoken will easily pierce such mediums, which to them will be transparent. Here, then, is revealed the bewildering possibility of telegraphy without wires, posts, cables, or any of our present costly appliances. Granted a few reasonable postulates, the whole thing comes well within the realms of possible fulfillment. At the present time experimentalists are able to generate electrical waves of any desired wave length from a few feet upwards, and to keep up a succession of such waves radiating into space in all directions. It is possible, too, with some of these rays, if not with all, to defract them through suitably shaped bodies acting as lenses, and so direct a sheaf of rays in any given direction. Enormous lens-shaped masses of pitch and similar bodies have been used for this purpose. Also an experimentalist at a distance can receive some, if not all, of these rays on a properly constituted instrument, and by concerted signals messages in the Morse code can thus pass from one operator to another. What, therefore, remains to be discovered is—firstly, simpler and more certain means of generating electrical rays of any desired wave length, from the shortest, say of a few feet in length, which will easily pass through buildings and fogs, to those long waves, whose lengths are measured by tens, hundreds, and thousands of miles; secondly, more delicate receivers, which will respond to wave lengths between certain defined limits and be silent to all others; thirdly, means of darting the sheaf of rays in any desired direction, whether by lenses or reflectors, by the help of which the sensitiveness of the receiver (apparently the most difficult of the problems to be solved) would not need to be so delicate as when the rays to be picked up are simply radiating into space in all directions, and fading away according to the law of inverse squares.

"Any two friends living within the radius of sensibility of their receiving instruments, having first decided on their special wave length and attuned their respective instruments to mutual receptivity, could thus communicate as long and as often as they pleased by timing the impulses to produce long and short intervals on the ordinary Morse code. At first sight an objection to this plan would be its want of secrecy. Assuming that the correspondents were a mile apart, the transmitter would send out the waves in all directions, filling a sphere a mile in radius, and it would therefore be possible for any one living within a mile of the sender to receive the communication.

This could be got over in two ways. If the exact position of both sending and receiving instruments were accurately known, the rays could be concentrated with more or less exactness on the receiver. If, however, the sender and receiver were moving about, so that the lens device could not be adopted, the correspondents must attune their instruments to a definite wave length, say, for example, 50 yards. I assume here that the progress of discovery would give instruments capable of adjustment by turning a screw or altering the length of a wave, so as to become receptive of wave lengths of any preconcerted length. * * * This is no mere dream of a visionary philosopher. All the requisites needed to bring it within the grasp of daily life are well within the possibilities of a discovery, and are so reasonable and so clearly in the path of researches which are now being actively prosecuted in every capital of Europe that we may any day expect to hear that they have emerged from the realms of speculation into those of sober fact."

In the following year, 1893, Nicola Tesla delivered a lecture before the Franklin Institute in Philadelphia on the subject of high frequency and high potential currents. Tesla was not dealing with Hertz waves, but, after discussing and describing certain apparatus for high frequency illumination and power transmission, he said:

"In connection with the resonance effects and the problem of transmission of energy of a single conductor which was previously considered, I would say a few words on a subject which constantly fills my thoughts and which concerns the welfare of all. I mean the transmission of intelligible signals, or perhaps even power, to any distance without the use of wires. I am becoming daily more convinced of the practicability of the scheme; and though I know full well that the great majority of scientific men will not believe that such results can be practically and immediately realized, yet I think that all consider the development in recent years by a number of workers to have been such as to encourage thought and experiment in this direction. My conviction has grown so strong that I no longer look upon this plan of energy or intelligence transmission as a mere theoretical possibility, but as a serious problem in electrical engineering, which must be carried out some day. The idea of transmitting intelligence without wires is the natural outcome of the most recent results of electrical investigations. Some enthusiasts have expressed their belief that telephony to any distance by induction through the air is possible. I cannot stretch my imagination so far, but I do firmly believe that it is practicable to disturb by means of powerful machines the electrostatic condition of the earth, and thus transmit intelligible signals, and perhaps power."

After speculating upon this problem, and the possibility of solving it by means of his theory of electrostatic induction, or "wabbling the earth's charge," as it has been characterized, Tesla concludes as follows:

"I think that beyond doubt it is possible to operate electrical devices in a city through the ground or pipe system by resonance from an electrical oscillator located at a central point. But the practical solution of this problem would be of incomparably smaller benefit to man than the realization of the scheme of transmitting intelligence, or perhaps power, to any distance through the earth or environing medium. If this is at all possible, distance does not mean anything. Proper apparatus must first be produced by means of which the problem can be attacked, and I have devoted much thought to this subject. I am firmly convinced that it can be done, and hope that we shall live to see it done."

In 1894, Sir Oliver Lodge delivered a lecture before the Royal Institution of Great Britain (which was published in the London Electrician and in book form) on "The Work of Hertz," in which he repeated Hertz's experiments and described various forms of detectors or re-

ceivers which would render manifest the existence of Hertzian waves. Some of these detectors were discoveries of his own; others were repetitions of Branly's discoveries in 1891. Lodge also showed, experimentally and diagrammatically, the forms of Hertzian waves. This lecture, although of great scientific interest, contained no suggestion of practical application to wireless telegraphy. Writing several years later, in his book on "Signaling without Wires," he said:

"Although the method of signaling to a moderate distance through walls or other nonconducting obstructions by means of Hertz waves * * * was practiced by the author and by several other persons in this country, it was not applied by them to actual telegraphy. The idea of replacing a galvanometer * * * by a relay working an ordinary sounder or Morse was an obvious one; but, so far as the present author was concerned, he did not realize that there would be any particular practical advantage in thus with difficulty telegraphing across space, instead of with ease by the highly developed and simple telegraphic and telephonic methods rendered possible by the use of a connecting wire. In this nonperception of the practical uses of wireless telegraphy he undoubtedly erred."

In 1895, a Russian scientist, Prof. A. S. Popoff, in a lecture printed in the Journal of the Russian Physico-Chemical Society repeated some of the experiments of Branly and Lodge, and gave an account of some experiments of his own relative to certain substances which he had noted were detectors of Hertzian waves. In this article Popoff also describes a laboratory experiment in which he noted that if one of his detectors, consisting of a Branly tube containing filings, was connected to a lightning conductor at one end and to ground at the other, in connection with an electric bell and battery, this apparatus would note the existence of a distant thunderstorm in the Ural Mountains. Popoff concludes his paper with the following:

"In conclusion, I may express the hope that my apparatus, with further improvements of the same, may be adapted to the transmission of signals at a distance, by the aid of quick electric vibrations, as soon as the source of such vibrations, possessing sufficient energy, will be found."

To sum up the results of this period of speculation and experiment: The conductive and inductive types of wireless telegraphy had been tried and found impracticable for long-distance signaling. Maxwell, in 1863, had speculated on the possibility of the production of electric waves which would detach themselves from a source of origin; Hertz, in 1887–88, had proved experimentally that Maxwell's theories were correct; Lodge, in 1889, had repeated Hertz's experiments; Branly, in 1890, had repeated Hertz's experiments, and had also discovered that certain substances, in addition to Hertz's ring resonator, were detectors of electric waves; Crookes, in 1892, had forecast the possibilities of wireless telegraphy by the utilization of Hertzian waves; in 1893 Tesla reverted to the impracticable scheme of electrostatic induction; Lodge, in 1894, had reviewed the experiments of Hertz and Branly and some of his own, touching the form which electric waves took when emanating from their source of origin, and upon substances which would detect these waves; Popoff, in 1895, in similar experiments had noted that he could detect the existence of a distant thunderstorm, and had expressed the hope that wireless telegraphy could be

accomplished by the utilization of Hertzian waves. But no one had described and demonstrated a system of wireless telegraph apparatus adapted for the transmission and reception of definite intelligible signals by such means. This was the state of scientific knowledge and practice when in 1896 Marconi applied for his first patent. The foregoing chronological narrative comprises all the prior publications and patents relied upon by the defendant.

Marconi Patent, Reissued No. 11,913 (1901).

[1] This patent for "improvements in transmitting electrical impulses and signals and in apparatus therefor," was originally issued to Guglielmo Marconi on July 13, 1897, and was reissued under date of June 4, 1901. According to this invention, as described in the specification, electrical signals, actions, or manifestations are transmitted (through the air, earth, or water) by means of oscillations of high frequency, such as have been called Hertz rays or Hertz oscillations. At the transmitting station is employed a Ruhmkorff coil or other source of high tension electricity, having in its primary circuit a Morse key or other signaling instrument, and at its poles appliances for producing the desired oscillations. At the receiving station there is a local battery circuit containing any ordinary receiving instrument and an appliance for closing the circuit, which is actuated by the oscillations from the transmitting station.

The transmitting and receiving means are then fully described and illustrated. At the transmitting station there is a battery and an ordinary Morse key in circuit with the primary of a Ruhmkorff coil. The terminals of the secondary circuit of the coil are connected to two metallic balls fixed at the ends of tubes of insulating material, such as ebonite or vulcanite. Similar balls are fixed in the other ends of the tubes. These tubes fit tightly in a similar tube, having covers, through which pass rods connecting the balls to the conductors. One (or both) of the rods is connected to the ball by a ball and socket joint, which permits the adjustment of the balls in accordance with the quantity and electromotive force of the electricity employed. Directions are then given with respect to the adjustment of the spark gap, and for insuring the regularity and power of the discharge of an ordinary Ruhmkorff coil with a trembler break on its primary, by causing one of the contacts of the vibrating break to revolve rapidly by connecting it to a small electric motor.

At the receiving station is a battery, whose circuit includes an ordinary telegraphic instrument (or a relay or other apparatus) and a circuit closer. The appliance employed as a circuit closer is a glass tube containing metallic powders or grains of metal, each end of the column of powder being connected to a metallic plate of suitable length to cause the system to resonate electrically in unison with the electric oscillations transmitted. Two short pieces of thick silver wire fitting tightly inside the tube are joined to pieces of platinum wire. The tube is closed and sealed to the platinum wire at both ends. Directions are then given with respect to the size of the tube, the preparation and mixture of the powder or filings, and the sealing and operation of the tube.

It is stated that the tube may be replaced by other forms of imperfect electrical contacts, and that, instead of the tuned plates, tubes or even wires may be employed.

It is pointed out that when no oscillations are sent from the transmitting station the tube does not conduct the current and the local battery circuit is broken, but when the powder or tube is influenced by the electrical oscillations from the transmitter it conducts and closes the circuit. When once started, however, the powder in the tube continues to conduct, even when the oscillations have ceased; but if it be shaken or tapped the circuit is broken. A tube well prepared will instantly interrupt the current passing through it at the slightest tap, provided it is inserted in a circuit in which there is little self-induction and small electromotive force; the two plates communicating with the local circuit through two very small choke coils, thereby preventing the high-frequency oscillation induced across the plates by the transmitter from dissipating itself by running along the local battery wires, which might weaken its effect on the sensitive tube. The local circuit in which the sensitive tube is inserted contains a sensitive relay. The tapping is done automatically by the current started by the tube, employing a trembler on the circuit of the relay similar in construction to that of an electric bell, but having a shorter arm. In series or derivation from the circuit actuated by the relay is inserted the telegraphic or other apparatus desired to be worked.

The operation of the apparatus is thus described:

"The Ruhmkorff coil or other source of high tension electrically capable of producing Hertz oscillations being in circuit with a signaling instrument—such as a Morse key, for instance—the operator by closing the circuit in a way commonly employed for producing dots and dashes in ordinary telegraphy will cause the oscillator to produce either a short or a more prolonged electric discharge or spark, or succession of sparks, and this will cause a corresponding short or more prolonged oscillation in the surrounding medium corresponding in duration to the short or longer electrical impulse which in ordinary telegraphy produces a dot or dash. Such oscillations of defined character will thereupon be propagated as such throughout the medium, and will affect a properly constructed instrument at a distant receiving station. At such station the imperfect contact instrument is in circuit with a relay, and when oscillations from the transmitting station reach and act upon such imperfect contact its resistance is reduced, and the circuit is thereby closed during the continuance of the oscillation and for a length of time corresponding thereto. The closing of the relay circuit causes the sounder or other signal apparatus to act in accordance with the particular oscillation received, and the oscillation also immediately starts the action of the shaking or tapping device, which so shakes the powder in the imperfect contact instrument as to cause it to break circuit as soon as the oscillation ceases, which has closed the circuit and produced a movement of the signaling instrument corresponding thereto. I am, therefore, enabled to communicate signals telegraphically without wires by thus artificially forming oscillations at the transmitting station into definite signals by means of a signaling instrument and receiving and reading the same at a receiving station by an imperfect contact instrument, which when acted upon by such defined oscillations operates, first, to close the circuit in accordance with the received oscillation, and produce a corresponding movement of the receiving instrument, relay, or sounder, and also to operate a shaking device to automatically reopen the circuit immediately after the reception of each oscillation, thereby preserving the results of its defined character in the action of the receiver."

Three forms of the system are illustrated and described. When transmitting through the air, and it is desired that the signal should be sent in one direction only, the oscillation producer at the transmitting station is placed in the focus or focal line of a reflector directed to a receiving station, and in the circuit closer at the receiving station is placed a similar reflector directed toward the transmitting station. In this form, illustrated in Figs. 1 to 8, there are neither elevated conductors nor ground or water connections at either station. A second form, illustrated in Fig. 9, is stated to be convenient when transmitting across long distances. Here the plates or conductors are suspended by poles, but there are no ground connections. When transmitting signals by the aid of earth connections, one end of the oscillation producer and one end of the circuit closer are connected to earth, and the other ends to plates preferably electrically tuned with each other in the air and insulated from earth. In Figs. 10 and 11 is illustrated this third form having elevated conductors and ground connections at both stations. It is thus described:

"When transmitting with connections to the earth or water, I use a transmitter as shown in Fig. 10. I connect one of the spheres *d* to earth *E*, preferably by thick wire, and the other to a plate or elevated conductor *u*, carried by a pole *v* and insulated from earth, or the spheres *d* may be omitted and one of the spheres *e* be connected to earth and the other to the plate or conductor *u*. At the receiving station, Fig. 11, I connect one terminal of the sensitive tube *j* to earth *E*, also by a thick wire, and the other to a plate or elevated conductor *w*, preferably similar to *u*. The plate *w* may be suspended on a pole *x* and must be insulated from earth. The larger the plates of the receiver and transmitter and the higher from the earth the plates are carried the greater is the distance at which it is possible to communicate. When using the last-described apparatus, it is not necessary to have the two instruments in view of each other, as it is of no consequence if they are separated by mountains or other obstacles. At the receiver it is possible to pick up the oscillations from the earth or water without having the plate *w*. This may be done by connecting the terminals of the sensitive tube *j* to two earths preferably at a certain distance from each other and in a line with the direction from which the oscillations are coming. These connections must not be entirely conductive, but must contain a condenser of suitable capacity—say one square yard of surface. Balloons can also be used instead of plates on poles provided they carry up a plate or are themselves made conductive by being covered with tinfoil. As the height to which they may be sent is great, the distance at which a communication is possible becomes greatly multiplied. Kites may also be successfully employed, if made conductive by means of tinfoil."

It is with this system alone that the single claim in issue deals:

"3. The combination, in an apparatus for communicating electrical signals, of a spark producer at the transmitting station, an earth connection to one end of the spark producer, an insulated conductor connected to the other end, an imperfect electrical contact at the receiving station, an earth connection to one end of the contact, an insulated conductor connected to the other end, and a circuit through the contact, substantially as and for the purpose described."

Thus far I have been using the reissued patent No. 11,913, dated June 4, 1901. It may be convenient at this point to consider the defendant's contention that the claim in issue was narrowed by the affirmative act of the patentee in securing a reissue and by subsequent disclaimer dated December 11, 1905. The original patent No. 586,193,

dated July 13, 1897, contained 56 claims. Claim 43 of the original became claim 3 of the reissue. The only difference between them is that in the latter there are added to the former, at the outset, the words, "In an apparatus for communicating electrical signals," and, in conclusion, the words, "substantially as and for the purpose described." Save with respect to the specific additions hereafter referred to, the specification of the reissue makes no material change in the original. I note, however, two particular changes pointed out by the defendant: Where the original patent, in describing the construction of Figs. 10 and 11, reads, "When transmitting through the earth or water, I use a transmitter as shown in Fig. 10," the corresponding passage in the reissue reads, "When transmitting with connections to the earth or water." Again, where the original patent, referring to the sensitive tube, states that "the tube *j* may be replaced by other forms of imperfect electrical contact, but this is not desirable," the reissue, in the corresponding passage, omits the last clause. No change whatever was made in the figures.

The application for reissue, filed April 1, 1901, was made upon these grounds:

"That deponent * * * believes that the letters patent No. 586,193, referred to in the foregoing petition and specification, and herewith surrendered, are inoperative or invalid, for the reason that the specification thereof is defective, and that such defect consists particularly in the patentee claiming as his invention or discovery more than he had a right to claim as new, and particularly in that some of the claims of said letters patent No. 586,193 were made to cover, by their terms, apparatus referred to in certain descriptions of apparatus, employed by one Prof. Popoff, contained in a publication entitled 'Journal of Russian Physico-Chemical Society, vol. 28, 1896, Division of Physics, Part I.' * * *

"That at the time of the filing and prosecution of the application for United States letters patent No. 586,193, the publication of the experiments of Prof. Popoff was not known to the deponent, nor, as deponent is informed and believes, to those acting for or on behalf of said deponent, and while the deponent believes that the said publications do not describe any practically operative receiving instrument which can be used with definite artificially produced Hertzian oscillations of a character to record intelligible signals, yet, in view of said publications, the language of certain claims of said letters patent No. 586,193 might be construed as too broad. That the said letters patent No. 586,193 did not contain a sufficiently full explanation of the mode of operation of the system of telegraphy invented by deponent. That the original letters patent No. 586,193 contained, as deponent is informed and believes, an unnecessary number of claims, some of which differ from others only in very small details, and the inclusion of which was caused by the fact that the art to which the invention relates was substantially a novel one, and it seemed best to the deponent and those acting for or on behalf of deponent, to present detailed claims for a great number of variations in the form of apparatus to be employed in carrying out the inventions or discoveries of deponent."

Accordingly, in the reissue the 56 claims of the original patent were reduced to 24, and there was added at the end of the original specification, first, the description of the operation of the patentee's apparatus which I have already quoted in full, and, secondly, the following concluding passage:

"I am aware that the sensitiveness of various apparatus, including tubes containing filings, to more or less distant electrical disturbances has been

observed in a general way, and that it has also been proposed to disturb the conductivity of such filings by various instrumentalities for shaking the tubes containing the same. I am also aware that the use of tubes containing metallic powders of several separate kinds has been described or suggested in connection with certain experiments relating to so-called 'coherers'; but I am not aware that the utility of a mixture of metallic powders has ever previous to my invention been ascertained and utilized for the purpose of obtaining the required degree of sensitiveness in such an instrument.

"I am aware of the publication of Professor Lodge of 1894, at London, England, entitled 'The Work of Hertz' and the description therein of various instruments in connection with manifestations of Hertz oscillations. I am also aware of the papers by Professor Popoff in the Proceedings of the Physical and Chemical Society of Russia in 1895 or 1896; but in neither of these is there described a complete system or mechanism capable of artificially producing Hertz oscillations and forming the same into and propagating them as definite signals and capable of receiving and reproducing, telegraphically, such definite signals, nor has any system been described, to my knowledge, in which a Hertz oscillator at a transmitting station and an imperfect contact instrument at a receiving station are both arranged with one terminal to earth and the other elevated or insulated, nor am I aware that prior to my invention any practical form of self recovering imperfect contact instrument has been described.

"I believe that I am the first to discover and use any practical means for effective telegraphic transmission and intelligible reception of signals produced by artificially formed Hertz oscillations."

As I understand the defendant's contention, it is asserted that if the reissue be construed broadly according to its terms it is invalid because it constitutes an enlargement of the original patent; whereas, the reissue expressly narrows the original patent. I do not agree with either contention. So far as the claim in issue is concerned, I do not perceive that the reissue makes any material or appreciable change. The Popoff publication referred to dealt with a receiving apparatus. The receiving apparatus constitutes only one of the elements in the combination now claimed by the complainant. The same conclusion applies to the defendant's argument with respect to the subsequent disclaimer. It appears that after Judge Townsend had decided, in the case of Marconi Wireless Telegraph Co. v. De Forest Wireless Telegraph Co. (C. C.) 138 Fed. 657, that claim 1 of the reissued patent was invalid, a formal disclaimer of that claim was filed. But this disclaimer can have no effect upon the validity or scope of claim 3, since claim 1 related to a receiver alone, not to the combination specified in claim 3.

In 1896 Marconi brought his invention to the notice of the chief engineer of the British post office, Sir Wm. Preece, for whom in September of that year he demonstrated and confirmed, in experiments on Salisbury Plain, the results which he says he had previously attained in Italy. These tests, as appears from Sir Wm. Preece's report to the British Association, were conducted with parabolic mirrors. In a lecture on "Telegraphy without Wires," delivered at Toynbee Hall on December 12, 1896, Preece expressed great faith in the apparatus:

"The curious thing about it was that there was no new principle introduced. The first man who taught us how to generate these waves was Hertz, the German physicist, and they had been developed by others. But in making practical use of these waves Mr. Marconi had invented devices which were highly novel and very beautiful."

In March, 1897, in further tests on Salisbury Plain, a distance of about 4 miles was attained. In May, by the use of long vertical wires, communication was successfully established across the Bristol Channel, a distance of 9 miles. This test was made in the presence of representatives of the British postal, war and naval departments, and of the Italian and German governments. The German representative, Prof. A. Slaby, published in Berlin, in November of that year, a description of what he had seen, in the course of which he said:

"What I saw was something new. Marconi had made a discovery. He worked with means the full importance of which had not been recognized, and which alone explained the secret of his success. I ought to have said this at the commencement of my subject, as at a later date, especially in the English technical press, the novelty of Marconi's process was denied. The production of Hertz waves, their radiation through space, the sensitiveness of the electric eyes—all are known. Very good; but with these means 50 meters were attained, but no more. In the first instance Marconi has devised for the process an ingenious apparatus, which, with the simplest means of assistance, attains a sure technical effect. He has thus first shown how by connecting the apparatus with the earth on the one side, and by using long extended vertical wires on the other side, a telegraphy was possible. These wires form the main feature of his invention; the term 'wireless telegraphy' is therefore really a misnomer."

Preece himself, describing the same test in a lecture before the Royal Institute, June 4, 1897, says that the mirrors used in the earlier experiment had been laid aside. He notes as curious the fact that hills and apparent obstructions fail to obstruct:

"The wings shown in Fig. 2 may be removed. One pole can be connected with earth and the other extended up to the top of the mast, or fastened to a balloon by means of a wire. The wire and balloon covered with tin foil or kite becomes the wing. In this case one pole of the transmitter must also be connected with earth. The distance to which signals have been sent is remarkable. On Salisbury Plain, Mr. Marconi covered a distance of 4 miles. In the Bristol Channel this has been extended to over 8 miles, and we have by no means reached the limit. It is interesting to read the surmises of others. Half a mile was the wildest dream."

In the middle of July, 1897, Marconi carried on some tests for the Italian government, at Spezia, between warships and ships and shore, obtaining communication over a distance of 10 miles. The system was thereupon adopted by the Italian navy. Returning to England, Marconi carried out further tests for the post office in the autumn of 1897. In December of that year stations were erected in the Isle of Wight and at Bournemouth, on the south coast of England, 14 miles apart, and early in 1898 these stations were in working order. The first commercial use of the system was made in 1898, in reporting the yacht races at Kingston, Ireland, for the Dublin Express. Marconi testified that on that occasion communication was accomplished over a distance of about 25 miles. The system was also used at Lloyd stations in the north of Ireland for communication with outlying islands, and it was also installed upon lightships in the English Channel.

Marconi testified that he succeeded in transmitting intelligible messages over a distance of 30 or 40 miles with the apparatus shown in the patent in suit; that is, with the spark gap and the coherer directly connected between the earth and the antenna. From

1898 he increased the sensitiveness of the coherer by interposing a transformer. With this improvement he succeeded in March, 1899, in establishing communication across the English Channel between Dover and Bologne, a distance of over 30 miles. In that year tests were made on a large scale by the British navy, resulting in the following year in its installation on 32 warships and shore stations. In 1899, also, following its use in reporting the international yacht races off Sandy Hook, Marconi made a test for the United States navy, when communication was carried on over a distance of 36 miles. Other tests over longer distances had established the value of wireless telegraphy for naval and mercantile purposes upon a firm basis prior to Marconi's application in 1900 for his improved system of syntonic wireless telegraphy, which forms the subject-matter of the second suit.

Marconi's relation to his predecessors appears from the foregoing narrative. The fundamental principles upon which radio-telegraphy depend were discovered and demonstrated by Hertz with his simple form of oscillator and resonator. His oscillator was measurably efficient, but his ring resonator was suitable only for laboratory demonstrations. Righi improved the oscillator, and the timely discovery by Branly of the action of electric oscillations upon powders and metal filings disclosed a practical method of detecting ether waves. This filings tube, or coherer, was developed by Lodge, who added means for restoring the receptivity of the tube after the coherence of the filings under the impact of the waves. Employing the Hertz oscillator with the improved Branly coherer, Lodge demonstrated the transmission of waves by the deflection of a galvanometer. Popoff supplanted the galvanometer by a relay and bell; and for meteorological observations he used as a receiver a vertical aerial wire grounded at one end to a water pipe. Signals had been detected at a distance of more than 100 yards. The possibilities of utilizing ether waves in the communication of intelligence had been foreseen. As early as 1892 Crookes had conceived the idea of transmitting messages in the Morse code by such means.

Now, in his first patent Marconi used improved forms of the Hertz-Righi oscillator and the Branly-Lodge-Popoff coherer or detector. Of the three forms of structure described and illustrated, the first is the well-known horizontal type used by Hertz; in the second, the plates or conductors of the transmitting station are suspended on poles; in the third, there are vertically suspended conductors with grounded connections at both transmitting and receiving stations. In actual use, after some early experiments, the third form of structure, with vertical conductors and grounded connections at both stations, soon superceded the others; and the structure reached its final form upon the abandonment of the elevated plates and the adoption of a vertical wire, an alternative mentioned in the specification. And the practical application of the structure is brought about by inserting a Morse key in the sender and the ordinary receiving instrument in a local battery circuit in the receiver.

In his practical application of Hertz's discovery to telegraphic communication, it is apparent from his specification that Marconi himself,

as well as other scientists, at the time he filed his application for a patent, regarded his improvement in the coherer as his substantial contribution to the art. In its immediate application, and for the relatively short distance attained in early tests, such a conclusion was doubtless correct; but in the subsequent progress of the art the coherer has been abandoned. The grounded vertical aerial wire or antenna at the transmitting and receiving stations is, however, a fundamental feature of the later art. The tentative way in which this feature is advanced is characteristic of the state of scientific knowledge at that time. The statement in his original application that this form is used "when transmitting through the earth or water" was changed in the reissue to "transmitting with connections to the earth or water." "When using the last-described apparatus," he says, "it is not necessary to have the two instruments in view of each other, as it is of no consequence if they are separated by mountains or other obstacles." What is meant by the statement that the two instruments need not be in view of each other is inexplicable, for both Hertz and Lodge had demonstrated the transmission of ether waves through solid walls. The capacity of waves generated by this form of apparatus to overcome mountains or other obstacles is, however, a disclosure of the fundamental significance of the grounded conductor. And, although the specification describes and illustrates another form of structure as convenient for transmitting across long distances, I think that the described characteristics of the grounded vertical conductor plainly indicate its utility for long-distance transmission, as does also the statement that:

"The larger the plates of the receiver and transmitter and the higher from the earth the plates are carried, the greater is the distance at which it is possible to communicate."

The precise action of the grounded vertical aerial or conductor is not yet agreed upon. But waves thus radiated act as if they traveled with their feet upon the earth, a property which has made it possible to overcome the greatest of all obstacles to long-distance telegraphy—the curvature of the earth. Although Henry had used a grounded vertical wire to magnetize a needle, and the use of the earth as a capacity was well known in electricity, Marconi first applied the grounded aerial to Hertzian wave telegraphy with new and indispensable results. Popoff had used it in his receiver, but its use in the transmitter is the material consideration.

The defendant's contention, that such use was disclosed in the passage (quoted above) from Lodge's 1889 article on "Electric Radiation and Concentration by Lenses," is untenable. The fact that Lodge made no reference to ground connections in his subsequent lecture on the work of Hertz shows that his earlier statement is nothing more than an incidental reference to an abandoned experiment. It is immaterial whether Marconi did or did not understand its method of operation. He understood and described its function, and he expressly claimed it. And although it appears that in his early experiments on Salisbury Plain he used the old form with parabolic reflectors, the evidence shows beyond question that in all subsequent tests he used the

grounded antennæ. Accordingly, I find that the evidence establishes Marconi's claim that he was—

"the first to discover and use any practical means for effective telegraphic transmission and intelligible reception of signals produced by artificially formed Hertz oscillations."

He did not make a pioneer invention in the sense that he discovered the principles of the art at the same time that he applied them to practical use, as did Morse in wire telegraphy and Bell with the telephone. His patent was a pioneer in point of time; but he did not discover the principles, nor did he invent the primary appliances, upon which the transmission of electromagnetic waves are based. In his original application he claims only a patent for "improvements in transmitting electrical impulses and signals and in apparatus therefor," by means of Hertz oscillations, and I think that his subsequent reissue and disclaimer would preclude any broader claim now. Marconi accomplished his result by combining, in the utilization of known principles, features which had been disclosed by others, which he improved and co-ordinated, with additional features of his own invention which subsequent knowledge has shown to be of fundamental importance. These combined means are embodied in the claim in issue, in the practical application of which, without any subsequent improvement, communication was established over a distance of 30 miles.

In such a situation I understand the relevant legal principle to be this: To attack this claim upon the score of novelty, it must be shown that all the elements of the combination were disclosed in some one prior publication, patent, or use. Even if all the elements of a combination be old, it may still disclose invention if the elements combine to produce a new result. As the Supreme Court said in Loom Co. v. Higgins, 105 U. S. 580, 26 L. Ed. 1177:

"It may be laid down as a general rule, though perhaps not an invariable one, that if a new combination and arrangement of known elements produce a new and beneficial result, never attained before, it is evidence of invention. It was certainly a new and useful result to make a loom produce 50 yards a day, when it never before had produced more than 40; and we think that the combination of elements by which this was effected, even if those elements were separately known before, was invention sufficient to form the basis of a patent."

It is only when the elements constitute a mere aggregation, a mechanical juxtaposition, as distinguished from a real combination, or vital union, and produce no new result, that a patent can be defeated by showing anticipation of the separate parts in divers publications.

Now the defendant has attacked the validity of this patent in both ways. Its expert, Dr. Kennelly, in his testimony pointed out four exhibits, each of which, he asserted, embodied all the elements of the claim in issue: The Edison patent, No. 465,971 of 1891, for wireless telegraphy by induction; Lodge's publication in the Philosophical Magazine, July, 1889, of his lecture "On Electric Radiation and Its Concentration by Lenses"; Lodge's publication in the Electrician, 1894, on "The Work of Hertz"; and Popoff's publication in the Journal of the Russian Physico-Chemical Society, 1895, of his lecture before that society. On the argument, however, the principal contention

seemed to be that Tesla's 1893 lecture had disclosed an operative transmitting station, which needed only to be combined with the receiving station disclosed by Popoff to bring about a complete anticipation of the patent in suit.

I am of opinion that neither position has been sustained. All the foregoing references have been reviewed in connection with the history of the subject. Some of them have nothing whatever to do with Hertzian wave radiation. Others record mere abandoned experiments. No one of them contains a description of all the elements of the specified combination, in such full, clear, and exact terms as to enable a person skilled in the art to construct and practice the invention without any information derived from the patent. An account of an experiment, by way of suggestion or speculation as to something that might succeed, will not suffice. Even if the doctrine of aggregation or selection were applicable to this issue, no combination of any apparatus disclosed by Tesla, in his experiments with high frequency and high potential currents, with Popoff's detecting apparatus, would produce the elements prescribed in the claim in suit. The requirement in the claim of a spark producer at the transmitting station fixes the method of operation as radiation and differentiates it from Tesla's proposed scheme of induction telegraphy.

With respect to infringement, it appears that the defendant's transmitting station is inductively connected with an oscillating path from antenna to ground through the intervention of an oscillation transformer. At the receiving station the antenna is permanently connected in a closed circuit to ground. This antenna path is inductively connected to a local oscillation circuit through the medium of a transformer. The local oscillation circuit comprises one coil of the transformer, a condenser, and either an electrolytic or a crystal detector. There is also a pair of telephone receivers in a loop around one of the condensers, and a voltaic battery, which, however, may be dispensed with.

The electrolytic detector is a device having for its lower terminals a small platinum cup containing a dilute acid solution. The upper terminal includes an exceedingly fine wire of silver with a platinum core, mounted so as to be adjustable. This wire is prepared for use as a detector by immersing a small portion at the end in an acid solution and applying a battery current so as to remove the silver from the wire, leaving the almost invisible platinum core projecting. In use this fine point of the wire is lowered into contact with the acid in the cup. In the crystal detector the lower terminal is a cup in which there is fastened a piece of crystal of silicon or ferro-silicon, and the upper terminal is a small metal point carried at the end of an adjustable spring arm, so as to enable it to be placed in contact with any desired spot on the crystal. In use a battery and suitably adjusted potentiometer are employed with it to produce a sensitive detector. In both forms the accumulated energy in the closed circuit actuates a quantitatively responsive telephone indicator directly.

Two of the defendant's contentions of noninfringement require consideration. One relates to the grounded antennæ; the other, to the imperfect electrical contact at the receiving station.

The patent in suit describes, illustrates, and claims a specific arrangement of grounded antennæ; "an earth connection to one end of the spark producer, an insulated conductor connected to the other end;" at the receiving station, "an earth connection to one end of the [imperfect electrical] contact, an insulated conductor connected to the other end." No alternative arrangement is suggested. In the defendant's device the spark gap and detector are not in the antenna at all. They are in closed circuits, which are not grounded, and are not physically connected, but only associated inductively and through oscillation transformers, with the grounded antennæ. With the spark producer and detector in closed circuits, which obviously have no ends, how can it be said that the defendant's apparatus falls within the claim?

When the complainant's expert, Waterman, was asked which one of the ends of the detector in an inductively associated system having an open antenna circuit and a closed oscillating circuit was connected to the ground, he admitted that he would have to say that it was not connected with the ground at all. That the inductive arrangement of circuits was a later development is shown by the fact that Marconi subsequently secured a patent for it, in the specification of which his original patent was differentiated. The complainant's contention is that, although there is no direct physical connection, there is electrical connection, which is the material connection. But the material connection is the connection specified in the claim, and that is specifically a physical connection. A claim may, on occasion, be broadly construed; but it may not be rewritten. Marconi's claim was, not for a grounded connection in general, but for a particular connection, which the defendant does not use.

It seems equally plain to me that the defendant's electrolytic and crystal detectors do not infringe the complainant's imperfect contact device or coherer. The action of these detectors has been the subject of much theorizing, but what actually takes place in them does not seem to be known. We must therefore begin with what Marconi describes and illustrates as an imperfect electrical contact device. This was nothing more than a simple filings tube or coherer, which he improved in sensitiveness and efficiency. It was in every essential principle and method of operation the filings tube of Branly, Lodge, and Popoff. So strong was Marconi's reliance upon his improved coherer that, although he stated in his original patent that "the tube *j* may be replaced by other forms of imperfect electrical contacts," he added that this was not preferred. In the reissue the latter clause was omitted. By that time the art had developed beyond the coherer, and it was apparent that other forms of detectors were preferred. Since then the coherer has been practically abandoned.

The subsequent disclaimer of claim 1 serves to indicate how narrow was Marconi's invention with respect to the coherer. Yet he claimed it under the broad term "imperfect electrical contact," which is the principle of operation. If he is not to be confined to the particular application of that principle which he describes and illustrates, certainly

he must be strictly confined to the principle of operation under which he claimed it.

But the complainant's argument on infringement is based, not upon the language of the claim, but upon Judge Townsend's characterization of the term (it is also referred to in the specification) as meaning a device which operates in virtue of "a variation of resistance." Marconi v. De Forest Wireless Telegraph Co. (C. C.) 138 Fed. 657. Such a construction sweeps within the claim, according to the complainant's expert, Waterman, every known detector except the physiological ones —the frog's leg and the human eye. Such a contention seems to me to run counter to the grounds upon which Judge Townsend invalidated claim 1 of the original patent:

"In the original patent, as already shown, Marconi limited most of his claims to a combination in a receiver for electrical oscillations of his coherer, consisting of a tube and powder, and means for shaking the powder. But inasmuch as this had been disclosed by prior publications, he applied for the reissue, and now by claim 1 has attempted to cover, as shown above, not merely the coherer of his former claims, or any such coherer in a receiver, or a coherer with means for shaking the powder therein, but every form of imperfect contract device, previously disclosed by others, or which might be thereafter discovered whenever combined with any electrical signal apparatus using Hertz oscillations."

In the form of imperfect electrical contact shown in the patent in suit, there is interposed between the two metallic terminals in the glass tube a mixture of powdered metal filings, the resistance of which, until the passage of an oscillatory current, is greater than that of the terminals. Hence there is imperfect electrical contact between the terminals. Judge Townsend held that the De Forest anti-coherer (which operated upon the same principle, but in the reverse manner)—

"does infringe the claims covering an imperfect electrical contact, because it produces the same result, the transmission of the oscillations by a variation of resistance, and by means which operate in the same way, namely, by changing the amount of resistance in the coherer or detector device."

Judge Townsend's statement must be construed with reference to the facts before him. The utmost that can be said is that he allowed Marconi those detectors which act as circuit closers and openers by reason of variation of resistance. I am unable to understand how it can be said with any degree of accuracy that the coherer operates by variation of resistance. It operates only when there is a complete change of resistance; and when once the filings cohere under the action of the oscillatory current they continue to act as a conductor without substantial variation until decohered. Both Branly and Lodge said that the resistance of the coherer was practically infinite. So did Marconi as late as 1902. Lodge, in his article on the work of Hertz, gives six classes of detectors, and classifies the filings tube under the heading "microphonic." As late as 1904, Fleming classified detectors as (1) imperfect contact; (2) magnetic; (3) thermal; and (4) electrolytic and chemical (crystal detectors had not then been discovered).

Any possible variation of resistance taking place in the coherer is a variation through a complete group or train of waves. With respect to the defendant's detectors, it is true that both of them are constructed

in such a way as to produce a variation of resistance. In the electrolytic detector, the nitric acid interposed between the platinum terminals has a normal conductivity less than (and accordingly a greater resistance than) the terminals. When, according to the prevailing theory, the oscillatory current heats the acid, its resistance is decreased, or its conductivity is increased. So, also, in the crystal detector, the ferrosilicon has a higher resistance than the terminals between which it is interposed, which resistance is reduced by the passage of electrical oscillations. In both forms of detector the local contact is very small, so that a relatively large resistance is located at the contact. In a similar sense, and because of the interposition of a substance of less conductivity, it may be said that there is an imperfect electrical contact between the terminals in both forms of detector. But whatever theory is adopted of the action which takes place in the defendant's detectors—whether change of resistance, or electrolytic or thermal action, or what not—it is one as between wave and wave. Whatever variation of resistance there is takes place within the limits of a single wave, and that resistance is the same in each succeeding wave.

From an electrical point of view the defendant's detectors are not imperfect electrical contacts, as the term is used by Marconi, because the electrical condition is permanent from wave to wave of electrically received impulses. Moreover, the defendant's devices are rectifiers, which means that in any complete cycle or complete wave of alternating current the positive half wave passes through the device with less obstruction or greater power than the negative half wave. This rectifying action is a definite property, which is the same from wave to wave. The defendant's detectors do not operate in the same manner as the Marconi coherer. In the defendant's device it is the received energy from the distant station which produces the result. It is immaterial that the defendant sometimes uses a local battery, because the local battery current is not varied, much less interrupted, by the so-called detector. Moreover, while the battery does all the work of indicating in Marconi's system, and the received oscillating current is kept away from the indicator, in the defendant's system it is the received oscillating current which does move the indicator, and the local battery is not essential for any purpose.

Clearly, in the patent in suit it is not the received energy which produces the indication; it is the battery circuit which is released and set in action. Marconi described his coherer as a circuit-closing device, and his patent does not suggest any other way of operating except by a circuit closer and opener. The defendant does not use anything operating on a similar principle. It has a permanently closed circuit, without any variability of contact whatever. The defendant could not possibly use a coherer, and Marconi could not possibly use a rectifier, without entirely altering their principle of operation.

The pendency of the companion suit is of itself proof that to change from an apparatus in which the spark gap and the coherer are in the antenna, to a system in which the spark gap and detector are in separate circuits, coupled by transformers to the antenna, is a radical change carrying defendant's device outside the contemplated system

of the patent in suit. The function of the complainant's coherer is to close a local battery circuit so that it may operate a relay; the function of the defendant's detectors is to accumulate the energy in an already closed circuit, and thereby move a quantitatively responsive indicator directly. This is accomplished by the complainant by the breaking down of a gap by means of the electrical impact of the waves upon the loose filings. The defendant accumulates an oscillating current in a separate closed circuit, rectifies this current from a state of oscillating pulses in opposite directions to a succession of pulses in the same direction, and by the current moves the indicator.

Giving the claim in issue, therefore, the broadest construction to which it can possibly be entitled, it seems clear to me that it is not infringed by the defendant. Accordingly I find that the claim, although valid, is not infringed.

Lodge Patent No. 609,154 (1898).

[2] The object of the Lodge patent, No. 609,154, dated August 18, 1898, as set forth in the specification, is "to enable an operator, by means of what is now known as 'Hertzian-wave telegraphy,' to transmit messages across space to any one or more of a number of different individuals in various localities, each of whom is provided with a suitably arranged receiver," and to effect other ancillary improvements described and claimed.

"The method of intercommunication consists, according to my invention, in utilizing certain processes and apparatus for the purpose of producing and detecting a sufficiently prolonged series of rapid electric oscillations and in so arranging them that the excitation of a particular frequency of oscillation at the sending station may cause a telegraphic instrument to respond at a distant station by reason of being associated, through a relay or otherwise, with a subsidiary circuit capable of electric oscillations of that same particular frequency or of some multiple or submultiple of that frequency. Another distant station will similarly be made to receive messages by exciting at the sending stations alternations of a different frequency, and so on, and thus individual messages can be transmitted to individual stations without disturbing the receiving appliances at other stations, which are tuned or timed or syntonized to a different frequency."

In carrying out the invention the patentee specifies that he uses—

"a definite radiator consisting of a conductor or pair of conductors h h' of large capacity, arranged either as a Leyden jar or preferably spread out into space, one of them being the earth when desired. For the purpose of combining low resistance with great electrostatic capacity, the preferred forms of charged surfaces or capacity areas are cones or triangles or other such diverging surfaces, with the vertices adjoining and their larger areas spreading out into space; or a single insulated surface may be used in conjunction with the earth, in which case the earth constitutes the other oppositely charged surface. To these capacity areas are joined a pan of polished knobs, forming a spark gap.

"Between either capacity area and its knob I place a syntonizing self-inductance coil—that is, a coil of wire or metallic ribbon h^4, preferably insulated with any solid or fluid insulator, as in Fig. 2, or in air, of shape suitable to attain greatest inductance with a given amount of resistance—the object of this coil being to prolong the electric oscillations occurring in the radiator, so as to constitute it a radiator of definite frequency or pitch and obtain a succession of tone waves emitted, and thereby to render syntony in a receiver possible, because exactitude of response depends upon the fact that

the total number of oscillations in a suitably arranged circuit is very great, so that a very feeble impulse is gradually strengthened by cumulative action until it causes a perceptible effect on the well-known principle of sympathetic resonance."

The receiver or resonator consists of a similar pair of capacity areas connected by a similarly shaped conductor or self-inductance coil—

"the whole constituting an absorber arranged so as to have precisely the same natural frequency of electrical vibration as the radiator in use at the corresponding emitting station, so that it can accumulate the received impulses—that is to say, can act cumulatively."

As a coherer circuit, the coherer is usually arranged in simple series with a battery and an indicator or recorder, the terminals of this series of instruments being connected to the capacity areas of the receiver close to its self-inductance coil. The coherer is thus affected by every electrical disturbance occurring in the connecting coil or in its capacity areas, and by the aid of the battery at once enables the signals to be detected. This plan of receiver is shown in Fig. 12.

"In some cases I may, as shown in Fig. 13, surround the syntonizing coil of the resonator with another or secondary coil *u* (constituting a species of transformer) and make this latter coil part of the coherer circuit, so that it shall be secondarily affected by the alternating currents excited in the conductor of the resonator, and thus the coherer be stimulated by the current in this secondary coil rather than primarily by the currents in the syntonizing coil itself, the idea being thus to leave the resonator freer to vibrate electrically without disturbance from attached wires."

Forms of adjustable coils are shown in Figs. 9 and 10. One is called an adjustable coil; the others, replaceable or interchangeable coils; but both, since they tend to a like end and behave similarly, may be included in the term "variably acting coils."

The claims in issue are:

"1. In a system of Hertzian-wave telegraphy, the combination, with a pair of capacity areas, of a self-inductance coil inserted between them electrically for the purpose of prolonging any electrical oscillations excited in the system and constituting such a system a radiator of definite frequency or pitch.

"2. In a system of Hertzian-wave telegraphy the combination, with a pair of capacity areas, of a self-inductance coil inserted between them electrically for the purpose of prolonging any electrical oscillations excited in the system, thus constituting the system a resonator or absorber of definite frequency or pitch, and a distant radiator of corresponding period capable of acting cumulatively."

"3. In a system of Hertzian-wave telegraphy, the combination, with a pair of capacity areas, of a variably acting self-inductance coil, serving to syntonize such a radiator or resonator to any other such resonator or radiator, whereby signaling may be effected between any two or more correspondingly attuned stations without disturbing other differently attuned stations."

The principle of sympathetic resonance, to which the specification refers, must first be defined. Resonance is an increase or amplification of a periodic motion by an intermittent force of the same frequency. A certain or natural period of vibration is characteristic of all bodies, which, when displaced by the application of external force, tend, by virtue of their elasticity, to return and to execute free vibrations until, by virtue of their inertia, they gradually come to rest. Sonorous bodies, such as strings under tension, and confined portions of air, as in the

organ pipe, are further illustrations suggested by the term. Just as very feeble impulses applied to a pendulum at rest, at intervals exactly corresponding to its natural period of vibration, will cause almost any desired amplitude of swing, so bodies capable of executing vibrations by virtue of their own resiliency may be put into strong vibration by a series of impulses in tune with their own natural period. Thus impulses from a tuning fork will cause another tuning fork of the same pitch to hum a note in unison.

Resonance effects may likewise be observed in the flow of electricity in a circuit. A circuit possessing inductance and capacity has a certain time period of vibration; that is, it takes a certain length of time for an oscillation to complete itself in the circuit. Such a circuit is said to have a definite wave length. A circuit possessing capacity and inductance tends to oscillate electrically at its own frequency. It becomes the seat of an induced oscillatory current when subjected to the influence of electric waves of that frequency, each wave giving a slight impulse to the oscillations already excited, with the result that the induced electromotive forces will be amplified in intensity, just as the swing of a pendulum is increased by the application of properly tuned though feeble touches. However, not only must the impulses, of whatever kind, be rightly timed, but it is also essential to the utilization of resonance that there should be a long series of such impulses of approximately equal strength or amplitude. Having regard to ether waves, such a train can only result where the oscillations from which they proceed occur in a circuit which gives out its energy slowly, for the amplitude of the waves depends upon the energy expended. The energy must not be wasted either by internal resistance or by lavish radiation. On the other hand, if ether waves are to be detected at any great distance, they must be of substantial amplitude. Hence a circuit which is a good conserver of energy, capable of creating a train of waves of approximately equal amplitude, is a feeble radiator; conversely, a good radiator, giving out its energy in one big wave, followed by rapid damping of the remainder, is obviously a poor conserver of energy, and will not create the necessary train of waves of approximately equal amplitude. A similar difficulty applies to the detector. A good radiating circuit will be a good absorbing circuit, but it will not be a good conserver. In proportion to its susceptibility to ether waves is its unfitness to accumulate the effects of a train of waves, for it tends to give off forthwith the energy it receives.

The specification refers to the principle of sympathetic resonance as being well known. No one had done more to make it well known than Lodge himself. In his book on Modern Views of Electricity, published in 1889, in his Philosophical Magazine article of 1889 (reprinted in his book on Lightning Conductors and Lightning Guards, published in 1892), in his Royal Institute Lecture of 1894 on the work of Hertz, and in his book on Signaling through Space without Wires (which is his 1894 lecture with additional matter concerning later developments), the theory of electrical resonance is fully developed.

In his book on Modern Views of Electricity, published contemporaneously with the researches of Hertz, he considers the rate of oscilla-

tion in a Leyden jar by analogy to the vibration of a loaded spring, like the reeds in a music box. The stiffer the spring and the less the lead, the faster it will vibrate. From this data may be calculated the period of its swing. The electric problem and its solution are precisely the same. That which corresponds to the flexibility of the spring is called static capacity; that which corresponds to the inertia of ordinary matter is called inductance. Increase either of these, and the rate of oscillation is diminished. Increasing the static capacity corresponds to lengthening the spring; increasing the inductance corresponds to loading it. The static capacity is increased simply by using a larger jar or by combining a number of jars. Increase in the self-induction is attained by giving the discharge more space to magnetize or by making it magnetize a given space more strongly. To increase the space we have only to make the discharge take a long circuit instead of a short one; but it is just as effective, and more compact, to intensify the magnetization of a given space by sending the current hundreds of times round it, instead of only once by inserting a coil of wire into the discharge circuit. So much for the conditions determining the rate of oscillation.

Next, with respect to the regulation of the damping out of the vibrations; i. e., the toal duration of the discharge. Resistance is one thing; radiation is another. Just as the vibrations of a reed are damped partly by friction, but partly also by energy transferred to the surrounding medium and consumed in the production of sound, so the oscillatory discharge of a Leyden jar is damped out by the radiation of energy into the surrounding medium. A Leyden jar discharge can so excite a similarly tuned neighboring Leyden jar circuit as to cause the latter to burst its dielectric, if thin and weak enough. The well-tuned impulses accumulate in the neighboring circuit till they break through a quite perceptible thickness of air. Put the circuits out of unison by varying the capacity, or by including a long wire in one of them; then, although the added wire be a coil of several turns, well adapted to assist mutual induction as ordinarily understood, the effect will no longer occur. It can be obtained again by diminishing the static capacity.

In his Philosophical Magazine article he discussed experiments on Leyden jar discharges in which the Leyden jar coatings were represented by large insulated plates connected by a straight rod, after the manner of Hertz. The electrical surgings in the Hertz oscillator are of the same character as in a Leyden jar, discharging round an extensive circuit; but whereas from a closed circuit the intensity of the radiation will vary as the inverse cube of the distance as soon as the circuit subtends a small angle, the radiation from a lineal or axial oscillator varies in its equatorial plane only as the inverse distance, as Hertz showed. Hence for obtaining distant effects the lineal oscillator is vastly superior. Lodge points out that in this connection exact tuning of the receiver is unessential:

"If resonance occurred to any extent, so that the combined influence of a large number of vibrations were really accumulated, the effects might doubtless be great; but hitherto I have seen no evidence of this with linear oscillators, the reason being, I suppose, that the damping out of the vibrations is so vigorous that all oscillations after the first one or two are comparatively

insignificant, and very bad adjustment, or no adjustment at all, will give you the benefit of all the resonance you can get from such rapidly decaying amplitudes. The main reason of the rapid damping is loss of energy by radiation. The power of the radiation while it lasts is enormous, and the stock of energy in a linear oscillator is but small. Leyden jar discharges in closed circuits only die away after many more oscillations, and for them some approach to exact tuning is essential if a neighboring circuit is to respond easily."

In the lecture on the work of Hertz, referring to the vibrations set up in suitable elastic bodies by the radiant energy emitted by a struck bell or tuning fork, he points out that if the body receiving them has its natural or free vibrations violently damped, so that when left to itself it speedily returns to rest, then it can respond fully to notes of almost any pitch. But if the receiving body has a persistent period of vibration, continuing in motion long after it is left to itself, then far more facility of response exists, but great accuracy of tuning is necessary if it is to be fully called out; for if the receiver is not thus accurately syntonized with the source it fails more or less completely to respond. Conversely, if the source is a persistent vibrator, correct tuning is essential, or it will destroy at one moment motion which it originated the previous moment; whereas, if it is a dead-beat or strongly damped exciter almost anything will respond equally well or equally ill to it. He refers to his demonstration (1890) of electrical resonance with a pair of glass Leyden jars by connecting each to a discharge circuit, the one complete, the other with an air gap, and providing the first or receiving jar with an overflow path or by-circuit with an air gap across which a visible spark could occur whenever the induced oscillations accumulated in its main circuit were sufficiently intense to make the jar overflow. But he points out that a closed circuit such as this is a feeble radiator and a feeble absorber, and hence not adapted for action at a distance; nor was this resonance excited by true waves. By separating the coats of the jar as far as possible, however, we get a typical Hertz vibrator, which radiates powerfully. In consequence of its radiation of energy, its vibrations are rapidly damped. Hence it follows that it has a wide range of excitation; that is, it can excite sparks in conductors barely in tune with it.

"The two conditions, conspicuous energy of radiation and persistent vibration electrically produced, are at present," he concludes, "incompatible. Whenever these two conditions coexist, considerable power or activity will, of course, be necessary in the source of energy. At present they only coexist in the sun and other stars, in the electric arc, and in furnaces."

Now Hertz adjusted the inductance and capacity of his detector so as to attune it with his radiator, with the idea of rendering the detector more sensitive by utilizing as far as possible the theory of sympathetic resonance. But his arrangements were in the nature of a compromise. His open oscillatory circuit was an excellent radiator, but not a persistent oscillator. The rapid dissipation of energy in radiation rapidly damped out the oscillations, and the resulting ether waves consisted of one wave of great amplitude followed by a few others of rapidly diminishing amplitude. On the other hand, his closed ring detector was a feeble absorber but a good conserver, by virtue of being at once a poor radiator and a persistent vibrator.

In Marconi's first structure he made use, as I have shown, of an open circuit at both the sending and receiving stations. Hence, in accordance with what has been said about the Hertz oscillator, his transmitter was a good radiator and his receiver a good absorber, though by virtue of these very qualities the former could not create nor the latter accumulate the effect of such a series of waves of equal amplitude as would be necessary for utilizing in any effective way the principle of resonance. Nevertheless, with this principle in mind, Marconi specifies that his elevated capacity areas or plates are "preferably electrically tuned with each other"; that is, of similar electrical dimensions. Hence, while Hertz effected whatever tuning was possible in his structure by adjusting the capacity and inductance in his closed receiving circuit, Marconi adjusted the capacity of his open transmitting and receiving circuits.

Thus stood the theory and practice when Lodge applied for the patent in issue. The theory of electrical resonance was well known, as was also capacity and inductance. The use of self-induction coils was old; the effect of the turns of the coil upon one another was well known. But in Lodge's experiments with his syntonic Leyden jars, in Hertz's adjustment of his ring resonator, and in all the other references relied upon by the defendant, self-induction coils had been used only in closed circuits. Such use contained no instruction upon the effect of a coil in an open radiating circuit. One might as well attempt to study articulation by observing the sign language of deaf mutes. The only attempt that had been made to tune open radiating circuits was by way of adjusting the capacity of the two circuits. But capacity alone will not syntonize. By increasing the length of his aerial wire or antenna Marconi could vary the time period or frequency of the oscillations, and thus vary the wave length; but there was no effective syntony because the oscillations would still die out too rapidly. It is the capacity of the self-induction coil to store up or conserve the energy, so that the waves are sent out in a train of approximately equal amplitude rather than in one great splash, that renders effective tuning possible. It is true that even a straight wire has inductance, and that by increasing its length its inductance is also increased to the same extent; still, such a wire will send off a rapidly damped series of waves, with which no true syntony is possible.

Lodge solved the problem by a compromise between the radiatory and oscillatory qualities of his transmitter, on the one hand, and between the absorbing and accumulating qualities of his receiver, on the other hand. He was the first to realize that if he could get a long train of waves he could afford to diminish the amplitude of the first few of them, the desired result being effected by cumulative effect. The principle disclosed by him was that, although a radiator with several swings is less violent at its first impulse than a momentary emitter, the lessened emitting power of a radiator may be largely compensated by a correspondingly prolonged duration or vibration on the part of the receiver or absorber, thus rendering the radiator susceptible of tuning to a special similarly tuned receiver. The tuned receiver then responds, not to the first impulse of the radiator, but to a succession of

properly tuned impulses, so that after an accumulation of the first few swings the electrostatic charges in the terminal plates become sufficient to overflow and spit off into the coherer, thereby effecting its stimulation and giving the signal. A resonator tuned to some different frequency of vibration would be unable to accumulate impulses and hence would not respond—unless, of course, it were so near the radiator that the very first swing stimulated it sufficiently to disturb the coherer, in which case again tuning is impossible.

The compromise by which effective syntony was thus made possible in wireless telegraphy was effected by the induction coil between the capacity areas of both transmitter and receiver, whereby the natural frequency of the circuits was not only diminished, but their electrical inertia was also increased; and in this way the transmitting circuit was able to create, and the receiving circuit to accumulate, the effect of a series of waves, as distinguished from a single wave of great amplitude.

It seems plain to me, therefore, that the patent in issue is valid, and that the subject-matter was not disclosed by the prior art. Lodge was aiming however, at selectivity alone, and he obtained the syntony which rendered that possible only at the expense of the radiating power of his transmitter. In the chapter on syntonic telegraphy in his book on Signaling without Wires (first published, as the context shows, at least as late as 1899; the copy in evidence is the third edition, published apparently in 1906), he states, in describing the patent in issue: "For the most distant signaling the single pulse or whip crack is the best." And so it was, so long as a single circuit was used. The reconciliation of the incompatability which he compromised was not attained until two circuits were employed at both transmitting and receiving stations, as in the second Marconi patent in issue. Although, therefore, the necessity for compromise was afterwards obviated, and means were found whereby increased distance as well as selectivity could be secured, Lodge's disclosure in the patent in issue is still an essential feature in that result.

That the claims in issue rest upon the defendant's structure admits of no doubt. Both its sending and receiving stations comprise an elevated conductor, acting as one capacity area, and the earth connection as the other, with a variable inductance coil between them for purposes of syntony.

The fact that laches is not set up in the answer as a defense to this patent relieves me of the necessity of considering it.

Marconi Patent No. 763,772 (1904).

[3] The stated object of patent No. 763,772, for apparatus for wireless telegraphy, is:

"To increase the efficiency of the system and to provide new and simple means whereby oscillations or electric waves from a transmitting station may be localized when desired at any one selected receiving station or stations."

The system—

"includes at the transmitting station the combination, with an oscillation transformer of a kind suitable for the transformation of very rapidly alter-

nating currents, of a persistent oscillator, and a good radiator, one coil of said transformer being connected between the aerial wire or plate and the connection thereof to earth, while the other coil of the transformer is connected in circuit with a condenser, a producer of Hertzian oscillations or electric waves shown in the form of a spark producer, and an induction coil (constituting the persistent oscillator) controlled by a signaling instrument."

The system also—

"includes at the receiving station an oscillation transformer, one coil whereof is included between the aerial receiving wire and earth, constituting a good absorber of electrical oscillations, while a device responsive to electric waves, such as an imperfect contact or a device for operating the same, is included in a circuit with the other coil of said transformer."

In description of the drawings the specification says:

"The transmitting station is provided under my present invention with a source *a* of current electrically connected in circuit with the primary of an induction coil *c* and with a circuit-closing key *b* or otherwise controlled by a signaling instrument. In the secondary circuit of said induction coil the spherical terminals or other contacts of a spark producer or other electric wave or oscillation producer are included with a shunt therefrom, in which shunt is included the primary coil *d* of an oscillation transformer, such as d^2. A condenser *e*, preferably one provided with two telescoping metallic tubes separated by a dielectric and arranged to readily vary the capacity by being slid upon each other, is included in one connection from the induction-coil to the transformer winding *d*. The secondary coil *d'* of the transformer is connected (at one end) to the earth *E* and at its other end to a vertical wire *A* or an elevated plate *f*.

"It is obvious that instead of the induction coil and associated parts for producing the electric waves or oscillations I may use any other proper means for producing such waves or oscillations—such, for instance, as a generator of alternating currents.

"The illustrated arrangement of parts at a transmitting station enables much more energy to be imparted to the radiator *f*, the approximately closed circuit of the primary being a good conserver, and the open circuit of the secondary being a good radiator, of wave energy. My experiments have demonstrated that the best results are obtained at the transmitting station when I use a persistent oscillator (an electrical circuit of such a character that if electromotive force is suddenly applied to it and the current then cut off electrical oscillations are set up in the circuit which persist or are maintained for a long time) in the primary circuit, and use a good radiator (i. e., an electrical circuit, which very quickly imparts the energy of electrical oscillations to the surrounding ether in the form of waves) in the secondary circuit.

"In operation the signaling key *b* is pressed, and this closes the primary of the induction coil. Current then rushes through the transformer circuit and the condenser *e* is charged and subsequently discharges through the spark gap. If the capacity, the inductance, and the resistance of the circuit are of suitable values, the discharge is oscillatory, with the result that alternating currents of high frequency pass through the primary of the transformer and induce similar oscillations in the secondary, these oscillations being rapidly radiated in the form of electric waves by the elevated conductor.

"For the best results and in order to effect the selection of the station or stations whereat the transmitted oscillations are to be localized, I include in the open secondary circuit of the transformer, and preferably between the radiator *f* and the secondary coil *d*, an inductance coil *g*, Fig. 1, having numerous coils, and the connection is such that a greater or less number of turns of the coil can be put in use, the proper number being ascertained by experiment."

The patent describes the combination of apparatus at the receiving station thus:

"Referring to Fig. 2, *f* indicates a plate or cylinder (not essential at either transmitter or receiver) at the upper end of an elevated conductor *A*, which

is connected to the primary coil j' of a transformer or induction coil and thence to earth E. In a shunt around said primary j' I usually place a condenser h, preferably similar in construction and operation to the condenser e. An inductance coil g' of variable inductance is interposed in the primary circuit of the transformer, being preferably located between the cylinder f' and the coil j' and the inductance of said coil may be adjusted in accordance with the method described by me in my letters patent of the United States No. 676,332 to harmonize with the inductance of coil g at the transmitting station, Fig. 1 of the accompanying drawings, or with that of the coil or coils at one or more of the transmitting stations included in the communicating system.

"The secondary coil j^2 of the transformer is wound in two parts, preferably as described in my United States letters patent No. 668,315, dated February 19, 1901, and the outer ends of said coil are connected in certain cases through one or more interposed inductance coils g^2, preferably of variable inductance, with the terminals of a coherer T or other detector of electrical oscillations. The inner ends of the split secondary coil are connected to the plates of a condenser j^3. A condenser h' is sometimes included in a shunt around the detector T. B is a battery and R a relay connected to the condenser j^3 and controlling a telegraphing instrument or a printing device. c' and c^2 are choking coils preventing oscillations from the secondary j^2 running into the battery circuit, and thereby confining them to the wave-responsive device."

The complete system comprises four circuits tuned to one another At the transmitting station there is an open oscillating circuit, which is a good radiating circuit, and this is to be tuned to a closed persistently oscillating circuit, constituting a reservoir circuit. At the receiving station there is an open circuit, constituting a good absorbing circuit, and this is to be tuned to a closed circuit, which is a good accumulating circuit. The patent specifies:

"The capacity and self-induction of the four circuits, i. e., the primary and secondary circuits at the transmitting station and the primary and secondary circuits at any one of the receiving stations in a communicating system * * * are each and all to be so independently adjusted as to make the product of the self-induction multiplied by the capacity the same in each case or multiples of each other—that is to say, the electrical time periods of the four circuits are to be the same or octaves of each other."

Referring particularly to the selectivity or inter-station tuning thereby attained, the specification states:

"In employing this invention to localize the transmission of intelligence at one of several receiving stations the time period of the circuits at each of the receiving stations is so arranged as to be different from those of the other stations. If the time periods of the circuits of the transmitting station are varied until they are in resonance with those of one of the receiving stations, that one alone of all the receiving stations will respond, provided that the distance between the transmitting and receiving stations is not too small."

By way of specific and detailed information as to how the capacity and self-induction of these circuits may be independently adjusted, so as to make the product of the self-induction multiplied by the capacity the same in each case, and thus obtain four circuit tuning, a table of tunes is given.

The broad claim of invention resides, therefore, in the independent adjustment of the capacity and self-induction of the four circuits, two at the transmitting station and two at the receiving station, so that the product of these elements in each of the two circuits shall be the same,

in order that the circuits may be in electrical resonance with one another. This broad invention is covered by claims 10 and 20 in issue:

"10. A system of wireless telegraphy, in which the transmitting station and the receiving station each contains an oscillation transformer, one circuit of which is an open circuit and the other a closed circuit, the two circuits at each station being in electrical resonance with each other and in electrical resonance with the circuits at the other station, substantially as described."

"20. In a system of wireless telegraphy, a transmitting station containing an oscillation transformer, the primary of which is connected to a condenser-circuit discharging through a spark gap which automatically causes electric waves of the desired frequency, the secondary of said transformer connected to an open circuit, including a radiating conductor, and with a capacity and a coil for charging the condenser aforesaid; a receiving station containing an oscillation transformer, the primary of which is connected with an oscillation receiving conductor and with a capacity, a wave-responsive device connected with the secondary of said transformer, and a receiving instrument connected with the wave-responsive device, all in combination with means for bringing the four transformercircuits, two at each station, into electrical resonance with each other, substantially as described."

Subcombinations of this broad invention, having relation to the transmitting station alone, are covered by claims 1, 3, 6, 8, 11, and 12 in issue. Subcombinations relating to apparatus at the receiving station are covered by claims 2, 13, 14, 16, 17, 18, and 19 in issue.

The essential features of this apparatus and its departure from previous methods of operation are apparent. In his first patent Marconi had disclosed a method and apparatus for the effective transmission of wave energy through the ether of space, and for its utilization in the communication of intelligible signals. But in this early apparatus the energy was quickly radiated and as quickly absorbed. By reason of this characteristic his radiator could not create, nor could his receiver store up the effect of a sustained train of waves necessary for the utilization of the principle of resonance. It was an effective apparatus for distress calls and purposes of that kind, but there was necessarily interference between messages. Moreover, the electric energy that he could get into his transmitter was necessarily limited. The energy supply had to be adapted to the elevated conductor. The capacity of a vertical wire is not great, and the extent to which it may be increased by lengthening the wire or adding capacity areas is obviously limited. Lodge came forward with a new idea. Although he recognized the impossibility of having a circuit which should be at once a good radiator or absorber and a persistent oscillator, he proposed a compromise. He increased the persistence of vibration of his radiating circuit at the expense of its radiating qualities, and increased the accumulative power of his receiving circuit at the expense of its absorbing qualities. Effecting this compromise by means of the introduction of an inductance coil in an open circuit, he obtained a train of waves of approximately equal amplitude and thus rendered effective syntony possible. But the syntony thus obtained was utilized for selectivity alone. It was attained at the expense of the radiating and absorbing qualities of the circuit; and Lodge still supposed that for distant signaling the single pulse or whip crack was best.

Marconi's improvement, in his second patent, upon his own prior apparatus, and his solution of the difficulty involved in Lodge's com-

promise, consists in the substitution for a single circuit in both transmitter and receiver of a pair of circuits, one of which is so constructed as to radiate or absorb readily, and the other to oscillate persistently and be a good conserver of energy. By using two linked circuits in his transmitter, in which the circuit of the primary contains a condenser of any desired capacity, with the usual provision for its discharge through the spark gap, and in the circuit of the secondary the vertical wire, any required energy may be imparted to the radiator, since the closed circuit of the primary is a good conserver or reservoir of energy for the radiating open circuit of the secondary. This arrangement would be futile, however, without means whereby the stored energy of the reservoir circuit could be transmitted to the elevated conductor at the rate at which that conductor could effectively radiate it. The mode of getting the energy from the reservoir circuit into the radiating circuit, in like measure as it is radiated, is the tuning of the persistently oscillating circuit to the radiating circuit. In this way the principle of resonance is fully utilized between the two circuits. Similarly, the two circuits of the receiver are linked through a transformer, so that electrical oscillations in an open and absorbing primary build up similar oscillations in a closed and conserving secondary until the coherer breaks down. Finally, the four circuits must be tuned together.

That this apparatus overcame the difficulties emphasized by Lodge is not disputed. Where Lodge compromised, Marconi reconciled. The open radiating circuit of the transmitter produces a train of waves of approximately equal amplitude without any sacrifice of its radiating qualities, and with increased available energy drawn from the closed and persistently oscillating primary circuit; and the open absorbing circuit of the receiver, unable to accumulate the effect of a long train of waves without a sacrifice of its absorbing qualities, hands over the task to a closed and conserving secondary circuit, which accumulates such effect until the coherer breaks down. With this definite control over radiation, effective selectivity was maintained. So far as possible with a coherer, it enabled full use to be made of the principle of sympathetic resonance. In combination with the increased available energy in the transmitter, the distance over which messages could be sent was enormously increased. With this apparatus Marconi communicated across the Atlantic in 1901, and the claims in issue constitute the essential features of apparatus which has since made possible communication over a distance of 6,000 miles. It is used in more than 1,000 installations by Marconi, and is admittedly an essential feature of the wireless art as at present known and practiced.

I do not understand the defendant to deny that if the claims in issue are valid as thus construed the defendant infringes. At all events this conclusion appears to me to be inevitable. It is true that the defendant directed some evidence to a contention that the four electrical circuits of the patent in suit are not properly described as being in electrical resonance with each other, as specified in claim 10, because the transmitting circuits as illustrated and described are tightly or closely coupled circuits, while in the defendant's system the transmitting circuits are loosely coupled. In consequence of the tight coupling

of Marconi's transmitting circuits two waves are sent out, and his four circuits are not therefore in electrical resonance with each other; while in the defendant's apparatus the loose coupling emits only one wave and admits of electrical resonance. Very little reference is made to this contention in the argument, and I shall not dwell upon it. The terms "loosely" and "tightly" as applied to coupling are relative terms. Fessenden admits that transformers alone whose coefficient of coupling is less than 50 per cent. are loosely coupled transformers. But to determine the degree of coupling between two circuits coupled through a transformer it is not permissible to take the transformer alone; the coupling of the whole circuit must be calculated. And even if the transformer part of the circuits alone be tightly coupled, yet when such a transformer is connected into a grounded antenna circuit the circuits become loosely coupled circuits. The claim directs, not that the circuits at the receiving station must be mathematically tuned to the frequency emitted from the transmitting station, but that the circuits are to be in electrical resonance with each other. This condition results from the independent adjustment of the four circuits so as to make the time period the same, whatever may be the wave form. As a practical matter, perfect coupling—that is, where the coefficient of the two circuits equals unity—is unattainable. Different frequencies are produced, but one is taken as the effective frequency, and the others are disregarded as ineffective or merely parasitical.

In the consideration of the validity of the patent, it must be admitted at the outset that the patent derives very little support from the proceedings in the Patent Office as disclosed by the file wrapper. A patent issued under such circumstances should be, and, so far as I have been able, has been, subjected to the most careful scrutiny and consideration. But the question of abandonment and revival are clearly issues for the Patent Office, not for the court. Nor do I think that the defendant's contention that the patent was unlawfully broadened by the introduction of new matter subsequent to the filing of the original application is well taken. Without prolonging this opinion by setting out the particular passages, it will suffice to say that a careful comparison of the original application with the patent as issued shows that although many verbal changes were made, mostly by way of amplification, the essential features of the patent in issue were clearly set forth in the original application.

[4] In mere lapse of time from the date of the patent to the filing of suit, the defense of laches is presented in an impressive way. But the defense of laches is not tested by time alone. As the Circuit Court of Appeals for this circuit said in the recent case of A. R. Mosler & Co. v. Lurie, 209 Fed. 364, 126 C. C. A. 290:

"There have been cases where all relief has been refused to patent owners who were negligent about enforcing their rights for a long period of time. Richardson v. Osborne [C. C.] 82 Fed. 95, affirmed by this court 93 Fed. 82[illegible] [36 C. C. A. 610]. These cases have been such as presented 'unusual conditions or extraordinary circumstances'; usually with knowledge of infringement the owner of the patent has stood by and, without objection or warning, has allowed the infringer to invest his money in a plant for manufacturing infringing devices."

These cases proceed upon the assumption that the party to whom laches is imputed had ample opportunity to assert his right, and that by reason of his delay the adverse party had good reason to believe that the alleged rights had been abandoned or were worthless. Walker on Patents (4th Ed.) 468.

Now laches is an affirmative defense. The evidence in this case bearing directly upon this issue is meager and vague, and the argument in support of it rests largely upon the assertions of counsel rather than upon proof of facts. The implication of equitable estoppel, upon which the doctrine is based, does not appear. This is not an art in which large profits have been made by anybody. Most of the concerns operating in this country have failed, and it is only in recent years, with the establishment of regular transatlantic communication, that the financial prospect has improved. Various governments experimented with the different systems as an instrument available for national defense, collaborating with the inventors or makers. Such was the course in this country, as shown by the Navy Department's "Instructions for the Use of Wireless Telegraph Apparatus," issued in 1903. These instructions are stated to be—

"based primarily on the needs of the apparatus installed, but are, in the main, applicable to any system of wireless telegraphy employing an induction coil for transmitting and a coherer with relay for receiving."

Only incidentally from two photographic reproductions of Slaby-Arco instruments does the origin of any of the apparatus appear.

Prior to the organization of the defendant company in 1902, Mr. Fessenden carried on experimental work as an employé of the United States Weather Bureau. Within two or three years after its incorporation the defendant is said to have sold some equipment to the government; since then it has sold to the Navy Department, according to Mr. Kintner, "about 75 or 80 ship equipments." Just what this equipment was does not appear; nor am I able to find any support in the record for the assertion made by the defendant's counsel that any of this equipment was supplied in direct competition with the complainant company. In 1909 the defendant secured the contract for the equipment of the government's station at Arlington; but as late as 1910 the defendant's counsel stated to a committee of the United States Senate that it was engaged in scientific investigation and experiment rather than in commercial work. At all events, the proof shows that the defendant dealt in a commercial way with the United States government alone prior to 1912. In that latter year it placed apparatus on some Sound boats, and in that year this suit was brought.

The principal defense is that the patent in suit is invalid, first, because the alleged invention was anticipated in prior publications; second, because the apparatus of the patent did not, in the state of the art in 1900, require invention to produce; third, because, if there is any invention, it is the invention of Fessenden and others, not of Marconi. The defendant's expert, Dr. Kennelly, finds direct anticipation of four-circuit tuning, as described in the patent in suit, by Fessenden alone. He asserts there were instances of two-circuit tuning at the sending station prior to Fessenden's application of 1899 for patent No. 706,-

736, as well as instances of two-circuit tuning at the receiving station, but not for the direct combination of both, although even that had been reached by equivalence. Thus Dr. Kennelly finds anticipation of four-circuit tuning in Fessenden's alleged 1899 apparatus, if associated with a sending station employing a Tesla oscillation transformer, or if the Marconi receiving station connections of the 1899 patent were employed with a Tesla oscillator such as described in the Tesla book, or in the Ducretet pamphlet, or as Fessenden claims to have used it. In the argument defendant's counsel claim that there was a disclosure of four-circuit tuning by equivalence in Lodge's 1898 patent, by Tesla in his 1893 lectures and in his patents of 1900 (particularly No. 649,621), and by Pupin; also by a combination of Thompson's sender and Fessenden's receiver, by Tesla's sender and Tesla's receiver, by Tesla's sender and Marconi's 1899 receiver, or Ducretet's apparatus, or by Lodge's 1899 receiver.

The defendant's contention may be summarized thus: The idea of synchronizing four circuits was common knowledge of the prior art and was patented by Tesla. The idea of the transformer at either sending or receiving stations was common knowledge, was published by Lodge, Tesla, and Fessenden before 1900, and was patented by Tesla. Tuning the two circuits of a transformer was common knowledge, and was practiced by Ducretet, Braun, Lodge, Tesla, and Pupin, and was described and used by Fessenden prior to 1900.

I shall consider these defenses, first, with respect to four-circuit tuning as covered by claims 10 and 20 of the patent in suit, and then with respect to the separate tuning of sending and receiving circuits as specified in the subcombination claims. It seems desirable to discuss at the outset, together and in approximate chronological order, the various publications, patents, and practices of Reginald A. Fessenden. The bearing of this is the claim advanced by the defendant that Fessenden conceived the invention of the patent in suit as early as 1891 or 1892, that he disclosed it to others in 1898 or 1899, that he described it publicly in 1899, that he reduced it to practice at Pittsburgh, Pa., in 1899, and that on December 15, 1899, he filed an application for a patent therefor, which was afterwards granted as patents Nos. 706,735 and 706,736.

Fessenden's claim that he developed in 1891 or 1892 the first system of selective telegraphy by resonant circuits ever constructed may be placed on one side, since it appears that the laboratory experiments here referred to were made with the forced oscillations used in line telegraphy, as to which, he admits, the laws of tuning are entirely different from those of free vibrations, and permit of no deductions from one to the other.

Fessenden says that in 1898 he had compared coherers with other forms of receivers invented by him (particularly the hot-wire barreter), and had found coherers to be inferior, inefficient, and unreliable. But in the Electrical World, in August, 1897, three months after his students, Bradshaw and Bennett, who continued his experiments, had read their graduating thesis on the subject, Fessenden said:

"Putting to one side the utterances of electrical fakirs about 'wobbling the earth charge,' the fact remains that there are at present three practical means by which messages can be transmitted without wires. The first is the electromagnetic induction method first suggested, I believe, by Professor Henry, or at any rate about the time when he was living. The second is the electrostatic induction method, which has been used to some extent in telegraphing to moving railway trains, which method was developed by Mr. Edison. The third is Marconi's system of telegraphy, with an improved form of Lodge's ball transmitter and 'coherer' receiver."

Apparently his experiments had been abandoned before the end of 1899, for he said in his lecture before the American Institute of Electrical Engineers, November 22, 1899:

"Having thus been forced, some years ago, into X-ray work, with much loss of time and very little results to show for it, I considered myself proof against the seductions of liquid air and wireless telegraphy. Consequently, when having suggested to one of the editors of the New York Herald that they report the international yacht race by the new method, I was invited by them in December, 1898, to undertake the work myself, I declined and put them in communication with Signor Marconi."

Fesseden testified that he reduced his arrangement of circuits for tuning to practice in the fall of 1899 by operating with this type of apparatus a distance of about three miles between Pittsburgh and his laboratory in Allegheny. His testimony is, however, not only indefinite and entirely uncorroborated by documentary evidence, but is also contradicted in important particulars by his own testimony and by that of his assistants, Kintner and Fisher. The oral testimony is contradictory and conflicting both as to the actual date of the experiments and the distance covered. The same may be said of the testimony of what was actually done in this experiment. No messages, it appears from the testimony of Kintner and Fisher, were sent at all, and the only evidence that signals were sent is the statement by Fisher that when he turned on the power Fessenden said he detected a movement of the coil in the receiver. This "successful operation" was a brief experiment during one evening, which was discontinued in consequence of a breakdown of the apparatus.

On January 1, 1900, Fessenden testified, he entered the employ of the United States Weather Bureau for the purpose of adapting the system to the use of the unskilled operators in charge of the Weather Bureau station. At all events his work continued for some time to be admittedly experimental. He fixes the date (May, 1902) when he produced a system which the Bureau considered satisfactory for its purpose. Although he testified on his direct examination that his was a commercial system in January, 1899 (on cross-examination he made it 1896), he declined to answer the question as to what commercial installations, if any, he had made prior to November 1, 1902.

There are many discrepancies with respect to the apparatus alleged to have been used in the autumn of 1899. An examination of the drawing made by Fessenden in 1913 to illustrate the apparatus which he claims to have used in 1899, and a comparison thereof with other drawings made by him relative to the same event, show radical inconsistencies as to what he and his supporting witnesses now claim that the apparatus was. Even assuming that Fessenden in his 1899 experiment

used condensers in shunt with a galvanometer detector, and in shunt with a spark gap, still the defendant has not shown that these condenser circuits were tuned. Much less has the defendant proved that the condenser circuits were tuned to the open circuits at the transmitting station and receiving station respectively, or that the four circuits were in tune or in electrical resonance with one another. Variable elements, inductance and capacity, both contribute their separate values to determine whether two associated electric circuits are in electrical resonance with each other. These values must be known and definite. But there is no proof of the values in the circuits Fessenden is alleged to have used in Pittsburgh in 1899.

The Fessenden defense is deficient, because not a single piece of apparatus claimed to have been used is produced; not a scintilla of corroborating written evidence that such apparatus as Fessenden illustrates in his 1913 sketch was in fact used; no corroborating written evidence as to when, where, how long, or to what extent any such apparatus was used. It is supported only by the oral testimony of witnesses with respect to occurrences which happened a dozen years ago. And this evidence is conflicting and contradictory.

None of the various Fessenden publications discloses anticipation of the patent in suit. They are all confined to receiving circuits. Of the four "Electrical World" articles, it does not appear that those of August 7, 1897, and July 29, 1899, have any bearing whatever. In the article of August 12, 1899, the first of the three figures shows only a condenser in series with the galvanometer and antenna and ground. Nor does the third figure, which shows an antenna circuit and coherer circuit associated together through a transformer, disclose two circuits tuned to each other. Since he states that he does "not believe in the use of a condenser in the secondary," the purport seems to be merely that where you have a coherer detector in a separate circuit you may connect a condenser in series in the antenna or primary circuit. In the September 16th publication the only condensers illustrated are the condensers *C*, which, in the first two figures, are in the primary circuit, and, in the third figure, in shunt with the galvanometer. There is no suggestion of tuning.

The next reference is the paper read by Fessenden before the American Institute of Electrical Engineers, on November 22, 1899, on the possibilities of wireless telegraphy. Fessenden's assertion that this lecture disclosed sending apparatus is not warranted by the paper, and is contradicted by his previous statement in this and in a former action. He shows one form with a condenser in shunt, which he says would avoid resistance losses, just as he said later in his patent. But there is no suggestion that such a condenser was used for the purpose of tuning. An examination of his recapitulation of the points which require investigation indicates very clearly that Fessenden did not know at that time what effect was produced by connecting condensers in series or in shunt with the spark gap or with the detector, nor did he know what the effect of varying the capacity of these two circuits would be. Moreover, when, in the discussion which followed Fessenden's paper, Dr. Pupin clearly indicated that one of the great possible

advances to be made in wireless telegraphy was that of tuning, Fessenden did not then say that he had already solved this problem in his experiments in Pittsburgh, nor did he then say that the apparatus which he had just described and illustrated comprised tuned circuits.

Finally, it is claimed that the application filed by Fessenden on December 15, 1899, for his patents Nos. 706,735 and 706,736, discloses not only two circuits tuned together at the transmitting and at the receiving stations, but four-circuit tuning as well. But neither the specification nor the claims contain a word about tuning. The only mention of condensers in the specification is the statement that the condenser indicated in the first figure may be put in series or in shunt with the transmitter or receiver. The only mention of condensers in the claims is in claim 3, where he refers to a condenser in shunt with the coils and essential ring. While, therefore, a condenser in circuit is shown and claimed, its function is neither described nor claimed, nor is it shown to be adjustable. It has already been held by two courts that Fessenden's original application is barren of suggestion concerning tuning, and that the subsequent amendment relating to tuning was an afterthought, constituting a departure from the original application. United Wireless Telegraph Co. v. National Electric Signaling Co., 199 Fed. 153, 117 C. C. A. 275; National Electric Signaling Co. v. Telefunken Wireless Telegraph Co. (D. C.) 209 Fed. 856.

The file wrapper is particularly illuminating upon Fessenden's asserted knowledge and use of tuned circuits. The Patent Office's rejection of all the claims stated that, in view of the fact that the use of condensers in such systems was common, nothing patentable was shown in claim 3. In response to this invitation to disclose any peculiar function of the condensers or their connections, Fessenden, without any reference to the function performed by the condenser in shunt with the spark gap at the transmitting station, stated that the purpose of the condenser at the receiving station was to reduce the current in the receiving wire without reducing the current in the coil or coils 7, so that the resistance drop is eliminated. This statement was held to be insufficient, and further description was required. In response to this second request, Fessenden stated, not that the purpose of this condenser at the receiving station was for tuning, but that it was for the purpose of "obtaining as large a current as possible in the field coil 7, as this increase in current will give greater torque to the ring 8"; and by amendment all reference to the condenser at the transmitting station was canceled. This was in February, 1901. On May 17th of that year Marconi delivered his lecture before the Society of Arts in London fully disclosing four-circuit tuning. The evidence shows that Fessenden had read this lecture at some time prior to June 29, 1901, for in a communication from him, printed in the Electrical World of that date, he expresses a feeling of pleasure "in reading the admirable communication recently made by Mr. Marconi to the Society of Arts." Thereafter, on March 6, 1902, Fessenden canceled the entire specification and claims and substituted a new specification and claims, among other things restoring the condenser and its connections at the transmitting station. Then, under date of June 19, 1902, two and one-half

years after the filing of the original application, more than a year after Marconi's lecture, and nearly a year after the four-circuit tuned system had been installed on the Nantucket Lightship, Fessenden again amended his application by inserting the following passage:

"It is preferred to place a shunt circuit containing a condenser across the terminals of the induction coil at the sending station for the purpose of maintaining sustained radiation. This shunt circuit must be tuned to the receiving conductor; otherwise, the oscillations produced by it will have no action upon the wave responsive device at the receiving station. This shunt circuit, by virtue of its capacity, stores up an additional amount of energy, and when a spark passes across the gap, since the sending conductor can radiate energy at a given rate, it must continue to radiate for a longer time in order to dissipate this additional stored up energy."

Thereupon, on July 2, 1902, the patent (No. 706,735) was granted. It is unnecessary to review the history of Fessenden's divisional application for his patent No. 706,736, since it followed the same course. It was not until June 19, 1902, therefore, that Fessenden stated anywhere that the condenser circuit must be tuned. The bearing of all this upon Fessenden's extensive claims of prior knowledge and use of tuning is significant. As Judge Hand has neatly put it:

"How much he or any one knew is not capable of ascertainment, except by what he said, and neither in his patent nor anywhere else did he say anything in the least resembling it."

But it is argued by the defendant that the mere showing of a condenser in shunt with the galvanometer detector was a sufficient disclosure to one skilled in the art that the purpose of the condenser was for tuning. I think that the contrary is plainly shown by Fessenden's own admission on cross-examination when testifying with reference to Braun's patent, elsewhere discussed. Although Braun showed a condenser in shunt with a spark gap circuit, Fessenden admitted that even a person skilled in the art could not, from an examination of the drawings, understand how they were intended to work or what Braun was trying to do. I agree that the mere fact that a condenser is shown in the drawings of a patent, without a description of its function, is insufficient to constitute an adequate disclosure.

Tesla's patents, No. 645,576 and the divisional patent No. 649,621, granted in 1900, relate to a later conception, in which he abandoned the idea of electrostatic induction, and proposed to produce direct conduction in the upper strata of the atmosphere. He states in the earlier patent that the drawings illustrate a general arrangement of apparatus for carrying out his invention on an industrial scale—"as, for instance, for lighting distant cities or districts from places where cheap power is obtainable." In another passage he says:

"While the description here given contemplates chiefly a method and system of energy transmission to a distance through the natural media for industrial purposes, the principles which I have herein disclosed and the apparatus which I have shown will obviously have many other valuable uses—as, for instance, when it is desired to transmit intelligible messages to great distances, or to illuminate upper strata of the air, or to produce, designedly, any useful changes in the condition of the atmosphere, or to manufacture from the gases of the same products, as nitric acid, fertilizing compounds, or the like, by the action of such current impulses, for all of which and for many

other valuable purposes they are eminently suitable, and I do not wish to limit myself in this respect."

The method by which this ambitious scheme is to be attained is particularly specified in the last paragraph of the specification of the divisional patent:

"It is to be noted that the phenomenon here involved in the transmission of electrical energy is one of true conduction and is not to be confounded with the phenomena of electrical radiation which have heretofore been observed, and which from the very nature and mode of propagation would render practically impossible the transmission of any appreciable amount of energy to such distances as are of practical importance."

Tesla's method is fully developed in the specification of the parent patent. Crookes had shown that if terminals were sealed into a glass tube, and the air nearly exhausted, a particular state of exhaustion occurred where the air became conducting, and small electromotive forces were adequate to produce a glow within the tube. It had been a matter of speculation whether the higher strata of the atmosphere, corresponding in pressure to the pressure in the tube, were not also conducting, and whether certain phenomena, such as the aurora, were not due to conduction in the strata. These patents set forth Tesla's theory that if the potential and frequency of the current were high enough, strata much nearer the earth could be made available to conduct. His view was that when the high potential was impressed upon the atmosphere by an elevated terminal—one six or seven miles in height was suggested—then a progressive breaking down of the air would occur, so that it would no longer insulate but would conduct.

He proceeds to distinguish this method from that proposed in his 1893 lecture:

"To conduce to a better understanding of this method of transmission of energy, and to distinguish it clearly, both in its theoretical aspect and its practical bearing, from other known modes of transmission, it is useful to state that all previous efforts made by myself and others to transmit electrical energy to a distance without the use of metallic conductors, chiefly with the object of actuating sensitive receivers, have been based, in so far as the atmosphere is concerned, upon those qualities which it possesses by virtue of its being an excellent insulator, and all of these attempts would have been obviously recognized as ineffective, if not entirely futile in the presence of a conducting atmosphere or medium."

Although he says it had long been known or surmised that atmospheric strata 15 or more miles above sea level are or should be in a measure conducting, the utilization of any conducting properties of the air for purposes of transmission of energy had been hitherto out of question in the absence of suitable apparatus and the difficulty of maintaining terminals at such heights. "Through my discoveries before mentioned," he adds, "and the production of adequate means, the necessity of maintaining terminals at such inaccessible altitudes is obviated, and a practical method and system of transmission of energy through the natural media is afforded, essentially different from all those available up to the present time." What he means by the required altitudes easily accessible and at which terminals can be safely maintained, "as by the aid of captive balloons supplied continuously

with gas from reservoirs and held in position securely by steel wires or by any other means," appears later on when he says:

"From my experiments and observations I conclude that with electromotive impulses not greatly exceeding 15,000,000 or 20,000,000 volts, the energy of many thousands of horse power may be transmitted over vast distances, measured by many hundreds and even thousands of miles, with terminals not more than 30,000 to 35,000 feet above the level of the sea, and even this comparatively small elevation will be required chiefly for reasons of economy, and if desired may be considerably reduced."

After describing the construction and adjustment of the coil, he refers to apparatus which he had used. He describes a combination of primary capacity and inductance giving vibration of from 230,000 to 250,000 times per second. This refers to oscillation of current in the coil, corresponding to a wave length in the coil of about 1,200 meters. If an elevated wire 6 or 7 miles high were connected to such a coil, such a wire would have a wave length by itself of from 48,000 to 56,000 meters, or something like 30 to 35 miles. The connection of such a wire to such a transformer would bring about a condition which would be in no sense resonant. The transformer itself might be resonant, but the connection thereto of such a wire would render resonance impossible. Tesla's conception seems to be entirely remote from the subject-matter of the patent in issue.

Sir Oliver Lodge's book of 1889 on Modern Views of Electricity, his article of the same year in the Philosophical Magazine, and his 1894 lecture on the work of Hertz, contain, as already indicated, much discussion of the theory of resonance. His knowledge is presumably applied to practical use in his patent No. 609,154 of 1897. It is asserted that he there points out that the sending and receiving stations should be tuned together for the purpose of accumulating the energy of a long wave train; that the sending station should be arranged with two circuits, so as to allow the radiating antenna to vibrate freely; that the receiving antenna, connected by a transformer to another circuit containing a coherer, should be free to vibrate electrically without disturbance from attached wires. In Fig. 4 he does show, in a way, two circuits in his transmitter; but so far from using one as a reservoir for the other, when once he has charged his radiating circuit, he separates it entirely from its source of supply. In Fig. 13 he shows the open circuit of his receiving antenna linked through a transformer with a closed circuit containing a coherer. But the secondary circuit, as shown, is not tuned to the circuit of the antenna.

In view of these facts, I am unable to see how Lodge can be said to have disclosed four-circuit tuning. Indeed, the defendant attempts to support his contention that such a disclosure was made by arguments which show that it was not; for it is said that Lodge's silence concerning the tuning of the two circuits of his transmitter is immaterial, in view of the fact that Tesla had long before taught that they should be in tune in order to produce the largest amount of oscillation; that the circuits of the receiving station are at least tunable, and if a condenser be placed in the local circuit in Fig. 13 we have Marconi's receiving station. Nor does the defendant's argument with

respect to patentable invention derive any support from this reference. Here was an electrical engineer of the highest ability, who had formulated the principles of electrical resonance, considering means for overcoming the difficulty which he had himself pointed out, and arriving at a compromise by which the radiating and absorbing qualities of his conductors were partially sacrificed. Although he actually introduces two circuits, he does not see that if only he utilized the principle of resonance between them the problem would be solved. If so able an electrician as Lodge failed to grasp the real advantage of having two circuits, it can hardly be said to be obvious.

Turning, now, to the defendant's references with respect to the tuning of two circuits at transmitting and receiving stations. These are, of course, relevant to the validity of the subcombination claims of the patent in issue relating to the tuning of those circuits, but not to claims 10 and 20. In view of the conspicuous advance in wireless telegraphy achieved by Marconi's four-circuit tuning apparatus, it is not permissible in this, any more than in the case of the earlier Marconi patent (and for the same reason), to piece out a defense by way of anticipation by finding one or more elements of the combination disclosed in one prior publication or patent and other elements elsewhere. The references relied upon by the defendant as showing the tuning of two circuits at a sending station are Tesla, Ducretet, and Braun.

Tesla's Franklin Institute lecture of 1893, dealing with various phenomena resulting from the high frequency, high potential currents produced by the Tesla coil, has already been considered in connection with the first Marconi patent. It embodies Tesla's conception of the static induction method, by means of which he proposed to "wabble the earth's electric charge." If it were otherwise relevant to the subject of electromagnetic radiation, it would still appear to me to be wholly insufficient as a disclosure of the specific combination of apparatus of the claims in issue. The Tesla coil was one having a coarse wire and a fine wire winding, and it was subject to a species of adjustment whereby the length of the fine wire winding or the size of the condenser was such as to give maximum potentials at the terminal. It was not pretended that the "resonance" referred to in this connection was true resonance. On this and various other aspects of electricity the lecture is highly interesting and suggestive; but his treatment of resonance is speculative and conjectural, for, as he says, "proper apparatus must first be produced by means of which the problem can be attacked." Dr. Kennelly introduced a composite sketch of what he understood Tesla's suggestions to be, as applied to wireless telegraphy. But Mr. Waterman shows that, if the Tesla coil were used as depicted by Dr. Kennelly, the circuit would be inoperative, because the secondary would be unable to carry the energy imposed upon it and would burn out. If the coil were connected with an antenna and ground, the condition of resonance would be obliterated, and the circuits into which the coil was incorporated would not be tuned circuits. I should conclude that the suggestion of its use in radiating Hertzian waves would mean nothing more than the use and connections which Lodge described in his 1898 patent, where he says:

"I supply the electricity to the radiator from a Ruhmkorff or from a Tesla coil, or from a Wimshurst or other known or suitable high-tension machine."

Tesla's patent No. 454,622, of 1891, showing the use of a transformer in the generation of high frequency, high potential currents for electric lighting contains no suggestion of tuning.

In Ducretet's lecture of 1898 he gives two figures illustrating apparatus, but without showing circuit connections. Even if Dr. Kennelly were correct in his translation of the passage on which he relies, all that Ducretet disclosed was that the antenna at the transmitting station and the antenna at the receiving station should be tuned together, just as Lodge in his 1898 patent provided for tuning his mast wires; that is, the total height of the vertical wires should vary according to the distance covered. No possible translation can torture the passage in question into an assertion that the transmitting open aerial was tuned to a closed oscillating circuit at the transmitting station. In Ducretet's trade catalogue of scientific instruments he describes Oudin coils (he calls them radiators), which he says can be used in Hertzian-wave telegraphy. But he does not illustrate how this Oudin coil or resonator should be connected in a wireless telegraph circuit, and Dr. Kennelly's sketch is not warranted by any disclosure made by Ducretet himself. It is demonstrable, as I understand it, that (as in the case of the Tesla coil) inasmuch as the Oudin resonator has a very fine secondary winding, if the Oudin coil were connected as Dr. Kennelly illustrates it, the coil would burn out. As in the case of the Tesla coil, of which it is a modification, the term "resonance," used with reference to the adjustment of the Oudin coil, is not at all the resonance of two circuits containing inductance and capacity as used in wireless telegraphy.

Of Braun's two British patents of 1899 something was said in the testimony, but little reliance was placed upon them in the argument. Dr. Kennelly admits that nothing is said in either of them about tuning the two circuits of the transmitter together. Fessenden admits that the drawings of the earlier patent are insufficient in themselves to disclose tuning. In the later patent the language of the specification is inconsistent with any intention to tune the two circuits together. Moreover, according to Fessenden, the Braun method is inoperative.

As showing tuned receiving circuits, the defendant cites the work of Marconi, Ducretet, and Pupin.

In his 1899 patent, No. 627,650, Marconi introduces in his receiver a pair of circuits linked through a transformer. The purpose of this transformer, Marconi says, was to increase the potential of the oscillation at the terminals of the detector. While a condenser is shown in the closed circuit, it is not adjustable. It was used for the purpose of preventing the battery circuit from being short-circuited by the winding of the transformer. No adjustable inductance is shown. It is true that the specification states:

"It is desirable that the induction coil should be in tune or syntony with the electrical oscillations transmitted;" and that "the capacity of the condenser on the connection between the imperfect contact and the secondary of the coil should be varied [in order to obtain best effects] if the length of wave is varied."

But Dr. Kennelly's contention that this shows "that the receiving station was to be tuned to the incoming electric waves from the sending station by the adjustment of the condenser K' in the secondary circuit, and also by the adjustment of the number of turns in the primary and secondary coils of the oscillation transformer," is in conflict with his testimony in another case in 1911, when he said that all that could be definitely stated was, not that the receiving system was tuned, but that "increasing the number of turns in the secondary winding tends to increase, other things being equal, the induced electromotive force on open circuit of that secondary winding"—which is what Marconi himself says. And Marconi's explanation is:

"What I meant by saying the induction coil is tuned there was that the period of its primary, the primary period of the coil which was connected to the aerial, should be such as to make the period of that circuit—by circuit I mean a coil in the aerial—such as to be in tune with the other station; but I had not conceived at that time that the two circuits of the transformers, or the two receiving circuits, to be more accurate, should be in tune with each other."

I conclude that Marconi did not in that patent, any more than Lodge in his patent, tune the two circuits together.

With respect to Ducretet's foreign patents of 1899, relating to improvements in what he calls radioconductors, reliance is placed upon two of the figures showing certain circuits. The transformer device shown is referred to as "a simple pole induction coil," but is not further described. The entire description of this circuit is that:

"The reception of the electric waves may further be improved by joining in the circuit of the radio-conductor or the relay R, the battery P, and the condenser or variable capacities $C\,O'$, a single pole induction coil I (Figs. 5 and 6), and a second condenser $C\,O$, connected to the earth D."

There is nothing showing the association of these coils in any particular way, much less that they are associated in such a way as to tune the circuit. It is true that the patent says that the condensers $C\,O'$ and $C\,O$ are variable, and Dr. Kennelly asserts that they are variable for the purpose of tuning. But the specification particularly points out that the purpose of using these condensers was for "insuring the high efficiency of action of my radio-conductor while diminishing the effects of atmospheric disturbances and earth currents"; in others words, to keep out lightning.

Finally, it is asserted that from 1893 to 1895 Pupin, the distinguished inventor in line wire telegraphy, in various publications, developed every refinement of tuning in the art of telegraphy, culminating in his application in the latter year for his patents Nos. 640,515 and 640,516 (granted in 1900). Referring to the later patent, as showing the tuning of the circuits together, counsel say:

"It will be noted that if in Fig. 2 the plates of the condenser K, for example, are widely separated, we will have an open absorbing circuit with a tuning device therein, connected by a transformer to a closed tuned secondary circuit containing an indicating instrument. Was it invention for Marconi to carry over into a closely similar art this receiving combination? Certainly it was not, if we consider that in Pupin's discussion of Fessenden's lecture of November 2, 1899, he himself did instruct how to carry it over into the wireless telegraph art. Thus, at page 650, he shows in Fig. 6 a closed oscilla-

tion circuit at the sending end, connected by a condenser to an open radiating circuit, and at the receiving end an open absorbing circuit connected by a condenser to a closed resonating circuit, which in turn is connected by a transformer to a detector circuit, which he describes particularly as having the purpose of storing up resonance effects."

After reconstructing Pupin's Fig. 6 of the patent, and quoting at length from Pupin's statement in the discussion of Fessenden's American Institute of Electrical Engineers' lecture of November 22, 1899, counsel say:

"Pupin, in his figure we have above copied with symbols now in common use, uses at the sending station a condenser as a transformer. * * * The condenser was well understood to be the equivalent of a coil transformer. But more than this, in the receiver circuit Pupin shows a coil transformer *m* connecting it to the 'secondary winding' containing the coherer. So that if it be supposed the condenser *l* in his Fig. 6 is not itself the transformer, then it inevitably follows that the loop *m* is the transformer, with the condenser *l* shunted around the primary."

Now what did Pupin say in 1899? He said, at the outset, this:

"It is extremely important that we should know from actual personal experiences what are the difficulties involved in wireless telegraphy. But the subject of this evening is 'the possibilities of wireless telegraphy,' and I do not think that the American Institute should adjourn without saying something relative to these possibilities. Of course, when a man speaks about the possibilities of anything, it is all in the future, and he has poetical license —he can indulge to his heart's content. * * * One of the possibilities is the tuning of receiving apparatus. The chief difficulty to-day is that, if two transmitting stations are working at the same time, the message received at the receiving apparatus is unintelligible, because they interfere with each other. It is, therefore, very desirable that the receiving apparatus should be tuned so that it will respond to one transmitting apparatus only, and to no other. The second important point is that we should extend the distance as much as possible. These are the two important points; and I think the possibilities in those two directions are very great."

Later on, speaking of the transmitting wire with a spark gap, he said:

"The free vibrations of a wire like that are like the free vibrations of a string, the elasticity of which varies from point to point. Now, no man on earth would be able to tell you with any degree of exactness what sort of oscillations you would get there. I don't think you would get a pure harmonic oscillation. There will be an oscillation of all sorts of unrelated frequencies. * * * You have the high resistance, dissipation of energy, and the oscillation is a very damped one; you have only a very few waves sent out after each spark. Now, when you have a train consisting of very few rapidly diminishing waves, they cannot produce much resonance. That is the reason why they have not been able to tune their receiving apparatus in England; that is, I think so. I don't know anything in this line for certain. I know only one fact, and that is that nobody has been able to tune the receiving circuit."

Then, after discussing some further possibilities, Dr. Pupin concluded his remarks thus:

"We must put a great deal of energy into our transmitter in order to increase our distance of transmission. The more energy you put into any radiator, I don't care what it is, the better illumination you get. The more energy you can get into an electrical radiator, the more energy you can get out of it, the longer the distance over which you can transmit a certain

amount of energy. There is not the slightest doubt about that. What we want then is, in the first place, to be able to put a great deal of energy into our radiators; secondly, very rapid succession of sparks; thirdly, radiators and receivers of small damping, and as a result of all these things, an efficient tuning of the receiving to the transmitting apparatus. The solution of these problems will increase the sphere of future possibilities of wireless telegraphy more than anything else that I know of."

Nothing could be clearer than this statement. It is absolutely incompatible with the supposition that Pupin himself, or any one else so far as he knew, had solved this problem. The enumeration in the final paragraph of the particulars of the problem to be solved is a clear summary of the disclosures of the patent in issue.

My conclusion is that the claims in issue are valid, not anticipated, and infringed. Decrees in accordance with the foregoing conclusions may be settled upon notice.

On Reargument.

[5] Prior to the settlement of the decrees in these suits, the question of laches in connection with the Lodge patent was, on the defendant's petition, reargued. Counsel for the defendant now asserts that he intended to raise that issue. Of course, his intention could be gathered only from what he said and did. The defense of laches was set up in the twentieth paragraph of the answer. Having regard to the language used, and upon comparison with the manner in which the two patents in issue and one which was withdrawn were carefully set forth by number in each of the other joint defenses, it seemed plain to me that the defense related to Marconi patent No. 11,913 alone. The defendant's explanation, that the patent number there given merely fixed a date, serves only to make the allegation ambiguous. Laches is attributed to "said complainant and patentee," not "patentees," as reference to a plurality of patents would require, and as was used in such connection in the preceding and in other paragraphs of the answer. The testimony now relied upon by the defendant in support of laches was equally relevant to the defenses of nonuser and lack of utility.

My attention has been called to one statement only in this record where evidence was expressly offered in support of laches; and in that instance the evidence was excluded (Complainant's Rebuttal Testimony, folios 546–561). In neither of the oral arguments, preceding and following the filing of a formal brief, did the defendant's counsel refer to laches in connection with the Lodge patent. In its elaborate printed brief laches was referred to casually in the last paragraph of a section of the argument relating to abandonment by reason of Lodge's prior publications. In the complainant's printed brief reference was made to laches, but the subject was dismissed with the statement:

"Defendant's answer in the first suit (paragraph 20) alleges laches against the first Marconi patent, but not against the Lodge patent."

In the elaborate oral argument which followed, after a long interval, that statement was not challenged by the defendant's counsel, nor was any reference made by them to the subject.

While, therefore, my conclusion that laches was not pleaded was, I feel, justified by the record, the complainant now waives all objection on this score and submits the issue upon its merits, insisting that the defense has not been affirmatively established by proof. So far as the claim to injunctive relief is concerned, I agree. The defendant refers to only four or five passages in the evidence in support of its contention, and this testimony is either vague or conflicting. The defendant's expert, Dr. Kennelly, made the broad statement:

"In all commercial systems of which I have any knowledge, no matter by whom constructed, some kind of a variable inductance coil for tuning has always been employed in connection with the antenna."

Dr. Kennelly has been a college professor since 1902, and the extent of his knowledge of the commercial art of wireless telegraphy is not stated by him, nor does it otherwise appear. But Dr. Kennelly is directly contradicted by Mr. Fessenden, who stated that:

"In the transatlantic work of the National Electric Signaling Company at Brant Rock, Mass., and at Fortress Monroe and elsewhere, we frequently worked without any coil of wire in the antenna at either or both the sending and receiving end."

In fact, the only definite evidence was supplied by Mr. Marconi himself. On direct examination he stated that he had used an inductance coil in the antennæ of his transmitting and receiving circuits as early as 1898, and had used it to a considerable extent in later apparatus. On cross-examination (see Complainant's Rebuttal Testimony, folios 546–549) he admitted that he had steadily infringed Lodge's patent, and that every station built by him probably had an inductance coil in the antennæ.

Marconi's admission has a direct bearing upon the complainant's claim for profits and damages. While the evidence discloses little or no use by Lodge of his patent, Marconi, by far the most active practitioner in the art, was exploiting his system with every possible form of publicity, and in so doing was openly infringing Lodge's patent. As Judge Lacombe said in A. R. Mosler & Co. v. Lurie, 209 Fed. 364, 370, 126 C. C. A. 290, where an owner has remained thus supine for many years, shutting his eyes to what was going on in the art to which the patent belonged, and thus leading the defendant and others to suppose that he intended to make no claim that his patent dominated a portion of that art, it is inequitable that he should come at this late day and insist on being granted an accounting for damages and profits during his long period of inaction.

Accordingly, so far as the Lodge patent is concerned, the complainant may have a decree for an injunction, but without any accounting for profits or damages.

CROWE v. OSCAR BARNETT FOUNDRY CO.

(District Court, D. New Jersey. May 8, 1914.)

1. PATENTS (§ 214*)—EXCLUSIVE LICENSE—RESCISSION—EQUITABLE RELIEF.
Where complainant granted defendant an exclusive license to manufacture and sell a patented grate bar and stoker, to continue during the life of the patent, on a royalty of one cent a pound for metal used in stokers sold, defendant agreeing to manufacture the stokers and to pay royalties under the contract on specified quarterly dates during the life of the patent, and on patents on all improvements covering metal for stokers and operating equipment, except engines, etc., the fact that complainant committed a breach of the contract by accepting a personal contract to install one of the stokers for a customer did not authorize defendant to refuse further to manufacture and sell stokers pursuant to the license; and, having done so, complainant, being only entitled to recover royalties on stokers manufactured and installed pursuant to the license, had no adequate remedy at law, and was therefore entitled to a rescission of the contract in equity.

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

2. CONTRACTS (§ 262*)—RESCISSION—DEFENSES.
In a suit in equity to rescind a contract, the fact that there has been a breach on both sides does not preclude the granting of such relief.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1181–1183; Dec. Dig. § 262.*]

In Equity. Suit by Paul L. Crowe against the Oscar Barnett Foundry Company. Decree for complainant.

W. P. Preble, of New York City, for complainant.
Russell M. Everett, of Newark, N. J., for defendant.

BRADFORD, District Judge. [1] This is a bill for the rescission of a contract between the complainant, Paul L. Crowe, and the Oscar Barnett Foundry Company, hereinafter referred to as the foundry company, and for an account of profits made by the latter. On careful consideration I have reached the conclusion that under the special circumstances of this case there should be a decree for the rescission of the contract, but not for an accounting on either side; and further, that in view of the fact that both parties have been at fault the total costs and expenses of the suit should be paid equally by them. Crowe being the inventor and owner of certain improvements in mechanical stokers for the smokeless burning of bituminous and anthracite coal for use in connection with steam boilers and furnaces, and the foundry company being desirous of manufacturing stokers containing such improvements, entered, Crowe as party of the first part, and the foundry company as party of the second part, into a contract under seal bearing date January 29, 1908, whereby, for the considerations and covenants therein set forth Crowe granted to the foundry company, among other things, a sole and exclusive license to manufacture and sell chain grate mechanical stokers under United States patents to be granted to him under three certain applications by him then pending in the United States patent office; such sole and ex-

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

clusive license to continue "for the life of all patents issued upon said applications." Crowe further granted to the foundry company a license to manufacture and sell the grate bar designed for stokers under patent No. 866,627 in a large number of states, including, among others, New Jersey, for the life of the patent, upon a royalty of one cent for every pound of metal used in the stoker and its operating equipment, excepting the engine. Crowe also granted a license to the foundry company (exclusive as to some territory and non-exclusive as to other territory), to manufacture and sell chain grate stokers covered by the above mentioned patent as to grate bar and by claims in the above mentioned applications for patents, and also all applications made by him for improvements thereon, the license not to be exclusive in the states and territories other than those specified in the contract, upon a like royalty of one cent per pound of metal used in the stoker and operating equipment, excepting the engine. Crowe further granted to the foundry company a license to manufacture and sell the said chain grate stoker with all improvements thereon which should be made by Crowe for "the life of all patents issued upon any and all applications hereinafter made by said party of the first part on said stoker upon the same terms as above set forth for the above mentioned states and territories." The foundry company in and by the contract expressly undertook the manufacture of the stokers under the protection of the above mentioned applications, patent and improvements, and "guarantees absolutely to the party of the first part the payment to him as a license fee" of the above mentioned royalty and "agrees absolutely to make settlements to be delivered on the tenth days of January, April, July and October, in each year for the life of the above patent, and of the patents issued upon the said applications, and upon all improvements covering all metal for stokers and operating equipment, except engine, shipped from its shop or other place from which it is made or procured by said party of the second part during the period of the last preceding three months." The foundry company agreed to keep separate order and invoice books for the record of the sale of the said stokers and granted the right to Crowe "to inspect at any time said books." The foundry company agreed "to make and deliver to the said party of the first part full and true returns, under oath, of all stokers and parts thereof, including repair parts shipped by it, together with operating equipments, except engine, and of the total weight of metal used therein, the names of the parties and localities for which said stokers and said parts are to be installed or used on or before the tenth days of January, April, July and October in each year covering a period of the previous three months, for the life of the said patents and improvements." Crowe agreed to protect the foundry company "in the rights herein granted against any infringement on the claims in the patent already issued, and on patents which may be hereafter issued * * * on said applications and improvements," and agreed that all improvements made by him on the stoker should be used on the stokers manufactured by the foundry company. And it was further agreed that if such improvements should be of such value that they should be protected

by patent, the foundry company would take out such patents at its own expense. On the execution of the above contract Crowe entered into the employ of the foundry company to show it how to construct the stokers and to make the installations, and remained in such employ until August, 1909; but his connection with the foundry company did not long continue before dissatisfaction or differences arose between them. Crowe testifies, among other things, to the effect that while he was in its employ the foundry company was "very arbitrary in building the stoker properly, and when I was at the plants to make the installations the work was so poor that I had to build the stokers over at the plant, which cost a great deal of time and money," and that about the first of August, 1909, he left the employ of the foundry company and took an order from the Commercial Trust Company in Jersey City for the construction of a stoker on his own account and for his own benefit "under my former patent." This action on the part of Crowe led to litigation between the parties. The foundry company brought two suits in the court of chancery of New Jersey against Crowe, alleging violation of the contract on his part, the first being instituted August 31, 1909; and the decisions in both of these suits were adverse to Crowe, and were affirmed on appeal. In them it was decided that Crowe had violated the rights of the foundry company under the exclusive license granted to it in and by the contract of January 29, 1908, and he was compelled to pay damages Untenable and unjustifiable as the conduct and position of Crowe subsequently may have been, there is enough in that contract to indicate that he may have taken only a mistaken view of the right to construct and install the stoker for the Commercial Trust Company. The contract provided that Crowe should protect the foundry company "in the rights herein granted against any infringement on the claims in the patent already issued, and on patents which may be hereafter issued by the United States patent office on said applications and improvements." The evidence is that Crowe was at and prior to the execution of the contract the owner of many patents not referred to in that contract, relating to improvements in mechanical stokers for the smokeless burning of bituminous and anthracite coal for use in connection with boilers and furnaces. It appears from the testimony of Hanney, the secretary and treasurer of the foundry company, that knowledge of the fact that Crowe had taken the order for the installation of the stoker for the Commercial Trust Company "came to us from Mr. Crowe himself. He asked us to manufacture certain parts of the stoker, and we refused to do so, claiming that our contract entitled us to have the order turned over to us." This incident certainly does not indicate a fraudulent intent on the part of Crowe to invade the exclusive rights of the foundry company. But whether Crowe's intent in doing what has been conclusively decided to constitute a breach of contract and of the rights of the foundry company under the exclusive license granted to it, was innocent, though mistaken, on the one hand, or, on the other, wrongful, is a question not necessarily decisive of this case upon the facts disclosed. After Crowe left the employ of the foundry company in August, 1909, it continued to pay him the royalty provided for in the contract until January, 1912, when

it ceased such payment and has never resumed it; the total amount of royalties paid by it to Crowe amounting to about $9,000. The evidence is that up to that time the foundry company continued the manufacture and sale of stokers under the contract. Since January, 1912, the foundry company never made any return to Crowe of stokers and parts thereof made or installed by it, and since that date it made and installed from fifty to seventy-five chain grate mechanical stokers. Hanney testifies touching the operations of the foundry company with respect to the contract since January, 1912, as follows:

"Q. You don't, of course, deny that you stopped working under it? A. Yes, I do deny it. Q. You deny now that the company stopped work under it? A. Yes. Q. What did their working under consist of subsequent to January 10, 1912? A. Consisted largely of paying royalties. Q. Since January 1, 1912? A. Since then? I don't know whether we were working under it or not since January, 1912. * * * Q. On direct examination you were asked why the defendant company ceased paying royalties on January 1, 1912. You remember that? A. Yes. Q. Do you remember what you answered to that question? A. Yes. Q. Why we [you] ceased to pay royalties? A. Yes. Q. Why? A. On account of Mr. Crowe failing to keep his contract to protect us against infringers and going out and infringing himself. Q. That is the only reason you care to state? A. No, that is one what we consider good reason. Q. And you had no others to state, that is you didn't care to state? A. I have none to state at this minute."

It thus appears from the evidence that the foundry company after ceasing to pay royalties to Crowe under the contract from and after January, 1912, manufactured and installed from fifty to seventy-five chain grate mechanical stokers and paid royalties thereon, the secretary and treasurer of the company stating that the work of the foundry company subsequent to January 10, 1912, "consisted largely of paying royalties." No royalty after January, 1912, was paid to Crowe. If the foundry company was operating under the contract in manufacturing and installing chain grate mechanical stokers the royalty was due and should have been paid to Crowe, unless the company was relieved from so doing by a judicial determination. The fact that no royalty was paid to Crowe after January, 1912, although the above mentioned large number of stokers were made and installed, affords potent evidence that the foundry company in making and installing stokers after that date was not working under the contract. It appears that the foundry company paid royalties; but to whom? They were not paid to Crowe who was entitled to receive them if it was working under the contract. Yet the royalties were paid and could not have been paid to any other person than Crowe under the contract. There is only one reasonable inference to be drawn from the facts, namely, that the company while holding an exclusive license from Crowe under the contract to manufacture and install stokers, was not operating under the contract, but independently of the license. This inference is fully supported beyond the possibility of successful contradiction by a statement by the foundry company in section 4 of the answer, that it denies that since January 10, 1912, "it has made and sold chain grate mechanical stokers in all essential particulars practically identical with those upon which it had paid royalty previous to that date, and denies that it has ever failed to

pay full royalty upon all chain grate mechanical stokers made under said contract." It thus appears from the answer which is binding upon the foundry company that it never failed to pay full royalty upon all stokers made under the contract, but that since January, 1912, the stokers made and sold by it were not identical in essential particulars with those covered by the contract. Hanney testifies to the effect that he believed that the foundry company owned a patent taken out by one Clark on a grate bar shoe for stokers, and that the foundry company was using that patent in the manufacture of stokers. The inevitable conclusion is that the stokers manufactured and sold by the foundry company after January, 1912, were different from those called for by the contract upon which alone royalty could become payable to Crowe. By the contract Crowe granted, among other things, to the foundry company a sole and exclusive license (except as in the contract otherwise provided) to manufacture and sell the stokers therein referred to, and the foundry company in consideration of this grant, bound itself to enter upon the manufacture of such stokers and to pay to Crowe the royalty mentioned in said contract. The contract was of a continuing nature; the license to last during the life of the patents with respect to which it was granted. The foundry company, whatever may have been the dereliction of Crowe in the violation of the rights he granted to it, has placed itself in a more reprehensible position. The only royalties which could be paid by the foundry company to Crowe would necessarily be the product of the manufacture and sale by that company of stokers under the contract with Crowe, and when the foundry company, holding this exclusive license, abandoned the manufacture of stokers under the contract, it destroyed the only source from which Crowe could receive the stipulated consideration for the exclusive rights granted by him to that company. So long as the foundry company omits to manufacture the stokers under the contract a recovery of royalties by Crowe is impossible. The company has put itself in the position of advancing its own interests by disregarding its undertaking to manufacture stokers from which Crowe could derive a royalty; by manufacturing stokers independently of its licensed right under the contract; and by preventing Crowe from competing with it by holding him to the exclusive license originally granted by him. This action on the part of the foundry company creates, in my opinion, an unjust and intolerable condition which should not be permitted to continue. As before said, Crowe certainly could not recover royalties for the manufacture of stokers outside of the contract. And owing to the continuing nature of the contract an action at law for damages for its violation by the foundry company could not afford an adequate remedy. It is true that there has been fault on both sides, but the injustice and oppression now indulged in by the foundry company against Crowe are so glaring as to require an absolute determination of the existing condition of things. While the foundry company denies that it has repudiated or abandoned the contract of January 29, 1908, its acts and conduct above referred to belie its words and disclose a clear abandonment and repudiation of that contract save in so far as it seeks to use it for a wrongful and practically fraudulent purpose. Under such

circumstances it is incumbent on a court of equity to declare and decree a rescission.

The contract of January 29, 1908, is continuing in its nature, but contains no provision for its rescission for any default or defaults on the part of either or both of the parties in the performance or observance of its stipulations or provisions. It does not follow from the absence of a provision for rescission that none can be effected. A continuing contract requiring the performance of acts or the pursuit of a line of conduct on the part of both or either of the parties, though lacking such a provision, may be rescinded by a court of equity at the instance of one of the parties if the other persistently refuses or fails to discharge the duties devolving upon him thereunder or manifests a wrongful intention not to observe essential features of the contract, but to defeat its purpose, and there be no adequate remedy at law. The circuit court of appeals for the second circuit in Neenan v. Otis Elevator Co., 194 Fed. 414, 114 C. C. A. 376, rendered a decision which is helpful in the determination of this case. The syllabus which fairly represents the principles decided is as follows:

"1. Under a contract by which complainant assigned certain patents relating to elevators to defendant, a builder of elevators, which required defendant to test the patented apparatus with reasonable diligence, and if such test proved satisfactory 'within such further reasonable time as is covenient to put such apparatus into practical use' and to pay royalties thereon, the test having proved satisfactory, complainant was entitled to have the inventions exploited during the life of the patents and within a reasonable time.

"2. The failure and refusal by defendant, although continuously building and installing elevators, to make any practical use of such invention for five years after the making of the contract, was a violation both of its spirit and letter which entitled complainant to its rescission in equity; there being no rational rule of damages which would afford an adequate remedy at law."

Judge Coxe in delivering the opinion of the court said:

"The dilemma in which the defendant is placed by the proofs is this: The Neenan patents are either for valuable inventions or they are not. If worthless, the defendant will not be injured, but on the contrary will be benefited. by reassigning them on receiving the amount it has paid. If, on the other hand, the patents cover valuable inventions, the inventor is entitled to have them exploited during the lives of the patents. The gains, profits and advantages which may accrue from the patents the complainant is entitled to receive, either under the contract or as owner. It seems evident that no substantial gains will accrue to him under the contract. * * * The intention of the parties, at least the intention of Neenan, was to exploit the inventions as soon as possible. It was the duty of the defendant to test the apparatus with reasonable diligence and if the tests were satisfactory to install it within such reasonable time as was convenient. It did test the apparatus and found it satisfactory, but has wholly neglected to put it into practical use. Its conduct in this regard seems to indicate a purpose not to use the patented improvements but to prevent rivals in business from acquiring them. Manifestly, the defendant does not intend to push the introduction of the inventions in an enthusiastic and energetic manner such as the complainant has a right to expect. * * * It is not too much to say that the defendant, after it proved the invention to be a valuable one, wholly neglected to put it into practical use. This was not what the contract contemplated and was contrary to its spirit and letter as well. The complainant has no adequate remedy at law, no rational rule of damages can be formulated upon the facts as shown; any verdict rendered would have nothing but speculation and

guesswork to support it. In such cases the right of the injured party to rescind is well recognized."

For any violation by Crowe of the rights of the foundry company under the exclusive license, that company would have had an adequate remedy by an action at law for damages or by a suit in equity for an injunction and an accounting. But for the wrong done by the foundry company in retaining, without using, the exclusive license granted to it by Crowe the latter has no remedy for the recovery of royalties which do not exist, and an action at law for damages based upon a breach of the contract by the foundry company would be a wholly inadequate remedy for the reason that the amount of royalty which the foundry company should have paid to Crowe if it had in good faith manufactured the stokers under the exclusive license, would be wholly uncertain and speculative as depending upon elements and factors impossible of judicial determination.

[2] This suit being in equity and not an action at law the fact that there has been fault on both sides does not preclude the granting of proper relief to Crowe. There should, therefore, be a decree rescinding and annulling the contract of January 29, 1908, and enjoining the foundry company from operating or attempting to operate under the exclusive license in question, and imposing the costs and expenses of this cause equally upon the parties. In view of the circumstances of the case neither party is entitled to an accounting or to recover damages as against the other. A decree in accordance with this opinion may be prepared and submitted.

ALLEN AUTO SPECIALTY CO. v. NIAGARA AUTO COVER CO. (two cases).

(District Court, S. D. New York. November 7, 1913.)

PATENTS (§ 328*)—INFRINGEMENT.

The Nathan patent, No. 799,662, for a cover for automobile tires, *held* infringed.

In Equity. Two bills by the Allen Auto Specialty Company against the Niagara Auto Cover Company. On final hearing. Decrees for complainant.

Howson & Howson, of New York City (Hubert Howson, of New York City, of counsel), for complainant.

Baird, Cox & Scherr, of New York City (Clarence G. Campbell, of Boston, Mass., of counsel), for defendant.

HAND, District Judge. There is no important issue in this case except infringement, and that is a purely verbal issue. That any one should copy the patent exactly, except to put the top section wrong side to, was surely not to be anticipated. It is so obviously a perversion of the natural use as to be possible only to one who was trying to avoid infringement. The most that Mr. Campbell could say for it

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

was that the cover would work as well hind side front as the normal way. Granting that this is true, though it seems to me most unlikely, still he could not suggest the least reason for the change, and the real reason is only a dishonest wish to infringe the patent.

However, it is urged that the actual language of the claim does not cover the defendant's device, and that the claim resides in the words used. I agree that if "front" is necessarily to be limited to the side away from the machine, this is so. If, however, it be interpreted as meaning the vertical face of the tire when in position, the difficulty disappears. Functionally that is all it can mean, as it is a matter of the most absolute indifference whether the vertically falling flap is before or behind. That, moreover, is undoubtedly the idea that the patentee and the patent examiner had in mind, when the phrase was included that contained the word, "front." All that they meant was that the flap should fall vertically, thus differentiating the claim from those covers which had a seam or opening upon the horizontal faces of the tire. If the patent is to be so easily evaded, then of course it would be no infringement so long as the whole tire was fastened on wrong side to. Now no one will carry literalism so far, and I am glad to say that Mr. Campbell very frankly admitted that it would not evade the patent to put the whole thing on with the face in. But that admission goes too far for the case, because the defendant has nothing to rest on but the mere literal language of the claims. If it be infringement to turn the whole cover around, how can it be different to turn half the cover? Is it not perfectly clear that "front" was merely a term of relation, indicating the position of the flap towards the observer who was opening or closing it, and that of course the patentee did not suppose that the observer would reverse it so that to face it he would have to look down over the top of it.

As to the first infringement, the flap does not, it is true, come down very far. It makes a start, as it were, and stops before it has gone far enough to get the best results. However, the purpose is undoubtedly present, and it does not avoid infringement to modify the patented device to a point where it merely works badly.

A decree may pass, with costs on both bills.

COOPER v. JAMES.

(District Court, N. D. Georgia. May 16, 1914.)

No. 37.

COPYRIGHTS (§ 12*)—SUBJECTS OF COPYRIGHT—MUSICAL COMPOSITIONS.

The addition of alto parts to well-known hymns, sung for years with only the three parts of soprano, tenor, and bass, is not such a new and original work as entitles the composer to a copyright.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. §§ 14, 15; Dec. Dig. § 12.*]

In Equity. Suit by W. M. Cooper against J. S. James. Bill dismissed.

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

Candler, Thomson & Hirsch, of Atlanta, Ga., for plaintiff.
Albert Kemper, of Atlanta, Ga., and J. S. James, of Douglasville, Ga., for defendant.

NEWMAN, District Judge. This is a bill in equity, brought by the plaintiff against the defendant, alleging the infringement of what is alleged to be a copyright for the revising, improving, and remodeling of a book known as "The Sacred Harp." It appears from the record that a song book called "The Sacred Harp" was issued as far back as 1869, and perhaps earlier. All rights to this song book had expired prior to 1902, when Cooper issued a book called "The Sacred Harp." The greater part of Cooper's improvement was preparing what is known as "altos" to the songs contained in the book. Cooper claims that James issued a book in 1911 in which he used the altos which he prepared and used in his book published in 1902.

It seems that the songs in the original song book called "The Sacred Harp," published in 1869, had only three parts, that is, what are now known as soprano, tenor, and bass, and that Cooper attempted in 1902 to copyright a book issued by him containing these same tunes, with the same or substantially the same soprano, tenor, and bass, but with altos added thereto. Although denied in an answer filed in the case, it is necessary, perhaps, as the case is now heard, to assume that the altos used in James' book, issued in 1911, are substantially the same as in Cooper's book, so that the question is whether, from the record now before the court, an alto is such an addition to a piece of music already having the other three parts as would make it the subject of a legal copyright; that is, with such well-known tunes in the Gospel Hymnals as "Coronation," "The Promised Land," and "Nearer, My God, to Thee," which had been sung for years with only the three parts named above, is the preparation or making of an alto such an original composition as can be copyrighted.

The rule laid down by Mr. Justice Nelson in Jollie v. Jaques et al., Fed. Cas. No. 7,437, is this:

"The musical composition contemplated by the statute must, doubtless, be substantially a new and original work, and not a copy of a piece already produced, with additions and variations, which a writer of music with experience and skill might readily make."

These altos that are prepared to the tunes in both Cooper's book and James' book, while probably made by musicians of experience and some skill, are not necessarily the productions of persons having the gift of originality in the composition of music. An alto may be an improvement to a song to some extent, and probably is; but it can hardly be said to be an original composition, at least in the sense of the copyright law. In patents we say that any improvement which a good mechanic could make is not the subject of a patent, so in music it may be said that anything which a fairly good musician can make, the same old tune being preserved, could not be the subject of a copyright.

The original Sacred Harp of 1869 and Cooper's book of 1902, 1907, and 1909, and James' book of 1911 are all, by agreement of counsel,

before the court for examination and a part of the record in the case for present purposes. In my opinion Mr. James has not infringed any legal rights of Cooper to the Sacred Harp, or as to any alleged improvement made by Cooper in the Sacred Harp over that published in 1869.

The facts upon which the conclusion in this case is based appear clearly from the record as presented here, in connection with the different books containing the music, which are either exhibits or used on this hearing by consent of counsel; the important fact being that the altos to these tunes are mere improvements, by adding another part to well-known, old-fashioned tunes, to which no one, so far as the tunes are concerned, claims or can claim to have any special rights whatever.

There is a motion by the defendant to dismiss upon several grounds. The third ground of this motion is as follows:

"The alto claimed to be infringed as a matter of law is no infringement, for defendant insists that no alto to a tune already having the other three parts is copyrightable, so as to keep other composers from publishing altos to such tunes, and this is all complainant claims defendant did. He does not claim that defendant infringed on any tunes in his book that were not in the Sacred Harp in 1869, and the books by reference to them show this fact."

In the view I have of the case, this motion should be sustained, and a decree may be entered dismissing the bill for the reason stated above; that is, that the addition of an alto to a well-known tune is not such a "substantially new and original work" as entitles the person adding such alto to a copyright

GREAT NORTHERN RY. CO. v. QUIGG et al.

(District Court, W. D. Washington, N. D. May 16, 1914.)

No. 34.

1. HIGHWAYS (§ 115*)—DAMAGES FROM CONSTRUCTION—INJUNCTION.

A railroad company *held* not entitled to an injunction to restrain the construction of an important state highway which for a distance was being built along the face of a cliff above complainant's tracks, necessitating blasting which threw rock and earth down upon such track, injuring the same and causing temporary delays in the movement of trains, where the contractors were solvent and able to respond in damages, and, by cooperation between them and complainant, danger of injury to trains or passengers could be practically obviated.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 358-370, 372, 373; Dec. Dig. § 115.*]

2. EMINENT DOMAIN (§ 113*)—PROPERTY "DAMAGED" BY PUBLIC WORK—TEMPORARY INJURY.

In order that property shall be "damaged" by a public work, within the meaning of Const. Wash. art. 1, § 16, so as to entitle the owner to compensation paid or secured in advance, the injury must be of such a permanent character as to impair the value of the fee.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 236, 243, 265; Dec. Dig. § 113.*

For other definitions, see Words and Phrases, vol. 2, pp. 1812-1820; vol. 8, pp. 7625, 7626.]

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

In Equity. Suit by the Great Northern Railway Company against J. W. Quigg and J. A. Scaman, copartners. On motion by complainant for judgment on the pleadings. Denied.

F. V. Brown and F. C. Dorety, both of Seattle, Wash., for complainant.

Thomas M. Vance and H. L. Parr, both of Olympia, Wash., for defendants.

NETERER, District Judge. The complainant alleges in substance that it is a corporation organized and existing under and by virtue of the laws of the state of Minnesota, and engaged in business in the state of Washington, operating a line of railway between the cities of Portland, Or., Seattle, Wash., and Vancouver, province of British Columbia, passing through the cities of Everett, Mt. Vernon, Bellingham, and other points; that it owns a right of way over which its line of railway is constructed and operated approximately parallel to and adjoining the shore of Puget Sound; that in the conduct of its business as a common carrier it has and necessarily will operate a large number of passenger and freight trains over and along said railway tracks; that the said right of way and track running through and across the lands in issue are located upon an abrupt hillside rising from the shore of Puget Sound to an elevation of several hundred feet above the waters of Puget Sound; that the complainant's track and right of way are along said hillside near the foot thereof and at a very small elevation above said waters; that the defendants have entered into a contract with the state of Washington for the construction of a highway over and across portions of the land along said hillside above the railway line and within a distance of from 100 to 400 feet of complainant's track; that a large part of said highway is constructed and will have to be constructed in rock or in rocky ground; that for more than one month last past defendants have been engaged in constructing said highway and in the course of said work have set off heavy blasts of powder or other explosives and thereby loosened and thrown out large masses of rock and stone from said highway; that there is great danger of the rock and stone loosened by said defendants in setting blasts and otherwise being thrown down the hillside and onto the track of complainant; that three or four instances during said month large masses of stone weighing several tons have been thrown by the defendants from said highway upon the right of way and track of complainant, breaking and damaging rails and ties of the complainant, and delaying trains for periods varying from 1 to 3 hours and 40 minutes; that a large portion of the construction of said highway remains to be completed under such contract, and that the said defendants threaten to and will, unless restrained by said court, proceed to complete said highway and set off heavy blasts of powder and other explosives along said highway and hillside at points above the track of this defendant, and where the hillside slopes directly down to the track, and there is great danger of large masses of stone and rock being loosened and thrown upon the track of the complainant; that there is great and serious danger that the rock loosened by one of such

blasts, or left in a precarious condition by said defendants, will be thrown down and upon the track of the complainant as one of its trains is passing, and that it will wreck and destroy said train of complainant and kill its passengers and employés. It is further alleged that the defendants are about to enter upon the right of way of the complainant at two different points and to construct said highway across said right of way; and that damage has been occasioned to the complainant by reason of the acts of the defendants in the sum of $3,500.

The defendants, answering the bill of complainant, in substance admit the corporate capacity of the complainant and that it has operated a line of railway as alleged over the right of way as stated, admit that they have entered into a contract with the state of Washington for the construction of a public highway as stated, admit that the said highway is above the complainant's right of way, and that a large part of said public highway to be constructed will have to be constructed in rock or rocky ground; and in the course of said work it will be necessary to set off heavy blasts of powder or other explosives, and that the hillside slopes abruptly from the highway to the railway right of way, and that there is danger of rock and stone loosened by the defendants and said blasting being thrown or rolled down said hillside and onto the right of way of complainant, and "deny that, during the month last past, large masses of rock and stone weighing several tons have been thrown by said defendants upon the right of way and ties of complainant, breaking and damaging rails and ties of complainant and delaying its trains for periods varying from 1½ to 3 hours and 40 minutes." Defendants especially deny that the prosecution of the work under the prescribed contract did constitute, does constitute, or will constitute any menace to the safety of complainant's employés or to the property of the complainant, and deny the other allegations in the bill.

Defendants allege by way of affirmative defense that on the 29th day of May, 1913, a contract was awarded to them by the state of Washington for the construction of a state highway, known as the Pacific Highway, over and through the lands described in the complainant's bill; that pursuant to said contract the defendants entered upon the construction of the said highway under the immediate supervision, direction, and control of the said chief engineer of the state highway commission of Washington, and that:

"The major portion of construction required under the said contract has been completed, there remaining to be completed about 20 per cent. of the entire construction work. That lying closely adjacent to complainant's right of way there remains to be completed a portion of said highway not to exceed 2,000 feet. That within the said 2,000 feet there are several points and places at which and over which the work of construction will necessitate from its very nature and from the terms of defendant's contract, Exhibit 1, the removing of certain masses of rock so situated with relation to complainant's right of way that they may not be removed by any usual, practicable, known, and practiced engineering method without, to a greater or less extent, obstructing for very short periods of time the railway tracks of complainant and causing more or less inconvenience and delay in the operation of complainant's trains. That any and all obstruction and delay that may have occurred heretofore, or that shall occur hereafter, to the operation of plaintiff's trains are due and owing entirely and solely to the fact that the highway in course

of construction by the state of Washington may not be constructed in accordance with the terms of the contract made between the state and defendants, or at all, without such obstruction and minor or inconsiderable delay in operation. That the greater part of the work remaining to be done under the defendant's contract may and will be done without in any way interfering with the right of way of complainant or with its usual and proper operation of its trains. That desiring to carry out their contract with the state, in the manner and method least inconvenient to the complainant herein and before attempting the construction of any part of the said highway that would necessarily or might probably interfere with the operation of complainant's trains, defendants, on or about February 13, 1914, requested of complainant that it, at defendants' expense, nominate and furnish flagman qualified for the duties of a flagman, necessary equipment, temporary telephone service, and equipment usual, necessary, and proper under such circumstances, requesting at the same time that complainant's trains operating through the immediate neighborhood traversed by the state highway under construction, be operated under slow orders, as is usual and proper under like circumstances. That thereafter, and before any blasting or shooting or rock was done on any part of the construction work, where such shooting or blasting cause injury to complainant's trains or undue delay in their operation, defendants requested that extra rails might be furnished at the points of danger, at defendant's expense, so that any damage or inconvenience that might or would result to complainant from any of said shooting or blasting would be minimized and negatived as far as might be. That, according to the schedule of trains operated by complainant over its railway near the highway under construction, from about 8 o'clock in the morning until 12 o'clock noon, there are no regular scheduled trains operated over said stretches of railway track. That a knowledge of these conditions, and with a desire to minimize the necessary, consequential, and unavoidable damage and inconvenience that might or would result to complainant, defendants requested that a proper crew be supplied at defendants' expense, so that, between the said hours of 8 o'clock a. m. and 12 o'clock noon and at such times as not to interfere with the operation of plaintiff's trains, the rails over which complainant's trains operated might be removed, the shooting and blasting of rock occurring at said times, the right of way cleared from the resulting débris and the rails restored, so that complainant's trains might operate during the remainder of the said day without interruption or disturbance. That none of the requests described above were complied with by complainant, except that complainant has, since the making of the said request, furnished two competent flagmen for duty upon this danger stretch of its railway. That defendants have furnished and maintain on the said danger strip of railway at all times two flagmen, and a great part of the time three flagmen, charged with the duty of warning complainant's trains, and during all of said time have furnished three, and during a greater part of the said time have furnished four or five, men, charged solely with the duty of inspecting and watching the tracks of complainant to prevent accident or disaster to complainant's trains, employés, or passengers. That, within about five days of the making and filing of complainant's bill herein, complainant after direction so to do by the public service commission of the state of Washington, and not before, and not without said direction, gave to its operating department, which duly promulgated slow orders for the operation of its trains through its said danger zone. That prior thereto, and up to the time of the making of the said order by the said public service commission, as defendants are informed and believe and so state the fact to be, no slow order warning of any kind had been given by complainant to its employés, and the trains of complainant were operated over and through said danger zone at their usual rates of speed, from 20 to 30 miles per hour, without regard to the conditions made necessary by the construction of the state highway. That, as before said, the work of construction of the highway through this danger zone has been under constant inspection of the chief engineer of the state highway commission and under the daily and almost hourly inspection and supervision of the resident engineer representing the state highway commission and in charge of the said work. That, in doing the said work, the defendants have employed men and methods of proper skill and modern expedi-

ence. That the said work has been done as prudently, carefully, and cautiously as in the nature of things it may be done. That the character of the work, the method of its doing, and the standard of defendants' employés have been, during all of the said time and are now, as defendants so state and believe the fact to be, satisfactory to the said state highway commission, through its engineering department and in strict accordance with the literal terms and the actual spirit of the contract illustrated by Exhibit 1. That defendants are informed and believe that complainant's trains may be operated through the described lands with entire safety to the lives of the passengers and employés of the company and to the lives of the employés of the United States government in custody of its mail if the usual, proper, and customary precautions under like circumstances are taken by complainant for the protection of the lives of passengers and employés, and co-operation is had between the complainant and these defendants in the carrying out of the public functions devolving upon each of them."

It is further alleged: That any inconvenience and delay to complainant or damage occasioned by reason of the construction of the highway was not the result of any negligence on the part of the defendants or their employés, but that practically all of the damage that has occurred could have been avoided by the proper action and co-operation of complainant. That all delays and inconvenience of operation that have occurred have been necessarily incidental to the construction of said highway, or increased and aggravated by the negligence and failure to co-operate when requested by complainant. That any damages suffered because of the work described or that may consequently follow from the completion of said work are such as to do no irreparable injury to complainant, and for which, "as defendants are informed by their solicitors, learned in the law, adequate compensation might be obtained, if resulting from the wrongful or unlawful acts of the defendants or the state of Washington." That, if an injunction is issued as prayed in complainant's bill, defendants will be compelled to and must abandon and retire from their contract with the state of Washington for the construction of said road to their great and irreparable loss and damage.

"That defendants, as guaranteeing the faithful performance of the terms of their contract above mentioned, have entered into a bond with the state of Washington in the sum of $51,732. That in doing the said work defendants are in performance of a public function, having assumed the responsibility thereof by their contract, and that, if injunction is allowed as prayed, the said state highway may not be constructed, the public will be deprived of an artery deemed necessary, and the state of Washington will be foreclosed of its legal rights in the premises, without opportunity to be heard in a court of competent jurisdiction."

The complainant has moved for judgment on the pleadings, and:

"That final decree be entered herein enjoining and restraining the defendants and each of them and all of their servants and employés from the further prosecution of the work mentioned in the bill of complaint and from the further exploding of blasts of powder, or other explosives, along said highway and in the vicinity of the track of complainant, and the safety of its property, and that they be enjoined from casting any rock upon the property of the complainant and from setting off any blasts of explosives which will or may cause rock to fall upon complainant's property."

[1] This case was before the court on an application for a preliminary injunction, and the application was denied in an opinion filed on

the 6th day of April, 1914. Upon the argument on this motion it was said that work has been continuously prosecuted since the former hearing, and that, unless enjoined, will be completed within 20 days. No new conditions or developments are now presented. There are various issues presented by the answer and affirmative defense which require a trial before they can be disposed of, but counsel for complainant in open court waived claims for recovery against the blasting and throwing of rock upon the right of way of complainant. The issue here can be resolved into the following statement: The defendants, as contractors for the state of Washington, in the construction of this public highway will need to use powder and other explosives, and the use of such explosives will or may cause rock or débris to fall or roll upon the track of the complainant, to its damage.

It is urged that from the admitted facts it appears that by the blasting rock has been cast upon the track of the complainant, and that the same will occur in the future, and that the damage to the complainant by reason of loss in event of collision with such rock and the loss of travel over the line by reason of timidity on the part of the public because of such blasting is irreparable, and that the acts of the defendants are to be repeated, and therefore an injunction should be granted.

Many cases are cited. None of the cases cited are decisive here. In Sequim Bay Canning Co. v. Bugge, 49 Wash. 127, 94 Pac. 922, 16 Ann. Cas. 196, defendant was enjoined from digging clams on another's land. In Keil v. Wright, 135 Iowa, 383, 112 N. W. 633, 13 L. R. A. (N. S.) 184, 124 Am. St. Rep. 282, 14 Ann. Cas. 549, fowls were continually trespassing on another's premises. In Carlson v. St. Louis River D. & I. Co., 73 Minn. 128, 75 N. W. 1044, 41 L. R. A. 371, 72 Am. St. Rep. 610, defendant wrongfully caused complainant's land to be flooded. In Atchison, etc., v. Spaulding, 69 Kan. 431, 77 Pac. 106, 66 L. R. A. 587, 105 Am. St. Rep. 175, 2 Ann. Cas. 546, defendant was continuously riding on the rails of plaintiff's road by means of a bicycle, and the court held that it was a continuing menace to the safety of the public. In Connecticut, etc., Co. v. Holton, 32 Vt. 43, the court said that the defendant may not build a crossing at a place where he has no right to do so or remove turf from the right of way of plaintiff. In Gulf, etc., Ry. v. Puckett (Tex. Civ. App.) 82 S. W. 662, defendant was enjoined from using the complainant's railway for travel by means of a velocipede. The other cases cited are of no assistance.

It is also suggested on the part of the complainant that, if the court should find that the work to be performed in the construction of the highway was such a work of necessity and of such character and dignity that the public good required the construction, as a condition to the continuance of the work defendant should be required to enter into a bond to hold the complainant harmless from all damages which might be occasioned by reason of the prosecution of such work. In the opinion filed denying a preliminary injunction, this court said:

"The facts, as they appear from the record in this case and as developed upon the argument, show that the defendants are impressed with the seriousness of the work in which they are engaged, and no charge of any act of omission or commission is made which challenges the manner in which the work is being done. There is no allegation in the complaint, nor is it con-

tended upon the argument, that the defendants are insolvent and cannot respond in damages for any injury which they may occasion. The defendants, under the issue here, being financially responsible, I am satisfied that the facts as developed in this case are not sufficient to justify the court in granting a preliminary injunction. That inconvenience will be occasioned and some loss sustained for which no compensation can be made may not be questioned. The defendants are liable in an action at law for all damages occasioned by blasting operations which occasion injuries to complainant's property. I believe that the complainant has an adequate remedy at law; and its right being granted, and the conduct of the defendants being limited by law, a court of equity should not undertake to define those legal rights and compel the defendants to enter into a written arrangement as suggested to respond to certain enumerated expenditures or damages, and on failure to do so restrain the prosecution of the work. But the parties should be left unhampered to enforce their rights in a court of law."

It is contended that the holding of the Supreme Court of Washington in State ex rel. Smith v. Superior Court, 26 Wash. 278, 66 Pac. 385, and Hart v. Seattle, 45 Wash. 300, 88 Pac. 205, 13 Ann. Cas. 438, is decisive here. In each of these cases the city changed the grade of the streets and deprived the abutting owner of access, and consequently damaged his property. Archer v. Greenville Sand & Gravel Co., 233 U. S. 60, 34 Sup. Ct. 567, 58 L. Ed. ——, is cited with confidence; but in that case the defendant entered upon the land of complainant and removed the sand, and the court said:

"We think the bill shows a continuing trespass of such nature and of such character of injury that remedies at law by actions for damages would be inadequate and would besides entail repeated litigation."

I think it must be apparent that these cases do not aid in the solution of this issue.

The issue here is of peculiar concern. The complainant is practically an insurer of the safety of its passengers. It is necessarily placed at expense and great concern with relation to this work. It must guard and protect the traveling public and the investment made by its stockholders. It likewise owes a duty to the state. Its relation is of a quasi public nature. It has by its acts become an adopted creature of the state enjoying the rights and privileges provided by its laws and is subject to control by the laws and Constitution of Washington. Rem. & Bal. Code of Wash. § 8669. The state accords it the right of eminent domain, and by this privilege it had the right to have the necessity for the right of way over the land adjudicated by the courts on the authority of legislative enactment. The state, which has afforded these rights and permission to complainant to operate in the state under its supervision, by the same supervision now seeks to construct this public highway, a work of great public importance and greater local necessity. This work is being done, as disclosed by the record, by practical and experienced men, and has been carried almost to its consummation since the denial of the application for a preliminary injunction without further complaint of mishaps or interruption of traffic on complainant's road being made to the court. To hold to the contention of complainant would render the state impotent in this enterprise and destroy a large public work of public necessity.

[2] While the phrase "or damages" in section 16 of article 1 of the

Constitution of Washington would prevent this court from going to the full extent of the doctrine laid down by the Supreme Court in Gibson v. United States, 166 U. S. 269, yet the following principle stated on page 274 of 166 U. S., page 578 of 17 Sup. Ct. (41 L. Ed. 996), should be considered by the court where, as here, the complainant seeks to enjoin the prosecution of a public work which neither "takes" nor "damages" his property within the meaning of the Constitution requiring previous compensation.

"It is not, therefore, enough to set before us a case of moral wrong, without showing us that we have legal power to redress it. Beyond constitutional restraint or legislative power, there is none but the legislative will, tempered by its sense of justice, which has happily been sufficient, in most cases, to protect the citizen. Compensation has been provided for every injury which could be foreseen, whether within the constitutional injunction or not, in all laws for public works by the state or a corporation, though cases of damage have occurred which could neither be anticipated nor brought within the benefit of the provision by the most strained construction."

In this case no easement is sought to be impressed or servitude imposed upon complainant's property; nor is the light, air, or access in any way obstructed; nor is any act of the defendants conducive to a damage to the value of complainant's property that the use or value is palpably impaired or stripped of incidents comprised within the conception of complete property rights, which bring to those rights quite as much value as the possession; nor does it amount to an interest which could be acquired by the right of eminent domain; nor could the state, before it proceeded with the work, be required to institute proceedings in condemnation to assess the damages to be sustained. The only acts complained of are personal tortious acts external to and away from the property. The damages contemplated by the constitutional provision must be such a permanent interest in the land as will impair the value of the fee, and not such temporary act as disclosed by the record here. The only right which could be obtained, adopting complainant's theory, would be the right to commit a tort by casting temporarily, on the complainant's property, rock and débris during the continuance of the work, a right which could not be acquired by any proceeding. I am convinced that the acts complained of do not "damage" complainant's property, within the meaning of the constitutional provision requiring previous compensation, and that, all equities considered, the motion for judgment should be denied.

It is so ordered.

BUCHLER v. BLACK et al.

(District Court, W. D. Washington, N. D. May, 1914.)

No. 2112.

1. CORPORATIONS (§ 314*)—TRUSTEES—PURCHASE OF OUTSTANDING MORTGAGE. A trustee of a corporation to protect his own interests may purchase a majority of the outstanding stock of the corporation and a mortgage on its property, in his individual capacity, the corporation having no author-

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

ity to purchase the same for itself; such act not being inconsistent with the trustee's duty to the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1393–1398, 1400; Dec. Dig. § 314.*]

2. CORPORATIONS (§ 314*)—RIGHTS OF STOCKHOLDERS—PRESERVATION OF PROPERTY.

Where a corporation was in financial difficulties, after having mortgaged its property, and a written notice was sent to all stockholders, including complainant, asking a pro rata advancement to preserve the company's property, but complainant personally declined to make any advances, and the stockholders did not respond, complainant could not complain that one of the corporation's trustees took an assignment of the mortgage and an option on the interest of a majority stockholder in order to protect his own interest.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1393–1398, 1400; Dec. Dig. § 314.*]

3. CORPORATIONS (§ 320*)—SALE OF PROPERTY—OBJECTIONS—LACHES.

Where complainant, a stockholder of a corporation, waited more than three years after confirmation of a foreclosure sale of its property to one of its trustees and another, before instituting suit in equity to set it aside, on the ground that the trustee should be declared to hold the property in trust for the corporation, complainant's right to such relief was barred by laches.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1426–1431, 1433–1439; Dec. Dig. § 320.*]

4. CORPORATIONS (§ 482*)—RECEIVERS—SALES—CONFIRMATION—RES JUDICATA.

Where, in receivership proceedings against a corporation pursuant to mortgage foreclosure, objections were filed by minority stockholders to the validity of defendant's claims against the corporation, but these objections were overruled and a sale of the corporation's property to defendants confirmed, such confirmation was res judicata as to the validity of the sale in a subsequent suit by a stockholder to set it aside for fraud.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1870, 1877–1888; Dec. Dig. § 482.*]

5. JUDGMENT (§ 443*)—VACATION—FRAUD.

A judgment cannot be set aside for fraud in obtaining it, but only for fraud which is extrinsic or collateral.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 785, 836, 838; Dec. Dig. § 443.*]

In Equity. Suit by G. J. Buchler against W. W. Black and others. On final hearing. Bill dismissed.

See, also, 205 Fed. 1000.

O. C. Moore, of Spokane, Wash., and George H. Walker, of Seattle, Wash., for complainant.

Robert McMurchie, J. A. Coleman, and Lloyd L. Black, all of Everett, Wash., for defendants.

NETERER, District Judge. The plaintiff is now, and during all times material to this action has been, a citizen of the state of Pennsylvania. Defendant Bell is and has been a citizen of Glen Falls, N. Y., and defendant Black a citizen of Everett, Wash. The Sunset Mining Company is a corporation organized under and by virtue of the laws of Washington, with its principal place of business at Everett. Defendant Black was judge of the superior court of Washington for

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

Snohomish county from January, 1905, to January, 1913. He was also one of the trustees of the defendant company from 1903, and during a portion of that time served as secretary of the defendant company and as its local general manager. The majority of the trustees of the defendant company, during the time material to this inquiry, lived at Glen Falls, N. Y., where the majority of the stock of the company was held. The company had an office at Glen Falls, and seems to have transacted its business from there, except the stockholders' meetings, which were held at Everett, Wash. W. H. Baldwin appears to have been the dominating influence by reason of his large stock holdings. Defendant Bell is a lawyer, and was the legal adviser of W. H. Baldwin and Ella Baldwin, his wife, and for a time was general attorney for the defendant corporation. He never acted as trustee for the defendant company except for one day in 1904. At this time it seems to have been necessary to enable the company to transact some business to fill a vacancy on the board, and he was elected and continued a trustee for one day. Defendant Black was not present at this meeting, and it does not appear that he knew anything about it. On August 3, 1904, the employment of Bell as attorney for the defendant company ended, although thereafter he attended to some legal matters for the company under special employment. The defendant company was capitalized for 1,000,000 shares at $1 per share, which was subsequently increased to 3,000,000 shares, and it acquired 36 mineral locations upon government land, and was required, for the purpose of holding the claims, to do $3,600 worth of assessment or development work each year. The company had no funds except such as it obtained from selling what is termed in the evidence "treasury stock." This is stock contributed to a fund to be sold for the company's use. This stock was sold at from two cents per share upwards, and the proceeds were used for doing assessment work. Funds derived from this source were insufficient for the company's needs, and the Baldwins advanced and loaned to the defendant company, from time to time, $29,384.10, and on February 10, 1905, a mortgage was given by the defendant company to Ella Baldwin to secure the payment thereof. The defendant Black advanced to the company December 26, 1906, for the purpose of doing its assessment work, $1,500, and a mortgage to secure the repayment was thereafter made upon the company property to Black. On October 6, 1906, the defendant Black secured an option to purchase from Ella C. Baldwin 1,250,000 shares of the capital stock of the defendant company, and claims and mortgages held by her against said company, amounting to not less than $35,000, for the sum of $100,000 to be paid at stated times and upon default Black's interest to cease, the stock and evidence of indebtedness to be placed in bank in escrow; W. H. Baldwin having died in April, 1905, leaving Ella C. Baldwin, his widow, with no property except the Sunset property and her home. On November 5, 1906, Black sold his option to Soderberg for $130,000, and received $10,000. Soderberg assumed payments to be made to Mrs. Baldwin, and afterwards sold his contract to the Chelan Consolidated Copper Company. On February 13, 1907, Black in his individual capacity entered into a contract with the Chelan Consolidated Copper Company, in which the

Baldwin option and Soderberg sale and purchase by the Consolidated Copper Company was recited, with the further recitation that all parties desired to have the claims and properties of the Sunset Copper Company improved, and that the options did not contemplate the development of the mining claims beyond the ordinary prospective and development work, and that because of such fact the Chelan Consolidated Copper Company may enter upon the property "and develop * * * the same * * * and extract and ship * * * ores * * * in such manner as it may deem fit * * * but * * * in a miner-like manner, and all for the use and benefit of the Sunset Copper Company;" the Consolidated Copper Company to develop and pay the costs and expenses, and upon the sale of the ore to pay the cost of mining and shipping and pay the balance, if any, to the Sunset Copper Company. This company did no work under this contract, but paid to defendant Black the $20,000 due him. On March 27, 1907, the Consolidated Copper Company sold its option to Albers, and on April 2d following, Albers sold same to the Trout Creek Copper Company. This company expended, in developing the mining property, from $16,000 to $20,000. It sold approximately $8,000 worth of ore. The contract entered into by Black and the Chelan Consolidated Copper Company was ratified by the Sunset Copper Company as its act, and the board of trustees elected a general manager to look after the company's interest while this work was being done. The Sunset Copper Company afterward contended that it should receive the value of the ore shipped, which the Trout Creek Copper Company denied. A suit was commenced in New York to recover the $8,000 received for the ore. This suit was, on May 23, 1908, settled by the parties; all of the trustees of the Sunset Copper Company and the plaintiff in this case signing the agreement for such settlement. On December 9, 1908, defendant Bell, having succeeded to the Baldwin mortgage and stock, commenced a foreclosure proceeding in the superior court of Snohomish county, and on the same day a receiver was appointed, and it was "ordered that said receiver cause all necessary assessment work to be done upon the aforesaid mining claims," and he was authorized to issue receiver's certificates for work done. Claims were filed with the receiver against the company by H. C. McNutt, $1,307.95; defendant Bell, a judgment obtained in New York for $12,767.57; H. W. Holmes, $1,488; W. W. Black, $10,923.21, a part of which was for the mortgage given; Bartlett, $12.80; and the Bell mortgage, on which suit was commenced, $37,501.71. On March 18, 1907, Rudibeck, a stockholder, filed an affidavit on behalf of himself and other stockholders, and attacked the indebtedness and charged fraud and collusion. The claims were approved by the court and ordered paid, the property was sold, March 20th, to W. W. Black and F. N. Bell, and on March 29th Rudibeck filed protest and objection to the confirmation of the sale. On March 30th L. T. Reed, a stockholder, filed objection to the confirmation of sale. Objection to confirmation was based, in substance, on the same grounds upon which relief is sought in the complaint. On April 5, 1909, the objections to the confirmation of the sale came regularly on for hearing before the court. The objections

were overruled and sale confirmed, and conveyance by the receiver made to defendants Black and Bell.

There is no evidence before the court that there was any collusion between the defendants Black and Bell with relation to any of the conduct of the business of the defendant company, nor is there any evidence before the court to justify the conclusion that either the defendant Black or Bell had any influence over the board of trustees, or exercised any undue influence of any character in any of the proceedings referred to in the complaint. There is no evidence before the court that any information with relation to the conditions or status of the defendant company's property was at any time withheld from the plaintiff. By the evidence it is shown that the plaintiff was at all times advised of the financial condition and status of the defendant company, knew of every act and thing that was done by the board of trustees, and that he was advised, more than a year prior to the institution of the foreclosure action, that the company was without funds, and he was requested to contribute as a stockholder to the fund in connection with the other stockholders for the purpose of relieving the financial stress of the defendant company and doing the assessment work, and he declined to contribute anything, and stated that none of the stockholders would contribute. The plaintiff requested the defendant Bell to foreclose his mortgage more than a year prior to the time when foreclosure proceedings were instituted, and that he be given an option to sell the property. He also asked the defendant Black to use his influence with defendant Bell to secure a foreclosure. After the defendant Bell acquired the mortgage from Mrs. Baldwin, defendant Black made a trip to New York for the purpose of inducing the defendant Bell to withhold foreclosure proceedings, stating to defendant Bell that he believed money could be realized within a year to liquidate the indebtedness. Defendant Bell agreed to wait, and at the expiration of a year, no payments having been made, and it being necessary that the assessment work be done to protect the property, sent a circular letter to all of the stockholders, among whom was the plaintiff, and set forth the status and condition of the company, stating, in substance, that unless payment was made, foreclosure would ensue. None of the stockholders responded, except one small holder, and his check was returned when the other stockholders, including the plaintiff, declined to contribute. The assessment work for 1909 was not done, and the time in which it was required to be done expired January 1st next ensuing. This notice was dated November 16, 1908, and informed the stockholders of the indebtedness of the defendant company, and that the receivership was threatened, and his willingness to advance funds in proportion to the stock held by him for Mrs. Baldwin if the other stockholders would do likewise. Defendants Black and Bell since acquiring the property have expended in assessment work on the mining claims approximately $25,000. There is no direct evidence before the court as to the value of this property as mineral land.

The complainant seeks to have Black and Bell declared trustees of the property for the defendant company, and in the concluding paragraph of his reply brief says:

"The controlling factors in this case are the withholding by Black of $30,000, and the manipulation by the defendants of the corporation's property. Upon these two points the final decision must rest. In comparison with these two points all else is incidental."

[1] I think counsel has overemphasized this statement and the relation of the defendants to each other and to the defendant company. The evidence shows that the defendant Bell knew nothing about the option to Black until after it was given. There is no testimony showing any collusion between Black and Bell in the carrying out of a common design. Bell did not approve the transaction, and was a stranger to its bearings and relations. As to the defendant Black, he could not have taken this option for the company of which he was trustee. The corporation could not traffic in its own stock. He did nothing as an individual that he could have done as a trustee. He did nothing detrimental to or jeopardized any interest of the defendant company. On the contrary he obtained for the defendant company by this act from $16,000 to $20,000 worth of work without expense, and this work was utilized by the defendant company as a basis for its assessment work for the year 1907. This work was done with the consent of the defendant company, and the concluding relations between the defendant company and the Trout Creek Company which did the work was adjusted amicably after the commencement of a suit, and with the plaintiff's written consent. There is no evidence presented which would justify any court in finding that there was any manipulation of the defendant company's property by the defendants Black and Bell, which injuriously affected it. So far as the evidence disclosed there was no act of commission or omission on the part of either of said defendants which was intended to or did injuriously affect the defendant company. The securing of the option and selling by Black was a transaction between him and Baldwin, with which the defendant corporation had nothing to do, and was a transaction which the defendant corporation could not do. Black's act, therefore, was not inconsistent with any duty he owed as trustee to the corporation. Rem. & Bal. Code of Wash. § 3697; Tait v. Pigott, 32 Wash. 344, 73 Pac. 364; Barto v. Nix, 15 Wash. 568, 46 Pac. 1033; 10 Cyc. 577, 578; O'Neile v. Ternes, 32 Wash. 528, 73 Pac. 692. A trustee may buy property of the corporation when fairly done, and for the purpose of protecting his own interest, when he acts in his individual capacity.

In Twin-Lick Oil Co. v. Marbury, 91 U. S. 587, 23 L. Ed. 328, the defendant, a director of the complaining corporation, loaned the company $2,000 secured by a deed of trust. At a subsequent sale under this deed, the defendant purchased all of the property of the corporation. In an action brought four years later to have the defendant declared a trustee for complainant, on page 590, 91 U. S. (23 L. Ed. 328) the court said:

"If it be conceded that the contract by which the defendant became the creditor of the company was valid, we can see no principle on which the subsequent purchase under the deed of trust is not equally so. * * * Defendant was at liberty to bid, subject to those rules of fairness which we have already conceded to belong to his peculiar position; for, if he could not bid, he would have been deprived of the only means which his contract gave him of making his debt out of the security on which he had loaned his money."

In Cowell v. McMillin, 177 Fed. 25, 39, 100 C. C. A. 443, 457 (C. C. A., Ninth Circuit), in discussing a contract made by a director with the corporation, the court said:

"Thus the case is brought within the rule recognized by the Supreme Court of the United States, namely, that where the director has acted with that candor and fairness which equity imposes as the guide for dealing between him and the corporation, and the transaction is open and free from blame, the director is not forbidden from making a contract with the corporation, or from entering upon a transaction in which he is personally interested"—citing Twin-Lick Oil Co. v. Marbury, supra, and other authorities.

In Marks v. Merrill Paper Co., 203 Fed. 16, 20, 123 C. C. A. 380, 384, the court said:

"The authorities are numerous and controlling to the effect that the mere fact that the sale of property of one corporation to a new corporation, the majority of whose governing officers are the same, will not per se vitiate the sale. The question is always one of good faith and fairness, except in cases where public policy intervenes. The facts in the present case bring it within the language of the court in Harts v. Brown, 77 Ill. 226: 'The stockholders had been called together, and they were urged to make advances in proportion to the stock they severally held, and thus relieve the company and preserve its existence, but this they refused to do: and, as it could not be preserved, and must come to an end by a sale under the power in the trust deed, no reason is perceived why appellants might not become the purchasers at the sale. They were under no moral or legal obligation to advance their own means, pay the debts, and preserve the property for the use of the other shareholders, who had declined to join in making pro rata advances to relieve it from debt.'"

See, also, Janney v. Minnesota Ind. Expo., 79 Minn. 488, 82 N. W. 984, 50 L. R. A. 273; Saltmarsh v. Spaulding, 147 Mass. 224, 17 N. E. 316; Allen v. Gillette, 127 U. S. 589, 8 Sup. Ct. 1331, 32 L. Ed. 271.

[2] A written notice was sent to all the stockholders asking that pro rata advances be made for the purpose of preserving the property. The stockholders did not respond. The plaintiff personally declined to make any advance. The defendants Black and Bell cannot be "deprived of the only means which his contract gave him of making his debt out of the security on which he loaned his money."

[3] The plaintiff knew, long prior to bringing this action, of the option and subsequent sale, and knew that the contract by Black, permitting the Trout Creek Copper Company to do certain work on the property, was ratified by the defendant company. The plaintiff with the trustees of the defendant company entered into a written stipulation settling an issue arising out of said contract more than four years before the bringing of this action. The defendant company would not be permitted to raise an action on that account, and the plaintiff does not occupy a stronger position than would the defendant company. 10 Cyc. 963; 28 Am. & Eng. Encyc. Law, 970.

In Twin-Lick Oil Co. v. Marbury, supra, the Supreme Court of the United States, on page 591, 91 U. S. (23 L. Ed. 328), said:

"The doctrine is well settled that the option to avoid such a sale must be exercised within a reasonable time. This has never been held to be any determined number of days or years as applied to every case, like the statute of limitations, but must be decided in each case upon all the elements of it

which affect that question. These are generally the presence or absence of the parties at the place of the transaction, their knowledge or ignorance of the sale, and of the facts which render it voidable, the permanent or fluctuating character of the subject-matter of the transaction as affecting its value, and the actual rise or fall of the property in value during the period within which this option might have been exercised."

After stating that the plaintiff had taken no action for four years, while the defendant had been putting his skill, energy, and money in the enterprise to make his purchase profitable, the court concludes:

"We think, both on authority and principle—a principle necessary to protect those who invest their capital and their labor in enterprises useful but hazardous—that we should hold that plaintiff has delayed too long."

In Rothchild v. Memphis & C. R. Co., 113 Fed. 476, 51 C. C. A. 310, the minority stockholders did not bring an action until 17 months after the sale at which the majority stockholder bought the property, and the court held that the complainants were guilty of laches. The plaintiff waited more than three years after confirmation of sale before bringing this action.

The authorities cited by the plaintiff are merely to the effect that a court of equity is not governed by the statute of limitations, that a mere lapse of time will not impute laches, and that the court is not bound by hard and fast rules in the determination of what will constitute such laches as will bar a recovery. 19 Am. & Eng. Encyc. of Law, 162; 15 Am. & Eng. Encyc. of Law, 1206; Michoud v. Girod, 4 How. 504, 561, 11 L. Ed. 1076; Sullivan v. Portland, etc., R. Co., 94 U. S. 806, 24 L. Ed. 324; Stearns v. Page, 7 How. 819, 12 L. Ed. 928; Godden v. Kimmell, 99 U. S. 202, 25 L. Ed. 431; Payne v. Hook, 74 U. S. (7 Wall.) 430, 19 L. Ed. 260; Stevens v. Grand Central Mining Co., 133 Fed. 28, 67 C. C. A. 284; Burns v. Cooper, 140 Fed. 279, 72 C. C. A. 25; Davis v. Louisville Trust Co., 181 Fed. 22, 104 C. C. A. 24, 30 L. R. A. (N. S.) 1011; 16 Cyc. 152, and cases there cited; Street's Federal Equity Practice, Secs. 211, 212.

It is unnecessary to determine to what extent a court of equity, while not considering itself bound by a state statute of limitations, will rely upon such a statute for aid in determining a doubtful case, because I am convinced from the facts and circumstances here presented that the plaintiff has been guilty of such laches as should preclude his recovery by the operation of the rule as laid down in Twin-Lick Oil Co. v. Marbury, supra, without resort to the statute of limitations. While the court is not bound by hard and fast rules, yet no such case is here presented as would justify the court in disregarding the rules which have been laid down merely because it is recognized that a wide discretion is vested in the court which applies them.

[4] I am further of the opinion that the action of the state court in approving the claims of the defendants Black and Bell over the objections of the minority stockholders, and in confirming the sale after similar objections had been made, is res judicata of this suit. The same questions were involved and were necessarily determined by the court when, notwithstanding the objections made, it approved the claims and confirmed the sale. Counsel for plaintiff contends that, the sale

not having been confirmed, there was no presumption that the court would confirm it; consequently the cause of action did not arise until after the confirmation of the sale, and could not have been determined before the confirmation. The rule upon which he relies is stated in 23 Cyc. 1314, as follows:

"A judgment is not and cannot be an estoppel as to facts which did not occur until after the judgment was rendered, and which were not involved in the suit in which it was rendered."

It seems that counsel has confused the acts of the defendants with the act of the court. The acts of the defendants charged by the plaintiff as affording ground for relief occurred prior to the confirmation, and the confirmation was a determination by the court that these acts were not sufficient to prevent a confirmation of the sale which the plaintiff is here seeking to set aside. The only distinction between that action and this is that there the plaintiff was attempting to prevent that court from doing that which he asks this court to undo. The same elements entered into the court's determination there as are involved here, the prior acts and conduct of the defendants, and no additional element was introduced by the act of the court in the confirmation. The relief here sought is in effect the setting aside of the judgment of the state court in confirming the sale. The fraud upon which the hope of such relief is based was involved in the issues raised in the state court, and was necessarily determined by its judgment. Intermela v. Perkins, 213 Fed. 106, filed in this court, April 20, 1914; United States v. Throckmorton, 98 U. S. 61, 25 L. Ed. 93; Vance v. Burbank, 101 U. S. 514, 25 L. Ed. 929; Cromwell v. County of Sac, 94 U. S. 351, 24 L. Ed. 195; Stockton v. Ford, 18 How. 418, 15 L. Ed. 395; Mitchell v. First Nat. Bank of Chicago, 180 U. S. 471, 480, 21 Sup. Ct. 418, 45 L. Ed. 627; 2 Black on Judgments, 504; Willoughby v. Chicago, etc., 50 N. J. Eq. 656, 25 Atl. 277; Hearst v. Putman, 28 Utah, 184, 77 Pac. 753, 66 L. R. A. 784, 107 Am. St. Rep. 698.

[5] If the contention of the plaintiff should prevail in this instance, in all cases where a judgment is sought to be set aside on the ground that it was obtained by fraud, a plaintiff might contend that the fraud of the plaintiff was not committed until the judgment was entered, and yet the Supreme Court of the United States has laid down very clearly the rule that relief cannot be had unless the fraud is extrinsic or collateral, and that if it was involved in the issues it was determined by the judgment. United States v. Throckmorton, supra.

It is needless to discuss the further contentions of the parties. From what has been said the conclusion is inevitable that the complainant's bill must be dismissed.

Decree accordingly.

DALTON ADDING MACH. CO. v. STATE CORPORATION COMMISSION OF COMMONWEALTH OF VIRGINIA et al.

(District Court, E. D. Virginia. March 31, 1913.)

1. INJUNCTION (§ 85*)—ENJOINING LEGAL PROCEEDINGS.

Code Supp. Va. 1910, § 1104, requires foreign corporations, doing business in the state, to file with the Corporation Commission a written power of attorney appointing an agent upon whom process may be served, copies of their charter and a certificate of the Auditor of Public Accounts showing the payment of the fee required to be paid by such corporations, and to obtain a certificate of authority from the Commission to transact business in the state. Section 1105 provides that any such corporation transacting business without such certificate of authority shall be fined not less than $10 or more than $1,000 by the Commission, and that its officers, agents, and employés shall be personally liable for the fine and for claims against the corporation. The statute also provides for appeals from judgments and decrees of the Commission. *Held* that, as injunctions are granted on the theory that complainant is about to suffer irreparable injury and is without a complete and adequate remedy at law, and as there is ample provision for a judicial determination of a corporation's liability by the Commission and by the Supreme Court of Appeals of the state, and if there is a constitutional question involved, by the Supreme Court of the United States, the Corporation Commission would not be enjoined in advance of proposed action on its part from taking proceedings to enforce the statute against a corporation claiming to be doing only an interstate business, since, to grant such relief, it would be necessary to determine in advance that the Commission would not give such corporation a fair and impartial hearing.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 155, 156; Dec. Dig. § 85.*]

2. CORPORATIONS (§ 636*)—FOREIGN CORPORATIONS—POWER TO REGULATE.

A state legislature may require foreign corporations, engaged in business in the state, to take out a license and pay a license fee.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2505–2509, 2571; Dec. Dig. § 636.*]

In Equity. Suit by the Dalton Adding Machine Company against the State Corporation Commission of the Commonwealth of Virginia, and the members thereof. On motion for a preliminary injunction. Denied.

Thomas A. Banning, of Chicago, Ill., for complainant.

Samuel W. Williams, Atty. Gen., and Richard B. Davis, Asst. Atty. Gen., for defendants.

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

PRITCHARD, Circuit Judge. This is a motion for a preliminary or interlocutory injunction made in pursuance of section 266 of the New Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1162 [U. S. Comp. St. Supp. 1911, p. 236]).

The bill alleges that complainant is a corporation organized and existing under and by virtue of the laws of the state of Missouri; that it is a citizen and resident of that state, with its principal office in Poplar Bluff; that it has been engaged in the business of manufacturing

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

and selling what is known as adding, listing, and calculating machines; that it has spent more than $1,000,000 in experimental work, the building of a factory, the construction, purchase, and installation of special tools, machinery, etc., and has at all times been engaged in interstate commerce; that it has not in any manner conducted or carried on its business outside of the state of Missouri; that it has sold its machines through salesmen or solicitors, who are merely "drummers" authorized to solicit orders for, or proposals to purchase, its machines, has appointed a salesman or solicitor in the state of Virginia for the purposes aforesaid; that only sales have been made by virtue of his personal solicitation or of those employed to assist him in securing orders; that the said salesman is located at Richmond, Va.; that he is not a clerk or employé of the complainant, and is not paid a fixed compensation or salary, but rents his own office, bears his own expense, pays salary or commission to those employed to assist him, and that his only compensation being on sales effected and collections made; "that neither he nor those working under him have power to actually sell a machine or convey title thereto, and that he has not sold or conveyed title to any machine, and that his power and the power of those whom he employs is expressly limited to merely soliciting orders or proposals to purchase machines, which orders are taken on printed blanks or forms furnished him by complainant, which forms contain, and have always contained, the words, 'This order subject to approval of the company,' which orders amount only to an offer or proposition to purchase a machine, on the part of the person, firm, company, or corporation desiring to buy; that, after such offers or proposals are signed by the party desiring to purchase a machine, they are sent by the solicitor or salesman to the home office of your orator at Poplar Bluff, Mo., for approval and acceptance; that your orator thereupon considers the offers or proposals to purchase, and has accepted some and has rejected some sent to your orator by its salesman or solicitor from Virginia and other states, as your orator has found the terms of payment, the responsibility of the purchaser, and similar matters satisfactory or otherwise; that all checks and moneys are likewise forwarded to the home office of your orator at Poplar Bluff, Mo., and the commission due the salesman or solicitor in Virginia, as well as in other states, are paid by your orator from time to time from its home office in Missouri, as collections are received; that in no case is any title vested in the prospective purchaser in or to the machine which he is proposing to buy, but the same remains the property of your orator until your orator has accepted the offer or proposal and received the money in full therefor."

It is not alleged that the Corporation Commission of Virginia has required plaintiff to pay any license tax, or that any fines have been imposed upon it for violation of the statute, nor does it appear that any summons has been issued against plaintiff to show cause why it should not be proceeded against for violation of the statute.

The principal ground relied upon for relief is based upon the allegation that the State Corporation Commission has threatened to begin a suit or take proceedings against complainant to enforce the provisions of the statute to which reference is made. In other words, that the chairman of the Commission has intimated that the plaintiff's meth-

od of transacting business brings it within the purview of the statute, and that under the law it is required to take out a license and pay a license fee.

[1] The section of the Virginia Acts relating to this subject is to be found in the Virginia Code, annotated Supplement 1910, and is in the following language:

"Sec. 1104. Every company to keep an office in this state for payment of claims to residents; foreign company to appoint agent on whom process may be served; copy of charter, with power of attorney, to be filed, etc.; license; fees. Every incorporated company doing business in this state shall have an office in the state, at which all claims against the company due residents of the state may be audited, settled and paid. Every such company incorporated under a jurisdiction beyond the limits of this state (and hereinafter designated as a foreign corporation) shall, before doing business in this state, present to the State Corporation Commission (a) a written power of attorney, executed in duplicate, appointing some person residing in this state its agent, upon whom all legal process against the corporation may be served, and who shall be authorized to enter an appearance in its behalf; (b) two duly authenticated copies of the charter of the corporation; (c) a certificate of the auditor of public accounts, showing the payment into the treasury of the fee required by law to be paid by such corporation, and shall obtain from said Corporation Commission a certificate of authority to transact business in the state. If it shall be made to appear to the State Corporation Commission that said corporation has complied with the law relative to the obtaining of a certificate of authority for foreign corporations of the character of the applicant corporation, then said Corporation Commission shall issue to said corporation a certificate of authority to transact business in the state. Said Commission shall file and preserve in their office one copy each of the power of attorney, charter, certificate of the auditor, and a certificate of the Commission granting such certificate of authority, and forward copies of said documents to the secretary of the commonwealth, who shall file and preserve the same in his office. Whenever by reason of his removal from the state or from any other cause the powers of such resident agent shall be terminated, then such foreign corporation shall by like written power of attorney, executed in duplicate and filed with the Corporation Commission as above provided, appoint another resident agent; one copy of such power of attorney shall be filed and preserved in the office of the Corporation Commission, and the other copy thereof transmitted to the secretary of the commonwealth to be filed in his office. If the charter of any foreign corporation thus authorized to transact business in this state is amended, two duly authenticated copies of such amendment shall be presented to the Corporation Commission and filed as copies of the original charter are required to be filed, and the fee required by law on such amendment shall be paid in the manner prescribed by law. Any foreign corporation which has heretofore paid the fee required by law to entitle it to transact business in this state, and has otherwise complied with the law heretofore existing relative thereto, shall not, on application for certificate of authority to transact business in this state, be required to pay such fee again, nor to file a copy of the charter with the secretary of the commonwealth, if a copy thereof is already on file in his office. Such corporation shall pay the clerical fees for such certificate of authority and for filing such papers as prescribed by law."

Penalties for the enforcement of the above provision to compel foreign corporations to enter the state and take a license or authority to do business within the state by a provision reading as follows:

"Sec. 1105. License; penalty for doing business without, agents personally liable. * * * If any foreign corporation shall transact business in this state without first obtaining such certificate of authority provided for in the preceding section, it shall be fined not less than ten dollars nor more than one thousand dollars, such fine to be imposed by the State Corporation Commis-

sion, whose duty it shall be to see that the provisions of the preceding section are complied with. Every transaction had in the state by such a corporation without such certificate of authority shall be deemed a separate offense. The officers, agents and employés of any such corporation doing business in this state without such certificate of authority shall be personally liable to the state for any fines imposed on it, and to any resident of the state having a claim against such corporation, and service of legal process upon any of said officers, agents or employés shall be deemed sufficient service on the corporation."

[2] That the Legislature of Virginia had the power to pass an act requiring foreign corporations engaged in business in that state to take out a license and pay a license fee therefor is too well settled to require a discussion of that question, but we do not understand that complainant challenges the right of the Legislature to enact a law of this character. The only reference contained in the bill which intimates that this act is unconstitutional is as follows:

"And especially by the third clause of section 8 of article 1 of the Constitution of the United States, which provides that Congress shall have the power, 'To regulate commerce with foreign nations, and among the several states, and with the Indian Tribes'; that to enforce the above provisions of the Virginia statute against your orator will be, and is in violation of the above provisions of the Constitution of the United States; and that the above provision of the statute of the state of Virginia, when construed, or employed, or attempted to be construed or employed so as to prevent, interrupt, trouble, molest, or in any way interfere with your orator in carrying on its business as aforesaid is void and of no force and effect whatsoever, being contrary to the provisions of the Constitution of the United States."

It will be observed that it is not the contention of complainant that the statute in question is unconstitutional, but it is insisted that the statute may be enforced in such a manner as to deny complainant a right guaranteed by the interstate commerce clause of the Constitution of the United States. Therefore it will be seen that the principal point relied upon as ground for relief is that the Corporation Commission may so construe the acts and conduct of complainant as to bring it within the purview of the statute.

It is urged that, inasmuch as complainant is a foreign corporation engaged in selling and disposing of interstate shipments, it is not subject to hindrance or interference by taxation or otherwise by the laws of Virginia, and that the action of the chairman of the State Corporation Commission, in threatening to institute suit for the purpose of testing the question as to complainant's liability, is in the nature of a hindrance or interference with complainant in the transaction of its business, and that therefore it is the duty of this court, in advance of a trial by the state tribunal upon the facts alleged, to assume that the State Corporation Commission will so construe the Virginia statute as to disregard the provisions of the interstate commerce clause of the Constitution of the United States. There is nothing on the face of this statute to indicate that it is unconstitutional, nor do we believe that there is anything contained therein that is in conflict with the interstate commerce clause of the Constitution of the United States, and certainly there does not appear therein anything to show an intent to prevent by excessive penalties a foreign corporation from contesting its liability thereunder. Injunctions are granted upon the theory that com-

plainant is about to suffer irreparable injury, and that he is without a complete and adequate remedy at law. In this instance ample means are afforded by the state statute by which the question as to the liability of the complainant may be determined by a competent tribunal.

If proceedings should be instituted by the Corporation Commission, it would be for that body to determine upon the facts as to whether the complainant, as a foreign corporation, has been doing business in the state. If it then appears that the complainant has not made any sales of machines except those of an interstate character, it could not be held liable. There is a provision in the statute which authorizes an appeal from any of the judgments or decrees of the Corporation Commission, and if, after a hearing, that body should be of opinion that the complainant was liable for the penalties imposed by the statute, it would have the right to take an appeal to the Supreme Court of Appeals of the state, and, if that court should affirm the judgments of the Commission, complainant, upon a proper showing, would be still afforded an opportunity to carry the case to the Supreme Court of the United States.

The liability of the complainant in the event proceedings should be instituted against it would necessarily depend upon the facts as established by the evidence offered before the Corporation Commission. Thus it will be seen that ample provision has been made by which the very question sought to be determined here may be judicially determined, first, by the Corporation Commission, and if, as we have stated, complainant should feel aggrieved by the judgment of that court, then by the Supreme Court of Appeals of the state of Virginia, and finally, if there should be a constitutional question involved, by the Supreme Court of the United States.

This court cannot, in advance of the proposed action on the part of the Corporation Commission, see its way clear to determine that that body will not give complainant a fair and impartial hearing, and, as we view the matter, that is the principal question we are asked by the complainant to pass upon.

We do not wish to be understood as expressing any opinion as to the liability of the complainant under the Virginia statute. All we decide is that in view of the allegations of the bill, as well as the evidence which has been offered, we do not think that complainant, according to its own showing, is entitled at this stage of the proceedings to injunctive relief, and its prayer, therefore, is accordingly denied.

KEENE v. ÆTNA LIFE INS. CO.

(District Court, W. D. Washington, N. D. May 16, 1914.)

No. 33.

1. EVIDENCE (§ 419*)—PAROL EVIDENCE TO VARY WRITING—RECITALS OF CONSIDERATION.

Where an agreement recited that, in consideration of the cancellation and release of certain claims and demands, and "in consideration of the payment this day made * * * of $3500 receipt of which is hereby acknowledged," certain policies of insurance were thereby surrendered,

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

the recital as to the payment of the $3,500 was merely an acknowledgment of the receipt thereof, and not descriptive of the consideration, and could be contradicted by evidence showing that the payment was not in fact made; and hence, it not being necessary to reform the contract, an action for such amount was one at law and not in equity.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1912–1928; Dec. Dig. § 419.*]

2. EVIDENCE (§ 450*)—PAROL EVIDENCE TO VARY WRITING—RECITALS OF CONSIDERATION.

A recital, in an agreement that it was made in consideration of a payment that day made, was not so clear, certain, and unambiguous as to preclude evidence to show whether it referred to a payment which had been or was to be that day made, conceding that it was descriptive of the consideration, and not merely an acknowledgment of the receipt of the payment.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2066–2082, 2084; Dec. Dig. § 450.*]

3. LIMITATION OF ACTIONS (§ 24*) — LIMITATION APPLICABLE — "ACTION ON WRITTEN INSTRUMENT."

An action, on an agreement to surrender certain insurance policies in consideration of the payment of $3,500, to recover such consideration, which had not been paid, though its payment was recited, was an action on a written instrument within Rem. & Bal. Code Wash. § 157, par. 2, requiring actions upon written contracts to be brought within six years.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 112–117; Dec. Dig. § 24.*]

In Equity. Action by Walter A. Keene, as trustee in bankruptcy of John Gerrick and others, bankrupts, against the Ætna Life Insurance Company. On demurrer and motion to strike interrogatories. Demurrer overruled, interrogatories stricken, and proceedings stayed pending a motion to transfer to the law side of the court.

Leopold M. Stern, of Seattle, Wash., for plaintiff.

Kerr & McCord, of Seattle, Wash., for defendant.

CUSHMAN, District Judge. Plaintiff sues to reform a contract, the alleged contract providing:

"Whereas, on October 1, 1909, and October 29, 1909, and Jan. 7, 1910, the Ætna Life Insurance Company issued and delivered to Gerrick & Gerrick of Seattle, Washington, three certain policies of Casualty Insurance, to-wit: Policy No. E. 57091 and Policy No. P. 18921 and 19453, for which the consideration has only been paid in part, leaving at this time a balance of premium due to the Ætna Life Insurance Company of $1100.00; and Whereas the said Gerrick & Gerrick are further indebted to the said Ætna Life Insurance Company in the sum of five hundred dollars ($500.00) for moneys by it advanced in account of the insured in the settlement of the case of Klawitter v. Gerrick & Gerrick; and Whereas, various matters of difference exist between the said insurance company and the said insured as to the extent of said company's liability, if any, under said policies or either of them; and Whereas, the parties hereto desire to settle their said differences, and surrender up and cancel out said policies of insurance as to the date of their issue, and do hereby agree so to do upon the payment by the said Ætna Life Insurance Company to the said Gerrick & Gerrick of the additional sum of thirty five hundred dollars ($3,500.00); Now, therefore, it is agreed by and between Ætna Life Insurance Company, party of the first part, and John Gerrick and Joseph Gerrick, copartners doing business as Gerrick & Gerrick, parties of the second part, that in consideration of the cancellation of the claim of the first party against

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

second parties for the unpaid premium upon said policies in the sum of eleven hundred dollars ($1100.00) and of the release of second parties of the demand of first parties for the sum of five hundred dollars ($500.00) advanced on account of second parties in the settlement of said Klawitter Case and in consideration of the payment this day made by the party of the first part to the parties of the second part of the sum of thirty five hundred dollars ($3500.00) receipt of which is hereby acknowledged and of the waiver by first party of any and all demands by it held against second party in account of said policies and of expenses by first party incurred thereunder since the date of their issuance, said policies of insurance shall be and are hereby surrendered by second parties to first parties and are canceled as of the date of their issuance, and second parties acknowledge full satisfaction thereof and do hereby release first party from any other or further liability thereon or thereunder, of any character whatsoever."

Plaintiff alleges that John Gerrick and Joseph Gerrick surrendered the policies of insurance to defendant, and otherwise performed their part of the agreement.

It is further alleged:

"That the payment of $3,500 mentioned in said agreement was to have been paid contemporaneously with the execution and delivery of said agreement, but that the said defendant company through fraud and deceit procured the delivery of said agreement without the payment of the said $3,500.00. * * * Wherefore plaintiff prays the decree of this court reforming said agreement by striking therefrom the recital that said $3,500 had been paid, and, that he have judgment upon said contract, so reformed, for thirty five hundred dollars, with interest thereon from December 16, 1910, besides costs of suit."

Defendant demurs and moves to strike the interrogatories propounded to it.

Plaintiff cites the following authorities: Grand View Bldg. Ass'n v. Northern Assur. Co., 73 Neb. 149, 102 N. W. 246; Garst v. Brutsche, 129 Iowa, 501, 105 N. W. 452; Section 157, Rem. & Bal. Code; 34 Cyc. 906, 932, 962, 930; Equity Rule 58 (198 Fed. xxxiv, 115 C. C. A. xxxiv).

Defendant relies upon the following authorities: City of Eureka v. Gates, 137 Cal. 89, 69 Pac. 850; Webb v. Webb (Ky.) 64 S. W. 839; Plumb v. Campbell, 129 N. Y. 101, 18 N. E. 790; Waters v. East, 23 Tex. Civ. App. 412, 56 S. W. 939; Rem. & Bal. Code, §§ 159, 165; Corse & Co. v. Minn. Grain Co., 94 Minn. 331, 102 N. W. 728; Ex parte Fisk, 113 U. S. 713, 5 Sup. Ct. 724, 28 L. Ed. 1117; Nat'l Cash Register Co. v. Leland (C. C.) 77 Fed. 242.

The motion to strike is based upon the grounds that the action is one at law, and that the state statute, authorizing interrogatories, will not be followed in this particular, as the mode of proof is not that at common law, as provided for trials in the federal court. Ex parte Fisk, 113 U. S. 713, 5 Sup. Ct. 724, 28 L. Ed. 1117; Section 861, Rev. St. Fed. Stat. Ann., vol. 3, p. 7 (U. S. Comp. St. 1901, p. 661). The demurrer is upon the following grounds:

"(1) That the above-entitled action has not been commenced within the time limited by law; (2) that the plaintiff has no legal capacity to sue; (3) that the complaint does not state facts sufficient to constitute a cause of action."

[1] Defendant, taking the position that the suit is at law, has demurred. But, whether the motion to strike the interrogatories is first

considered, or the demurrer be considered as in a suit at law, or as a motion to dismiss in equity, the first thing to determine is whether the present suit is at law, or, if framed as a bill in equity, whether there is an adequate remedy at law.

As above stated, the prayer for reformation is that there be struck from the agreement the words "that said $3,500 had been paid." The recital aimed at is:

"And in consideration of the payment *this day made* by the party of the first part to the party of the second part in the sum of thirty five hundred dollars ($3500.00) receipt of which is hereby acknowledged," etc.

"A recital in a written instrument as to the payment of the consideration is merely in the nature of a receipt and may be contradicted, unless such contradiction would have the effect of rendering nugatory some substantial and contractual provision of a valid written contract or undertaking, or in the case of a conveyance where the grantor or those claiming under him attempt, by contradicting the consideration clause, to defeat the operation of the deed or establish a resulting trust in the grantee." 17 Cyc. 656, 657, "c."

"Where a consideration has been agreed upon in a contract, and incorrectly expressed in the instrument embodying the same, as between the original parties, a decree to reform is proper." 34 Cyc. 932 "4."

The question first to be determined is whether the recital asked to be reformed is merely an acknowledgment of receipt. If so, a suit at law is the proper remedy, as in such case it may be contradicted. If it is not merely an acknowledgment of receipt, the question then remains whether the words "this day paid" constitute such a descriptive part of the recital of consideration as to be varied, or contradicted, if evidence were offered to show, as alleged in the complaint, that this consideration ($3,500) was, under the agreement, to be paid "contemporaneously with the execution and delivery of said agreement."

It is concluded that the recital is rather an acknowledgment of receipt than descriptive of consideration. That it is so may be more clearly shown by omitting certain intervening words—

"in consideration of the payment this day made * * * receipt of which is hereby acknowledged."

Stated thus it is shown that the words sought to be changed are no more than a receipt which acknowledges payment, and may therefore be varied or contradicted by showing that payment was not, in fact, made.

[2] It is not meant to concede that such a recital, if descriptive of the consideration, might not be explained by oral testimony. The phrase "payment this day made" is not so clear, certain, and unambiguous as to preclude evidence to show whether it means "payment which has been this day made," or "payment to be this day made."

This conclusion is supported by a decision written by Baron Pollock, and concurred in by the other Barons of the English Court of Exchequer. Goldshede v. Swan, 1 Exch. 153. The contract there in question provided:

"*In consideration of your having this day advanced* to our client, Mr. Vernon Dolphin of Piccadilly, in the county of Middlesex, the sum of £750, secured by his warrant of attorney, payable on the 22d day of August next, we hereby jointly and severally undertake to pay the same on the said 22d day

of August, or so soon afterwards as you apply for same, in case default should be made in payment of the sum of £750 by the said Vernon Dolphin, Esq., on the said 22d day of August next. Dated this 22d day of June, 1840." The italics are ours.

In deciding the case, the court says:

"The real question is whether the evidence was admissible, that is, whether it might be shown that the advance was not a past advance. It appears to me that the evidence was properly received. Where any written instrument is ambiguous, evidence is receivable to construe its meaning, but not to alter or vary in any manner the terms of that instrument. Here it was proved that the guaranty was given, and that the money thereupon advanced. In the case of Butcher v. Steuart the memorandum was held to be prospective, and judgment was given for the plaintiff. That case is very similar to the present. It was a special case, and was very recently decided. The present case also falls within the same principle as that of Haigh v. Brooks. The expression 'this day' may mean something which *has been* done, or which is *to be* done this day. Evidence may therefore be properly admitted to explain its meaning, though not to contradict it. The words are not to have that grammatical strictness of construction put upon them for which the defendant's counsel contends; but such a one as will explain the meaning of the parties. For these reasons, and upon the authority of the cases of Haigh v. Brooks and Butcher v. Steuart, I am of the opinion that the plaintiff is entitled to retain his verdict without any amendment, and that this rule should be discharged." At page 159.

[3] The action is held to be at law. It is not therefore necessary to determine which section of the statute of limitations would control, if any, were it to reform the instrument. The suit is one upon a written instrument which, under section 157, Remington & Ballinger's Code, par. 2, may be brought within six years.

The first ground of demurrer—the only one argued—is, together with the other grounds of demurrer, overruled. The interrogatories will be stricken and proceedings on the equity side of the court stayed, pending a motion by either party to transfer to the law side.

EASTERN OREGON LAND CO. v. DES CHUTES R. CO.

(District Court, D. Oregon. May 18, 1914.)

No. 3624.

1. EMINENT DOMAIN (§ 280*)—REMEDY OF OWNER—CONSENT TO IMPROVEMENT.
   Where a purchaser, who elected to exercise an option to purchase real estate, knew that a railroad company was in possession, constructing its road at a large expense pursuant to an agreement or supposed agreement with the interested parties, including the purchaser, he could not be heard to say that the road was located and constructed without his consent.
   [Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 776; Dec. Dig. § 280.*]

2. EMINENT DOMAIN (§ 266*)—REMEDY OF OWNERS—CONSTRUCTION OF RAILROAD.
   Where a railroad company entered into possession and built its road by the consent or acquiescence of the owner and the holder of an outstanding option to purchase, the remedy, if any, against the company was at law for damages.
   [Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 694–696, 702, 703, 705; Dec. Dig. § 266.*]

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

3. EMINENT DOMAIN (§ 284*)—REMEDY OF OWNERS—DAMAGES—PARTIES ENTITLED TO RECOVER.

Where a railroad company was in possession and engaged in the actual construction of its road at the time a purchaser acquired title to the premises, the right to proceed against the company for the agreed price of the right of way or for damages for an unauthorized entry by the company or for the location of the road, in violation of an agreement with the owner, did not pass to the purchaser.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 789, 790; Dec. Dig. § 284.*]

In Equity. Suit by the Eastern Oregon Land Company against the Des Chutes Railroad Company. Complaint dismissed.

A. L. Veazie and Wirt Minor, both of Portland, Or., for complainant.

James G. Wilson and A. C. Spencer, both of Portland, Or., for defendant.

BEAN, District Judge. This is a suit to enjoin and restrain the defendant company from constructing and maintaining its railroad along the Des Chutes river and across certain premises owned by complainant. At the time the suit was commenced, the defendant company was engaged in the construction of its road and had its grade practically completed over the premises referred to. The road was located and the work thereon commenced while the land in question, except two small tracts, belonged to or was claimed by the heirs of J. H. Sherar, and the two tracts referred to by the Interior Development Company.

The Des Chutes river flows through the property in a deep gorge or canyon and, by reason of falls therein, the quantity of water, the uniformity of flow, and the steep and precipitous banks, is valuable for power purposes. The defendant's road is on the side of the canyon about 65 feet above low water at the proposed power site. The land actually occupied by it is not shown by the evidence to be of any substantial value, but the position of complainant in effect is that defendant entered into possession under oral agreements or understandings with its predecessors in interest to locate its road so as to permit the maintenance of a 60-foot dam in the river, but, as the road is actually built, 55 feet is the maximum height to which a dam can safely be constructed, and as a consequence the value of the water power is greatly impaired, to complainant's damage in a large sum.

The facts are that in 1908 defendant surveyed and located a line of railway across the property following substantially a water grade. In February, 1909, as a result of a conference between the holder of an option to purchase given by Sherar in his lifetime, and the officers of the defendant, the line was changed by elevating it for the purpose of protecting the water power. The witnesses are not in accord as to the terms of the agreement, but it is alleged in the amended complaint that it was agreed that the defendant might enter upon the lands in question and "locate and construct its railway over the same, provided that the railway should be so located, constructed, and maintained

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

over said lands and over the lands above and below said lands that a dam 60 feet in height above ordinary low water in the Des Chutes river might be constructed" at any place on the lands in the option described. There was no discussion at the time between the holders of the option and the officers of the defendant as to the consideration to be paid for the right of way, but it seems to have been assumed that the road would be of no damage to the premises, provided it did not interfere with the development of the water power.

In pursuance of the agreement referred to, the defendant relocated its line in March and April, 1909, at the place where the road was subsequently constructed. It thereafter obtained the consent of the Interior Development Company to enter upon the lands belonging to it and to construct its road according to the relocation survey.

Thereafter, and during the summer and fall of 1909, the complainant began negotiations with the holder of the Hostetler option to acquire the right to purchase thereby conferred, and such negotiations resulted in the assignment of the option to it about August 5th of that year. It thereupon employed an engineer to examine the project and report as to its value and availability. The engineer called upon the defendant company and obtained a profile of the resurveyed line through the property in question, and was advised of the probable elevation thereof above the water. On October 6, 1909, he reported to the complainant company that the levels run by him in connection with the profile indicated that the location of the line was only about 60 feet above the water surface, but he doubted if absolute assurance could be obtained without sending a man to the site to make careful measurements, and, in any event, he was reasonably certain the railroad company would object to raising its location.

On or about August 25, 1909, the defendant company obtained the consent of the heirs of Sherar to proceed with the construction of its road, provided it would build sufficiently high not to interfere with the use of the property for hydraulic purposes, and the holder of the outstanding option should consent, and, in case the option should not be taken up, it was to pay them $1,000 for the right of way.

About this time Mr. Morrow, the right of way agent of defendant, had an interview with Mr. Martin, president of complainant company, concerning the right of way over the Sherar property, and claims that he informed Martin of the agreement or understanding with the Sherar heirs, and that Martin consented thereto, and agreed that the defendant company might proceed with the construction of its road according to such understanding. Mr. Martin denies that any such agreement or understanding was had between him and Mr. Morrow. It is manifest, however, that Mr. Morrow so believed, and the complainant knew that he and his company were acting on such belief and spending large sums of money in reliance thereon, for on the 27th of August, Morrow advised Mr. Huntington, attorney for the Sherar heirs, that the consent of the plaintiff company for the construction of its road had been obtained, and on the same date Huntington wrote to the agents of the complainant in Portland informing them that Morrow had stated that

he had seen Martin, who had expressed a willingness that defendant might go upon its land to construct the road, and suggesting that, if Martin had not given such consent, "Morrow's mind should be disabused of an apparent impression he has received from the conversation" he had with Martin. No effort was made by complainant to repudiate the alleged agreement nor to correct the belief under which defendant was acting, but it was permitted to proceed with the work without protest.

The line of the road as relocated pursuant to the agreement or understanding with the holders of the Hostetler option, the Sherar heirs, and the Interior Development Company, and the understanding or supposed understanding with the complainant, was formally adopted by defendant in the fall of 1909, and the actual work of construction commenced in September of that year, and was prosecuted from that time with diligence without objection from any one until the grade was substantially completed in the following spring.

About December 1, 1909, and after defendant had thus entered into possession of the property, and while it was engaged in the construction of its road, complainant acquired the stock of the Interior Development Company and elected to exercise the right to purchase the Sherar property under the Hostetler option. The deeds from the Sherar heirs to it were deposited in escrow to be delivered upon the payment of the purchase price, but the consideration moving to them was not paid nor the deeds delivered until about April 1, 1910. At that time the grade of the road was practically completed. The deed from the Interior Development Company for the land at the power site was not made to complainant until April 4th of the present year.

[1] It thus appears that, notwithstanding complainant had knowledge of defendant's possession, the claims under which it was proceeding, the actual location of its line, and the work being done thereon, it allowed the work to proceed without objection until after defendant had expended large sums of money relying on its agreement or supposed agreement with the interested parties including the complainant.

I am therefore inclined to the opinion that, under such circumstances, the complainant cannot be heard to say that the road was located and constructed at the place where it was actually built without its consent.

[2] But however that may be, the defendant having entered into possession and built its road by the consent or acquiescence of the owners of the property and the holders of the outstanding option, it cannot now be ejected, but the remedy, if any, is restricted to a suit for damages. N. P. Ry. v. Smith, 171 U. S. 260, 18 Sup. Ct. 794, 43 L. Ed. 157; City of N. Y. v. Pine, 185 U. S. 93, 22 Sup. Ct. 592, 46 L. Ed. 820.

[3] And, as it was in possession and engaged in the actual construction at the time complainant purchased and acquired title, the right to proceed against it for the agreed price of the right of way, if there was such an agreement, or for damages if the entry is to be deemed unauthorized, or the road located in violation of the agreement with

the owners, did not pass to complainant, for, as said by the Supreme Court in Roberts v. N. P. R. R., 158 U. S. 1, 15 Sup. Ct. 756, 39 L. Ed. 873:

"It is well settled that where a railroad company, having the power of eminent domain, has entered into actual possession of land necessary for its corporate purposes, whether with or without the consent of the owner of such lands, a subsequent vendee of the latter takes the land subject to the burthen of the railroad, and the right to payment from the railroad company, if it entered by virtue of an agreement to pay, or to damages, if the entry was unauthorized, belongs to the owner at the time the railroad company took possession."

See, also, Kindred v. U. P. R. R., 225 U. S. 582, 32 Sup. Ct. 780, 56 L. Ed. 1216; Stone v. City of Waukeegan, 205 Fed. 495, 123 C. C. A. 563; 15 Cyc. 795; Maffet v. Quine (C. C.) 93 Fed. 347; N. P. R. R. v. Murray, 87 Fed. 648, 31 C. C. A. 183.

A contrary doctrine seems to have been announced by the Supreme Court of North Carolina in Phillips v. Telegraph Co., 130 N. C. 526, 41 S. E. 1022, 89 Am. St. Rep. 868, and Beal v. Railroad Co., 136 N. C. 298, 48 S. E. 674, and perhaps by some other courts, but these decisions are not in harmony with the rule laid down by the Supreme Court, which is, of course, controlling here.

It follows, therefore, that the complaint should be dismissed; and it is so ordered.

UNITED STATES ex rel. IVANOW et al. v. GREENAWALT, U. S. Immigration Com'r, et al.

(District Court, E. D. Pennsylvania. May 19, 1914.)

No. 62.

1. ALIENS (§ 39*)—POWER TO EXCLUDE ALIENS.
   Congress may define and regulate the admission of aliens into the United States and prescribe the conditions upon which the privilege of admission may be enjoyed.
   [Ed. Note.—For other cases, see Aliens, Cent. Dig. § 100; Dec. Dig. § 39.*]

2. ALIENS (§ 39*)—EXCLUSION—REVIEW OF PROCEEDINGS.
   Congress may commit to any official, department, or tribunal, executive or judicial, the determination of any questions of fact or otherwise upon which the admission of aliens may depend, and may prescribe within what time, in what manner, and by whom any decisions made may be reviewed.
   [Ed. Note.—For other cases, see Aliens, Cent. Dig. § 100; Dec. Dig. § 39.*]

3. ALIENS (§ 54*)—EXCLUSION—REVIEW OF PROCEEDINGS.
   No express power having been conferred and no duty imposed on the courts to review the proceedings of immigration officials in excluding aliens, the court cannot and should not interfere unless a judicial question fairly arises.
   [Ed. Note.—For other cases, see Aliens, Cent. Dig. § 112; Dec. Dig. § 54.*]

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

4. HABEAS CORPUS (§ 23*)—ADMINISTRATIVE PROCEEDINGS—JUDICIAL FUNCTIONS.

Color of authority or even clear and unquestioned power to review the acts of a different department of the government should be exercised with care and discretion.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 17; Dec. Dig. § 23.*]

5. ALIENS (§ 54*)—EXCLUSION—REVIEW OF PROCEEDINGS.

The partial exclusion of counsel from hearings held by immigration authorities pursuant to the general regulations of the department did not present a judicial question justifying the courts in reviewing the acts of the immigration officials in excluding an alien.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 112; Dec. Dig. § 54.*]

Habeas corpus by the United States, on the relation of Roman Ivanow and others, against Elmer E. Greenawalt, United States Commissioner of Immigration, and others. Relators remanded to the custody of the immigration authorities.

Monaghan & Phillips, of Philadelphia, Pa., for petitioners.

Robert J. Sterrett, Asst. U. S. Atty., and Francis Fisher Kane, U. S. Atty., both of Philadelphia, Pa., contra.

DICKINSON, District Judge. [1-3] This is an appeal from the helpless. So far as the questions which arise are judicial questions, they are questions of liberty—human liberty. The history of the writ of habeas corpus and every Bill of Rights which has been incorporated into our Constitutions, federal and state, as well as the legislation which has sought to preserve and make practically effective the benefits of the writ, all alike show the emphasis which the people have ever placed upon the right of every one to enjoy personal liberty. No court in the United States would ever refuse a prompt and full response to the plea that this right be upheld. The more friendless and helpless the relator, the quicker should be the response. This right to liberty, however, is to a liberty under the law. Let us see how this case stands. The main principle involved is a political, not a judicial, one. The right and power of the people of the United States through the action of Congress to define and regulate the privilege of admission to our shores must be unquestioned. Outside the act of Congress, admission is a privilege, not a legal right. It must also go without question that Congress may prescribe the conditions upon which this high privilege may be enjoyed, and may commit to any official, department, or tribunal, executive or judicial, the determination of any questions of fact or otherwise upon which the exercise of this privilege may depend. Congress may also prescribe within what time, in what manner, and by whom any decisions made may be reviewed. When Congress has in its wisdom committed the determination of any such question to one official, department, or tribunal, it must be that no other official, department, or tribunal, unauthorized by Congress, executive or judicial, can control or interfere with the determination thus reached. Over all, of course, are the mandates of the Constitution and the rights

to which it is a shield. The one with which we are concerned is the right to liberty to which any real man would with Patrick Henry give the preference over the mere right to live. The principle by which this cause must be determined is to the American mind the greatest of all principles, but, like all really great principles, it is clear and may be simply stated. The general question involved is this: Are these relators, by the restraint from which they ask to be relieved, being deprived of any legal right? What is the right of the denial of which they complain? It is not the natural right of liberty but the privilege of admission to the United States. The particular question, therefore, is: Have they been denied admission in accordance with the declared will of Congress or merely by the arbitrary act of the defendant? Congress by numerous acts has declared who shall not be admitted into the United States. It has defined the grounds upon which such exclusion is based. It has committed the execution of these laws to designated officials whose duty it is made to determine the questions of whether particular alien applicants for admission are within or without the excluded classes. It has provided a complete system for the effective enforcement of its will. It has guarded with sedulous care against the danger of possible abuse of the power conferred upon the immigration officials by according the privilege of an appeal which may reach in due course the Secretary of Labor, and the order of exclusion does not become operative until the whole proceeding has his sanction and the order his approval. A search into the provisions of the immigration laws for any power or authority granted to the courts to interfere with this well-ordered system would be fruitless. No duty has been imposed upon them and no power conferred. The reasons for this are many and obvious. The judges of the courts have at least one reason to be grateful to Congress that it has so decreed. As therefore no express power has been conferred and no duty has been imposed upon the courts, it is clear that they cannot interpose and ought not to interfere between the relators and the government officers to whom Congress has committed the authority to execute the laws, unless a judicial question fairly arises out of the record.

Thus seems the law to stand on general principles. It only remains to test their soundness by a reference to the decided cases. This test is met by the case of United States ex rel. Barlin v. Rodgers, 191 Fed. 970, 112 C. C. A. 382, and no other citations of authorities are called for to vindicate the conclusions reached.

At the cost of perhaps unduly lengthening this opinion, we do feel called upon to discuss the legal merits of this particular case. This is the due of the relators and their counsel. The relators among them bridge the whole span of life. At the one end is a helpless child; at the other is an equally helpless old woman. Between them is a boy of 15 and a girl of about the same age, together with a young man and a young woman very little older. They are without powerful or influential friends, and against them they have arrayed the officials who represent the might of a great nation. Poor people so situated have the right to know and to feel that their cause has been patiently and fully heard and their claim of right not lightly regarded. Their counsel ar-

gued their cause clearly and fairly and, as was proper, with an earnestness which, although well ordered and regulated, was forceful. At the oral argument before the bar of the court, we did not call upon counsel for the government to reply, and, because of all of these things, we gave to counsel for relators time to file a full brief. This we have carefully considered, but are unconvinced and adhere to the view of the case already expressed.

There are only a few points that need to be touched upon. The case of these relators has been heard and considered fully and carefully by the proper executive department of the government, and the order which we are asked to render ineffective comes before us bearing the approval of the Secretary of Labor as just and proper. The touchstone of the whole case is to be found in the statement that this court is asked to review the findings of another department of the government upon a question of fact which it was clearly within their province to have found either as they did or differently from what they did. The appeal is made "to this court for a review of the decision." To an appeal to review the whole proceedings in order that it may be determined whether the immigration authorities in depriving these relators of their liberty acted within the scope of the authority conferred upon them by the act of Congress, any court would and ought to make a quick response. The response of the court would be equally prompt whether the official had openly and boldly usurped a power and jurisdiction which the law had not conferred upon him, or whether he resorted to the always miserably unjust and sometimes the cowardly expedient of attempting to hide the real facts under findings which rest upon nothing but his own desire to grasp the power to do violence to the rights of others, which he could not otherwise wield than by standing upon false findings of fact. Intellectual dishonesty should never be permitted to confer either jurisdiction or power upon any official, and, when power thus acquired is attempted to be used to another's hurt, the courts should be alert to halt it.

[4] Before responding, however, to an appeal to review the findings of another tribunal upon a question of fact within their power and duty to find, any court ought to inquire: First, whether it has authority to interfere; and, second, whether it ought to exercise the power it has. The reasons for this are obvious. Under our scheme of government its powers and their execution have been apportioned by the Constitution and the laws made in pursuance thereof among several different departments and officials. When one department can find color of authority or even clear and unquestioned power to review the work of another, such power ought always to be exercised with care and discretion. The comity which exists between the different departments of government and the necessity for harmonious action demands this. This principle of comity is everywhere recognized, and its wisdom must be admitted by every thoughtful mind. It is as much a practical necessity in the action of governmental departments and among different courts and different nations as tact is in the individual concerns of life. If careful search were made, an official in one department might possibly be found who deemed himself superior in

judgment to some official in another department, and it is not an uncommon thing to find individuals who know more than the whole of Congress and that our laws are all wrong. Even if the fact of the superior wisdom be admitted, the questions still recur: Has this wiser man the lawful power and authority to interfere with the official acts of the other, and, if he has, is it a wise and prudent thing to interfere?

[5] A further point is made of the partial exclusion of counsel from the hearings held by the immigration authorities. It is due both to the government officials and to counsel to have the fact appear of record that this exclusion, so far as it was enforced, was not personal to counsel nor peculiar to this case. There was no exclusion except to the extent that the general regulations of the department require. It is sufficient to say that in this there was no deprivation of any legal right. There is no act of Congress conferring the legal right of representation, and the constitutional right is given only in criminal prosecutions. Any one familiar with the history of our race knows what a struggle was made to secure this right even in criminal cases, and, whatever views he may entertain as to the abstract justice of its denial in other proceedings, he would scarcely claim that by this a judicial question was fairly raised.

The appeal of the relators must be made to the Department of Labor, who can alone give them relief. The relators are therefore remanded to the custody of the immigration authorities, to be dealt with according to law.

In re ROBERTS.

(District Court, S. D. West Virginia. May 25, 1914.)

No. 304.

1. BANKRUPTCY (§ 342½*)—FAILURE TO GRANT DISCHARGE—EFFECT.

Where a petition by a bankrupt for his discharge was denied, the refusal of the referee to allow a claim against the bankrupt, filed by him as guardian of his infant children, was not reviewable on his application, because it was immaterial to him whether the claim was allowed or not.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 530; Dec. Dig. § 342½.*]

2. JUDGMENT (§ 720*)—CONCLUSIVENESS—ADJUDICATION OF STATE COURT—EFFECT AS TO CLAIM AGAINST BANKRUPT'S ESTATE.

A decree of a state court, in a suit to set aside a deed made by a bankrupt to his infant children, instituted after the filing of the petition in bankruptcy, which adjudicated that the deed was without consideration, conclusively determined want of consideration, and a claim of the children, based on the same transaction, presented against the bankrupt, was properly rejected.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1251; Dec. Dig. § 720.*]

In Bankruptcy. In the matter of the bankruptcy of H. W. Roberts. On petition for review of ruling of referee rejecting claim. Report and findings of referee sustained.

W. W. Smith, of Huntington, W. Va., for petitioners.

J. P. Douglass, of Huntington, W. Va., for trustee.

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

KELLER, District Judge. The bankrupt in his own right, and as guardian of his infant children, Hazel, Garland, Thelma, and Russell, asks to have reviewed an order of the referee in bankruptcy, refusing to allow a claim of $8,211.50, which was offered to be proved by the said H. W. Roberts, as guardian for the said infant children. In considering the propriety of the action of the referee, it must be noted that the original petition was filed by the bankrupt, asking to be adjudicated as such, on the 28th day of January, 1909, and that the claim which is sought to be set up by the infant children of Roberts against the estate was presented on the 13th day of March, 1914, more than five years after the filing of the voluntary petition in bankruptcy.

[1] It sufficiently appears from the record that the bankrupt filed his petition for a discharge within the time required by law, and that upon a hearing upon this petition for discharge the same was refused. Under this state of facts it appears that the application of the bankrupt to have the action of the referee reviewed, in refusing to allow this claim to be filed, is without merit. It can make no difference to Roberts whether the claim is allowed, or whether it is not, as in no event can he be discharged from the same.

[2] The bankrupt, in the capacity of guardian of his infant children, prays a review of the action of the trustee in refusing to allow the claim. The nature of the claim set up is a note for the sum of $8,211.50, which purports to have been given by the bankrupt to his deceased wife, upon the back of which is a purported holographic will, bequeathing said note to the infant children of Roberts and his wife. This indorsement on the note was duly offered for probate, and was probated as the will of Mrs. Roberts, and Roberts was appointed guardian of his infant children. It does not appear that any administrator was appointed with the will annexed. It might be suggested that it is necessary, in order to properly present this matter, to have such an administrator appointed, and have the claim presented by him, inasmuch as personal property in such cases as this ordinarily passes to the personal representative, instead of directly to the beneficiaries.

Waiving this question, however, is there any theory, under the acts of Congress relating to bankruptcy, upon which this claim can now be filed and allowed as a debt against the estate of the bankrupt? The petition accompanying the proof of claim attempts to avoid the requirement that such claims must be presented within one year by an allegation that the reason that this claim was not presented within one year from the date of the adjudication in bankruptcy is that the same was in process of adjudication, the petition averring that said claim should be allowed—

"for the reason that the claim was liquidated by litigation in the state courts of West Virginia; that the chancery suit, wherein the claim was liquidated by litigation, was instituted by R. S. Douthat, trustee, etc., v. H. W. Roberts et al., on the 20th day of July, 1909, the original petition in bankruptcy having been filed on the 20th day of January, 1909, said chancery suit having been instituted for the purpose of setting aside a certain deed made by said H. W. Roberts to said wards, which was claimed to be, and by the court held to be, an invalid deed, and such a *preference* as had to be surrendered by said wards."

If this conclusion were true, that is to say, if the state court had found that the deed which it set aside constituted a preference in favor of the children of Roberts which could not be sustained, and set the same aside because of such a preference, then of course it is likely true that the owners of such a claim, as was attempted to be so preferred, would have the right to file the same after such adjudication by the court in which the cause was pending, and I would incline to the opinion that the claim should be allowed to be filed had the deed been set aside upon the ground that it created an invalid preference. In other words, if the state court had adjudicated that while Roberts' children had a valid claim against him, still his act in conveying the property to them constituted giving them a preference over other creditors, and for this reason set the deed aside, then I think they should be allowed to present their claim for proof after this question was determined. However, the claimants presented with their petition copy of the record made in the state court, as well as the opinion of the Court of Appeals of West Virginia thereon. An examination of this record discloses that the ground upon which the court was asked to set aside the deed as stated in the bill of plaintiff is:

"That the pretended conveyance by the said W. H. Roberts to his infant children was, without consideration, deemed valuable in law, and was made by the said H. W. Roberts in contemplation of creating future indebtedness, and is but a shift and device upon the part of the said H. W. Roberts to hinder, delay, and defraud both his then existing and subsequent creditors, and that the said pretended conveyance was in its inception and execution fraudulent and void as to existing and subsequent creditors of the said H. W. Roberts."

Roberts answers the bill, and justifies the conveyance by the statement that the property was in fact purchased by money of his wife, and, besides furnishing the money to purchase the property and make the improvements on it, she furnished him in addition $4,250, which he expressed as the consideration for making the deed. Upon the hearing of the cause the court necessarily found that Roberts' wife did not furnish him the money with which to purchase the property, or with which to make the improvements thereon, and that Roberts' wife did not advance him $4,250, the expressed consideration for said deed, and that said deed was purely voluntary upon the part of Roberts, and was without consideration, and not only did said court find that the deed was without consideration, but it also found that said Roberts was insolvent at the time he delivered the deed, and that, therefore, the same must be set aside because of Roberts' insolvency at the time of its delivery, and because of the fact that it was voluntary. There was no issue made in that case that called for a finding that the deed created a fraudulent preference, but the distinct issue tried by the state court was that the deed was absolutely without consideration. This being so, and the only reason alleged for the allowance of the claim at this time being that the matter was in litigation ever since the adjudication in bankruptcy, and it clearly appearing that in that litigation it was determined that there never was such consideration passed from Roberts' wife to himself, it necessarily follows that the referee correctly held that the matters sought now to be raised had once been deter-

mined in appropriate litigation between the same parties by a court of competent jurisdiction, and the claim cannot now be relitigated in this proceeding.

Report and findings of referee sustained.

In re DUTCHER.

(District Court, W. D. Washington, N. D. May 20, 1914.)

No. 917.

1. BANKRUPTCY (§ 348*)—CLAIMS—WAGES—PRIORITY—RIGHTS OF ASSIGNEE.
An assignee of wages of workmen employed by a bankrupt is entitled to the same priority of payment to which the workmen would be entitled under Bankr. Act July, 1898, c. 541, § 64b (4), 30 Stat. 563 (U. S. Comp. St. 1901, p. 3447), providing that debts due workmen shall be entitled to priority over general debts for an amount not exceeding $300.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 536; Dec. Dig. § 348.*]

2. SUBROGATION (§ 31*)—RIGHTS OF SURETY—PRIORITY.
Where a bond given by a municipal contractor was conditioned that the wages of workmen should be paid, and, after the contractor became a bankrupt, the surety purchased certain claims of laborers employed by the bankrupt, the surety, though primarily liable to the creditor, was only collaterally liable to the principal, and hence the fact that it was surety did not deprive it of the right of subrogation to the rights of its assignors nor of the right to priority of payment out of the bankrupt's estate, as against general creditors.
[Ed. Note.—For other cases, see Subrogation, Cent. Dig. §§ 70–91; Dec. Dig. § 31.*]

3. PRINCIPAL AND SURETY (§ 65*)—PAID SURETY.
That a surety company was paid to execute a bond for a municipal contractor did not make his debt its debt as between them.
[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 105; Dec. Dig. § 65.*]

4. SUBROGATION (§ 33*)—RIGHT TO PREFERENCE—SURETY.
A surety may obtain a right to preferential payment by subrogation.
[Ed. Note.—For other cases, see Subrogation, Cent. Dig. §§ 96–98; Dec. Dig. § 33.*]

In Bankruptcy. In the matter of William Dutcher, bankrupt. On petition to review an order allowing the Title Guaranty & Surety Company a preference under an assignment of certain laborers' claims for services rendered the bankrupt. Affirmed.

James P. H. Callahan, of Hoquiam, Wash., for trustee.
T. H. McKay, of Aberdeen, Wash., for petitioning creditors.
Frank Beam, of Aberdeen, Wash., for respondent.

NETERER, District Judge. A petition has been filed by the trustee and general creditors for a review of the order of the referee granting priority of payment to the assignee of claims of workmen over the general creditors. Prior to June 8, 1911, the bankrupt was engaged in grading certain streets in Aberdeen, Wash., under a con-

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

tract with the city. The Title Guaranty & Surety Company was surety on the bond given by him to the city, one of the conditions of which was that the wages of workmen should be paid. On said date the bankrupt abandoned the contract, with the work on three streets designated therein not yet completed, and the surety company was required to and did complete the work under the contract. The order of adjudication was entered June 8, 1911. Although assignments of the workmen's claims were made in the name of Frank Beam, it is conceded that the money to pay them was furnished by and the assignments were for the benefit of the surety company. The trustee now has $3,611.45, which was derived from the sale of the bankrupt's property; the amount realized from the contract with the city having been paid out by the trustee on order of the referee. The assigned claims here in question amount to $3,035.02.

[1] Under section 64b (4) of the Bankruptcy Act, wages, due to workmen, clerks, and servants, not exceeding $300 to each claimant, earned within three months prior to the commencement of the bankruptcy proceedings, are entitled to priority of payment over general debts, after the payment of taxes, expenses of administration, etc. It has been held that the assignee of such workmen is entitled to the same priority of payment. Shropshire, Woodliff & Co. v. Bush, 204 U. S. 186, 27 Sup. Ct. 178, 51 L. Ed. 436; In re Fuller & Bennett (D. C.) 152 Fed. 538; Remington on Bankruptcy, §§ 2135, 3183.

[2] The petitioners contend, however, that the surety company, being primarily liable for the payment of these claims, could not obtain the benefit of the workmen's right to preference, either by virtue of the assignment or by operation of the doctrine of subrogation. I do not see any merit in this contention. The contract of suretyship makes a surety primarily liable to the creditor, but as to the principal he is only collaterally liable. 32 Cyc. 20. The fact that a surety is primarily liable to the obligee does not rob him of the right of subrogation.

"A surety who has paid the debt of the principal is at once subrogated to all the rights, remedies, securities, liens, and equities of the creditor, for the purpose of obtaining reimbursement from the principal debtor." 37 Cyc. 402.

The authorities cited by petitioners in this connection are to the effect that the surety on a bond such as the one here in question is liable primarily, not only to the city, but to the workmen. U. S. v. Rundle, 100 Fed. 402, 403, 40 C. C. A. 450; U. S. Fidelity & Guaranty Co. v. Omaha Bonding, etc., Co., 116 Fed. 145, 53 C. C. A. 465; U. S., etc., v. National Surety Co., 92 Fed. 549, 34 C. C. A. 526; United Surety Co. v. Iowa Manf. Co., 179 Fed. 55, 102 C. C. A. 623; U. S. v. Kimpland (C. C.) 93 Fed. 403. This merely makes the question the same as if the workmen were the obligees in the bond instead of the city. It does not change the principle involved. While the obligation as to the workmen is primary, yet, as between the principal and the surety, the liability of the surety is collateral. The rule stated in 37 Cyc. 374, to the effect that there is no right of subrogation where the obligation discharged is a primary one, has reference to an obligation primary, not only as between the person to whom it is paid and the person pay-

ing it, but as between the person paying it and the person against whom the right of subrogation is claimed. The surety company was liable only because the bankrupt was liable, and, when it paid the debt of the bankrupt, the bankrupt could not say as between himself and the surety company that the debt was discharged.

[3] The fact that the surety company was paid to execute the bond does not make the bankrupt's debt its debt as between it and the bankrupt.

The doctrine of subrogation is recognized in section 57i of the Bankruptcy Act and General Orders in Bankruptcy, XX (4), providing for proof of the claim of a person contingently liable and his subrogation to the rights of a creditor.

[4] A preference is a right which a surety may obtain by subrogation. 37 Cyc. 426. The surety company would therefore be entitled, through the operation of the doctrine of subrogation, to preference in payment of the claims which it has discharged. The fact that it took an assignment of the claims does not place it in a weaker position, as the assignee under the cases cited above is entitled to the preference given the workmen. The argument that the policy of the law permitting the assignee of a workman's claim to succeed to his preference does not apply where the assignee, as a surety, was bound to pay the claim is unsound. The policy of the law would look with more favor upon one who is under a duty to pay a debt than upon one who is not. For example, the benefit of subrogation is extended to sureties, guarantors, and others under a duty to discharge the debt, but it is not given to mere volunteers. Surely, if the law extends the right of preference to a mere volunteer who pays the debt due a workman and takes an assignment from him, it will not deny it to one who is under a duty to pay the debt of another, pays it, and takes an assignment.

An order may be presented confirming the decision of the referee.

JOHNSON v. BUTTE ALEX SCOTT COPPER CO.

(District Court, D. Montana. May 7, 1914.)

No. 161.

1 REMOVAL OF CAUSES (§§ 79, 95*)—TIME FOR FILING PETITION.

In order to divest a state court of jurisdiction by removal proceedings and to vest it in the federal court, a sufficient petition must be filed, and within the statutory time, and a petition filed after answer, and during the trial, is too late.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 135, 136, 139–160, 204, 205; Dec. Dig. §§ 79, 95.*]

2. REMOVAL OF CAUSES (§ 81*)—JURISDICTION OF FEDERAL COURT—CONSENT OF PLAINTIFF.

A plaintiff cannot divest a state court of jurisdiction of a cause, removable when brought if at all, by consenting to its removal after trial and verdict.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 137, 138; Dec. Dig. § 81.*]

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

3. REMOVAL OF CAUSES (§ 81*)—PROCEEDINGS FOR REMOVAL—FILING OF TRANSCRIPT BY PLAINTIFF.

Where a defendant waived its right to remove a cause, if it had such right, by proceeding with the trial in the state court after denial of its petition for removal, the removal cannot be subsequently effected by the plaintiff over the defendant's objection, by filing a transcript in the federal court.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 137, 138; Dec. Dig. § 81.*]

At Law. Action by William Johnson against the Butte Alex Scott Copper Company. On motion to strike transcript from state court from files. Motion granted.

John A. Smith, I. G. Denny, and Maury, Templeman & Davies, all of Butte, Mont., for plaintiff.

J. E. Healy and J. E. Murray, both of Butte, Mont., for defendant.

BOURQUIN, District Judge. This is a motion to strike or to remand. The complaint filed in the state court alleged plaintiff's citizenship of Nevada and defendant's of Delaware. Issue was joined, trial before a jury commenced, and all evidence concluded. Defendant then made some sort of application for time to prepare and present a petition for removal. The court took no action, the trial suspended over rule day, and on rule day counsel for defendant presented to the court a bond on and petition for removal. The petition was based upon diversity of citizenship, and alleged that at all material times plaintiff's citizenship was of Montana, and that in respect thereto the complaint was false and fraudulent to defeat removal. The court refused to approve the bond and denied the petition in that it came too late. Defendant excepted and filed the petition. Plaintiff's counsel at all times present remained mute. The next day defendant filed another petition for removal, wherein it was alleged as in the earlier one, with the addition that defendant only discovered the said fraud in respect to plaintiff's citizenship during the trial, and presented the petition at the earliest opportunity. It does not appear that the petition last aforesaid was brought to the court's notice. A bond on removal was sometime filed. The trial was resumed and concluded, resulting in a general verdict in a substantial sum for plaintiff and special findings favorable to defendant. The next day counsel for plaintiff presented to the court for signature a form of judgment upon the general verdict, which the court refused to sign to await determination of defendant's motion, then pending, for judgment upon the special findings which motion the court then set for the future. Plaintiff excepted. Two days later plaintiff filed in this court a transcript on removal. The motion aforesaid coming on for hearing in the state court, the court, being advised of the removal aforesaid, ordered a continuance to await the action of this court in the premises. Defendant promptly moves herein to strike the transcript from the files or to remand, and plaintiff resists. The motion to strike is granted.

[1] Removal proceedings are statutory, and the statutes must be followed. They provide that a defendant, to remove for diverse cit-

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

izenship, must file a petition therefor at or before the time he is required to answer or plead. A *sufficient* petition and bond filed at the *statutory time* in the state court divests the said court of jurisdiction, and vests the federal court with jurisdiction, and that as soon as filed, and though the transcript be not filed in the federal court for time later. The first petition for removal herein was not so filed. On the contrary it was not filed until after answer and during the trial. Thereby the state court's jurisdiction was not divested nor this court's vested. The state court rightly decided the petition was too late. It had jurisdiction to so decide. It had jurisdiction to proceed with the trial and did so to verdict. It disposed of the action, and there is nothing to remove hither.

[2] But plaintiff contends that the time for removal, not being jurisdictional, but only modal and formal, can be waived, that he has waived it, and that defendant is estopped to question the same, citing Powers v. Ry. Co., 169 U. S. 92, 18 Sup. Ct. 264, 42 L. Ed. 673, and cases therein cited. The waiver comes too late after trial and verdict. It is unnecessary to decide what would be the situation if plaintiff had consented to removal when the petition was filed, but it may well be doubted if the state court would have been thereby constrained to suspend the trial and order removal. The court, to a large extent, controls litigation and procedure within it. It is not compelled to yield in all things to desires of parties. If it embarks upon the trial of a cause removable when brought but removal not attempted, and during the same the parties agree to remove the case to the federal court, it would seem inconsistent with this control and with the cause of justice that thereby the court's jurisdiction would be then divested and its power to proceed with the trial destroyed. The Powers Case and those therein cited decide merely that if a case not removable when brought is converted into a removable case thereafter, removal may then be had, and the plaintiff is estopped to deny that the petition for removal was filed in time.

[3] This, because the case is "brought" within the removal statute when it is first given a removable form. But that is not this case. Here the case was removable from the beginning, if removable at all. There was no change in its status. If there was successful deception and fraud in the complaint in its representation of plaintiff's citizenship, the first petition for removal falls short in its facts to show that defendant was deceived, and only discovered the truth when the said petition was presented. If this had appeared, it well may be the petition would have been in time and plaintiff estopped to deny it. The second petition tended in that direction, but, if sufficient, it was not brought to the notice of the court, and the trial proceeded to conclusion. Thereby defendant waived it, and, waived by defendant, at no time can plaintiff rely upon it and by filing a transcript herein accomplish removal of the cause over defendant's objection.

For the state court's jurisdiction continued, and the action was by it tried, determined, and disposed of. An order will be entered accordingly.

SUSLAK v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. May 4, 1914.)

No. 2315.

1. PROSTITUTION (§ 4*)—WHITE SLAVE ACT—EVIDENCE.
In a prosecution for violating the White Slave Act (Act June 25, 1910, c. 395, 36 Stat. 825 [U. S. Comp. St. Supp. 1911, p. 1343]). evidence *held* to sustain a conviction.

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

2. PROSTITUTION (§ 4*)—EVIDENCE—INTENT.
In a prosecution for violation of the White Slave Act (Act June 25, 1910, c. 395, 36 Stat. 825 [U. S. Comp. St. Supp. 1911, p 1343]) in January, 1912, evidence that in 1910, when prosecutrix's husband was absent, defendant invited her to come to B., and, while lewdly consorting there with her, made her a proposition to set her up in the "sporting" business, and tried to show her how to conduct it successfully, the relations between defendant and the prosecutrix never having thereafter been entirely broken off, was admissible to prove defendant's intent in inducing prosecutrix to come to B. in 1912.

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

3. PROSTITUTION (§ 4*)—EVIDENCE—INTENT.
In a prosecution for violating the White Slave Act (Act June 25, 1910, c. 395, 36 Stat. 825 [U. S. Comp. St. Supp. 1911, p. 1343]) in February, 1912, evidence that in August, 1911, defendant told witness that he [defendant] "wouldn't mind getting" prosecutrix to B. so he could make a fortune out of her was admissible to show defendant's intent in procuring prosecutrix to come to B. in 1912.

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

4. PROSTITUTION (§ 4*)—WHITE SLAVE ACT—VIOLATION—EVIDENCE.
In a prosecution for violating the White Slave Act (Act June 25, 1910, c. 395, 36 Stat. 825 [U. S. Comp. St. Supp. 1911, p. 1343]), evidence of prosecutrix that she entered open prostitution soon after she came tc B., because the rooming house to which defendant took her was a rendezvous for harlots, and that, having thus gotten the reputation of a prostitute, she thought she might as well live the life and make the money, and that defendant told her how attractive the "sporting" life was, "how nice the girls dressed," etc., was admissible as bearing on the purpose for which defendant brought prosecutrix to B.

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

5. PROSTITUTION (§ 4*)—WHITE SLAVE ACT—VIOLATION—EVIDENCE.
In a prosecution for violating the White Slave Act (Act June 25, 1910, c. 395, 36 Stat. 825 [U. S. Comp. St. Supp. 1911, p. 1343]), evidence concerning the character of defendant's wife, and his attitude toward her and the life she lived, was admissible in connection with other evidence that defendant told prosecutrix that his wife was about to return in August, and that they would take prosecutrix with them tc engage in immoral business.

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

6. PROSTITUTION (§ 5*)—WHITE SLAVE ACT—"DEBAUCHERY."
In a prosecution for violating the White Slave Act (Act June 25, 1910, c. 395, 36 Stat. 825 [U. S. Comp. St. Supp. 1911, p. 1343]), an instruction that the act of debauchery denounced in the statute means that the wo-

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

man is to be subjected repeatedly to unlawful sexual intercourse or fornication or adultery was not objectionable on the ground that debauchery imports seduction from a condition of purity, and that there can be no such debauchery in the case of an unchaste woman; the words being otherwise defined as "excessive indulgence in sexual pleasures of any kind," sexual immorality, unlawful indulgence of lust, etc.

[Ed. Note.—For other cases, see Prostitution, Cent. Dig. § 5; Dec. Dig. § 5.*

For other definitions, see Words and Phrases, vol. 2, pp. 1863, 1864.]

7. PROSTITUTION (§ 1*)—WHITE SLAVE ACT—ELEMENTS OF OFFENSE—PREVIOUS PURITY OF FEMALE.

A violation of the White Slave Act (Act June 25, 1910, c. 395, 36 Stat. 825 [U. S. Comp. St. Supp. 1911, p. 1343]) is committed by the transportation of a female for the purpose of sexual immorality, without reference to her previous character.

[Ed. Note.—For other cases, see Prostitution, Cent. Dig. §§ 1, 2; Dec. Dig. § 1.*]

8. PROSTITUTION (§ 5*)—TRIAL—INSTRUCTIONS.

Where, in a prosecution for violating the White Slave Act (Act June 25, 1910, c. 395, 36 Stat. 825 [U. S. Comp. St. Supp. 1911, p. 1343]), it appeared that defendant was in almost daily correspondence with prosecutrix, and only a short time prior had written her to come to him, and offered to send money for that purpose, that she had accepted the offer, telegraphed for the money, and that, after he had arranged for the ticket, he changed his mind and had the ticket furnished her through another, the court properly charged that when a person arranges to have a crime committed, and sets in motion agencies for its commission, and thereafter repents, but does not prevent the crime, he is as responsible as if he had not repented.

[Ed. Note.—For other cases, see Prostitution, Cent. Dig. § 5; Dec. Dig. § 5.*]

9. CRIMINAL LAW (§ 865*)—TRIAL—COERCION OF JURORS—INSTRUCTIONS.

In a prosecution for violating the White Slave Act (Act June 25, 1910, c. 395, 36 Stat. 825 [U. S. Comp. St. Supp. 1911, p. 1343]), it was not an improper exercise of the trial court's discretion, after the jury had been out a considerable time, to instruct them that the case was important and costly both to the government and to the defendants, that the jury must remember that the witnesses were likely to disappear and could not be had at another trial, and that they should attempt to agree on honest convictions; and, though they had the power under the law to stand out for acquittal or conviction, no juror should do so arbitrarily, but should listen to the arguments of the other jurors, and come to an understanding if he could, and be convinced by their argument that it was wrong to convict as well as to acquit a man on an arbitrary stand taken by a juror, and that they must not consider the penalty in the case whatever.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2069; Dec. Dig. § 865.*]

In Error to the District Court of the United States for the District of Montana; George M. Bourquin, Judge.

Sigmund Suslak was convicted of violating the Mann White Slave Act (Act June 25, 1910, c. 395, 36 Stat. 825 [U. S. Comp. St. Supp. 1911, p. 1343]), and he brings error. Affirmed.

Odell W. McConnell, of Helena, Mont., for plaintiff in error.

Burton K. Wheeler, U. S. Atty., of Butte, Mont., and S. C. Ford, Asst. U. S. Atty., of Helena, Mont.

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

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

DIETRICH, District Judge. Suslak, the plaintiff in error, hereinafter called defendant, was convicted of violating the White Slave Act (Act June 25, 1910, c. 395, 36 Stat. 825 [U. S. Comp. St. Supp. 1911, p. 1343]), and was sentenced to two years' imprisonment and to pay a fine and costs. The indictment contains 12 counts, all relating to the going of a woman named Grace Beal from Spokane, Wash., to Butte, Mont., on the 5th day of January, 1912. In the first count the charge is that defendant and one Max Fried, jointly indicted with him, caused the woman to be transported for the purpose of prostitution. In the second count unlawful cohabitation is designated as the purpose; in the third count, debauchery; in the fourth, an intent to induce her to become a prostitute; and, in the fifth, an intent to induce her to give herself up to debauchery. In the sixth, seventh, and eighth counts the charge is that the defendant procured for her her railroad ticket; the intent or purpose alleged being either prostitution (sixth count), or debauchery (seventh count), or to induce her to give herself up to debauchery (eighth count). In counts 9 and 10 the charge is of persuading and inducing her to come to Butte for the purpose of prostitution (ninth count), or for debauchery (tenth count); and such in substance are also the eleventh and twelfth counts.

That the woman went from Spokane to Butte at the time alleged and upon the same train with Fried is conceded. So also it is not questioned that prior to that time the defendant had maintained illicit relations with her, and that immediately upon her arrival at Butte he took her from the depot to a room which he had secured for that purpose, and there renewed the illicit relations, and that a few days later she unreservedly gave herself up to prostitution.

[1] It is first assigned as error that the evidence is insufficient to support the verdict. The point was not raised at the trial by motion or request for an instruction to the jury, and upon that ground alone perhaps we should hold that it is not now reviewable. But, upon a careful reading of the entire record, we have no hesitation in concluding that upon the merits the point is not well taken. While in a measure it is circumstantial, the evidence is abundant. Fried's story is inherently so improbable and is so conflicting in material respects with the testimony, not only of the prosecutrix, but of several other witnesses, that it can be given little weight. The jury were not only at liberty to believe, but could hardly escape the conviction, that he had intimate relations with the woman at Spokane, and upon the trip to Butte, and afterwards, and that he encouraged her to come, and purchased her ticket for that purpose. Such being the case, it was entirely reasonable for the jury to find from the other facts and circumstances that there was an understanding between the defendant and Fried, before the latter left Butte, that he (Fried) should bring the woman back with him, and that he was to use such means as might be found to be appropriate for that purpose. Before Fried left for Spokane, the defendant rented a room in a lodging house for the use of the woman, and when she arrived he was at the depot, where he at once took

charge of her and placed her in this room and, as already stated, resumed immoral relations with her. Whatever may have been the character of this rooming house, within a short time she went to the Boston Block, a house of ill repute, where she took a room for which the defendant paid the rent. His "wife" was a harlot, and, upon the whole, it is difficult to escape the conclusion that he desired Grace Beal to come to Butte, possibly for the immediate gratification of his own lust, but for the ultimate purpose of profiting from her life of shame.

The other general question is: Did the defendant have a fair trial? Under this head it is urged, first, that the court admitted certain immaterial testimony. Nine different questions are specified which, over the defendant's objection, the court permitted to be answered. In considering these assignments, it must be borne in mind that the defendant's purpose or intent was an essential ingredient of the several charges laid in the indictment, and in proving intent the evidence may often properly take a wide range; and, especially in cases where, as here, the defendant's conduct is in some respects equivocal, the trial court is vested with a liberal discretion.

[2] In answer to one of the questions objected to, the prosecutrix stated that in the year 1910, at a time when her husband was absent, the defendant invited her to come to Butte, and while lewdly consorting with her there he made her a proposition of setting her up in the "sporting" business, and tried to induce her to learn how to conduct it successfully. Though somewhat remote, the circumstance is not left entirely isolated, and we do not think the admission of the testimony amounts to an abuse of discretion. The relations of the defendant with the prosecutrix were never entirely broken off, and this circumstance throws some light upon his attitude toward her.

[3] Of the same character is the testimony of the witness Lipson, to the effect that in August, 1911, the defendant told him that he (the defendant) "wouldn't mind getting Grace Beal to Butte, so he could make a fortune out of her."

[4] To another question objected to, the prosecutrix answered that she entered upon a life of open prostitution soon after she came to Butte because the rooming house to which the defendant took her turned out to be a rendezvous for harlots, and that, having thus gotten the reputation of a prostitute, she thought she might as well live the life and make more money.

And, in response to still another question, she stated that the defendant used to tell her how attractive the sporting life was, and "how nice the girls dressed," etc. The evidence was clearly material. If, upon her arrival in Butte, defendant took her to a house of ill repute, had illicit relations with her, and from time to time sought to make the sporting life appear attractive, it would be a fair inference that, if he had anything to do with her coming to Butte, it was for one of the purposes charged in the indictment.

[5] The other questions relate to the character of the defendant's wife, and his attitude toward her and the life she lived. These facts cannot be said to be wholly irrelevant to the question of the defendant's intent and purpose. But clearly in view of the testimony of the prosecutrix that the defendant told her that his wife was coming back

in August, and that he (the defendant) and his wife would take her with them to engage in immoral business, the questions were proper.

The other exceptions relate to instructions given and refused:

1. The court denied certain requested definitions of the terms prostitution, debauchery, and cohabitation, and upon that head instructed the jury as follows:

"Prostitution, within the meaning of the law and the charge before you now, means that the woman is to offer her body to indiscriminate sexual intercourse with men, either for hire or without hire." "The act of debauchery denounced in the statute * * * means that the woman is to be subjected repeatedly to unlawful sexual intercourse or fornication or adultery." "Unlawful cohabitation, as defined in this statute, is the dwelling and living together, as though married, and with the appearance of being married, and having or intending to have sexual intercourse more or less continuously. It does not mean, by unlawful cohabitation, that the parties should pass themselves off as husband and wife, but simply that they lived together or intended to live together more or less continuously, and indulge in sexual intercourse as desire and opportunity may arise. It might be unlawful cohabitation if a man had another room, if he intended to repeatedly visit at the woman's room and have sexual intercourse with her as desired."

[6] No serious complaint is made touching what was said about prostitution, but the definitions of debauchery and unlawful cohabitation are vigorously assailed. It is urged that debauchment imports seduction from a condition of perfect purity, and that there can be no debauchery in the case of an unchaste woman. We think this view is entirely too narrow. Surely a woman who has committed a single act of unchastity is debauched if thereafter she is seduced or inveigled into the life of a common prostitute. Moreover, the denunciation of the law is not against transportation for the purpose of debauchment, but for the purposes of debauchery. In the Century Dictionary debauchery is defined as:

"Excessive indulgence in sensual pleasures of any kind; gluttony; intemperance; sexual immorality; unlawful indulgence of lust."

So Webster, while giving, as one of the meanings, seduction from virtue, duty, or allegiance, also defines the term as:

"Excessive indulgence of the appetites, especially excessive indulgence of lust; intemperance; sensuality; habitual lewdness."

It was in this sense of unlawful indulgence of lust in which the term was intended to be used in the act.

[7] Whether the woman be pure or impure, if her transportation be for the purpose of sexual immorality, the statute is violated. Such a meaning, it is thought, both the spirit and the purpose of the statute imply, and in that view the instruction complained of was, to say the least, quite as favorable to the defendant as he had the right to expect. Athanasaw v. United States, 227 U. S. 326, 33 Sup. Ct. 285, 57 L. Ed. 699.

On the other hand, we think that the trial court gave to "unlawful cohabitation" too wide a meaning. It is to be noted that this phrase is not used in the White Slave Act at all. The act denounces transportation for the purpose of prostitution or debauchery, "or for any other immoral purpose"; and the one count in the indictment upon which

this question arises charges transportation "for an immoral purpose, to wit, for the purpose of unlawful cohabitation." It is a question, therefore, not of the construction of the language of the act, but of the proper interpretation or construction of the indictment. The pleader might have selected any appropriate language to describe the species of immorality intended to be charged, and, having chosen a legal phrase for the purpose, it is to be presumed that it was employed in its legal sense. In that view, the first part of the instruction is free from serious objection, but it is inaccurate to say that it would be unlawful cohabitation if a man and a woman, being unmarried, simply "intended to live together" as man and wife, or if the man, having another room, intended repeatedly to visit at the woman's room for the purpose of sexual intercourse. Such intention must be put into actual practice; there must be an actual living together. While it may be true that joint occupancy of the same room is not under all circumstances essential, still it is clear that where the man and woman do not dwell in the same house, and the visitation for sexual intercourse is clandestine, and there is no other association together after the manner of husband and wife, the relation, however immoral and unlawful, does not constitute unlawful cohabitation. Anderson's Dictionary of Law; Words and Phrases, vol. 8, p. 7188; Cannon v. United States, 116 U. S. 55, 6 Sup. Ct. 278, 29 L. Ed. 561; Turney v. State, 60 Ark. 259, 29 S. W. 893.

[8] 2. Exception is also taken to an instruction by which the jury were advised in substance that when a person arranges to have a crime committed, and sets in motion agencies for its commission, and thereafter repents, but does not prevent the crime, he must be held responsible the same as if he had not repented. In the criticism of the instruction it is apparently assumed that the only act done by defendant looking to a violation of the law was the deposit at the ticket office at Butte of the money for a ticket to be furnished to the prosecutrix at Spokane. The reasoning is that inasmuch as it appears that the ticket was never delivered, and that therefore the act in no way contributed to the offense, the instruction was wholly inapplicable to the facts in evidence. But the purchase of the ticket was not the only agency set on foot by the defendant. It appears that he had been in almost daily correspondence with the prosecutrix, and that only a short time prior to her coming he had written, requesting her to come to him, and offering to send the money to cover her expenses. Here was an influence which might well lead to a commission of the offense. Apparently acting upon his offer, the prosecutrix telegraphed to send the money, in order that she might come. Thereupon he arranged for the ticket, and then, for some reason which is left to conjecture, he seemingly changed his mind as to the method to be pursued, and, instead of having the ticket furnished to her at Spokane, he arranged with Fried to see her, and he telegraphed to her to meet Fried at the depot, with no intimation in the telegram, however, that she was not to come to Butte. When Fried arrived at Spokane he told her, so she testified, that the defendant had telegraphed her a ticket, but upon inquiry, not being able to get a ticket in that way, Fried bought one himself, with the suggestion that the defendant would reimburse him.

Manifestly it was this aspect of the case which was before the court when the instruction was given, and it was for that reason that doubt was intimated whether, after writing to and persuading the prosecutrix to come, the defendant ever made known to her any change of purpose or desire upon his part.

[9] 3. Exception is also taken to the following instruction given upon the court's own motion, after the jury had been out for some time:

"This is an important case; this is a costly case, both to the government and to the defendants; I realize that this is a strain upon all; but the jury must remember that witnesses of the character which have been introduced by the government in this case are likely to disappear and could not be had in another trial, and the jury must therefore attempt to agree; they must attempt to agree upon honest convictions; the jurors have a power under the law to stand out for acquittal or conviction, but no juror should take an arbitrary stand to acquit or convict a man; he must listen to the arguments of the other jurors, and he must listen and come to an understanding, if he can, and be convinced by their argument; it is wrong to convict as well as to acquit a man upon an arbitrary stand taken by a juror; they must not consider the penalty in the case whatever."

It is not an uncommon practice, and it is entirely within the discretion of the court, to recall the jury for the purpose of giving additional instructions. Perhaps the language employed is as strong as should ever be used in impressing upon a jury their duty, if possible, to reach unanimity by a fair consideration of each other's arguments, but in its general purport and spirit the instruction is not out of harmony with the common practice, and is abundantly supported by the decided cases. Allis v. United States, 155 U. S. 117, 15 Sup. Ct. 36, 39 L. Ed. 91; Id. (C. C.) 73 Fed. 165; People v. Miles, 143 Cal. 636, 77 Pac. 666; Jordan v. State (Tex. Cr. App.) 30 S. W. 445; State v. Dudoussat, 47 La. Ann. 977, 17 South. 685; State v. Gorham, 67 Vt. 365, 31 Atl. 845; Johnson v. State, 60 Ark. 45, 28 S. W. 792.

4. The other assignments we do not deem it necessary to discuss in detail. It was not improper to modify the defendant's tenth request, touching the significance of the fact that the prosecutrix entered upon a life of prostitution soon after she came to Butte. So, too, the court very justly and fairly explained to the jury that the operation of the act was not limited to women of chaste character, and further that their verdict should not be controlled by the nature of the penalty.

In conclusion, while we find error in the court's definition of unlawful cohabitation, the point is involved only in the second count, and, conviction upon the other counts being sufficient to support the judgment, it will be affirmed.

PETERSON v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. May 11, 1914.)

No. 2316.

1. RECEIVING STOLEN GOODS (§ 9*)—TRIAL—INSTRUCTIONS.

Under Cr. Code, § 288 (Act March 4, 1909, c. 321, 35 Stat. 1145 [U. S. Comp. St. Supp. 1911, p. 1675]), providing that whoever shall buy or receive any money or goods which has been feloniously taken or stolen, knowing it to have been so taken or stolen, shall be punished as therein provided, it was error to charge that the jury might infer knowledge that the property was stolen, from circumstances that should suffice to satisfy a man of ordinary intelligence and caution that it was stolen, that whatever would carry knowledge or induce a belief in the mind of defendant that the property was stolen, or that would induce it in the mind of a reasonable person, under the same circumstances, would, in the absence of countervailing evidence, be considered sufficient to apprise defendant or induce in his mind a like belief, that defendant was charged with what he knew or was put upon inquiry to know, that the jury could convict if defendant had such knowledge as would put a reasonable man upon inquiry from which he could ascertain the truth, or if he purchased with knowledge, belief, or a reasonable suspicion that he failed to investigate for fear he would learn that the property had been stolen, since the gist of the offense is the actual state of defendant's mind and not what might have been the state of mind of some other person, and, while knowledge need not be acquired by personal observation nor shown by direct testimony, the jury must find knowledge and not merely a suspicion, especially where the purchase was for full value without secrecy, concealment, or subsequent denial, there was no attempt to dispose of the property for an inadequate price, and the vendor was without a bad reputation.

[Ed. Note.—For other cases, see Receiving Stolen Goods, Cent. Dig. §§ 19–22; Dec. Dig. § 9.*]

2. CRIMINAL LAW (§ 865*)—TRIAL—COERCING VERDICT.

On a trial for receiving stolen cattle, where the jury retired on Friday afternoon and, after being out until 11 o'clock Saturday morning, reported that they had agreed as to one defendant but were unable to agree as to the other two defendants, it was error for the court, after inquiring and ascertaining that the jury stood 7 to 5, to charge that the case should be finally disposed of as to all defendants, that it was the second trial of the case, and that there was no reason to believe that a more intelligent or honest jury more likely to arrive at a verdict could be drawn on another trial, that justice demanded that the case be brought to an end, that the expense of the trials was very great, that the government had a right to a verdict without a further expenditure of time and money, and defendants, if guilty, a right to have that fact determined before they were bankrupt, and, if innocent, a right to be acquitted before their means were exhausted, that, if seven jurors were for an acquittal, the others should seriously inquire whether there was not a reasonable doubt, and, if the seven were for conviction, whether there was a reasonable doubt, and that they should further consider the case; the court believing that they could honestly come to an agreement, especially where, in less than an hour, they returned a verdict acquitting one defendant and convicting the other.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2069; Dec. Dig. § 865.*]

3. CRIMINAL LAW (§ 1172*)—HARMLESS ERROR—INSTRUCTIONS—TESTIMONY OF ACCOMPLICES.

On a trial for receiving stolen cattle from B., an instruction that B., if defendants knew he was selling them stolen stock, would be an accom-

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

plice, that that would lead the jury to give his testimony serious consideration and scan it very carefully, that they should do that anyhow because he had been convicted of stealing the stock, and they should take that into consideration in weighing his evidence, but that they should take his evidence in connection with all the evidence and circumstances to determine whether, upon the whole, they were satisfied beyond a reasonable doubt of defendants' guilt, though a meager instruction upon the weight to be given to B.'s testimony, was not prejudicially erroneous.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3128, 3154–3157, 3159–3163, 3169; Dec. Dig. § 1172.*]

In Error to the District Court of the United States for the District of Montana; George M. Bourquin, Judge.

Mitchell Peterson was convicted of receiving stolen goods, and he brings error. Reversed and remanded.

W. F. O'Leary, of Great Falls, Mont., and E. A. Carleton of Helena Mont., for plaintiff in error.

B. K. Wheeler, U. S. Atty., of Butte, Mont., and Homer G. Murphy, Asst. U. S. Atty., of Helena, Mont.

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

DIETRICH, District Judge. The plaintiff in error, Mitchell Peterson, hereinafter referred to as the defendant, was found guilty of buying and receiving stolen cattle, and was sentenced to imprisonment for one year and a day in the penitentiary, and to pay the costs of prosecution, taxed at $1,189.35. Jointly with Walter Peterson, Oscar Peterson, Melvin Peterson, his brothers, and Charles Peterson, his father, he was charged upon four different counts. Apparently at the first trial of the case two of the defendants were acquitted, and there was a disagreement as to the other three, including this defendant. Upon this, the second trial, the defendant was found guilty upon the first count, and acquitted upon the other three; his codefendants were found not guilty.

[1] The first count, which is the only one we need now consider, charges that on the 21st day of October, 1910, within the Blackfeet Indian Reservation, in the state of Montana, where the defendants resided, they bought a steer and three cows, knowing them to have been stolen. It was admitted at the trial that the purchase was made from one John Bostwick, by whom it was further admitted the stock had been stolen. The statute upon which the charge is based (section 288 of the federal Penal Code of 1910) is as follows:

"Whoever shall buy, receive, or conceal, any money, goods, bank notes, or other thing which may be the subject of larceny, which has been feloniously taken, stolen, or embezzled, from any other person, knowing the same to have been so taken, stolen, or embezzled, shall be fined not more than one thousand dollars and imprisoned not more than three years; and such person may be tried either before or after the conviction of the principal offender."

It therefore appears that substantially the only issue before the jury was whether or not, when he purchased the cattle, the defendant knew they had been stolen. It is not disputed that he paid Bostwick their

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

full value, or that he purchased and received them openly and placed his brand, or that of his family, upon them in the usual manner.

It is assigned as error that the court incorrectly construed the statute. In defining the word "knowing," the court advised the jury that:

"It is not necessary that he who buys should see the thief taking the property, nor is it necessary that the thief should tell him he stole the property, but if the circumstances and conditions surrounding the purchase, and the nature of the property, and all, are such that it can be inferred by you, as reasonable men, that the defendant had knowledge, you have a right to draw that inference. You may infer such knowledge from circumstances that should suffice to satisfy a man of ordinary intelligence and caution that the property was stolen."

And again:

"Whatever would carry knowledge or induce a belief in the mind of a defendant that the property was stolen, that would induce it in the mind of a reasonable person under the same circumstances, it would, in the absence of countervailing evidence, be considered by you sufficient to apprise the defendant, or induce in his mind a like belief."

And again:

"He (the defendant) is charged with what he knows or what he is put upon inquiry to know."

And again the jury were instructed that they could convict the defendant if he "knew the property was stolen, knew, as I have heretofore indicated to you, not necessarily the actual knowledge, but such knowledge as would put a reasonable man upon inquiry from which he could ascertain the truth."

And again the jury were told that the defendant could be convicted if he purchased the cattle "with knowledge, belief, or a reasonable suspicion, that he failed to investigate for fear he would learn the truth that the same had been stolen."

It is thought that the meaning thus given to the statute is somewhat broader than its language warrants, and, in view of the repetition of the instruction in slightly varying forms, there is little doubt that the jury were guided thereby. Congress used the word "knowing," and defined the crime as the purchase of stolen property by one having knowledge of the theft. It might have denounced as a crime the receipt of stolen property under conditions sufficient to create a suspicion in the mind of a reasonable man, but it did not do so. The gist of the offense is the actual state of the defendant's mind when he purchases the property, and not what, under like circumstances, might be the state of mind of some other person; the standard by which guilty knowledge is to be imputed is the defendant's mental attitude, and not that of the imaginary average man. It is doubtless true, as was said by the court, that it is not necessary to show knowledge by direct testimony, nor is it essential that the accused have actual or positive knowledge such as one acquires by personal observation of a fact. It is not required that he should see the thief taking the property, or that the thief should have told him he stole the property. Knowledge may be inferred from circumstances. Anything amounting to notice, whether such notice be direct or indirect, positive or inferential, will satisfy the statute. But, even so, the ultimate fact which the jury must find be-

fore a conviction is warranted is that the defendant had such knowledge; and knowledge is something more than a suspicion. Moreover, circumstances which would create a strong suspicion in the mind of one man might have little significance for another, and one is not to be convicted of a crime because he is of a less suspicious nature than the ordinary man, and where, therefore, he may have acted in entire good faith in the face of conditions which might have put another upon his guard. These considerations are peculiarly pertinent here, where, as it appears, the full value was paid for the property, there was no secrecy in the purchase, no subsequent concealment or denial of the purchase, no attempt to dispose of the cattle for an inadequate price, and the vendor was without a bad reputation. As was said of a similar instruction in the case of State v. Rountree, 80 S. C. 387, 61 S. E. 1072, 22 L. R. A. (N. S.) 833:

"There is no doubt as to the well-settled rule in civil actions that knowledge of such facts as are sufficient to put a reasonably prudent man on inquiry is equivalent to notice, but such is not the rule in cases arising under the foregoing section of the Criminal Code. * * * It cannot be successfully contended that a mere inadvertent failure to pursue an inquiry with reasonable diligence is the equivalent of guilty knowledge and of fraudulent intent, which are essential elements of the crime, as otherwise a person could be punished under the statute for negligence, unaccompanied with intentional wrong. Knowledge of the theft on the part of the receiver is an essential element of the offense, and such knowledge must exist at the moment the property is received."

In State v. Denny, 17 N. D. 519, 117 N. W. 869, the following instruction was held to be erroneous:

"Guilty knowledge is made out and sufficiently proven to warrant conviction in that respect by the proof that the defendant received the property under such circumstances as would satisfy a man of ordinary intelligence and caution that they were stolen."

In State v. Daniels, 80 S. C. 368, 61 S. E. 1073, the following:

"Where a person has knowledge of facts, or has suspicions that would induce a person of ordinary prudence to make an inquiry, then he is required to do so. If he fails to do so, he is as much bound by what may be the state of facts as if he had been openly informed as to what they were. If the defendant had notice of facts that would put him on inquiry, he is bound to pursue those facts, and, if he fails to do so, it is at his own risk."

So in State v. Goldman, 65 N. J. Law, 394, 47 Atl. 641, the following:

"That which a man ought to have suspected, in the position of the defendant, he (the defendant) should have suspected, and he must be regarded as having suspected, in order to put himself upon his guard and upon inquiry. The proof in any case is to be inferential."

See, also, Cohn v. People, 197 Ill. 482, 64 N. E. 306; Sanford v. State, 4 Ga. App. 449, 61 S. E. 741; Minor v. State, 55 Fla. 90, 45 South. 818; Territory v. Claypool, 11 N. M. 568, 71 Pac. 463.

In the main, we do not find the language used by the lower court objectionable, and we should hesitate to grant a reversal upon this ground alone, if the record disclosed strong incriminating evidence, but the circumstances relied upon are so meager and so remote that

we are constrained to think that the defendant was prejudiced in his rights.

[2] Turning now to another instruction complained of. It seems that the jury first retired to consider of their verdict on Friday afternoon, and, after being out for some time, they returned into court for further instructions, which were given. They again retired, and, after remaining out all night, came into court about 11 o'clock Saturday morning, and, through their foreman, reported that they had agreed as to the defendant Walter Peterson, but were unable to agree as to the other two. Thereupon the following statement was made to them by the court:

"The court at this time declines to receive a verdict as to one defendant. The case should be finally disposed of as to all. This is, as you know, the second trial. To try it again means to try it before a jury drawn from the same community that you have been, and with no reason to believe that they would be any more intelligent or honest than you are or any more likely to arrive at a verdict. Justice to both parties demands that the case be brought to an end. The expense of these trials is very great; possibly the expense of the parties so far incurred is from $7,000 to $10,000. The government has a right to a verdict without farther expenditure of time and money. The defendants, if guilty, have a right to have that fact determined by a verdict before they are bankrupt in pocket, and likewise if they are innocent they have the right to be acquitted before their means are exhausted. You state, in answer to the court's question, that you stand seven to five. If seven are for an acquittal, the five should seriously inquire whether there is not a reasonable doubt of the guilt of the defendants when seven of their fellows of equal intelligence and honesty have found that there is; if seven are for conviction, the five should equally seriously inquire whether there is a reasonable doubt of the guilt of the defendants when seven of their fellows of equal intelligence and honesty find there is no doubt. After three days spent in the trial of this case, with no reason to believe that it can be any better tried before another jury, the court is disposed to direct you to further consider the case, believing that you can honestly come to an agreement."

Considerable latitude is to be allowed the trial judge in impressing upon the jurors their duty at all times earnestly to endeavor, by a candid comparison of views and fair argument, to reach an agreement, and we are not disposed narrowly to limit this discretion. This we have recently decided in the case of Suslak v. United States, 213 Fed. 913, 130 C. C. A. 391, also arising in the Montana district. But we are unable to give our sanction to the language here used; it is plainly coercive in its general spirit and tendency. We doubt whether it would be warranted even in the most extreme case, where the evidence is so overwhelming as to leave little, if any, room for doubt, and where plainly a disagreement would amount to a miscarriage of justice; but this is not such a case. The charge upon which the defendants were being tried is one upon which it is not generally thought to be difficult to secure a conviction in this section of the country; the prosecution faced no popular prejudice; the personality of the defendants and their standing in the community were not such as to create a disturbing influence which it was necessary to counteract. And, in the most favorable view that can be taken of it, the evidence was doubtfully sufficient to warrant a conviction. Already one jury had been unable to reach an agreement, and this jury had spent many hours in a vain attempt to get together. To such a situation the language of the Su-

preme Court in Burton v. United States, 196 U. S. 283, 306, 307, 25 Sup. Ct. 243, 249, 250 (49 L. Ed. 482), is most pertinent; it was there said:

"Here was a case of very great doubt in the minds of some of the jury. It had deliberated for more than 36 hours and been unable to agree upon a verdict. * * * Balanced as the case was in the minds of some of the jurors, doubts existing as to the defendant's guilt in the mind of at least one (here at least five), it was a case where the most extreme care and caution were necessary in order that the legal rights of the defendant should be preserved. * * * A slight thing may have turned the balance against the accused, under the circumstances shown by the record. * * *"

It appears that here inquiry was first made of the jurors as to how they were divided, and it was thereupon disclosed that they stood five to seven. Of this practice the court said, in the Burton Case, supra:

"Such a practice is not to be commended, because we cannot see how it may be material for the court to understand the proportion of * * * division of opinion among the jury. All that the judge said in regard to the propriety and duty of the jury to fairly and honestly endeavor to agree could have been said without asking for the fact as to the proportion of their division; and we do not think that the proper administration of the law requires such knowledge or permits such a question on the part of the presiding judge. Cases may easily be imagined where a practice of this kind might lead to improper influences, and for this reason it ought not to obtain."

Although after continuous deliberation for nearly a day, the case was thus almost evenly balanced in the minds of the jurors, and, after presumably all legitimate argument had been employed, the presiding judge addressed them in such a way as to leave the inference that the five should in some way defer to the seven. True, if a jury were very unequally divided, as, for example, eleven to one, it might not be improper, in a guarded manner and with appropriate qualifications, to suggest to the one the propriety of most carefully testing the correctness of his conclusion, in the light of the opposite views entertained by his eleven associates, presumably of equal intelligence and fairness. But here, without cautioning the jurors against yielding their honest, conscientious convictions, whatever they may have been, to mere numbers or to considerations of economy, the presiding judge unqualifiedly told them that "the case should be finally disposed of as to all" defendants. "The government has a right," it was said, "to a verdict without farther expenditure of time and money." And the instruction was closed by the expression of a "belief" that the jurors could "honestly come to an agreement." The court might very well have expressed the hope for such an agreement, but it is difficult to conceive what basis there was at that juncture for believing that the jury could honestly agree. It is to be borne in mind that nowhere did the court make it clear that, however desirable it might be to avoid another mistrial and finally to terminate the prosecution, an agreement should not be reached in violation of the honest conviction of any one of the jurors. It was not correct to say that the government had a right to a verdict without farther expenditure of time and money; it had only a right to a fair consideration of the case. No obligation rested upon it to make any further expenditure, for, in case of a mistrial, it would

have been the right, if not the duty, of the prosecuting officers to dismiss the prosecution. In any event, it was not its right to demand an agreement; nor did the defendant have such right. But one impression could have been left upon the minds of the jurors, and that such impression was made is borne out by the event. They retired, and in less than an hour returned with a verdict acquitting the one defendant and convicting the other, and this without any new light upon the law, or any further suggestion from the court as to the significance or character of any of the evidence in the case, and after the jury had deliberated the larger part of a day, with the resultant conviction upon their part that they could not get together. Can there be any question that, retiring with the impression that the all-imporant thing was a final disposition of the case, the jurors consciously or unconsciously bartered the acquittal of one defendant for the conviction of the other?

[3] Inasmuch as the judgment must be reversed and the cause remanded for further proceedings, and the evidence may be different if another trial is had, we do not deem it necessary to discuss the defendant's contention that the court should have instructed the jury to acquit. The assignments touching rulings upon objections to the evidence are not thought to be well founded. The assignment relating to the right of the defendant to a speedy trial was practically abandoned at the hearing. The instruction bearing upon the weight to be given to the testimony of the witness Bostwick was meager, but we think without prejudicial error. The assignment of the failure of the record affirmatively to show arraignment or plea may be summarily disposed of by citing the recent decision of the Supreme Court in the case of Garland v. State of Washington, 232 U. S. 642, 34 Sup. Ct. 456, 58 L. Ed. ——.

The judgment is reversed, and the case remanded for further proceedings.

JOPLIN MERCANTILE CO. et al. v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. April 3, 1914.)

No. 3942.

1. INDIANS (§ 35*)—ACT PROHIBITING CARRYING OF LIQUOR INTO INDIAN TERRITORY—EFFECT OF OKLAHOMA STATEHOOD.

Act March 1, 1895, c. 145, § 8, 28 Stat. 697, which inter alia prohibits the carrying of intoxicating liquors into Indian Territory, was enacted as a part of the recognized guardianship by the United States of the Indians as a separate but dependent people, and in the exercise of the constitutional power of Congress to regulate commerce with the Indian tribes, and was not repealed by the Enabling Act of Oklahoma, and the admission of the state thereunder, as to importations from parts of the state not within the former Indian Territory, and an indictment for conspiracy to violate said act by carrying liquor into such territory need not allege that it was to be imported from without the state of Oklahoma.

[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 61, 62; Dec. Dig. § 35.*]

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

2. INDIANS (§ 35*)—INTRODUCING LIQUOR INTO INDIAN COUNTRY—CONSTRUCTION OF ACTS.

In none of the legislation of Congress prohibiting the introduction of liquor into the Indian country have state lines been recognized, but the acts prohibited have always been held unlawful whether the liquor was introduced from points within the same state or from without.

[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 61, 62; Dec. Dig. § 35.*]

3. CORPORATIONS (§ 528*)—CRIMINAL LIABILITY—FELONIES.

A corporation may be indicted and convicted under Cr. Code (Act March 4, 1909, c. 321, 35 Stat. 1096 [U. S. Comp. St. Supp. 1911, p. 1600]) § 37, for conspiracy to commit an offense against the United States by carrying liquors into Indian Territory or introducing liquors into the Indian country, although under section 335 of the Criminal Code (Act March 4, 1909, c. 321, 35 Stat. 1152 [U. S. Comp. St. Supp. 1911, p. 1687]) the offense is a felony.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2140–2144; Dec. Dig. § 528.*]

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

Criminal prosecution by the United States against the Joplin Mercantile Company and Joseph Filler. Judgment of conviction, and defendants bring error. Affirmed.

Paul A. Ewert, of Joplin, Mo., for plaintiffs in error.

Leslie J. Lyons, U. S. Atty., and Thad B. Landon, Asst. U. S. Atty., both of Kansas City, Mo.

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

SMITH, Circuit Judge. An indictment was returned for conspiracy under section 37 of the Penal Code (Act March 4, 1909, c. 321, 35 Stat. 1096 [U. S. Comp. St. Supp. 1911, p. 1600]) charging that the Joplin Mercantile Company, a corporation existing under and by virtue of the laws of the state of Missouri, and one Joseph Filler, and one Ben Due, and one Martin F. Witte, and other persons to the grand jury unknown, hereinafter called the defendants, then and there being, did then and there unlawfully, willfully, knowingly, and feloniously conspire together to commit an offense against the United States of America, to wit, to unlawfully, knowingly, and feloniously introduce and attempt to introduce malt, spirituous, vinous, and other intoxicating liquors into the Indian country which was formerly the Indian Territory and now is included in a portion of the state of Oklahoma, and into the city of Tulsa, Tulsa county, Okl., which was formerly within and is now a part of what is known as the Indian country and into other parts and portions of that part of Oklahoma which lies within the Indian country. Certain overt acts were then alleged all of which charged that the defendants shipped liquors from Joplin, Mo., to Tulsa, Okl.

Ben Due pleaded guilty. The case against the Joplin Mercantile Company, Joseph Filler, and Martin F. Witte was tried to a jury who found the Mercantile Company and Filler guilty and acquitted Martin

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

F. Witte, and the Joplin Mercantile Company was fined, and Filler sentenced to the Leavenworth penitentiary, and they sued out a writ of error.

The only errors assigned which can be considered by us are:

(1) The court erred in overruling the demurrer of the defendants and each of them to the said indictment herein.

(2) The court erred in overruling the motion to quash said indictment herein made by the defendants and each of them.

(3) The court erred in overruling the motion in arrest of judgment herein made by the defendants and each of them.

Neither the evidence nor the charge of the court are before us.

The other questions covered by the assignments are with reference to the motion for a new trial which cannot be considered here and the admission of certain evidence which does not appear in the transcript.

The questions, therefore, before this court can be resolved into one: Did the indictment charge an offense?

There are two separate systems of laws on the subject of liquors imported into the territory here in question. The Fifty-Second Congress, on July 23, 1892 (chapter 234, 27 Stat. 260), enacted the following as a substitute for section 2139 of the Revised Statutes:

"Sec. 2139. No ardent spirits, ale, beer, wine, or intoxicating liquor or liquors of whatever kind shall be introduced, under any pretense, into the Indian country. Every person who sells, exchanges, gives, barters, or disposes of any ardent spirits, ale, beer, wine, or intoxicating liquors of any kind to any Indian under charge of any Indian superintendent or agent or introduces or attempts to introduce any ardent spirits, ale, wine, beer, or intoxicating liquor of any kind into the Indian country shall be punished by imprisonment for not more than two years, and by a fine of not more than three hundred dollars for each offense. But it shall be a sufficient defense to any charge of introducing or attempting to introduce ardent spirits, ale, beer, wine, or intoxicating liquors into the Indian country that the acts charged were done under authority in writing from the War Department, or any officer duly authorized thereunto by the War Department. All complaints for the arrest of any person or persons made for violation of any of the provisions of this act shall be made in the county where the offense shall have been committed, or if committed upon or within any reservation not included in any county, then in any county adjoining such reservation, and, if in the Indian Territory, before the United States court commissioner, or commissioner of the circuit court of the United States residing nearest the place where the offense was committed, who is not for any reason disqualified; but in all cases such arrests shall be made before any United States court commissioner residing in such adjoining county, or before any magistrate or judicial officer authorized by the laws of the state in which such reservation is located to issue warrants for the arrest and examination of offenders by section ten hundred and fourteen of the Revised Statutes of the United States. And all persons so arrested shall, unless discharged upon examination, be held to answer and stand trial before the court of the United States having jurisdiction of the offense."

January 30, 1897, it being doubtful whether land allotted to Indians remained Indian country under the existing laws, the Fifty-Fourth Congress enacted Act Jan. 30, 1897, c. 109, 29 Stats. 506, in part as follows:

"Any person who shall introduce or attempt to introduce any malt, spirituous, or vinous liquor, including beer, ale, and wine, or any ardent or intoxicating liquor of any kind whatsoever into the Indian country, which

term shall include any Indian allotment while the title to the same shall be held in trust by the government or while the same shall remain inalienable by the allottee without the consent of the United States, shall be punished by imprisonment for not less than sixty days, and by a fine of not less than one hundred dollars for the first offense and not less than two hundred dollars for each offense thereafter."

But almost midway between the enactment of these two statutes the Fifty-Third Congress on March 1, 1895, enacted, chapter 145, 28 Stats. 693, 697:

"Sec. 8. That any person, whether an Indian or otherwise, who shall, in said [Indian] territory, manufacture, sell, give away, or in any manner, or by any means furnish to anyone, either for himself or another any vinous, malt, or fermented liquors, or any other intoxicating drinks of any kind whatsoever, whether medicated or not, or who shall carry, or in any manner have carried, into said territory any such liquors or drinks, or who shall be interested in such manufacture, sale, giving away, furnishing to anyone, or carrying into said territory any of such liquors or drinks shall, upon conviction thereof, be punished by fine not exceeding five hundred dollars and by imprisonment for not less than one month nor more than five years."

It will be observed that the first two statutes prohibited introducing liquor into the Indian country, but the last prohibited their introduction, not into the Indian country, but into the Indian Territory which had boundaries fixed by law.

The term "Indian country" has a constantly changing application, but the Indian Territory referred to is a well-defined and perpetually existing region.

In United States Express Co. v. Friedman, 191 Fed. 673, 112 C. C. A. 219, this court held that the two first statutes above quoted were still applicable to a considerable portion of the old Indian Territory.

In Ex parte Webb, 225 U. S. 663, 32 Sup. Ct. 769, 56 L. Ed. 1248, the Supreme Court held that the last-mentioned act, that of 1895, was still in force as applied to shipments from without Oklahoma.

In this situation this case was brought here in the belief that the decision in Ex parte Webb practically nullified our decision in United States Express Co. v. Friedman, but in United States v. Wright, 229 U. S. 226, 33 Sup. Ct. 630, 57 L. Ed. 1160, the Supreme Court also held, as held by this court in United States Express Co. v. Friedman, that the acts of 1892 and 1897 remained in force where applicable in Indian Territory, and the effect of this holding was that the acts of 1892, 1897, and 1895 all remained in force concurrently in Indian Territory.

If an indictment was returned which charged a defendant with introducing liquor into the Indian country upon the trial a question of fact would at once arise as to whether the place to which they were imported remained Indian country under the acts of 1892 and 1897; but, if the charge was under the act of 1895, the sole question would be whether the liquor had been carried into a geographical location fixed and determined.

It must be borne in mind that this was not an indictment for either of these offenses, but was an indictment for a conspiracy to violate both of these laws—introducing liquors into the Indian country which was formerly the Indian Territory. That one conspiracy could be

formed to violate any number of laws of the United States seems beyond question. Here the conspiracy was the crime charged and not the introduction of liquors into the Indian country or the carrying of them into the Indian Territory.

It is contended that this conviction could not stand upon the act of 1895 because the indictment failed to charge that the conspiracy was to introduce liquors from without Oklahoma and that the overt acts alleged could not be utilized as the equivalent of such an allegation in the indictment, and reliance is placed upon Ex parte Webb, 225 U. S. 663, 32 Sup. Ct. 769, 56 L. Ed. 1248. In that case it was claimed the liquors were shipped from Joplin, Mo., and manifestly it could not involve the question as to whether the act of 1895 was repealed as to importations from parts of Oklahoma not in Indian Territory. It is true that in the Webb Case the Supreme Court said:

"We may thus proceed at once to the question of the effect upon the act of 1895 of the Oklahoma Enabling Act of June 16, 1906 (34 Stat. 267, c. 3335), and the admission of the state of Oklahoma into the Union pursuant thereto. Since the government concedes that the act of 1895 has been thereby repealed saving so far as it prohibited the carrying of intoxicating liquors, etc., from another state into the territory, the matter to be discussed is still further narrowed."

Again the court said:

"No doubt the Enabling Act, followed by the adoption of the Constitution therein prescribed and the admission of the new state, had the effect of remitting to the state government the enforcement of the prohibition respecting the manufacture, sale, barter, etc., of intoxicating liquors within the state, and respecting commerce in such liquors conducted wholly within the state; and, to the extent that the scheme of prohibition established by the Enabling Act covered the same field that had been covered by the act of 1895, the latter act must be considered as impliedly repealed."

If this latter clause stood alone, we would be much inclined to think the act of 1895 had been repealed as to carrying liquors from other parts of Oklahoma into Indian Territory, but the question was again before the Supreme Court in United States v. Wright, 229 U. S. 226, 33 Sup. Ct. 630, 57 L. Ed. 1160. In that case the Supreme Court said:

"In the Webb Case, as appears from the opinion [225 U. S. 676, 32 Sup. Ct. 769, 56 L. Ed. 1248], the government conceded that the act of 1895 had been repealed by the Enabling Act and the admission of the state thereunder, saving so far as it prohibited the carrying of intoxicating liquors, etc., from another state into the territory. The statement to the like effect in the opinion [225 U. S. 681, 32 Sup. Ct. 769, 56 L. Ed. 1248] was made in view of this concession; but we see no reason for recalling it."

The latter case, like the former, was a case of importation into the Indian country, but it was a case of importation into the Indian country from Oklahoma. The indictment was not under the act of 1895, but under the acts of 1892 and 1897.

Schaap v. United States, 210 Fed. 853, 127 C. C. A. 415, involved an indictment for introducing liquor into the Indian country and did not involve the carrying of liquor into Indian Territory. In that case it appears that the liquor was deposited at Ft. Smith, Ark., for trans-

portation into the part of Oklahoma that was formerly Indian Territory. It was an attempt at an interstate shipment. We are therefore of the opinion that it did not involve a decision upon the application of the act of 1895 to transactions wholly within the state of Oklahoma. In other words, that manifestly it did not involve the question whether the importation of liquors from other points in Oklahoma was illegal. In the opinion in that case the court said:

"General expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. Cohens v. Virginia, 6 Wheat. 264, 393, 5 L. Ed. 257; King v. Pomeroy, 121 Fed. 287, 294, 58 C. C. A. 209, 216; Traer v. Fowler, 144 Fed. 810, 817, 75 C. C. A. 540, 547; Mason City & Ft. Dodge Ry. Co. v. Wolf, 148 Fed. 961, 968, 78 C. C. A. 589, 596."

[1] These are all the cases that touch upon the question as to whether the act of 1895 was repealed as to the balance of Oklahoma. This question is now first presented to this court. We feel that, by so specifically pointing out in the Wright Case that all that was said upon the subject in the Webb Case was based upon the admission of the Government, it was distinctly foreshadowed that it would not be binding upon the court in the future, even though it was then said, "We see no reason for recalling it."

It seems time that some one discuss the question, as the government has heretofore conceded it without discussing it.

The effect of holding that the Enabling Act for the admission of the state of Oklahoma repealed the law of 1895 as to importations from parts of Oklahoma not in Indian Territory would in effect hold that importations remained prohibited from the north, south, and east of Indian Territory, but from the west they were turned over to the state.

The provisions of the Enabling Act requiring the prohibition provisions in the Constitution of Oklahoma is of no validity if Oklahoma sees fit to repeal it. She is on an equality with all of the states and can repudiate that and other provisions of the Enabling Act whenever she sees proper. The states are equal in power, and a new state when admitted is clothed with all the power of the original states and she can repudiate all the restrictions placed upon her that do not amount to a contract. Coyle v. Oklahoma, 221 U. S. 559, 31 Sup. Ct. 688, 55 L. Ed. 853. Why then would the admission of the state repeal the west boundary limit of this law?

In the exercise of its powers to regulate commerce with the Indian tribes, Congress has never recognized the boundaries of states as existent. As pointed out in the Friedman Case, the power to legislate in general with reference to liquor and the Indians is derived from: First, the treaty-making power; second, the power to regulate interstate commerce; third, the power to regulate commerce with the Indian tribes; fourth, the ownership, as sovereign, of lands to which the Indian title has not been extinguished; and, fifth, the plenary authority arising out of the guardianship of the Indians as an alien but dependent people.

Prior to the admission of the last of the territories here at home, Congress was also vested with the power to legislate on this subject by the provisions of the Constitution that:

"The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."

If the act of 1895 was enacted in the exercise of the second of the powers enumerated in the Friedman Case, viz., the power to regulate interstate commerce, then it might well have been that the admission of Oklahoma repealed the statute so far as it applied to the introduction of intoxicating liquors from points of the state of Oklahoma not in Indian Territory. If it was enacted solely in the exercise of the power to enact legislation for the territories, then the admission of the state repealed the act in toto but did not repeal it upon the western side and leave it standing upon the north, south, and east sides.

Quite a different rule would prevail if it was enacted in the exercise of the third, fourth, or fifth powers enumerated in the Friedman Case, namely, the power to regulate commerce with the Indian tribes, the power to pass laws by virtue of its ownership as sovereign of land to which the Indian title had not been extinguished, and the authority of Congress arising out of its guardianship of the Indians as an alien but dependent people.

The law could not be assigned to the power to enact laws for the government of the territories because there is not an instance in the whole history of the federal government's dealing with the territories of a federal statute regulating the liquor business. That subject has been uniformly left to the territorial authorities, and the business has been carried on under such licenses or regulation as those authorized saw fit to impose.

Many considerations indicate that the act was passed as a part of the guardianship of the Indians and as a part of the power of Congress to regulate commerce with the Indians.

1. The federal government was under the most solemn pledges, contained in repeated treaties from the time the Indians were first removed to this district, to protect the Indians in their person and property against the evils of intercourse with people of the white race. History clearly shows that the greatest of those evils was the sale of intoxicating liquors.

2. Indian Territory contains the largest body of Indian population in the United States. It is not to be presumed that Congress intended to turn these Indians over to the protection of local authorities. This would be contrary to the uniform practice of the federal government in dealing with other Indian tribes in the various states.

3. Section 1 of the Enabling Act expressly reserves full authority to the national government for the protection of the Indians and their property, and thus shows clearly that it was not the intent of Congress in admitting Oklahoma, to remit the Indians to the control of the state. Protection of them against the liquor traffic has always been their greatest need, and it would be contrary to reason to suppose that the

reservation in the first section of the Enabling Act was not intended to cover that subject.

4. The numerous statutes passed by Congress at about the time Oklahoma was admitted, to protect these Indians against the evils of intoxicating liquor, show plainly that Congress intended to exercise this protection itself, and not to remit it to the state. It would be strange, indeed, if out of its abundant caution such a conflict has arisen as to wholly defeat this clear purpose of the federal government.

It is true that subdivision 2 of section 3 of the Enabling Act, containing provisions to be inserted in the constitution of the new state, provided that the Legislature might provide for one agency under the supervision of said state in each incorporated town of not less than 2,000 population and for one to a county in which there was no town of 2,000 inhabitants, for the sale of liquors for medicinal purposes and for the sale of denatured alcohol for industrial and scientific purposes.

This provision probably contemplated the repeal of so much of the act of 1895 as was necessary to enable the proprietors of such dispensaries to obtain intoxicating liquors, but there was no contemplation that if the state authorized such agencies they must obtain their liquors from within the state of Oklahoma. In other words this would be a repeal pro tanto of the act of 1895 upon all sides and not upon the western side. But such proviso or repeal in part of the act of 1895 need not be negatived even in an indictment for carrying liquors into Indian Territory. United States v. Cook, 17 Wall. 168, 21 L. Ed. 538; Ledbetter v. United States, 170 U. S. 606, 18 Sup. Ct. 774, 42 L. Ed. 1162. Still less would it be necessary to negative the proviso in an indictment for conspiracy to carry liquors into Indian Territory.

The same section of the Enabling Act required the state to prohibit for twenty-one years the sale of intoxicating liquors in Indian Territory. This was to secure the co-operation of the state authorities and was not intended to remit to the state the whole subject of the guardianship of the Indians on approach from the west.

[2] The courts have always held that state lines had nothing whatever to do with this subject. This has been in effect held in every case where a conviction has been had for introducing liquors into the Indian country from within the same state, but it has been squarely so held in United States v. Holliday, 3 Wall. 407, 18 L. Ed. 182; United States v. Forty-Three Gallons of Whisky, 93 U. S. 188, 23 L. Ed. 846; United States v. Forty-Three Gallons of Whisky, 108 U. S. 491, 2 Sup. Ct. 906, 27 L. Ed. 803; Dick v. United States, 208 U. S. 340, 28 Sup. Ct. 399, 52 L. Ed. 520; United States v. Sutton, 215 U. S. 291, 30 Sup. Ct. 116, 54 L. Ed. 200; Hallowell v. United States, 221 U. S. 317, 31 Sup. Ct. 587, 55 L. Ed. 750; United States v. Wright, 229 U. S. 226, 33 Sup. Ct. 630, 57 L. Ed. 1160; United States v. Sandoval, 231 U. S. 28, 34 Sup. Ct. 1, 58 L. Ed. ——; Sam B. Perrin v. United States, 232 U. S. 478, 34 Sup. Ct. 387, 58 L. Ed. ——; Joseph Pronovost v. United States, 232 U. S. 487, 34 Sup. Ct. 391, 58 L. Ed. ——; United States v. Barnhart (C. C.) 22 Fed. 285.

It thus appears that there was absolutely nothing even after the admission of the state to prevent Congress from prohibiting the importation of liquors into the Indian Territory peopled as it was so largely

by Indians, and there is therefore no reason to believe that the admission of the state was intended to repeal this law on the western boundary of the Indian Territory.

If the United States had power to prohibit the introduction of liquors illegally from Oklahoma and from other states into Indian Territory, upon what basis could it be held that the admission of the state repealed the western boundary of prohibition but left standing the prohibition upon the north, south, and east?

Why were these two systems of laws originally enacted? The general allotment law had been in force some years when the act of 1895 was passed. It was manifest that much of what had heretofore been Indian country would soon cease to be such, but Congress wanted to protect the Indians against intoxicating liquors and did not want them admitted to the territory and therefore prohibited their importation absolutely. Nothing could better illustrate the danger than what has happened. It is now lawful under the acts of 1892 and 1897 to ship liquors across Indian country if the point of destination is not Indian country and Indian Territory may be flooded with liquors under the acts of 1892 and 1897. On the other hand, if the act of 1895 was alone in force prohibiting the carrying of liquor within the Indian Territory, why would it be unlawful to transport liquor from a point within the Indian Territory to an allotment therein? It was therefore necessary to maintain the provisions of 1892 and 1897 prohibiting the introduction of liquor into the Indian country.

It is claimed that in some way the western boundary of 1895 was taken down and the government turned over to the state of Oklahoma the guardianship of its wards.

So long as Congress had the right to prohibit the introduction of liquor from Oklahoma into Indian Territory, there should be some clearly defined statute to indicate that Congress abandoned its guardianship and turned it over to the state, and neither the government nor the defendants have ever attempted to point out how was thus abdicated the exercise of congressional powers.

It was not necessary, therefore, for the indictment to allege the conspiracy was to import liquors into the Indian Territory from without Oklahoma.

The conviction may also be sustained upon another ground. The indictment charged a conspiracy to violate the laws of 1892 and 1897 to introduce or attempt to introduce liquors into the Indian country and into the city of Tulsa, which is now a part of what is known as the Indian country, and to other parts and portions of Oklahoma which lie in the Indian country.

That the laws of 1892 and 1897 are in force in the territory named is beyond question since the decision in United States v. Wright, 229 U. S. 226, 33 Sup. Ct. 630, 57 L. Ed. 1160.

An inspection of the opinion in Schaap v. United States of America will show that this court held that, if the place which was charged to be within the Indian country was not so situated, that was a matter for proof upon the trial, and we have before us none of the evidence, and no objection to the indictment could be made upon that ground.

If we should even take judicial notice of the fact that Tulsa was not in the Indian country, the indictment charged that the conspiracy was to introduce liquors into other parts or portions of Oklahoma which lie within the Indian country, and, until we should take judicial notice that no portion of Oklahoma was within the Indian country, the objection to the indictment could not be sustained.

[3] The plaintiffs in error suggest the question: "Can a corporation be lawfully indicted and convicted for a conspiracy which by statute is declared a felony?"

This question was not especially called to the attention of the District Court by any of the subdivisions of the demurrer, motion to quash, or motion in arrest of judgment; but, as the counsel for the plaintiffs in error says that this was presented to the court below upon the argument, we will briefly consider it, although we are not prepared to say that it is pending for consideration here.

"All offenses which may be punished by death, or imprisonment for a term exceeding one year, shall be deemed felonies. All other offenses shall be deemed misdemeanors." Penal Code, § 335.

It follows as the offense of conspiracy may be punished by imprisonment for not more than two years, Penal Code, § 37, the offense here charged was a felony. The statute provides, however, that each of the parties to the conspiracy shall be fined not more than $10,000 or imprisoned not more than two years or both. The mercantile company in this case was fined.

Owing to the changes from time to time by statute in the meaning of the term "felony," it is perhaps more apt to become misleading than otherwise. The meaning of the term "felony" is a growth. Originally it meant an offense which occasioned a forfeiture of the lands or goods of the offender as distinguished from a mere money fine. The actual offense here charged was subject to the same punishment before the enactment of the Criminal Code. Rev. St. § 5440; Act May 17, 1879, c. 8, 21 Stat. 4 (U. S. Comp. St. 1901, p. 3676). Yet it was not a felony. Bannon v. United States, 156 U. S. 464, 15 Sup. Ct. 467, 39 L. Ed. 494.

In that case, as if anticipating the action of Congress by nearly 15 years, the court said:

"And even if it were made a felony by statute, the indictment would not necessarily be defective for failing to aver that the act was feloniously done."

It is manifest that whether a corporation can be convicted of a criminal offense depends, not upon technical name, treason, felony, or misdemeanor, attached to the crime, but is one of whether the crime is such that the corporation is capable of committing it.

In Bishop's New Criminal Law, par. 417, upon the sole authority of the author, it is said:

"2. Its Criminal Capabilities Defined.—A corporation cannot in its corporate capacity commit a crime by an act in the fullest sense ultra vires and contrary to its nature. But within the sphere of its corporate capacity, and to an undefined extent beyond, whenever it assumes to act as a corporation it has the same capabilities of criminal intent and of act—in other words, of crime—as an individual man sustaining to the thing the like relations."

As the evidence is not here, it cannot be told what was the scope of the authority of this particular corporation, but it was doubtless its business to sell liquors.

In Cook on Corporations (6th Ed.) vol. 1, p. 94, it is said:

"Even where it is necessary to prove a fraudulent and malicious intent it is held by the great weight of modern authority that the fraud and malice of the authorized agents of a corporation may be imputed to the corporation itself."

See, also, on the imputability of crime to corporations, Wharton's Criminal Law (11th Ed.) par. 119.

It has been repeatedly held in civil cases that a corporation may be a party to a conspiracy. Aberthaw Co. v. Cameron, 194 Mass. 208, 80 N. E. 478, 120 Am. St. Rep. 542; White v. Apsley Rubber Co., 194 Mass. 97, 80 N. E. 500, 8 L. R. A. (N. S.) 484; Buffalo Lubricating Oil Co. v. Acme Oil Co., 106 N. Y. 669, 12 N. E. 825.

In Thompson on Corporations (2d Ed.) 5440, it is said:

"A corporation is liable for conspiracy to the same extent as are individuals under like circumstances."

And see Id., par. 5632.

And in Chicago W. & V. Coal Co. v. People, 214 Ill. 421, 73 N. E. 770, it was expressly held that a corporation could be indicted and convicted of a conspiracy at common law.

The plaintiffs in error cite State v. Delmar Jockey Club, 200 Mo. 34, 92 S. W. 185, 98 S. W. 539.

That was a civil case, and its statement therefore in accordance, however, with the ancient holdings that a corporation could not be guilty of a felony, while somewhat persuasive, is not controlling with us because the question was not involved in that case.

They also cite Commonwealth v. Proprietors of New Bedford Bridge, 2 Gray (Mass.) 339. That also was a civil case, but held the company liable for nuisance.

These are the only cases cited on the subject by the plaintiffs in error.

Upon the other hand, see United States v. Union Supply Co., 215 U. S. 50, 30 Sup. Ct. 15, 54 L. Ed. 87; Cohen v. United States, 157 Fed. 651, 85 C. C. A. 113, and United States v. MacAndrews Co. (C. C.) 149 Fed. 823.

The whole growth of the modern law tends to subject corporations, as nearly as may be, to the same pains and penalties imposed upon individuals. Of course, if the law imposed a death penalty or personal imprisonment, a corporation could not be subjected thereto.

Suffice it to say that we think that a corporation could be guilty of a conspiracy to carry liquor into Indian Territory and to introduce it into the Indian country.

The judgment of the District Court is affirmed.

SUPREME LODGE, A. O. U. W., v. GRAND LODGE, A. O. U. W., OF THE STATE OF MINNESOTA et al.

(Circuit Court of Appeals, Eighth Circuit. April 1, 1914.)

No. 4060.

INSURANCE (§ 697*)—FRATERNAL INSURANCE—SUPREME AND GRAND LODGES—ACCOUNTING FOR FUNDS.

The articles of incorporation of the Grand Lodge of the Ancient Order of United Workmen of the State of Minnesota, adopted in 1902, provided that all of its powers pertaining to the welfare of the order were subject to the supervisory control of the Supreme Lodge of the Ancient Order of United Workmen, by which it was instituted. The Supreme Lodge had created an emergency fund, known as the guaranty fund, and afterward as the fraternal aid fund, into which was to be paid an amount equal to an assessment of 15 cents per month on each member of the order, and where there were separate beneficiary jurisdictions, as in Minnesota, the Grand Lodges of such jurisdictions were required to pay over the amount of such assessments on their membership semiannually. The constitution of the Grand Lodge of Minnesota provided for a beneficiary fund, to be created by assessments and to be used solely for the payment of death claims and guaranty fund assessments to the Supreme Lodge. Such assessments were paid for several years, but in 1911 the Grand Lodge severed its connection with the Supreme Lodge, not having paid the guaranty assessment for some years previously. Its officers had, however, during such time transferred from its beneficiary fund to a newly created emergency fund the sum of about $96,000, which had been invested and was still on hand. *Held* that, under its constitution, the beneficiary fund was charged with the payment pro rata of death claims and guaranty or fraternal aid fund claims; that the Supreme Lodge was entitled to an accounting with respect to such fund and, all death claims having been paid, to impress a trust on the $96,000 and its increase and any other sums which had been diverted therefrom, in favor of its guaranty and fraternal aid fund claims.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1838; Dec. Dig. § 697.*]

Appeal from the District Court of the United States for the District of Minnesota; Charles A. Willard, Judge.

Suit in equity by the Supreme Lodge, Ancient Order of United Workmen, against the Grand Lodge, Ancient Order of United Workmen of the State of Minnesota, and others. Decree for defendants, and complainant appeals. Reversed.

George W. Winstead, of St. Louis, Mo., and Edmund S. Durment, of St. Paul, Minn. (Fred C. Wetmore, of Grand Rapids, Mich., and Albert R. Moore and Wm. H. Oppenheimer, both of St. Paul, Minn., on the brief), for appellant.

F. A. Duxbury, of Caledonia, Minn., and W. B. Anderson, of Minneapolis, Minn. (M. C. Tifft, of Minneapolis, Minn., on the brief), for appellees.

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

CARLAND, Circuit Judge. Supreme Lodge, Ancient Order of United Workmen, hereafter called Supreme Lodge, brought this action

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

against the Grand Lodge, Ancient Order of United Workmen of the State of Minnesota, hereafter called Grand Lodge, for an accounting as to all moneys collected and received by the latter for the use and benefit of the former with reference to a guaranty and fraternal aid fund, and a per capita tax, and judgment for the amount found to be due. The Grand Lodge denied liability, and on final hearing the bill was dismissed for the reason that it did not appear that the Grand Lodge had established any such funds or collected any money for said funds to which the Supreme Lodge had any claim. The facts which condition the liability of the Grand Lodge to the Supreme Lodge are as follows:

The Supreme Lodge is a fraternal beneficial society, incorporated under the laws of Texas. The Grand Lodge is a fraternal beneficial society, incorporated under the laws of Minnesota. Prior to January 24, 1877, the Supreme Lodge caused to be organized subordinate lodges, having more than 2,000 members, in the State of Minnesota, and on or about March 15, 1878, the Supreme Lodge, in accordance with its constitution, laws, rules, and regulations, set apart the Grand Lodge as a separate beneficiary jurisdiction. The Grand Lodge continued as a separate beneficiary jurisdiction and carried on its business as a voluntary unincorporated beneficiary association until the year 1902, when it was incorporated under the laws of Minnesota. Since said time, when the Grand Lodge was so set apart as a separate beneficiary jurisdiction, the Supreme Lodge has also conducted a beneficiary jurisdiction distinct and separate from the beneficiary business of the Grand Lodge.

Since the Grand Lodge was set apart as a separate beneficiary jurisdiction, it has organized within the state of Minnesota more than 260 subordinate lodges with a membership of over 20,000, and during such time no subordinate lodge has been organized within the state of Minnesota except those organized by the Grand Lodge. During all of said time the Grand Lodge has, in accordance with its constitution and laws and articles of incorporation, determined the necessity for and number of beneficiary assessments to be levied upon the members within the jurisdiction of the Grand Lodge, and the amount of money required for the payment of claims against the beneficiary fund of said lodge, the form and sufficiency of proofs of death of members of said lodge, allowance and payment of claims against the beneficiary fund and against the general fund of said lodge, the necessity for and the amount of money to be expended in promoting the interest of the Grand Lodge and extending its membership in the state of Minnesota, and in general has conducted its business affairs as seemed best to the Grand Lodge and its officers.

The Grand Lodge since its organization has sent representatives to and has been represented in each session of the Supreme Lodge, as provided in the constitution and laws of the Supreme Lodge and Grand Lodge, until and including the session of said Supreme Lodge held in December, 1910.

At the session of said Grand Lodge held in February, 1911, it adopted a resolution that it should at once sever all connection with said Supreme Lodge and directed its committee on laws to prepare and

submit amendments to its Grand Lodge constitution and its certificate of incorporation to carry the resolution into full force and effect. Pursuant to the resolution such amendments were submitted and adopted.

The articles of incorporation of the Grand Lodge contain the following certificate:

"This is to certify, that, pursuant to the provisions of chapter 2 of the General Laws of the state of Minnesota, for A. D. 1901, the Grand Lodge of the Ancient Order of United Workmen of the State of Minnesota, heretofore instituted and authorized in the state of Minnesota under the authority of the Supreme Lodge of the Ancient Order of United Workmen, and now located in said state, desiring to become a body corporate, and having so determined by a two-thirds vote of all its members present and voting thereon at a regular meeting of the same convened and in session at the city of St. Paul, in said state, on the 18th, 19th, 20th and 21st days of February, A. D. 1902, and having by the same vote at the same meeting adopted and caused to be prepared this certificate, to that end doth further certify:

"First. The name under which this body was instituted and chartered by the Supreme Lodge of the Ancient Order of United Workmen, which shall also be its corporate name as provided by said act, was 'the Grand Lodge of the Ancient Order of United Workmen of the State of Minnesota.'

"Second. The date this body was instituted was the 24th day of January, A. D. 1877, and the date of the charter issued to it is the 30th day of June, A. D. 1882."

Also the following language:

"All the powers of this body, pertaining to the welfare of said Ancient Order of United Workmen, that are enumerated herein, are subject to the supervisory control of said Supreme Lodge of the Ancient Order of United Workmen when in session, and of the executive officers thereof when the same is not in session."

The constitution of the Grand Lodge contains the following sections:

"Sec. 3. Its governing bodies are: (1) The 'Supreme Lodge of the Ancient Order of United Workmen,' which is a corporation duly created, organized and existing under and pursuant to the laws of the state of Texas, and which has general supervision and jurisdiction over the whole order, with such powers over the whole order, including this body, as may be from time to time set forth in its corporate charter, its constitution and general laws, and conformable to the law of the land. (2) Grand Lodges, of which this body is one, and which owe their existence to, and receive their power and authority as a part of said order, from charters severally issued to them by the Supreme Lodge of the Ancient Order of United Workmen aforesaid, and which Grand Lodges have supervision and control over the said order within certain territorial limits prescribed by the said Supreme Lodge of the Ancient Order of United Workmen, as may be from time to time set forth in the corporate charter, and the constitution and general laws of the said Supreme Lodge of the Ancient Order of United Workmen, and conformable to the law of the land."

"Sec. 6. Powers of This Grand Lodge. All the powers of this Grand Lodge pertaining to the welfare of said order, that are enumerated in this section, are subject to the supervisory control of said Supreme Lodge of the Ancient Order of United Workmen when in session, and of the executive officers thereof when the same is not in session."

In 1880 the Supreme Lodge, in order to protect each beneficiary jurisdiction of the order from exigencies which might arise, increasing its death rate to an extent which would make assessments for a time

oppressive upon its membership, established a fund known as the relief fund. In 1900 the law of the Supreme Lodge, establishing a relief fund, was amended and the name of the fund changed to guaranty fund. In 1903 the so-called relief law and guaranty fund was again amended by the Supreme Lodge. This amendment, so far as material, reads as follows:

"1. How Raised. Commencing with October 1st, 1903, there shall be raised the amount of one guaranty fund assessment with each beneficiary fund assessment (or a sum equal thereto in any other manner) upon each and every member of the Supreme Lodge beneficiary jurisdiction and all other jurisdictions, as per the following schedule of rates."

In 1906 the relief and guaranty fund law was again amended. This amendment, so far as material, reads as follows:

"In order to extend relief to the Supreme Lodge beneficiary jurisdiction and the Grand Lodge separate beneficiary jurisdiction for all claims arising under the provisions of the law relating to the guaranty fund enacted at the thirty-first stated meeting of the Supreme Lodge, up to and including September 30, 1906, a fraternal aid fund shall be raised, managed and disbursed as provided in these laws:

"1. How Raised. There shall be raised an amount equal to the sum of fifteen cents for each member of the order each and every month, commencing with the month of July, 1906. The amount so raised shall be due and payable to the Supreme Lodge by members of the Supreme Lodge beneficiary jurisdiction and by the Grand Lodge separate beneficiary jurisdictions on the first day of July, 1906, and on the first day of each succeeding month unless the same shall be a Sunday, in which case it shall be due and payable on the second day of the month, and must be paid on or before the last day of the month."

The law of the Supreme Lodge in regard to a per capita tax was as follows:

"Per Capita Tax. The assessments for revenue upon the Grand Lodges, to enable the Supreme Lodge to properly transact its business and to provide for the general welfare of the order, shall be the sum equal to twelve and one-half (12½) cents on each workman degree member in good standing under the jurisdiction of said Grand Lodges on June 30th, and a sum equal to twelve and one-half (12½) cents on each workman degree member in good standing under the jurisdiction of said Grand Lodges on December 31st of each year, and the same shall become due and payable on or before August first and March first of each year respectively."

Section 63 of the constitution of the Grand Lodge provided as follows:

"Revenue. Beneficiary Fund. There shall be a fund of this Grand Lodge known as its 'beneficiary fund.' All money in the beneficiary fund of this Grand Lodge when this section takes effect and is in force, together with such money as may thereafter be paid into the same for beneficiary assessments or arrearages upon reinstatement under the provisions of this constitution, shall constitute said beneficiary fund. And the beneficiary fund shall never be used for any other purpose than the payment of beneficiary certificates, for the payment of which this Grand Lodge is now, or hereafter shall become, liable, and the payment of guaranty fund assessments due and unpaid or that become unpaid or that become due by this Grand Lodge after this section takes effect, to the Supreme Lodge of the Ancient Order of United Workmen under its laws."

Sections 90, 91, and 96 of the constitution of the Grand Lodge provided as follows:

90. "Beneficiary Assessments. Whenever the committee on finance of this Grand Lodge, and the grand recorder thereof, are satisfied that the condition of the beneficiary fund of this Grand Lodge is such that all claims accrued or pending, that are subject to payment therefrom, cannot be promptly paid by this Grand Lodge, without the collection of one or more beneficiary assessments, the said committee and grand recorder shall levy upon all the members of said order who are subject to the jurisdiction and control of this Grand Lodge, one or more assessments as they may deem necessary for said beneficiary fund. (In the Constitution of 1908, this section 90 was renumbered 88.)"

91. "How Levied. To levy an assessment or assessments as provided for by section 90 of this constitution, it shall only be necessary for the committee on finance of this Grand Lodge and the grand recorder thereof to cause to be published in the official newspaper of this Grand Lodge, on or before the 8th day of any calendar month, a notice in substantially the following form, and bearing date the first day of such month, whereupon the levy of such assessment or assessments shall be deemed to have been made as of the first day of such month. The form of such notice shall be substantially as follows, that is to say:

"Notice of Assessment No. ..... (insert proper number or numbers), of 19.. (insert proper year).

"The Grand Lodge of the Ancient Order of United Workmen of the State of Minnesota: To All Members, Greeting:

"St. Paul, Minnesota, ... (Insert Month) 1st, 19.. (Insert Year).

"Whereas, the committee on finance and the grand recorder of the Grand Lodge aforesaid are satisfied that the condition of the beneficiary fund of this Grand Lodge is such that all claims accrued or pending, that are subject to payment therefrom cannot be promptly paid by this Grand Lodge without the collection of (here insert number of assessments required) beneficiary assessment .....

"Now, therefore, you are hereby notified that beneficiary assessment ..... No....., for the year 19.., has (or have) been duly levied upon all members who are subject to the jurisdiction and control of the said Grand Lodge, and that the same must be paid to the proper officer on or before the last day of this month.

"Yours in C. H. & P.,

"(To be signed) .....

"[Grand Lodge Seal] Committee on Finance.

"Grand Recorder."

96. "Payment to Supreme Lodge Guaranty Fund. The amounts due from time to time from this Grand Lodge to the Supreme Lodge of the Ancient Order of United Workmen under the laws of the latter for its guaranty fund shall, as such amounts come due, be paid from the beneficiary fund of this Grand Lodge."

In 1907 the Grand Lodge amended section 96 as follows:

"Amend section 96 of chapter xi of the Constitution by striking out wherever they appear the words 'guaranty fund' and insert in lieu thereof at each place the words 'fraternal aid fund,' so that when amended said section 96 will read as follows:

"Sec. 96. Payment to Supreme Lodge Fraternal Aid Fund. The amounts due from time to time from this Grand Lodge to the Supreme Lodge of the Ancient Order of United Workmen under the laws of the latter for its fraternal aid fund shall, as such amounts come due, be paid from the beneficiary fund of this Grand Lodge."

The following appears in the record as a stipulation of fact:

"Upon the books of the defendant Grand Lodge there is charged against the beneficiary fund in August, 1909, $93,483.93 and in September, 1909, $2,-

531.24. Prior to February, 1908, the constitution and laws of the defendant Grand Lodge did not provide for any emergency fund. At its session in February, 1908, a change in the rate of assessments for the beneficiary fund was provided for and it was then provided that each member subject to the jurisdiction and control of the Grand Lodge and holder of a beneficiary certificate upon which the Grand Lodge is liable should, commencing on July 1, A. D. 1908, pay the new rate of assessments. In the same section it was also provided: 'It shall be the duty of the committee on finance of this Grand Lodge and of the grand recorder thereof, in addition to levying a sufficient number of assessments each year for the purposes of the beneficiary fund, as provided in section 88 of this constitution, to levy one such assessment each year for an emergency fund.' Section 88 referred to is section 90, Editions of Constitution and Laws published prior to 1908.

"On the 28th day of July, 1909, or shortly before, it came to the attention of the finance committee that there did not appear upon the books of the defendant Grand Lodge any account under the head 'Emergency Fund.' Thereupon, and on July 28, 1909, the finance committee passed a resolution as follows: 'Pursuant to the provisions of section 92 of the constitution of the Grand Lodge of the Ancient Order of United Workmen of the State of Minnesota (amended 1908), providing for an emergency fund of one assessment each year, it is hereby ordered that the proceeds of assessment No. 3, levied May 1st, 1909, amounting to $93,483.93, be and the same is hereby transferred from the beneficiary fund to the emergency fund of the Grand Lodge. It is further ordered that all moneys received on account of reinstatements of members suspended for the nonpayment of assessment No. 3 for the year 1909, be transferred from the beneficiary fund to the emergency fund of the Grand Lodge.' Pursuant to that resolution an account was opened upon the books of the Grand Lodge under the head 'Emergency Fund' and these two items of $93,483.93, and $2,531.24, above mentioned transferred from the account shown on the books as beneficiary fund to this new account headed emergency fund. Commencing with the July, 1908, assessment, and prior to the levy of the May, 1909, assessment, there had been levied five assessments for the beneficiary fund."

"The said two items, which aggregated $96,015.17, were invested by the Grand Lodge in United States Bonds in September, 1909, pursuant to a resolution of the finance committee adopted September 9, 1909, as follows: 'Resolved that the grand recorder be authorized to draw a warrant against the surplus or emergency fund in favor of the Capital National Bank for ninety-six thousand, fifteen and $^{17}/_{100}$ dollars ($96,015.17) in payment of the bonds, United States government, four per cent. 1925, registered bonds, purchased by the loan committee."

Sections 114 and 61 of the constitution of the Grand Lodge read as follows:

"Sec. 114. Claims on General Fund. All expenses incurred in the management of this Grand Lodge, and the per capita tax due from time to time from this Grand Lodge to the Supreme Lodge of the Ancient Order of United Workmen under the laws of the latter shall, as the same become due, be paid from the general fund of this Grand Lodge upon warrants drawn and signed by the grand recorder, and also signed by the grand master workman."

"Sec. 61. Revenue General Fund. All money received by this Grand Lodge from all sources except that paid for beneficiary assessments or upon reinstatement, and all money in the general fund of this Grand Lodge when this section takes effect, shall be covered into a fund known as the 'General Fund.'"

Upon the face of this record we do not think it can be truthfully said that there was no guaranty or fraternal aid fund. It is true that there was no money assessed and collected under the name of a guaranty or fraternal aid fund, but this does not determine the liability of the Grand Lodge. The law of the Grand Lodge provided that the claims of the Supreme Lodge for guaranty fund or fraternal aid fund

should be paid from the beneficiary fund, so that every assessment that was made, and every dollar that was collected pursuant to the assessment for the beneficiary fund, though nominally for the beneficiary fund, was also assessed and collected to pay guaranty fund or fraternal aid claims. In other words, the beneficiary fund was charged by the law of the Grand Lodge with the payment of death claims and guaranty fund or fraternal aid claims. This law made the beneficiary fund in fact a guaranty fund or fraternal aid fund.

It charged a trust upon all moneys coming into the beneficiary fund for the payment of the guaranty and fraternal aid claims, and, in the event there was not a sufficient amount collected and covered into the beneficiary fund to pay the death claims and the claims against the fraternal aid and guaranty fund in full, the money should have been paid out proportionately. The proportion of payment being the same proportion which the total amount of valid claims against the guaranty or fraternal aid fund bore to the total amount of death claims.

In violation of this trust the officers of the Grand Lodge paid out substantially all the money in the beneficiary fund for death claims and refused to pay any claims against the guaranty or fraternal aid fund, after having paid these claims for years out of the beneficiary fund. Not only this, but the record shows that the officers of the Grand Lodge established an emergency fund by providing that one beneficial assessment should be levied each year for this fund. But, instead of levying the assessment, they took arbitrarily out of the beneficiary fund $96,015.17 and placed it in the emergency fund and invested the same in government 4 per cent. registered bonds. This amount, when thus arbitrarily taken out of the beneficiary fund, was charged with the payment of death claims and guaranty or fraternal aid claims, and said amount with its increase must be returned to the beneficiary fund and there subjected to the payment of valid claims of the Supreme Lodge against the guaranty or fraternal aid fund in the following manner: Since all death claims have been paid in full, the $96,015.17 and its increase must first be applied to the payment of the valid claims of the Supreme Lodge for guaranty fund or fraternal aid fund. If the amount of this $96,015.17 and its increase is sufficient to pay such claims in full, then the decree should be for the payment of the amount of these claims, and no farther accounting regarding the beneficiary fund will be necessary. If the amount so derived is insufficient to pay these claims in full, then the Supreme Lodge should recover in addition to an amount equal to the $96,015.17 and its income the amount which, after crediting the Grand Lodge with the payment of this $96,015.17 and its increase on its valid claims, will appear from an accounting to have been diverted from the beneficiary fund of the period between January 1, 1904, to February 28, 1911, and applied to the payment of death claims, when, taking into consideration the proportion of the amount of the death claims to the amount of the valid claims of the Supreme Lodge, it should have been applied to the payment of the valid claims of the latter.

In regard to the per capita tax, the record shows that this tax was not to be collected by the Grand Lodge, but was an indebtedness which the Grand Lodge was liable for and obliged to pay to the Supreme

Lodge at certain times, and under the law of the Grand Lodge was chargeable to the general fund.

This is an action for an accounting, and this court cannot enter into that, but in the accounting before the master the per capita tax can be considered, and the amount due the Supreme Lodge, if any, may be ascertained as a part of the accounting in regard to the guaranty or fraternal aid fund.

We have considered all objections to the right of the Supreme Lodge to recover, but all objections that we have not discussed bear upon the question of the amount of the recovery, and that question cannot be determined until an accounting is had.

The judgment of the trial court is reversed, and the cause remanded, with instructions to refer the cause to a master for the purpose of making an accounting under the principles of law, hereinbefore stated, and report the same to the court to be proceeded with as law and justice may require.

HALE & WARD v. COOK.

(Circuit Court of Appeals, Sixth Circuit. April 14, 1914.)

No. 2403.

FRAUD (§ 65*)—ACTION FOR DECEIT—INSTRUCTIONS.

Defendants sold and conveyed to plaintiff all the standing ash timber of certain dimensions on certain quarters of sections 33 and 34 of a described township in Fulton county, Ky., "and the fractional sections south of sections 32, 33 and 34." The tracts described, other than the fractional ones, were bounded on the south by what is known as the "Henderson line," run by Henderson in making the original survey of the lands in 1820, and supposed by him to be the state line between Kentucky and Tennessee. The true state line, however, as afterward established, was at this point some distance further south than the Henderson line, leaving land between them which was never sectionalized. There were no fractional sections at this place within the survey. The conveyance further provided that defendants would, as soon as practicable, have the state line, which was not marked opposite the lands, surveyed. *Held*, in an action by plaintiff to recover damages for misrepresentation as to the quantity of ash timber on the lands, that the words "fractional sections" in the conveyance evidently meant and were intended to include the unsurveyed strip between the Henderson and state lines, and that an instruction which limited the jury to a consideration of the timber on the surveyed lands was erroneous.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 72–74; Dec. Dig. § 65.*]

In Error to the District Court of the United States for the Western District of Kentucky; Walter Evans, Judge.

Action at law by A. D. Cook against Hale & Ward. Judgment for plaintiff, and defendants bring error. Reversed.

For opinion below, see 210 Fed. 340.

W. M. Smith, of Louisville, Ky., W. J. Webb, of Mayfield, Ky., and F. S. Moore, of Hickman, Ky., for plaintiffs in error.

Wheeler & Hughes, of Paducah, Ky., for defendant in error.

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

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

COCHRAN, District Judge. The judgment which this writ of error has brought before us was for the plaintiff. The action was one of deceit, and it was tried to a jury.

On June 29, 1911, Hale & Ward conveyed to Cook "all of the ash timber twelve inches and up at the stump on the following described land in Fulton County, Ky., viz.: The southwest quarter of section 34, T. 1, R. 6 west, and being bounded on the north and west and south by the lands of Hale & Ward and on the east by B. H. Hale's land; also northwest quarter of section 34, the northeast, southeast and southwest of section 33 and the fractional sections south of sections 32, 33 and 34, all in T. 1, R. 6 W., containing about twelve hundred acres, more or less, except 1¼ acres heretofore conveyed as right of way to C. M. & G. R. R. Co." According to this, the land on which the timber conveyed stood consisted of the five quarter sections designated and of the fractional sections south of sections 32, 33, and 34. The first of the quarter sections designated had been conveyed to Hale & Ward by one Williams, and the rest of the land had been so conveyed by R. T. Tyler. Seemingly the latter contained about 1,200 acres, more or less, so that the whole contained about 1,360 acres, more or less. The consideration for the conveyance was $8,000 cash then paid. Cook was given the right for five years after January 1, 1912, with the extension of two years longer, on the payment of $500 additional, to remove the timber. Hale & Ward, on June 26th and 27th previous, had exhibited to Cook, through his agent, the timber they were proposing to sell him.

The misrepresentation complained of was as to the quantity and quality of the ash timber conveyed. It was that the ash timber conveyed was the timber theretofore exhibited, and that there was of it 2,000,000 feet that was merchantable. It was not controverted that it had been represented that the timber conveyed was the timber theretofore exhibited. The position was simply that the representation was not untrue. It was controverted that it had been represented that there was on the land 2,000,000 feet of such timber that was merchantable, and possibly also that such a representation would have been untrue. The questions so raised and that as to the amount of recovery were the sole questions in the case. The verdict and judgment was for $8,000, the exact amount which had been paid.

Of the errors assigned the only one urged in argument is a portion of the charge to the jury on the subject of the amount of recovery, which is the only part of the charge excepted to, and we will limit what we have to say thereto. The jury had been told that the measure of damages was "the difference between $8,000 paid by the plaintiff and the value of the ash timber on the land described in the contract, of the dimensions and character provided for therein, estimated proportionately; that is to say, as $8,000 is to the value of the ash timber of that description now actually on the land described in that contract and that which may be there by January 1, 1917." They were then charged as follows, to wit:

"And the court in this connection particularly charges you that, in estimating the ash timber for this purpose, you should only estimate what is now on or by January 1, 1917, may be on the sections and quarter or other frac-

tional sections mentioned in the contract. Timber upon any other land was not sold to plaintiff or conveyed to him. In this connection, and, in making your estimates, should you find for the plaintiff on the other issues, then you should remember the uncontradicted testimony that only the land north of what was called in the testimony the Henderson line was ever sectionized. In ascertaining plaintiff's damages, should you find for him, you should not take into consideration any timber on land not embraced in the sections and quarter or other fractional sections mentioned in the contract, for only that timber was conveyed to the plaintiff, and only that timber became his property. Ash timber not on the sections and fractional sections described in the contract should not be embraced in your estimate, even should it be in Fulton county, Ky., south of the sections and fractional sections referred to."

It is this portion of the charge which was excepted to and that has been assigned as error. We are constrained to hold that the assignment is well taken. To make this plain necessitates that we make a statement of facts in addition to those already set forth, going considerably into detail, and that we make certain ultimate deductions therefrom. In so doing we will state such facts only as are unquestionable, appearing either from the evidence or from public documents of which we take judicial notice.

Fulton county, in which the land on which the timber conveyed stands, is the most southwest of the counties of Kentucky. It binds on the Mississippi river and the state of Tennessee. The county of that state on which it binds is Obion. Within it is situated Reelfoot Lake, of some notoriety. Arms thereof extend north across the state line into Fulton county. The eastern arm is known as Green timber or Grassy, and the western one as Eastage. Between the two are three smaller ones. The line between the two states, referred to in an early act of the Legislature of Kentucky as the "chartered line of Kentucky," was the parallel 36° 30′ of north latitude, a due east and west line. Article 1, ch. 12, of Kentucky Statutes (4th or 1909 Ed.), the third or 1903 edition of which was adopted by an act of the Legislature approved February 29, 1904, gives an historical sketch of the manner in which the boundary of Kentucky was formed and finally fixed. It contains this as to the line between the states of Kentucky and Tennessee:

"The line which divided Virginia and North Carolina was the southern boundary of the state of Kentucky. Virginia and North Carolina, prior to the creation of the states of Kentucky and Tennessee, appointed commissioners, Messrs. Walker and Henderson, to run and mark the line on the parallel of latitude 36° 30′. From a point on the top of the Cumberland Mountains, now the southeastern corner of the state of Kentucky, the commissioners, jointly, did not run the line west. One of the commissioners (Mr. Walker) run and marked the line to a point on the Tennessee river. This line, called Walker's line, was regarded for many years as the dividing line between the states of Kentucky and Tennessee. It was ascertained, however, that the line, as run and marked by Walker, was north of latitude 36° 30′. After the Indian title to the land west of the Tennessee river was extinguished by the treaty of 1819, the Legislature of Kentucky appointed Robert Alexander and Luke Munsell to ascertain the true point of latitude 36° 30′ on the Mississippi river and to run and mark a line east upon that parallel. This was done so far east as the Tennessee river. The two states subsequently appointed commissioners, vested with full powers, to settle and adjust all matters concerning the boundary between them. The commissioners entered into an agreement, which was subsequently ratified by the Legislatures of the two states, and the line

therein described has been ever since the southern boundary of the state of Kentucky."

The ratification by the Legislature of Kentucky of the agreement referred to was by an act of February 11, 1820, which is incorporated in article 3 of that chapter. We are here concerned with only so much of the state line as is west of the Tennessee river. By the agreement the line was to run with Walker's line to the Tennessee river and "thence with and up said river (i. e., south) to the point where the line of Alexander and Munsell, run by them in the last year (i. e., 1819), under the authority of an act of the Legislature of Kentucky, entitled 'An act to run the boundary line between this state and the state of Tennessee, west of the Tennessee river,' approved February 8, 1819, would cross said river and thence with the said line of Alexander and Munsell to the termination thereof on the Mississippi river below New Madrid."

By this article 3, after reciting the act of February 11, 1820, it is declared what the southern boundary of the state is, and, as to that portion thereof west of the Tennessee river, the declaration is that it runs "thence with the line run by Alexander and Munsell on the parallel of latitude 36° 30′ to the middle of the channel of the Mississippi river opposite the point on the Mississippi below New Madrid, fixed, marked and ascertained by them as the point of intersection of said parallel of latitude and said river."

This historical sketch and this declaration in this form first made their appearance in the Revised Statutes of Kentucky adopted in 1851 and 1852. They were carried thence into the General Statutes of Kentucky adopted in 1873. The act of February 11, 1820, was then for the first time incorporated therewith, and the matter as thus presented was carried into the Kentucky Statutes now in force.

The sketch is both incorrect and incomplete. Alexander and Munsell did not run and mark the entire line from the Tennessee river to the Mississippi. Nor, in so far as they ran and marked it, did they proceed from the Mississippi river and run east. That this is so will appear later. The sketch was complete when first made (i. e., at the adoption of the Revised Statutes in 1851 and 1852), but not so when carried into the General Statutes, adopted in 1873. In the meantime, in the late '50's, the two states took most important action in relation to the line between them. An act of the Legislature of Kentucky, entitled "An act for running the state line between Kentucky and Tennessee," was approved February 17, 1858. Session Acts 1857–58, vol. 1, p. 82. By that act provision was made for the appointment of two commissioners to act in conjunction with such as might be appointed by the state of Tennessee "to run and re-mark the line between the states of Tennessee and Kentucky, beginning on the east bank of the Mississippi river, running thence to the eastern boundary of the state of Kentucky, putting up a large stone every five miles, provided when rock or stone cannot be conveniently had, posts of some durable wood be substituted." The commissioners were to report to the Governor what they did in the premises, and he was to communicate their report to the succeeding Legislature of the state. With their report they were to submit "a plat of their survey showing the relative positions of for-

mer lines to the line of survey made by them and such other information as may be necessary." Pursuant thereto and to like legislation on the part of Tennessee, the entire line was run and re-marked in the year 1859, and the report of the joint commissioners submitted to the Governor of Kentucky was communicated by him to the Legislature of 1859–60. This report with accompanying plat is to be found in a book entitled "Documents 1859–60," containing legislative documents of that year. And by an act of the Legislature of Kentucky entitled "An act relating to the dividing line between the states of Kentucky and Tennessee and allowing compensation to the persons engaged in running the same," approved February 28, 1860 (Session Acts, 1859–60, vol. 1, p. 71), it was enacted that "the boundary line recently run and made between the states of Kentucky and Tennessee by commissioners respectively appointed by said states be, and the same is hereby approved, adopted and recognized as the true boundary line, between said states"; and provision was made for the deposit of two printed copies of the report of the commissioners and a lithograph map of the survey in the clerk's office of each county in the state on the state line of Kentucky and Tennessee. A like report was made to Tennessee, and approved by its Legislature, and the line as thus run and marked is set forth in full in Shannon's Annotated Code of Tennessee, published in 1896, p. 125 et seq.

No notice of this action is taken in the General Statutes of Kentucky or the Kentucky Statutes, except that Judge Carroll, editor of Kentucky Statutes, in a note to article 3 of chapter 12 thereof, after directing attention to the legislation, says:

"For reasons unknown to me, the boundary as run by these commissioners was omitted from the General Statutes, and I have not deemed it necessary to insert it in this statute, nor do I know to what extent, if any, it varies from the boundary here inserted, which is the boundary found in the edition of the General Statutes adopted as the law of the state in 1873."

The true explanation of its omission from the General Statutes would seem to be that it was simply overlooked. The relation of this boundary to the earlier boundary run by Alexander and Munsell is to be gathered from the report of the commissioners who made it. But, before noting what they say in regard thereto, attention should be directed to another matter in connection with the portion of Kentucky west of the Tennessee river. The portion of the state east of that river has never been laid off into townships and sections. Provision for so laying off that portion thereof west of the Tennessee river was made by an act of the Legislature, entitled "An act to provide for laying off the lands west of the Tennessee river into townships and sections," approved February 14, 1820. 2 M. & B. p. 1040. It called for the appointment of a superintendent to do the surveying, and provided that first the land should be divided into townships six miles square "by north and south lines running according to the true meridian, and by others crossing them at right angles," except "where the course of navigable rivers" might "render it impracticable," and in such case the rule should "be departed from no farther than such particular circumstance" might "require," and that then each township "should be divided into sections containing, as nearly as may be, 640 acres each,

by running through the same 5 lines parallel to the east boundary lines of the township beginning at the distance of one mile from each other," which with 5 lines run through it parallel to the south boundary lines, so beginning, contemplated by the act, but not expressly called for, would make 36 sections to the township. Provision was made for numbering and marking the townships and sections and also for marking quarter sections. William T. Henderson was appointed superintendent under this act, and he completed the work in 1821. By an act approved December 19, 1820, he was given the exclusive right for 10 years to publish and sell a map of his work.

We return now to note the relation of the line run in 1859 to that run in 1819, and we will confine ourselves to the portion thereof west of the Tennessee river. It is from the report of the commissioners who ran and marked the line in 1859 that we gather that the historical sketch hereinbefore referred to is incorrect in the particulars stated and just what Alexander and Munsell did in 1819. These commissioners state that they (i. e., Alexander and Munsell) ran west from the Tennessee river. They "intended and believed" the line which they ran therefrom to be "on the parallel of 36° 30′ north latitude." But they missed it. The point which they took to be in that latitude at the river was in fact upon the parallel of 36° 29′ 54″; i. e., "too far south by 600 feet." They started their surveyors therefrom westward and themselves floated down the Tennessee, Ohio, and Mississippi rivers to a point something over two miles above the head of island No. 10 in the Mississippi, which they determined to be in the right latitude, there to await the coming of the surveyors. They in their westward course "tended northward," and that so much so that when they reached the Green timber arm (i. e., the eastern arm of Reelfoot Lake, a distance of some 68 miles) they were north of their starting point about 3,600 feet and of the latitudinal line about 3,000 feet. As to what they did when they reached this point the commissioners have this to say:

"They concluded that these arms of the lake, swamps, ponds, and bayous were impassable—and no wonder. Nothing like them are to be seen in either state, unless it be southwardly; the country was sparsely populated; the Indian title to the lands but recently extinguished by the treaty of Jackson and Shelby, and they about being brought into the market. None but old pioneers, or those who always march in advance of civilization, knew anything about it. They went around all these apparent obstructions to the Mississippi river, where the state line going west first crosses it, and here they met the commissioners."

The point on the east bank of the Mississippi river which was determined to be in the proper latitudinal line was correct. The commissioners say that it "coincided with ours very nearly." Owing to the Mississippi river at this point being somewhat in the shape of the letter "S" reversed, looking west, a portion of Fulton county (i. e., the portion in what is known as the Madrid bend) is west of a portion of the state of Missouri, which thus intervenes between the two portions of Fulton county, and there are two east banks of the Mississippi river therein. The point at which the commissioners awaited the surveyors and the surveyors met them and was determined to be the proper latitudinal line was the near east bank of the river. From this point "the

surveyors were started back with the view of striking the lake on its western shore opposite to the point where they had been stopped by it on the other; but after running 274 poles, encountering a pond and heavy canebrake, they again stopped short of the western shore of the lake near three miles and short of where they had stopped on the other over five." This portion of the line they ran practically on the latitudinal line. From the end of this 274 poles they ran no further eastward. It follows that Alexander and Munsell, in running the line in 1819, did not run so much thereof as intervened between the point on the east side of the Green timber or eastern arm of the lake where the surveyors stopped in their westward course, and the point 274 poles from the near east bank of the Mississippi river, and near three miles short of the western shore of the lake. The 1859 commissioners thus express themselves as to this:

"They neither run or marked this portion of the line, but left it as they found it—untouched—not supposing, as we are willing to believe, that they were more than half a mile south of their stopping place on the other side."

The portion of the line which was not run is the portion thereof which crosses the arms of Reelfoot Lake, hereinbefore referred to.

The surveyors in 1819 not only tended northward in their westward course from the Tennessee river to the Green timber or eastern arm of the lake, but made "angles almost continually, though small ones."

"To run any half mile of their whole line, and then produce it each way for half a mile, neither of the last would have followed the course of the first in more than one or two instances."

The 1859 commissioners in their report cover also what Henderson did as to the state line in 1821, when engaged in laying off the land into townships and sections. They state that he "run the same line (i. e., as Alexander and Munsell) from the Tennessee river to the Green timber arm of Reelfoot Lake, and then produced it to the Mississippi river on the parallel of 36° 30′ 32″ of north latitude, or 3,200 feet or thereabouts north of the true point. This he made his base line in sectionizing the lands south and west of the Tennessee river."

This disposes of the work of Alexander and Munsell and of Henderson, as disclosed by this report. What, then, according thereto, did those commissioners do? They simply accepted the work of Alexander and Munsell, so far as it went, except that they "endeavored to straighten" the line from the Tennessee river to the Green timber or eastern arm of the lake "somewhat by making points at each quarter section corner (that is, every half mile nearly) and connecting these points by direct lines." This left the eastern end of the 274-pole line west of Reelfoot Lake still "more than half a mile south" of the western end of the 68-mile line east of the lake. Beyond thus correcting the latter and marking both, the commissioners did no more than to connect the ends of the two lines run in 1819 by a straight line, the course of which going east was N. 83° 40′ 19″ E. They say as to this that they "run the line across Reelfoot Lake, and the swamps, ponds, and bayous adjacent thereto, and marked it all the way (a work never performed before); and we were about four weeks engaged in it."

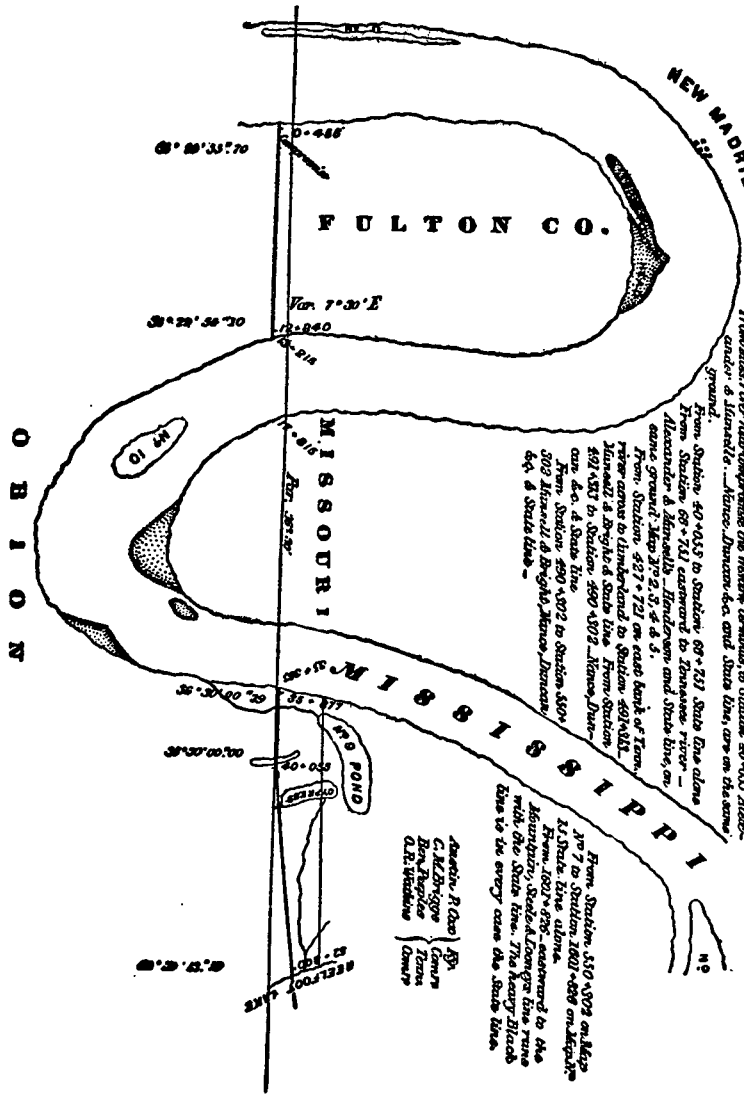
The statute, as herebefore noted, required the commissioners to place stone posts every five miles. As they ran eastward from the Missis-

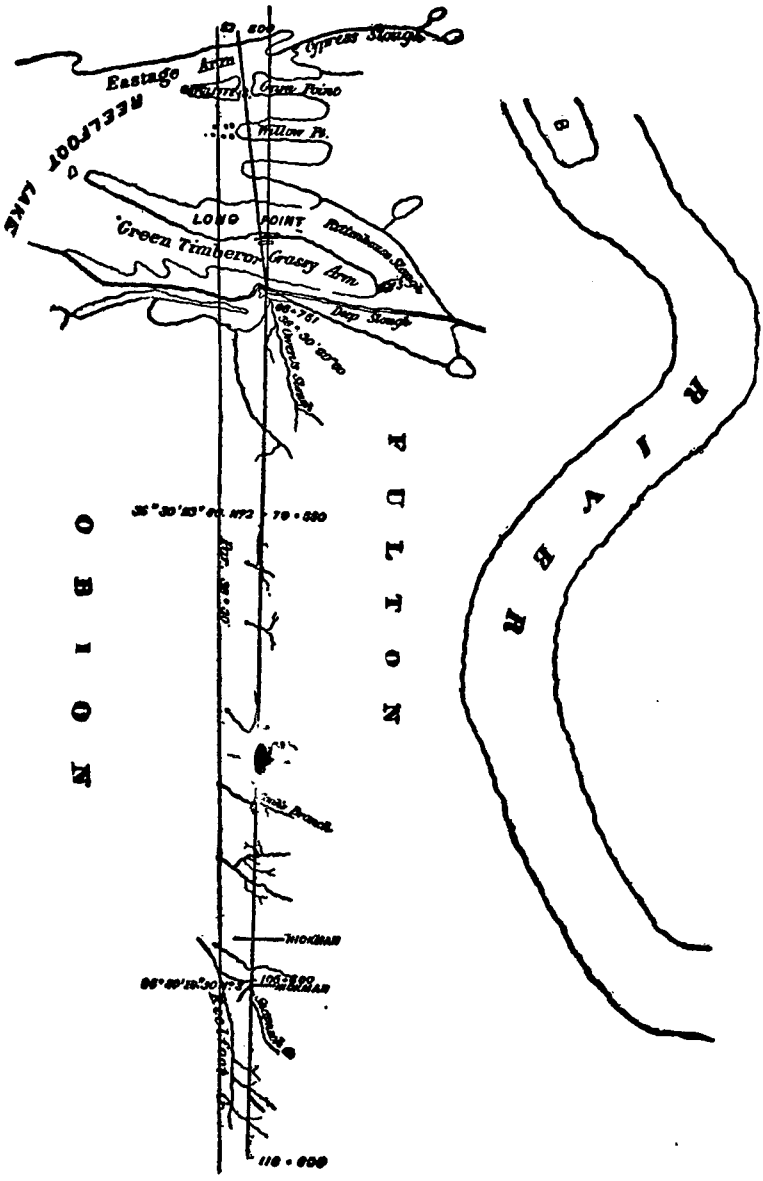
sippi, the stones which they placed were numbered from one up. These stones they had specially prepared for the purpose at Bowling Green. They did not place the first stone at the end of five miles, because by reason of the Madrid Bend of the Mississippi river, hereinbefore referred to, it would be in Missouri, but placed it at a distance of ten miles from the western end of the line or starting point (i. e., the far east bank of the river), and then placed them "every succeeding five miles or nearly so—sometimes falling short, and again going over somewhat in order to get places where persons would have an opportunity of seeing and knowing where the state line was, instead of placing them precisely five miles apart, in out-of-the-way places on mountain tops, in deep ravines, or in cultivated fields, where but few, if any, persons would be likely ever to see them." They had engraved on them on appropriate sides "Ky." and "Tenn.," their number and their distance in miles from the starting point. They also placed a stone at the end of the 274 poles from the near east bank of the Mississippi, engraving upon it the course to the stopping point on the eastern shore of the lake, to wit: "N. 83° 40′ 19″ E."

The No. 1 stone, heretofore referred to, placed ten miles from the western end or starting point of the line, was "put in the ground 319 feet west of the western shore of the Eastage, or western arm of Reelfoot Lake." The No. 2 stone was placed some distance east of the Green timber or eastern arm of the lake, and they placed at the end of the 68-mile line run by Alexander and Munsell in 1819 and re-run and marked by them (i. e., at the point where that line joins the line which they ran across the arms of Reelfoot lake to connect it with the eastern end of the 274-pole line) a mulberry post. We are not concerned with the stones east of No. 2, and hence take no notice of them. The only monuments of which note need be taken are the four already mentioned, to wit: (1) The stone at the end of the 274 pole line, also, referred to as a "set rock"; (2) stone No. 1 at the end of ten miles from the starting point (i. e., far east bank of the Mississippi river) and 319 feet west of the western shore of the Eastage or western arm of Reelfoot Lake; (3) the mulberry post on the eastern shore of Green timber or eastern arm of the lake; and (4) stone No. 2 (east of eastern arm of lake). The stone or set rock at the end of the 274-pole line is referred to in the evidence as Brushy Point Rock; stone No. 1 as Tyler Rock; and stone No. 2 as Puckett Rock. These monuments are now all standing and where the commissioners placed them in 1859. One witness for Cook testified that the Tyler Rock had been moved south a considerable distance from where he had before known it to be, but other testimony is strongly against this and to the effect that it is now where it has always been, and Cook has no interest in questioning this and maintaining the correctness of his witness' testimony. The mulberry post is not now standing, nor does it seem that there is any indication on the ground where it once stood or that any witness recollects ever having seen it. The commissioners in their report gave the courses between the monuments erected by them, but not the distances. These, however, can be obtained from their map. The courses from the near east bank of the Mississippi river to stone No. 2, or Puckett Rock, are as follows, to wit:

"Beginning on the east bank of the Mississippi river at station 35 + 363, in latitude 36° 30′ 00.29″, and running S. 89° 35′ 15″ E., passing a set rock at station 35 + 877, to a second set rock at station 40 + 055 (i. e., Brushy Point Rock at end of 274-pole line), thence N. 83° 40′ 19″ E., passing stone No. 1 (i. e., Tyler Rock) at Station 52 + 800 to station 66 + 751, a mulberry post (now gone); thence S. 88° 35′ 14″ E. to stone No. 2" (i. e., Puckett Rock).

As a further aid to a comprehension of the situation with which we have to do, we here give the first two sheets of the map prepared by the commissioners and accompanying their report. They are as follows, to wit:





Notwithstanding the care and thoroughness with which the commissioners did their work, they made two mistakes in the portion of the line with which we have to do. There is another mistake in the report which they made to the Governor of Kentucky as copied in "Documents 1859–60," but possibly that was a mistake of the printer. Therein the course from the mulberry post to stone No. 2, or Puckett

Rock, is given as S. 83° 35′ E. It should have been S. 88° 35′ 14″ E. It is so given in the Tennessee Code. That this is the correct course rather than the other is shown by the map. It shows that the course of the line from the mulberry post to stone No. 2, or Puckett Rock, is that of the line east of the latter monument, and both of the reports give the courses therefrom as "S. 88° 57′ 40″ E."; "S. 88° 05′ E."; "S. 88° 10′ E.," etc.—which conform substantially to the course from the mulberry post to that monument as given by the Tennessee Code, to wit, S. 88° 35′ 14″ E. The two mistakes which the commissioners made were in relation to the placing of the stone or set rock at the end of the 274-pole line, to wit, Brushy Point Rock, and stone No. 1, or Tyler Rock. They placed the latter where the former should have been placed and the former at the end of 10 miles from the starting point; i. e., far east bank of the river. This is shown by the uncontradicted evidence that "No. 1" is marked on the stone or set rock at the end of the 274-pole line, and that on the stone 10 miles from the starting point (i. e., far east bank of the river) is marked on the north side "83° 40′ 19″" and on the south side "89° 35′." These are the courses according to the report from and to the end of the 274-pole line—that therefrom being "N. 83° 40′ 19″ E.," and that thereto being "S. 89° 35′ 15″ E." The other mistake was in placing any stone at all where they misplaced the stone intended for the end of the 274-pole line; i. e., at the end of the 10 miles from the starting point or where the Tyler Rock stands. The uncontradicted evidence is that the stone so placed and bearing on its north and south sides the figures "83° 40′ 19″" and "89° 35′," respectively, is 794 feet south of a line running from the Brushy Point Rock at the end of the 274-pole line N. 83° 40′ 19″ E. to the mulberry post (i. e., the place where it once stood), which is the course given between those two points. There is but one line between those two points, and that, of course, is a straight line. As heretofore stated, all the 1859 commissioners did was to re-run and mark the line so far as run in 1819 and then to connect the ends of the two lines then run by a straight line. In both the boundary given in the report made to the Governor of Kentucky and that given in the Tennessee Code, these two points are connected by one straight line, the course of which going east is given as N. 83° 40′ 19″ E., and it is stated that in its course that line passes stone No. 1. In the report to the Governor of Kentucky it is stated that the stone or set rock at the end of the 274-pole line (i. e., the Brushy Point Rock) had engraved on it "the course to the stopping point on the eastern shore of the lake, to wit, N. 83° 40′ 19″ E." Besides the map shows but one straight line between the two points. Whereas, if the stone intended for stone No. 1 and known as Tyler Rock was rightly placed, it takes two lines to connect those two points. And it would seem to be apparent just how the mistake came to be made. As stated, that monument was placed 10 miles from the starting point; i. e., far east bank of the Mississippi. The course from that point to the west bank thereof is S. 89° 15′ 18″ E., and that from the near east bank thereof to the end of the 274-pole line, Brushy Point Rock, is S. 89° 35′ 15″. The two courses are practically the same. What the commissioners did in measuring

the 10 miles was to continue this same course to the end of the 10 miles, instead of changing their course northwards from the Brushy Point Rock onwards. At least this is a very plausible explanation of their certain mistake.

This concludes the statement of facts which we have deemed it necessary to put forth to make plain our position as to the assignment of error in question. The ultimate findings which we would reach therefrom are three.

1. That the line between the two states from Brushy Point Rock on the west to Puckett Rock on the east, consists of two straight lines which are as follows, to wit: From the Brushy Point Rock N. 83° 40′ 19″ E. to the mulberry post and from the latter S. 88° 35′ 14″ E. to Puckett Rock. Of course, as the mulberry post is not now standing, it has to be located. If its location can be proven, such will have to be taken as its position. Otherwise it is that point on the eastern shore of Green timber or eastern arm of Reelfoot Lake where a line from Brushy Point Rock running N. 83° 40′ 19″ E. will strike a line from Puckett Rock running N. 88° 35′ 14″ W. But, assuming the location thereof to be determined, a straight line from it to Puckett Rock on the east and another such line from it to Brushy Point Rock on the west constitute the line between the two states at this point.

We do not think that the matter is affected by the consideration that, subsequent to the fixing of such as the state line by the legislation of the two states in 1858 and 1860, the Legislature of Kentucky by adopting the General Statutes of 1873 and the Kentucky Statutes in 1904, whereby it was declared that the line between the two states west of the Tennessee river should be "the line run by Alexander and Munsell on the parallel of latitude 36° 30′." As stated, they did not run the whole line. They ran the 68-mile line on the east of Reelfoot Lake, but not on the parallel and the 274-pole line on the west thereof on the parallel. As coming within the purview of the legislation, a straight line connecting the ends of these two lines should be taken as being so far the state line. Thus construing this legislation, the line is the same as that adopted in 1858 and 1860.

2. That so much of Fulton county as lies within the line from the mulberry post to Brushy Point Rock and thence to the near east bank of the Mississippi river (i. e., the state line on the south) and the line from the mulberry post on the parallel 36° 30′ 32″ to the near east bank of that river, the line which Henderson in 1821 produced from the western end of the 68-mile line run by Alexander and Munsell in 1819, on the north, starting from nothing and widening as far as Brushy Point Rock was not sectionized by Henderson and has never been sectionized. He did not sectionize it because he thought that it was in the state of Tennessee.

3. That there are no fractional sections binding on the Henderson line, but the whole sections come down to it. This may not be so clear and certain as the other two ultimate facts which we have found. But we think that there can be no reasonable doubt that this is so. According to the report of the 1859 commissioners, Henderson took the line run by Alexander and Munsell and the production thereof by him

to the Mississippi river on parallel 36° 30′ 32″ north latitude as "his base line in sectionizing the lands south and west of the Tennessee river." In the absence of this statement, it would be taken that he did this. There was no other line for him to take as a base line, as all the other sides of the land were bounded by the three rivers, Tennessee, Ohio, and Mississippi. This line was taken to be a due east and west line, and the township and sectional squares which he made were bounded by north, east, south, and west lines. There was therefore no occasion for him to locate any fractional sections binding on what he took to be the state line, so far as it had been run by Alexander and Munsell. That the whole sections come down to and bind on the state line, as he took it to be, may be inferred from the statement of the 1859 commissioners, heretofore quoted, that, in endeavoring to straighten out the 68-mile line run by Alexander and Munsell, they made "points at each quarter section's corner (that is, every half mile nearly") and connected "these points by direct lines." Besides it is a fact familiar to all those acquainted with this survey system and developable from the requirement in the statute of 1820 that the work should begin at the southeast corner of each township; that all fractional sections resulting from surveying discrepancies are necessarily upon the north and west edges of a township; and that it is therefore impossible that there should be any fractional sections between 32, 33, and 34, and the base line of the survey being the south line of the township. Two reasons are urged on behalf of Cook, whose interest it is thought to be to have it that there were fractional sections binding on the Henderson line, why it should not be held otherwise. One is that a line whose latitude is 36° 30′ could not possibly be taken as a base line for a section, because such a line runs between an east and west course and a north and south course, and the sections run directly north and south and east and west. But the mistake is made in thinking that such a line so runs. It does not so run. It runs a due east and west course, and hence can be taken as a base line for a section. It is stated by the 1859 commissioners that Henderson took the state line, as run by Alexander and Munsell and produced by him, as the base line in his sectionizing. The other reason so urged is the absence from the record before us of certain documentary evidence introduced before the jury, consisting of a plat of the land on which the timber conveyed stood, given by Hale to Cook's agent when the land was exhibited to him, two maps made by surveyors, who testified, and the report of the 1859 commissioners. But this report, if it was the full report, as contained in "Documents 1859–60," which we doubt, favors, as we have seen, the position that there were no fractional sections binding on the Henderson line. It certainly contained nothing tending to show that there are such sections. As to the surveyor's maps, we gather from their testimony in connection with them that they were limited to showing the respective contentions as to the state line and did not indicate anything as to the nature of the sections binding on the Henderson line. And there is no reason to believe that the plat given by Hale to Cook's agent contained any such indication. We are quite confident that, with what we have before us, we are in as good a position as the

lower court to determine this matter. Besides what we have urged in support of the position here taken, there are slight indications in the testimony of the surveyors introduced by Cook that they thought it was whole and not fractional sections which bounded on the Henderson line, but it is not necessary to lengthen this opinion further by referring to them. We would note that one of the maps which Henderson was authorized to publish and sell was not introduced in evidence. Possibly no such maps are now in existence.

These findings enable us to come closer to the question in hand. The land on which the timber conveyed stands lies north of Reelfoot Lake and binds to a certain extent on its arms which extend across the state line into Fulton county. The parties understood that it extended down to the state line. When the timber was exhibited it was so represented, and the conveyance contained the following clause, to wit:

"It is also agreed by parties of the first part (i. e., Hale & Ward) that they will, as soon as practical, not, however, to be longer than November 1st, 1911, have the state line between said land in Fulton county, Kentucky, surveyed."

There is an ellipsis here of the other land between which and that described here, referred to as "said land in Fulton county, Kentucky," the state line was thought to run. It was the land across the state line in Obion county, Tenn. This thought and the provision that this line should be run makes certain that the parties understood that the land on which the timber stood and the timber itself so extended. There is no indication in the evidence that at the trial they differed as to this. The sole difference in this particular which it discloses is as to the location of that line. And, in view of the findings we have made, there can be no doubt that it extended thereto. The whole sections mentioned in the conveyance, to wit, 32, 33, and 34 of township 1, range 6 west, the quarter sections designated being in sections 33 and 34, are the lower tier of sections in that township and extend from west to east. This is to be gathered from the fact that the sectionizing act provided that the sections should be "numbered respectively, beginning with the number 1, in the northeast section of the township and proceeding west and east alternately through the townships with progressive numbers until the thirty-sixth shall be completed." These sections, therefore, bind on the Henderson line. But the conveyance is not limited to the timber on the quarter sections designated in sections 33 and 34. It covers also the timber "on the fractional sections south of sections 32, 33 and 34." It was not possible for these words to have had any application except to the timber on the land between the Henderson line and the state line. Of course, were it a fact that there are fractional sections between the whole sections 32, 33, and 34 and the Henderson line, then probably the timber conveyed should be limited to that line. In such a case, the words of the conveyance as to fractional sections could have application without going to the state line. But, as there are no such fractional sections, those words can only have application to the land between the Henderson line and the state line, and they must therefore be held to have been intended to and that they did cover that land. Cyc. vol. 13, pp. 543, 544, and 545.

It follows that Hale & Ward were entitled to have the jury charged that the conveyance conveyed all the timber down to the state line, and that, in making an estimate of the value of the timber conveyed in determining the difference between the consideration paid and such value, they should include all of such timber. They were also entitled to have the jury charged that the state line was located as hereinbefore held. No such charge on either point was requested by them. Nor was any such charge given by the court of its own motion. Instead it left it to the jury to determine the extent of the timber. It told them that they were to estimate the timber on the sections and quarter or other fractional sections in the contract and upon no other land. In so far there was no error, save possibly in leaving the question to the jury, of which possibly, in view of the fact that the court was not requested to charge that the land and timber on it extended to the state line and that that line was located as held herein, Hale & Ward could not complain. But the court did not stop here. It, with emphasis, directed the jury's attention to the "uncontradicted testimony that only the land north of what was called in the testimony the Henderson line was ever sectionized," and further on charged them that they should not embrace in their estimate ash timber not on the sections and fractional sections described in the contract, "even should it be in Fulton county, Ky., south of the sections and fractional sections referred to." There was no timber in Fulton county, Ky., south of those sections and fractional sections. The timber thereon, as we have seen, extended down to the state line. The jury were thus charged that they might limit their estimate of the timber conveyed to that north of the Henderson line, if they determined it extended no farther south, notwithstanding that by so doing no effect whatever would be given to the words in the conveyance as to the fractional sections south of sections 32, 33, and 34. Such, then, are our reasons for holding that the lower court erred in so charging the jury. It should be noted that it had to deal with a very complicated situation and was probably without the help of the full report of the 1859 commissioners which sheds so much light on it.

The judgment is reversed and cause remanded for further proceedings consistent herewith.

CITY OF TOPEKA v. FEDERAL UNION SURETY CO. et al.

(Circuit Court of Appeals, Eighth Circuit. March 19, 1914. Rehearing Denied June 18, 1914.)

No. 3943.

1. PRINCIPAL AND SURETY (§ 59*)—LIABILITY OF SURETY—CONSTRUCTION OF CONTRACTS OF SURETY COMPANIES.

The general rule that a surety should be held only where his liability is fixed by the most strict law does not apply to a corporate surety, which is engaged in the business of becoming surety for premiums supposed to be based on the amount of the risk, but, on the contrary, such contracts are construed most strongly against the surety.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 103, 103½; Dec. Dig. § 59.*]

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

2. MUNICIPAL CORPORATIONS (§ 374*)—CONTRACTS—SURETY ON BOND OF CONTRACTOR.

Complainant surety company executed a bond to the state of Kansas as surety for a contractor for paving with the city of Topeka, conditioned for the payment by the contractor of all claims for labor and material. Under the statute when such bond was given, no lien could attach as against the city. On completion of the contract, there was a sum due from the city to the contractor thereon, and also sums due from the contractor to subcontractors for labor and material, for which complainant was liable on its bond. In an action by the contractor against the city, the city pleaded as a set-off a prior indebtedness from the contractor exceeding the amount of his claim, and recovered judgment against him thereon. *Held*, that, there being no statutory lien in favor of the subcontractors against the city to which complainant could be subrogated, it could not enforce an equitable lien in their behalf, since there was no fund due from the city to the contractor to which it could attach.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 905, 910; Dec. Dig. § 374.*]

Appeal from the District Court of the United States for the District of Kansas; John C. Pollock, Judge.

Suit in equity by the Federal Union Surety Company and others against the City of Topeka. Decree for complainants, and defendant appeals. Reversed.

W. C. Ralston, City Atty., and Frank G. Drenning, both of Topeka, Kan., for appellant.

John L. Baker, of Indianapolis, Ind., and John S. Dean, of Topeka, Kan. (Ferry, Doran & Dean, of Topeka, Kan., and Henley & Baker, of Indianapolis, Ind., on the brief), for appellees.

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

SMITH, Circuit Judge. This action in equity was brought by the Federal Union Surety Company against the city of Topeka, Kan., John Ritchie, Clarence A. Ritchie, the Topeka Vitrified Brick & Tile Company, the Capital City Vitrified Brick & Paving Company, Fred Luttjohan, and H. H. Folks. The complaint was filed March 18, 1911, in the Circuit Court of the United States for the District of Kansas. The facts as they existed at the date of the filing of the bill, March 18, 1911, are substantially as follows:

On February 6, 1905, the city of Topeka let a contract to a partnership composed of John Ritchie and J. D. Hanley to construct a sewer system in sewer district No. 26 in that city. This contract was performed by the partnership, and shortly thereafter the city made payment. In 1907 the city claimed to discover that, without its knowledge, authority, or consent, large overpayments had been made to the partnership on that contract, and on December 18, 1907, an action was begun in the state court to recover on that account $23,665.50 against Ritchie & Hanley. For aught that appears in the record that case is still undisposed of. On April 19, 1909, John Ritchie was awarded the contract for certain grading, rolling, curbing, guttering, and paving on certain streets in Topeka for $72,878.04. These were all improve-

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

ments the expenses of which were chargeable to the adjoining property in 10 equal annual installments, and bonds were issued pursuant to section 1018 of the General Statutes of Kansas of 1909. This statute provided that:

"Such bonds shall not be issued in amount in excess of the contract price of the work or improvement, except that the installment coupons shall include the interest on such installments to the maturity thereof."

It also, after providing for payment of the amount necessary to pay the sum required to redeem an owner's land to the city treasurer, stated that:

"All sums so paid shall be applied solely to the payment of such improvements or the redemption of the bonds issued therefor."

Independently of statute there is no mechanic's lien at law or in equity, and ordinarily there is no statutory lien as against a municipality, but under early Kansas statutes it was held that contractors or subcontractors could obtain mechanics' liens as against a municipal corporation. In the chapter on Liens of Mechanics and Others the law provides, in General Laws of Kansas, § 6255 (Code Civ. Proc. § 660), that contractors may execute a bond to the state of Kansas for the use of all persons in whose favor liens might accrue by virtue of the act conditioned for the payment of all claims which might be the basis of liens, and when said bond is given, "no lien shall attach under this act."

On the date of this contract the contractor gave bond with the Federal Union Surety Company as surety to the state of Kansas, conditioned:

"Now, therefore, if the said John Ritchie shall pay all indebtedness incurred for labor and material furnished in making said public improvements as provided by the laws of the state of Kansas then this obligation shall be void, otherwise it shall be and remain in full force and effect."

Ritchie and the Federal Union Surety Company gave a second bond to the city of Topeka, but that requires no further consideration at the hands of the court. Ritchie performed this new contract with the city, except that he did not complete it in the time specified. He was paid by the city on the contract from time to time, except a balance of $10,941.33. Upon the completion of the contract, however, he owed subcontractors, Clarence A. Ritchie, Topeka Vitrified Brick & Tile Company, the Capital City Vitrified Brick & Paving Company, and Luttjohan and Folks an aggregate of $10,378.34. On January 7, 1911, John Ritchie brought suit in the state court for the balance alleged to be due him on this contract, and on January 21, 1911, the city filed answer and a counterclaim or set-off for the alleged overpayments on the contract of 1905 for $23,665.50. On January 13, 1911, the Capital City Vitrified Brick & Paving Company brought suit in the state court against the complainant surety Company for $6,377.18, the amount alleged to be due it as a subcontractor. This suit was removed to the federal court by the surety company. On February 21, 1911, Fred Luttjohan and H. H. Folks brought suit in the state court against the surety company and John Ritchie for the sum of $711.29, alleged to be due them as subcontractors. At this stage this suit was brought.

The bill after alleging some of the facts continued:

"XI. Your orator further avers that in equity and good conscience said defendant city should be required to pay said balance for the benefit of the subcontractors and materialmen made defendants herein, and such others of the same class as may become parties to this suit, to the end that said contractors and materialmen should be paid out of the funds in the hands of said defendant city, lawfully appropriated to such use. And your orator avers that said city has no lawful right to divert said fund, or any part thereof, to the payment or satisfaction, in whole or in part, of any obligation or liability of the said John Ritchie growing out of any other transactions between the said city and the said John Ritchie, wholly apart and disconnected from the public improvements provided for by the terms of said agreement of April 19, 1909."

And the bill prayed that all the parties be required to litigate their claims to this fund in question, being the balance due upon the new contract and against the surety in this suit, and that the city be required to pay said balance into the registry of the court, and that the same be applied first to the payment of the subcontractors. This brings the facts down to the date of the commencement of this suit, but the following additional facts appear: On March 28, 1911, the Topeka Vitrified Brick & Tile Company brought suit in the state court against the surety company and John Ritchie for the amount alleged to be due it as a subcontractor, and has since recovered $863.45. Clarence A. Ritchie never brought a separate action but filed an answer to this suit on June 2, 1911, in which he claimed from John Ritchie and the surety company $2,535.50 as a balance due as a subcontractor. Subsequently the surety company paid the claims of the Capital City Vitrified Brick & Paving Company, and Luttjohan & Folks, but so far as the record shows has not yet paid the claims of Clarence A. Ritchie or the Topeka Vitrified Brick & Tile Company. On September 29, 1911, the state court, in the case referred to of Ritchie v. City, appointed Robert Stone as referee to report to the court his findings of fact and conclusions of law, and on October 23, 1912, he filed his report. On December 28, 1912, the court rendered judgment in favor of the city of Topeka and against John Ritchie, crediting him with $10,941.33 on account of the contract of April 19, 1909, charging him with $2,000 liquidated damages thereunder, and with $20,173.48 as overpayments on the contract of 1905 and interest, for $16,209.20, balance. This case was appealed to the state Supreme Court and there modified by deducting the $2,000 allowed as liquidated damages, thus making the judgment, as we understand it, in favor of the city after taking out the balance due him on the contract of April 19, 1909, $14,209.20. Ritchie v. City of Topeka (Kan.) 138 Pac. 618. In the meantime, but after the appointment of the referee in the state court, on October 11, 1911, the United States District Court appointed J. T. Hazen master to take the proofs and report his conclusions of fact and recommendations as to a decree. Upon his report the District Court entered a decree for plaintiff on February 20, 1913.

It is claimed by the surety company that this suit was commenced as ancillary to the case of the Capital City Vitrified Brick & Paving Company, which had been removed to the United States District Court, as before stated. There is nothing in the bill suggesting such

ancillary character, but that point is not material to the disposition of this case.

[1] Before proceeding to a consideration of the law questions directly involved, it may not be amiss to point out in a degree the status of the complainant. It is entitled to just the same consideration as ordinary litigants. Generally the surety is a favorite of the law, and should be held only where his liability is fixed by the most strict law. That is to say, what is known as the rule of strictissimi juris applies. These rules have no application to a corporate surety which is engaged in the business of becoming surety for premiums which are supposed to be based upon the amount of such risks. It is not in the position of a voluntary surety who signs his principal's obligation. Upon the contrary surety bonds are usually on forms prepared by the company, and in place of a strict construction in favor of such surety the instrument is construed most strongly against the surety. Contracts of such companies bear a distinct analogy to insurance, and are largely governed by the same rules in construction. American Surety Co. v. Pauly (No. 1) 170 U. S. 133, 18 Sup. Ct. 552, 42 L. Ed. 977; American Surety Co. v. Pauly (No. 2) 170 U. S. 160, 18 Sup. Ct. 563, 42 L. Ed. 987; Guaranty Co. v. Pressed Brick Co., 191 U. S. 416, 24 Sup. Ct. 142, 48 L. Ed. 242; United States Fidelity & Guaranty Co. v. Egg Shippers' Strawboard & Filler Co., 148 Fed. 353, 78 C. C. A. 345; Kansas City Hydraulic Pressed Brick Co. v. National Surety Co , 167 Fed. 496, 93 C. C. A. 132; United States Fidelity & Guaranty Co. v. United States, 178 Fed. 692, 102 C. C. A. 192; Hull v. Bonding Co., 86 Kan. 342, 120 Pac. 544; Lumber Co. v. Douglas, 89 Kan. 308, 131 Pac. 563, 44 L. R. A. (N. S.) 843; Empire Co. v. Lindenmeier, 54 Colo. 497, 131 Pac. 437, 440; Lesher v. United States Fidelity & Guaranty Co., 239 Ill. 502, 88 N. E. 208; People v. Rose, 174 Ill. 310, 51 N. E. 246, 44 L. R. A. 124; Fidelity Co. v. Poetker (Ind) 102 N. E. 372; Van Buren County v. American Surety Co., 137 Iowa, 490, 115 N. W. 24, 126 Am. St. Rep. 290; Getchell & Martin Lumber & Manufacturing Co. v. Peterson & Sampson, 124 Iowa, 599, 100 N. W. 550; Champion Ice Manufacturing & Cold Storage Co. v. American Bonding & Trust Co., 115 Ky. 863, 75 S. W. 197, 103 Am. St. Rep. 356; Crystal Ice Co. v. United Surety Co., 159 Mich. 102, 123 N. W. 619; Brandrup v. Empire State Surety Co., 111 Minn. 376, 127 N. W. 424; Allen v. Eneroth, 111 Minn. 395, 127 N. W. 426; Lakeside Land Co. v. Empire State Surety Co., 105 Minn. 213, 117 N. W. 431; Hormel v. Bonding Co., 112 Minn. 288, 128 N. W. 12, 33 L. R. A. (N. S.) 513; Rule v. Anderson, 160 Mo. App. 347, 142 S. W. 358; Boppart v. Surety Co., 140 Mo. App. 683, 126 S. W. 768; Town of Whitestown v. Title Guaranty & Surety Co., 72 Misc. Rep. 498, 131 N. Y. Supp. 390; Bank of Tarboro v. Fidelity & Deposit Co., 128 N. C. 366, 38 S. E. 908, 83 Am. St. Rep. 682; Long v. American Surety Co. (N. D.) 137 N. W. 41; Brown v. Title Guaranty & Surety Co., 232 Pa. 337, 81 Atl. 410, 38 L. R. A. (N. S.) 698; Young v. American Bonding Co., 228 Pa. 373, 77 Atl. 623; Pacific National Bank v. Ætna Indemnity Co., 33 Wash. 428, 74 Pac. 590; Fidelity Co. v. Parker (Wyo.) 121 Pac. 531; 32 Cyc. 306; Pingrey on Suretyship & Guaranty (2d Ed.) par. 442 et seq.

[2] The appellant contends that the subcontractors were entitled to mechanics' liens, and that they failed to file the same within the statutory period. This contention, as understood by the court, is that the bond in question was given, not under section 6255 of the Kansas Statutes, but under sections 6256 and 6257 of the same (Code Civ. Proc. §§ 661, 662). In the view taken by the court it will not be necessary to consider this question. Let it be conceded that the bond was given under section 6255, and it will not avail the surety company. In that statute it was provided, "no lien shall attach under this act," and, there being no statutory lien, the surety company contends: First, that the subcontractors are entitled to be paid out of the contract price before the owner has a right to apply the same to some other claim of his; second, the provision in section 1018 of the General Statutes of Kansas of 1909 that "all sums so paid shall be applied solely to the payment of such improvements or the redemption of the bonds issued therefor," gives the surety an equitable lien as against the fund raised for the very purpose of making the specific improvement.

It will, for the purposes of the case, be conceded that a court of equity having jurisdiction to conserve assets could entertain this suit before any claims were paid by the surety company, but, before this could be held, it must appear that there were assets to conserve. The city of Topeka owed nothing to Ritchie. On the contrary he was largely indebted to it. After the bond was given there was no lien under the mechanic's lien law, but the surety company cites and relies on Richards Brick Co. v. Rothwell, 18 App. D. C. 535. That case was based upon the federal statute, and upon the fact therein stated that the government still owed the principal contractor. But here, so far from the city of Topeka owing Ritchie, he had by fraud procured in advance on another contract more than $20,000, and upon a balancing of their accounts it owed the contractor nothing, but he owed it. There was no fund existing upon which the alleged lien of subcontractors could attach. Even if there was such a fund, if the claim is correct that the subcontractors had a lien upon the contract price, they must have derived it in some way through the principal contractor, yet in Lumber Co. v. Douglas, 89 Kan. 308, 131 Pac. 563, Douglas and Evans had a contract with the state to build a memorial building, and had given a bond of this surety company, the state paid to Douglas & Evans on account $2,000 which they in turn paid to the Chicago Lumber Company, which was a subcontractor, but also had an account against Douglas & Evans for material furnished prior thereto, and the lumber company applied this payment upon the old account and then sued the surety company on the account for material furnished for the memorial building. The court, construing the very section of the state statute here in question, said:

"After the bond was given the only relation there was between the contractors and the lumber company was the ordinary one of debtor and creditor; and, so far as the surety company is concerned, the money paid to the contractors by the state was their own, and they could do with it as they pleased. The surety company could claim nothing by way of subrogation to the rights of the state, as the state had paid in full for the work, and there was no fund or security in its hands which any claimant could reach."

In this case the surety company claims to be subrogated, not to the rights of the corresponding party, the city of Topeka instead of the state of Kansas, but to an alleged lien on the fund in favor of subcontractors, but that cannot greatly benefit it because generally there is no such lien, and the farthest any cited case goes is to hold that there is an equitable lien upon money due from the owner, and there was nothing due in this case. Equally unavailing is the claim that such a lien exists under section 2018 of the statutes of Kansas. That section refers to money paid in by the taxpayer upon his assessment, and there is no evidence that any has yet come into the hands of the treasurer, but if it appeared he had collected some of this money it would all be required to meet the bonds issued for this improvement, and there is nothing to indicate there would be any surplus over the amount necessary to pay the bonds. But wholly aside from this, the provision in question is solely for the protection of the taxpayer and not at all for the protection of the surety on the contractor's bond, and in no event would this court raise from it an equitable lien in favor of the surety company.

This case is reversed and remanded, with directions to set aside the decree heretofore entered and dismiss the bill of the Federal Union Surety Company, at its costs.

HOOK, Circuit Judge, took no part in the decision of this case.

UNITED STATES v. THEURER et al.

(Circuit Court of Appeals, Fifth Circuit. April 9, 1914. Rehearing Denied May 18, 1914.)

No. 2383.

PENALTIES (§ 31*)—JUDGMENT FOR PENALTY—ABATEMENT BY DEATH OF DEFENDANT.

A judgment in favor of the United States against the owner of whisky seized for a violation of the internal revenue laws, on a delivery bond given by him, is one for a penalty, and an action cannot be maintained thereon to enforce the same against the heirs of the defendant after his death.

[Ed. Note.—For other cases, see Penalties, Dec. Dig. § 31.*]

Pardee, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Eastern District of Louisiana; Rufus E. Foster, Judge.

Action at law by the United States against Mrs. Rudolph F. Theurer and others. Judgment for defendants, and plaintiff brings error. Affirmed.

J. Charlton R. Beattie, U. S. Atty., of New Orleans, La.

Henry P. Dart, of New Orleans, La. (Dart, Kernan & Dart, of New Orleans, La., of counsel), for defendants in error.

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

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

NEWMAN, District Judge. This is a suit brought by the United States, by Charlton R. Beattie, United States attorney, in the United States District Court for the Eastern District of Louisiana, against Rudolph Vaihinger, a resident of Germany; Mrs. Sallie Bouwel, wife of A. J. Brooks, and a resident of the parish of Ouachita; Henry E. Leimbach, a resident of the parish of Rapides; and the following, all residents of the parish of Orleans: John Bouwel, Mrs. Louise Bouwel, wife of James McCormack; Charles Bouwel; Mrs. Mary E. Bouwel, wife of Samuel Johnson; Mrs. Louise R. Starck, widow of Alexander Starck; Frank Starck; Alexander Starck, Jr.; Mrs. Magadeline Klein, wife of Charles Foerstner; and Mrs. Wilhemina Henrietta Back, widow of Rudolph F. Theurer—for the sum of $6,000 and interest thereon at 5 per cent. from April 4, 1868.

Exceptions were filed to the suit, among others this:

"That the alleged claim presented by petitioner has been lost by laches and neglect and is prescribed by the lapse of 10 and 30 years, and that exceptor pleads said laches and neglect and exceptor particularly pleads the prescription of 5, 10 and 30 years to said action."

And also that the judgment made the subject-matter of the suit, "if legal and valid, which exceptor denies, abated by the death of Gaspard Theurer, the defendant in said cause, and is no longer a valid and subsistent judgment against exceptor."

The exception of no cause of action was sustained by District Judge Foster and the suit dismissed. Judge Foster's opinion, which does not appear to have been reported, is as follows:

"This case seems to present another branch of a never ending litigation, originally entitled United States against 'Fifty Barrels of Whisky.' In the original case, a libel was filed in 1867 against 50 barrels of whisky, presumably under the internal revenue law of July 13, 1866. Shortly after the seizure, one Gaspard Theurer appeared and claimed the goods, and they were released to him on bond. After that the case went to trial and resulted in a judgment against him in the District Court, from which he took an appeal to the Circuit Court. And then he died. After his death various other proceedings were had, which eventually established the validity of the judgment of the District Court. The present action is brought against the heirs of his heirs and their heirs, even to the fourth generation, and the United States is seeking to hold them for a judgment of $6,000, with interest at 5 per cent. per annum for about 45 years.

"To the petition exceptions of prescription and no cause of action have been filed. It is principally urged on behalf of the exceptors that the forfeiture of the whisky in the original suit was the enforcement of a penalty, and that the action abated with the death of the original Gaspard Theuer.

"It is contended by the United States that it has been deprived of property worth $6,000, by the bonding of the whisky in the original proceeding, and that Theurer's estate received the benefit, and his heirs have also received the benefit in their turn, and, as they had accepted the successions of their respective ancestors, that under the law of Louisiana they are bound for their debts, whether they derived any benefit or not. It is difficult to understand how Theurer's estate was enriched by bonding the whisky. He owned it and had it in his possession before it was seized, and by bonding it he did no more than get it back. In my opinion the equities are entirely with the defendants.

"The law under which the seizure was made is highly penal. Any one vio-

lating its many provisions could be both fined and imprisoned, and even the goods of innocent third persons might be forfeited to the United States. Henderson's Distilled Spirits, 14 Wall. 44. I can see no difference between the forfeiture in this case, with the subsequent judgment on the bond, and a fine imposed after trial on indictment. The form of the action is immaterial. United States v. Chouteau, 102 U. S. 611 [26 L. Ed. 246].

"Treating the present proceeding as a suit to revive, it is clear that the United States would have no standing, as the original action abated by the death of Gaspard Theurer, regardless of the fact that judgment was entered prior thereto. Dyar v. United States, 186 Fed. 623 [108 C. C. A. 478]; United States v. De Goer (D. C.) 38 Fed. 80; Schreiber v. Sharpless, 110 U. S. 76 [3 Sup. Ct. 423, 28 L. Ed. 65]. If it is contended that this is a new proceeding against the heirs, arising under the laws of Louisiana, because of their acceptance without the benefit of inventory of the successions of their respective ancestors, nevertheless it is the same old cause of action, for the Supreme Court of Louisiana has repeatedly said, 'a judgment neither creates, adds to, nor detracts from a debt.' Successions of Anderson, 33 La. Ann. 581.

"It would seem logical that the United States, when seeking a right under the laws of Louisiana, is bound to take all the laws as it finds them. If so, this action would be barred by the prescription pleaded. As to this, however, I express no opinion. But in any event this is a suit to enforce a penalty, and therefore it is barred by the prescription of five years created by the Revised Statutes of the United States, § 1047 (U. S. Comp. St. 1901, p. 727).

"The exception of no cause of action will be maintained and the suit is dismissed."

This whole matter which is now sought to be brought against, to use Judge Foster's language, "the heirs of his (Gaspard Theurer) heirs and their heirs, even to the fourth generation," originated in a seizure by the government in 1867 of 50 barrels of whisky because the same had been removed from the place of its manufacture to a place other than a bonded warehouse, as provided by law, before the duties thereon had been paid, contrary to the form of the statute in such case made and provided, whereby and by force of the statute in such case made and provided the said 50 barrels of whisky became and are forfeited to the United States. Upon this suit being instituted, a bond was given by Gaspard Theurer and the whisky released to him. Issue was joined on the libel filed against the whisky on the ground, first, that it was not true that the whisky had been removed from the place of manufacture to a place other than a bonded warehouse, as provided by law, before the duties thereon were paid, and also denying that any duties were due thereon. There was a trial April 4, 1868, and judgment of condemnation, and the whisky condemned as forfeited to the United States, and a judgment rendered on Theurer's bond and against John I. Adams, as surety thereon. On April 9, 1868, a suspensive bill was allowed to the Circuit Court. It will be remembered that this was in 1868 and under the practice as it then existed. An appeal bond was given and the case removed into the Circuit Court.

On May 2, 1870, this appeal was dismissed for reasons orally assigned. On May 18, 1870, a writ of error was taken to the Supreme Court of the United States. Pending this appeal to the Circuit Court it appears that Gaspard Theurer died.

The case seems to have rested in the Supreme Court of the United States from 1870, until December 4, 1905, when it was docketed and dismissed. The mandate was returned to the Circuit Court, and on January 26, 1906, this mandate was entered and the case remanded to

the District Court of the United States for the Eastern District of Louisiana, at New Orleans, to the end that such further proceedings might be taken in the case as may to law and justice appertain.

On August 5, 1911, this suit was brought in the Circuit Court of the United States. The allegations in the petition are that Rudolph F. Theurer was the only child of Gaspard Theurer, and as such his only heir and his only legatee under his will, and that he accepted the succession of his father, Gaspard Theurer, simply and unconditionally and thus became personally responsible and liable for the debts of his father, and among others for the aforesaid debt to the United States; that Rudolph F. Theurer died in the city of New Orleans, leaving a widow and one son, Charles W. Theurer, who then accepted simply and unconditionally the succession of Rudolph Theurer and thus became responsible personally for all his debts and obligations and among others for the debt due the United States under this judgment; that his widow accepted one-third of the estate and Charles W. Theurer accepted two-thirds; that the widow is still living; that Charles W. Theurer died in 1910, without ascendants or descendants; that he left a last will and testament by which he devised certain property to Mrs. Charles Foerstner and that he made and constituted Mrs. Foerstner and his legal heirs, ten in number, who are named as defendants in this case, his universal legatees; that Mrs. Foerstner and his ten legal heirs accepted simply and unconditionally the succession of Charles W. Theurer, and have thus become responsible personally for all his debts, and among others the debt due, as aforesaid, to the United States under this judgment.

We think that this case was correctly decided in the District Court because, after all, this was the enforcement of a penalty against the heirs of Gaspard Theurer. The question which is involved here was thoroughly discussed by Judge Holt, United States District Judge for the Southern District of New York, in United States v. Pomeroy (C. C.) 152 Fed. 279. Judge Holt, in that case, goes thoroughly into the question, states the argument on the other side, cites the authorities, and finally determines that in a case like this, even after judgment has been rendered, the penalty cannot be collected after the death of the wrongdoer, against his heirs. An extract from the opinion in the Pomeroy Case will show what was determined:

"It is true that a judgment is often in law regarded as creating a new and distinct liability. In suits for torts or for unliquidated damages, it is sometimes held that the judgment creates a debt in the place of what before was an unliquidated demand. But a judgment, after all, is nothing but a new form of an obligation. Its original essence remains unchanged. Courts, whenever necessary, look beneath the form of the judgment to see what was the original nature of the claim. For instance, the general rule is that the courts of no country enforce the penal laws of another country; and if a judgment is entered in one country to enforce its penal laws, and a suit is brought on the judgment in another state or country, the court in which such suit is brought will take notice of the fact that the original judgment was based on a penal law, and refuse to allow a recovery for that reason. Wisconsin v. Pelican Ins. Co., 127 U. S. 265, 8 Sup. Ct. 1370, 32 L. Ed. 239; Huntington v. Attrill, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123; Black on Judgments, § 870.

"Upon the whole there is in my opinion no satisfactory authority controlling this case. It must therefore be decided on fundamental principles. In my opinion the fundamental principle applicable to this case is that the object of criminal punishment is to punish the criminal, and not to punish his family. When A. recovers a judgment against B. for a tort, the recovery is undoubtedly based on the defendant's misconduct; but the fundamental principle upon which the action is maintained is the idea of compensating the injured party; but, when a court imposes a fine for the commission of a crime, there is no idea of compensation involved. In this case the defendant was fined $6,000. That money was not awarded as compensation to the United States. No harm had been done the United States. It was imposed as a punishment of the defendant for his offense. If, while he lived, it had been collected, he would have been punished by the deprivation of that amount of his estate; but, upon his death, there is no justice in punishing his family for his offense. It may be said, of course, that there is very little difference between the loss which his family would have sustained if the money had been collected before his death, and the loss which it will now sustain if it is collected from his estate. But if the money had been collected before his death, he would have been punished. If it is collected now, his family will be punished, and he will not be punished. In my opinion, therefore, this prosecution should be deemed ended and this judgment abated by the defendant's death."

This case was reversed in United States v. New York Cent. & H. R. R. Co. et al., 164 Fed. 324, 90 C. C. A. 256; but the judgment there rendered was upon an entirely different ground from that discussed by Judge Holt. Indeed, the court says that this question does not arise in the case as considered by it on appeal.

This case of United States v. Pomeroy, supra, was cited by this court with approval in Dyar v. United States, 186 Fed. 614–622, 623, 108 C. C. A. 478.

We do not discuss the question as to whether section 1047 of the Revised Statutes of the United States, or the law covering prescriptions in Louisiana, applies here, because it is unnecessary in the view we have taken of the case as above stated.

It is earnestly urged here that the complainant's estate was benefited by Theurer giving the bond and taking back the whisky seized by the government. We do not agree with this view of the matter, but agree with Judge Foster that the equities are with the other side as to this. This whisky was in the hands of Gaspard Theurer. It was his property. The United States, through its officers, declared that he had forfeited the whisky by certain violations of the internal revenue laws, and seized it. He took it back, certainly, by giving the bond; but it was his whisky, and the bond simply stood in place of the whisky if no bond had been given. We do not think it would do to say that the fact that he took the whisky by giving the bond changed the status of affairs at all from what they would have been if no bond had been given.

We put our decision in this case, affirming the judgment of the District Court, upon the ground solely that the suit is for the enforcement of a penalty strictly against the estate of a dead man.

The judgment of the District Court is affirmed.

PARDEE, Circuit Judge (dissenting). On March 31, 1868, in a suit entitled United States of America v. Fifty Barrels of Whisky, marked Hoffheimer Bro., No. 8907 of the docket, the District Court for the

District of Louisana rendered two judgments, to wit: One judgment condemning and forfeiting to the United States the said 50 barrels of whisky; and a civil judgment in favor of the United States against G. Theurer as principal, and John I. Adams as surety, in solido, on their release or delivery bond taken in said suit in the sum of $6,000.

By appeal and supersedeas to the Circuit Court where the appeal was dismissed, and by writ of error thereafter from the Supreme Court, the litigation was pending until December, 1905. The writ of error was dismissed in the Supreme Court on last date mentioned, and proper mandate thereafter filed in the Circuit Court on January 26, 1906, and thereafter on February 3, 1906, the mandate of the Circuit Court was duly entered and ordered executed in the said District Court, when then, and then only, the aforesaid judgment became final and executory.

This present suit, originally filed in the Circuit Court for the Eastern District of Louisiana, is not a suit to recover any forfeiture or penalty, nor to revive either of the said judgments, but is a suit to enforce the civil judgment against G. Theurer and John I. Adams, his surety, and against the heirs of G. Theurer, under the provisions of article 1013, Rev. Civ. Code La. Section 3467, Rev. Stat. U. S. (U. S. Comp. St. 1901, p. 2314), seems also to aid in fixing liability on the defendants.

As the said judgment sued on is now in full force and executory, the United States cannot be chargeable with any laches; besides, it is to be noticed that prescription in such cases does not run against the United States.

It does not appear that there is any improper joinder of parties defendant, nor that the judgment sued on is null and void, because perhaps the case may have been tried and decided by the judge of the District Court without the intervention of a jury. The petition in the instant case certainly states a cause of action. The merits seem to have been misconceived in the District Court. Hardship to the defendants does not change the law. The judgment of the District Court should be reversed, and the cause remanded, with instructions to overrule all exceptions, and thereafter proceed according to law and the views herein expressed.

JACKSON v. VIRGINIA HOT SPRINGS CO.

(Circuit Court of Appeals, Fourth Circuit. February 4, 1914.)

No. 1213.

1. INNKEEPERS (§ 7*)—REFUSAL TO FURNISH ACCOMMODATIONS—ACTIONS—DECLARATION.

In an action against an innkeeper for refusing accommodations to plaintiff, his wife, and daughter, declaration *held* sufficient to fully advise defendant as to the matters which it was called upon to answer.

[Ed. Note.—For other cases, see Innkeepers, Cent. Dig. §§ 10, 11; Dec. Dig. § 7.*]

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

2. INNKEEPERS (§ 7*)—REFUSAL TO FURNISH ACCOMMODATIONS—ACTIONS—DECLARATION.

In an action against an innkeeper for refusing accommodations to plaintiff, his wife, and daughter, it was not necessary for the declaration to allege that defendant had rooms at the time for the accommodation of guests, as it is presumed that an innkeeper is prepared for the accommodation of guests, and the declaration need not allege a fact as to which the burden is on defendant, or the existence of which is wholly within defendant's knowledge.

[Ed. Note.—For other cases, see Innkeepers, Cent. Dig. §§ 10, 11; Dec. Dig. § 7.*]

3. PLEADING (§ 48*)—"DECLARATION"—SUFFICIENCY.

The declaration need state only such facts as are necessary to constitute a cause of action, but must be sufficiently full and explicit to inform defendant of the nature of the claim and to enable him to plead.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 105, 106; Dec. Dig. § 48.*

For other definitions, see Words and Phrases, vol. 2, pp. 1902, 1903.]

4. APPEAL AND ERROR (§ 843*)—REVIEW—MATTERS UNNECESSARY TO DECISION.

Where, in an action against an innkeeper for refusing accommodations, the other counts were sufficient, it was unnecessary to determine whether the counts which alleged that defendant was the keeper of a house of private entertainment, and that he was the keeper of an ordinary, were sufficient.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3331–3341; Dec. Dig. § 843.*]

In Error to the District Court of the United States for the Western District of Virginia, at Lynchburg; Henry Clay McDowell, Judge.

Action by W. W. Jackson against the Virginia Hot Springs Company. Judgment was rendered for defendant on demurrer (209 Fed. 979), and plaintiff brings error. Reversed and remanded, with instructions.

J. T. Coleman, of Lynchburg, Va. (Coleman, Easley & Coleman, of Lynchburg, Va., on the brief), for plaintiff in error.

George E. Caskie, of Lynchburg, Va. (Caskie & Caskie, of Lynchburg, Va., John W. Stephenson, of Warm Springs, Va., and J. T. McAllister, of Hot Springs, Va., on the brief), for defendant in error.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

PRITCHARD, Circuit Judge. The plaintiff in error, hereinafter referred to as "plaintiff," instituted an action against the defendant in error, hereinafter referred to as "defendant," in the District Court of the United States for the Western District of Virginia, based upon the unlawful and wrongful refusal of the defendant to furnish plaintiff, his wife, and daughter with accommodation at defendant's inn, and oppressively turning them away from the inn in the nighttime; the plaintiff's wife, Ida G. Jackson, being at the time an invalid. At the time of the institution of this suit Ida G. Jackson also instituted a similar action against the defendant; that case being No. 1212 (213 Fed. 975). A demurrer was filed to the original declaration in each case which was sustained with leave to amend; at that time plaintiff filed an amended declaration to which the defendant again demurred,

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

the two demurrers being sustained the court gave final judgment for the defendant, and the two cases now come here on writ of error. Briefs were only filed in this case.

In passing upon the questions presented for our consideration in this case we will also consider those involved in the Ida G. Jackson case, inasmuch as the counts in each case are practically the same.

[1] By the first count it is averred that the defendant was an innkeeper and kept a common inn for the accommodation of travelers, wayfarers, and guests; that the plaintiff, being a traveler and wayfarer, came to the defendant's inn on the 17th day of March, 1911, and lawfully requested and required the defendant to suffer and permit him to stay and lodge, for the customary consideration, at the said inn for and during the night of the said day; and that although the plaintiff was, as the defendant well knew, then and there ready and willing to pay the reasonable, customary, and adequate compensation for such lodging, yet the defendant did not, nor would, suffer or permit the plaintiff to stay or lodge at the said inn, but "unlawfully, uncivilly, discourteously, and insultingly declined and refused to do so," whereby the plaintiff was forced and obliged to quit the said inn and go and travel in the nighttime a considerable distance, to wit, a mile, in order to secure lodging elsewhere, and whereby also the plaintiff was put to great trouble, inconvenience, and expense, and was greatly mortified, humiliated, discomfited, and distressed, and otherwise injured.

In the second count the defendant's hostelry, is described as a house of private entertainment.

In the third count it is described as a hotel.

In the fourth count it is described as a house of entertainment at which the defendant customarily furnished for hire or compensation lodging and diet for travelers or sojourners.

And in the fifth count it is described as an ordinary.

The sixth count contains the averment that the defendant kept a certain inn or hotel known as "The Homestead," and was also the owner and proprietor of certain celebrated springs known as the "Virginia Hot Springs," to which said inn and springs the public generally, and especially invalids and infirm persons, were accustomed to resort for the purpose of obtaining the usual accommodations at the inn and partaking of the benefits of the curative and healing properties of the waters of the springs, the defendant having held out the said inn and the said springs to the public as a place of resort and sojournment for health, entertainment, and pleasure, and having held itself out as ready, prepared, and willing to receive, accommodate, entertain, and care for, as guests of its said inn for hire, all such travelers and sojourners as might resort thereto for any of the purposes aforesaid, and especially invalids and infirm persons, to whom defendant recommended and held out the curative and healing properties of the waters of its springs as of great merit and efficiency; that the plaintiff's wife, being an invalid and infirm person, and having been attracted by the defendant's exploitation of its said inn and springs and the general reputation thereof, and having been thereby led to believe that the baths at the defendant's resort would be greatly

beneficial to her, prevailed upon the plaintiff to secure lodgings and accommodations at the defendant's inn and to take and accompany her there, in order that, as a guest of the inn, she might conveniently avail herself of the benefits to be derived from the waters of the springs and the baths connected therewith; and that, on the 15th day of March, 1911, the plaintiff set out from Atlantic City, N. J., together with his wife, and also his daughter, and proceeded and traveled to the defendant's inn, arriving there on the 17th about 1 o'clock a. m., and entered the same, and then and there applied to, requested, and required of the said defendant that it furnish him, the said plaintiff, and his said wife and daughter, with lodgings and accommodations at the said inn, as guests thereof for hire, at the customary rates and charges; but that the defendant, although well knowing that the plaintiff was then and there ready and willing to pay the customary and adequate compensation for such lodgings and accommodations, as well for himself as for his wife and daughter, and well knowing that the plaintiff's wife was an invalid and an infirm person, and that the plaintiff and his wife and daughter had traveled a long distance for the purpose of becoming, in good faith, guests at the defendant's inn, nevertheless, in disregard of its duties and of the plaintiff's rights in the premises, then and there "unlawfully, oppressively, discourteously, and insultingly" declined to allow or to permit them to remain at the said inn, and turned them away in the nighttime, and forced them to go and travel a distance of a mile, in cold and inclement weather, in order to procure lodgings and entertainment elsewhere; whereby the plaintiff was mortified, humiliated, discomfited, and distressed, and the illness of his wife was greatly augmented, aggravated, and increased, and her health greatly injured and impaired, with the result that the plaintiff has lost and been deprived of the comfort, society, and services of his wife, and been forced to incur and expend large sums of money in endeavoring to restore her.

In the seventh count the allegation is simply that the plaintiff and his wife and daughter were unlawfully refused accommodations at the defendant's inn, although the plaintiff was ready, willing, and offered to pay for such accommodations, and were turned away in the nighttime and forced and obliged to quit the inn and travel, in cold and inclement weather, a long distance in order to procure lodgings elsewhere.

In the eighth count it is alleged that they were unlawfully and wrongfully turned away from the inn and refused accommodations, etc.

The ninth count was withdrawn, without prejudice.

[2] It is agreed by counsel that the principal question involved herein is as to whether the court below erred in sustaining the demurrer to the declaration upon the ground that it was not alleged that the defendant had rooms at its inn at the time it refused to accommodate plaintiff, his wife, and daughter.

Among other things, it is alleged that the defendant is an innkeeper and kept a common inn for the purpose of accommodation of the public. Where one thus holds himself out for the entertainment of the

public, the presumption is that he has accommodations for those who may apply for entertainment.

In the Civil Rights Cases, 109 U. S. 40, 3 Sup. Ct. 43, 27 L. Ed. 835, Justice Harlan, among other things, said:

"The innkeeper is not to select his guests. He has no right to say to one, you shall come to my inn, and to another, you shall not, as every one coming and conducting himself in a proper manner has a right to be received; and for this purpose innkeepers are a sort of public servants, they having in return a kind of privilege of entertaining travelers and supplying them with what they want."

While as a general rule this is true, nevertheless there are instances where an innkeeper would not be required to furnish accommodations. For instance, if one suffering from smallpox, yellow fever, or any other contagious disease should apply for accommodation the proprietor would not be required to accept such person, and if upon refusal to do so a suit should be instituted as in this instance, the innkeeper could set up such matter as a defense to the action; but it would not be necessary for the plaintiff to allege that he was in a sound physical condition and free from such diseases in order to state a cause of action. In other words, the plaintiff would not be required to anticipate by allegation any defense that the defendant might interpose to his right to recover.

[3] It is well settled that the plaintiff is not required to go further in his declaration than to state such facts as are necessary to constitute a cause of action, i. e., the declaration must be sufficiently full and explicit to inform the defendant of the nature of plaintiff's claim to enable him to plead to the action.

The rule is well stated in the case of Norfolk, etc., Co. v. Carr, 106 Va. 508, 56 S. E. 276, in which the court said:

"The purpose of a declaration is to inform the defendant of the nature of the demand upon him. The facts must be stated with sufficient certainty to be understood by the defendant, who has to answer them, by the jury, who have to inquire into their truth, and by the court, which has to render the judgment. Wood v. Am. Nat. Bank, 100 Va. 306, 40 S. E. 931; Wheel Co. v. Harris, 103 Va. 708, 49 S. E. 991."

He is not required to allege a fact when the burden of establishing the same rests not upon him, but upon the defendant. It would be manifestly unjust to require plaintiff to allege a fact as to the existence of which he knows nothing, where it appears as it does in this instance that the existence or nonexistence of such fact is wholly within the knowledge of the defendant. The only method by which the plaintiff could have ascertained the facts as to whether the defendant had or had not room for accommodation on the occasion in question would have been to have gone to the defendant and made demand upon him for full information as to whether, at that time, he had rooms for the accommodation of guests. This request would have undoubtedly been refused, and the defendant would have been justified in withholding such information until required to answer the allegations contained in the declaration.

We do not think the plaintiff is called upon to anticipate or avoid any matter of defense which may be made to this action by the defendant.

In the case of Hammer v. Kaufman, Fed. Cas. No. 5997, it was held that it was not necessary for the declaration to contain any allegation as to matters which should come from the defendant. The court, among other things, said:

"But there is another well-settled principle of special pleading that has a direct bearing on this question. It is not necessary to state matter which should come more properly from the other side. Steph. Pl. 350. The author says the meaning of this is that it is not necessary to anticipate the answer of the adversary. And in 2 Chit. Pl. 223, it is laid down that matter in defeasance of the action need not be stated, and whenever there is a circumstance, the omission of which is to defeat the plaintiff's right of action, prima facie well founded, whether called by the name of a proviso, or a condition subsequent, it must, in its nature, be matter of defense, and ought to be shown in pleading by the opposite party. Now the application of this rule to the question before the court is obvious. The ground of demurrer to the declaration is that the plaintiff does not allege the nonuser of his improvement by the defendants on or after the 1st of March, and that such nonuser, under the agreement, was to release the defendants from their obligation to pay. But clearly this nonuser, if such was the fact, was within the knowledge of defendants more properly than of the plaintiff, and must be set forth as matter of defense by plea. The object of all pleading is to advise the adversary party of what is relied on to sustain or defeat the suit. Now it clearly was not necessary for this plaintiff to notify the defendants of the abandonment of the use of the plaintiff's improvement, on the 1st of March, by an averment to that effect in the declaration; for the plain reason that whether the defendants did or did not cease the use on or before that day was within their knowledge."

[4] We deem it unnecessary to enter into a discussion of the questions as respects the second and fifth counts. The court based its action in sustaining the demurrer to the second count on the further ground that the keeper of a house of private entertainment is not under obligation to receive guests, and as to the fifth count on the additional ground that the keeper of an ordinary is not under obligation to furnish lodging to travelers and sojourners.

The only objection sustained by the court to the remaining counts was the failure to allege that the defendant had rooms at its inn at the time for accommodation of guests, and, inasmuch as we are of the opinion that the court erred in sustaining the demurrer thereto, it becomes immaterial as to the sufficiency of the second and fifth counts, inasmuch as the other counts are abundant to enable the plaintiff to test the liability of the defendant.

The Supreme Court in adopting the new Equity Rules has practically abolished all technical requirements as to pleading. This action on the part of the Supreme Court clearly indicates the trend of judicial sentiment as respects what may be properly termed technical procedure in the preparation and trial of equity cases. While the rules as to common-law pleadings are still in force, yet there is a marked tendency on the part of the courts to dispense with as many technical requirements as possible.

However, we do not wish to be understood as saying that any essential allegation should be omitted from pleadings. The declaration in

the case at bar contains a full and concise statement of the facts upon which plaintiff relies to recover. In our opinion the allegations are sufficient to fully advise defendant as to the matters which it is called upon to answer.

The learned judge who heard this case in the court below filed a very able and interesting opinion, but after a careful consideration of the same we find ourselves unable to concur in his conclusion as to the rule applicable to the facts in this case.

Under the circumstances we do not think the plaintiff should be required to go further and allege matters that from the very nature of this action may be interposed as a defense.

For the reasons stated the judgment of the lower court is reversed, and the case will be remanded, with instructions for further proceedings in accordance with the views herein expressed.

Reversed.

JACKSON v. VIRGINIA HOT SPRINGS CO.

(Circuit Court of Appeals, Fourth Circuit. February 4, 1914.)

No. 1212.

In Error to the District Court of the United States for the Western District of Virginia, at Lynchburg; Henry C. McDowell, Judge.

Action at law by Ida G. Jackson against the Virginia Hot Springs Company. Judgment for defendant, and plaintiff brings error. Reversed.

J. T. Coleman, of Lynchburg, Va. (Coleman, Easley & Coleman, of Lynchburg, Va., on the brief), for plaintiff in error.

George E. Caskie, of Lynchburg, Va. (Caskie & Caskie, of Lynchburg, Va., John W. Stephenson, of Warm Springs, Va., and J. T. McAllister, of Hot Springs, Va., on the brief), for defendant in error.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

PRITCHARD, Circuit Judge. The questions raised by assignments of error in this case were disposed of at this term in the case of W. W. Jackson v. Virginia Hot Springs Co., 213 Fed. 969, 130 C. C. A. 375.

For the reasons therein stated, the judgment of the lower court is reversed, and the cause remanded, with instructions for further proceedings in accordance with the views therein expressed.

Reversed.

THE STRATHLEVEN. THE MARGARET J. SANFORD. THE S 11.

(Circuit Court of Appeals, Fourth Circuit. February 4, 1914.)

No. 1183.

1. COLLISION (§ 71*)—ANCHORED VESSEL—IMPROPER ANCHORAGE.

A vessel anchoring in a place forbidden by a local law or custom in case of collision must take the consequences of her own unlawful acts.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 101; Dec. Dig. § 71.*]

2. COLLISION (§ 69*) — VESSELS ANCHORING IN CHANNEL — CONSTRUCTION OF STATUTE.

Act March 3, 1899, c. 425, § 15, 30 Stat. 1152 (U. S. Comp. St. 1901, p. 3543), making it unlawful to tie up or anchor vessels in navigable chan-

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

nels in such manner as to prevent or obstruct the passage of other vessels, is not an absolute prohibition and is not violated by a vessel which anchors at a point in a channel where notwithstanding such anchorage other vessels, navigated with the care the situation requires, can safely pass.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 87–90; Dec. Dig. § 69.*]

3. COLLISION (§ 71*)—STEAMSHIP ANCHORED IN CHANNEL AND PASSING VESSEL—MUTUAL FAULTS.

A collision occurred in the Elizabeth river between a steamship and a scow passing in tow. The steamship had anchored to the west of the channel, but a strong wind caused her to swing into the channel and also to drag her anchor until she obstructed three-fourths of the 800-foot channel, when the scow struck and broke her propeller. The harbor regulations prohibited anchoring in the channel. *Held*, that she was in fault, but that the towing tug, which was moving at only two miles an hour against the wind and tide, was also in fault for not stopping when the steamship was seen drifting across the channel.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 101; Dec. Dig. § 71.*

Collision with or between towing vessels and vessels in tow, see note to The John Englis, 100 C. C. A. 581.]

Appeal from the District Court of the United States for the Eastern District of Virginia, at Norfolk; Edmund Waddill, Jr., Judge.

Suit for collision by Strathleven Steamship Company, Limited, owner of the steamship Strathleven, against the tug Margaret J. Sanford and Scow S 11, P. Sanford Ross, claimant. Decree for respondent, and libelant appeals. Modified and affirmed.

For opinion below, see 203 Fed. 331. Resettlement of costs denied in 213 Fed. 979.

Floyd Hughes, of Norfolk, Va., and R. J. M. Bullowa, of New York City (Hughes & Vandeventer, of Norfolk, Va., on the brief), for appellant.

H. H. Little, of Norfolk, Va. (Hughes, Little & Seawell, of Norfolk, Va., on the brief), for appellee.

Before PRITCHARD and WOODS, Circuit Judges, and ROSE, District Judge.

ROSE, District Judge. [1] On January 9, 1912, the scow S 11 in tow of the tug Sanford came into collision with the propeller of the steamship Strathleven and broke it off. The accident happened in the main ship channel of the Elizabeth river leading into the port of Norfolk. Some ten minutes before the vessels came together the Strathleven had dropped anchor, at a point about 100 feet west of the channel. Under the influence of wind and tide she not only began to swing, but dragged her anchor as well. As she had out 45 fathoms of chain, the result was that at the moment of the collision her stern was within 200 feet of the easternmost edge of the channel. In short, she was then occupying three-fourths of the entire 800 feet of channel width. In the court below the Strathleven was held solely in fault. Its owner has appealed. The opinion of the learned judge who sat in the District Court is reported in 203 Fed. 331. A detailed statement

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

of the facts by us is therefore not requisite. Nor will it be necessary to discuss at length the meaning or application of state or federal laws on the subject of anchorages. The regulations of the Harbor Commissioners in so many words forbid vessels to anchor in the channel; this prohibition impliedly extends to anchoring so as to obstruct the channel. The court below finds that neither authority nor usage has designated any specific anchorage grounds, and the implication from much that is said in the learned and elaborate opinion is that the port regulations already referred to have been but indifferently enforced or obeyed. Suffice it on this point to say that vessels anchoring in places forbidden by local law or custom must take the consequences of their own improper acts. The Clarita and the Clara, 23 Wall. 1, 23 L. Ed. 146; United States v. St. Louis Transportation Co., 184 U. S. 255, 22 Sup. Ct. 350, 46 L. Ed. 520; Culbertson v. The Southern Bell, 18 How. 586, 15 L. Ed. 493; The Annasona (D. C.) 166 Fed. 803.

[2] This court has already placed a construction upon section 15 of the Act of Congress of March 3, 1899, c. 425, 30 Stat. 1152 (U. S. Comp. St. 1901, p. 3543) which declares that it shall not be lawful to tie up or anchor vessels or other craft in navigable channels in such manner as to prevent or obstruct the passage of other vessels or craft. We have said that we did not think that Congress thereby intended absolutely to forbid anchoring in navigable waters, except only at such places as would necessarily prevent the passage of other vessels or obstruct them in passing to such an extent as to make the effort to do so a dangerous maneuver. If a vessel anchors at a point in the channel where, notwithstanding such anchorage, other vessels navigated with the care the situation requires can safely pass, then she has neither violated the statute nor rendered herself liable under the general rules applicable to navigation even though she has to a certain extent obstructed the channel. The Caldy, 153 Fed. 840, 83 C. C. A. 19. The same conclusion has been reached by the Circuit Court of Appeals of the Second and of the Ninth Circuits. The City of Birmingham, 138 Fed. 559, 71 C. C. A. 115; The Europe, 190 Fed. 478, 111 C. C. A. 307.

[3] Upon the facts of the case at bar we concur with the court below in thinking that the Strathleven was in fault. When she let go her anchor, vessels were in sight moving towards her from opposite directions. The wind was blowing 30 miles an hour; the tide was at flood. She was 350 feet long, and was light. Unless great care was used, she would swing into the channel. It was possible that before her anchor ceased to drag it would be necessary to pay out a good deal of chain. Under such circumstances, she should have selected another anchorage or adopted precautions to offset the effect of wind and tide and the possibility of a dragging anchor. We cannot, however, persuade ourselves that the tug was free from fault. It was broad daylight. All the vessels concerned were moving very slowly, the Sanford not over two miles an hour. That the Strathleven was coming to anchor must have been apparent to the tug for many minutes before the collision. That she was swinging around was obvious.

That she was visibly dragging back on her anchor is testified to by the master of the tug.

It matters not how gross the fault of the Strathleven was, the Sanford was not absolved from the use of such precautions as good judgment and accomplished seamanship required. The Albert Dunois, 177 U. S. 249, 20 Sup. Ct. 595, 44 L. Ed. 751. She was approaching a vessel, whose movements must to her have seemed uncertain, as in fact they were. If she could not for any reason so change her course as to carry her out of the possibility of a collision, she should have stopped if she could have done so with safety to herself and to her tow. The New York, 175 U. S. 201, 20 Sup. Ct. 67, 44 L. Ed. 126. Moving as slowly as she was, in the teeth of so strong a wind and with the tide running against her, stopping was both safe and easy.

The learned judge below said that the effect of stopping would have been uncertain. In coming to this conclusion he has apparently lost sight of the testimony of the master of the tug that he could have stopped without danger, and would have done so had the tide not been at ebb. There is no question but that the tide was flood. The court so finds. Ignorance by a navigator of the state of the tide in waters to which he is accustomed is inexcusable. "For * * * it his vessel must answer." The John H. May (D. C.) 52 Fed. 884. We appreciate that the efforts of the tug to carry its tow safely by the stem of the Strathleven were embarrassed by the approach of the Maryland and the proximity of the dredge stakes, all of which conditions are fully discussed in the opinion below. None of these things tended to make stopping difficult. The master of the tug did not stop because he thought the tide was running in the opposite direction from that in which it was and because as he testified, "We cannot stop for everything that comes along; we would never get to any place." The Supreme Court has said the "lesson that steam vessels must stop their engines in the presence of danger, or even of anticipated danger, is a hard one to learn; but the failure to do so has been the cause of the condemnation of so many vessels that it would seem that these repeated admonitions must ultimately have some effect." The New York, 175 U. S. 204, 20 Sup. Ct. 75, 44 L. Ed. 126. There are still navigators who have not mastered it.

It follows that the case must be remanded, with directions to modify the decree so as to adjudge both the Strathleven and the Sanford in fault and to provide that the damages and the costs below shall be divided equally between them. The appellee must pay the costs in this court.

Modified and affirmed.

THE STRATHLEVEN. THE MARGARET J. SANFORD. THE S. 11.

(Circuit Court of Appeals, Fourth Circuit. March 14, 1914.)

No. 1183.

ADMIRALTY (§ 126*)—COSTS ON APPEAL—MODIFICATION OF DECREE.

A party to a suit in admiralty which by an appeal secures the modification of a decree against it is entitled to recover its costs in the appellate court.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 858–865; Dec. Dig. § 126.*]

Appeal from the District Court of the United States for the Eastern District of Virginia, at Norfolk; Edmund Waddill, Jr., Judge.

Suit for collision by the Strathleven Steamship Company, Limited, owner of the steamship Strathleven, against the tug Margaret J. Sanford and scow S. 11, P. Sanford Ross, claimant. On motion to modify decree in 213 Fed. 975, as to costs in appellate court. Denied.

Robert M. Hughes, of Norfolk, Va., for the motion.

Floyd Hughes, of Norfolk, Va., opposed.

Before PRITCHARD and WOODS, Circuit Judges.

PRITCHARD, Circuit Judge. This is a motion to modify the decree heretofore entered in this cause as to costs in this court. The cause came here on appeal from the District Court wherein it was decreed:

"That the tug Margaret J. Sanford, and scow S. 11, were blameless in the premises, and that the collision in the pleadings mentioned was brought about solely by the fault of the steamship Strathleven, * * * and that the respondent do recover its costs."

It was decreed by this court that both the steamship Strathleven and the tug Margaret J. Sanford were in fault, and that the damages and the costs below should be divided equally between them, and that the appellee pay the costs in this court.

It is contended by appellee that this court in the exercise of its discretion should have divided the costs of this court between the parties, inasmuch as the entire decree of the lower court was in favor of the appellee, and that appellant in its brief based its appeal upon the ground that it was entirely without fault, and that therefore the decree of the lower court should have been in its favor instead of the appellee. The appellee relies upon the following cases: The America, 92 U. S. 432, 23 L. Ed. 724; The North Star, 62 Fed. 71, 10 C. C. A. 262; The Fountain City, 62 Fed. 87–92, 10 C. C. A. 278; The S. B. Hume, and The Pennsylvania (C. C.) 24 Fed. 296–298; The J. J. Driscoll et al., 63 Fed. 1023, 12 C. C. A. 4; and also upon the action of this court in case No. 149, Thom, Receiver A. & D. Ry. Co., Claimant of Steamship City of Chester, v. N. & C. R. R. Co., 78 Fed. 186, 24 C. C. A. 51, wherein it appears from the records of this court that the original decree entered therein provided appellee should pay the entire costs was modified so as to divide the costs

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

between the parties. However, there was no opinion filed in that case.

Appellant admitted that, while it is true that it contended in its brief that appellee was not entitled to have any decree in its favor, nevertheless upon the oral argument the contention as set forth in the brief was abandoned, and appellant admitted that it was not entirely without fault, and that in reality it recovered everything for which it contended for in this court, and that under these circumstances it is entitled to recover its costs from appellee in this court.

The appellant cites in support of its contention the following cases: The Horace B. Parker, 76 Fed. 238, 22 C. C. A. 418; The Citus, 202 Fed. 189; Horne v. John I. Brady, 204 Fed. 424; The Columbia, 25 Fed. 844; The Umbria, 59 Fed. 475, 8 C. C. A. 181; and many other cases. In the case of The Umbria, supra, the court in referring to the question of costs, said:

"As to costs, the appellant was put to the necessity of an appeal to secure a proper modification of the decree. If the libelants had made the Iberia a party, and insisted upon a decree against her as well as the Umbria, such as they would have been entitled to according to The Alabama and Game Cock, 92 U. S. 695 [23 L. Ed. 763], they could urge with reason that they should not be charged with the costs of the Umbria's appeal. Not having done so, there is no good reason why the appellant shall be required to bear the costs of a necessary appeal."

Also in Benedict's Admiralty (4th Ed.) § 587, among other things it is said:

"When appellant reduces the decree of the District Court, the appellee bears the costs of the appellate court."

A number of cases are cited to sustain the text.

The cases we have just quoted, as well as the other cases cited by appellant, are to the effect that where the decree in the lower court is in favor of the appellee, and appellant on appeal secures a modification of the decree of the lower court, appellant is entitled to recover its costs in the appellate court against the appellee.

The decision of the Supreme Court in the case of The America, supra, was cited by appellee as an authority supporting his position that the costs of the appellate court in a case like this should be divided. We do not so construe this decision. It is true that the Supreme Court ordered the costs in the Circuit and District Courts to be divided, but it also ordered the costs in the Supreme Court to be paid by the appellee. While the other cases cited by appellee tend to support its contention, yet when we come to consider the decisions of the various circuits we think the weight of authority is against the contention of the appellee.

In this instance the appellant was put to the necessity of taking an appeal in order to secure a modification of the decree, and was successful. In our opinion it necessarily follows the appellee should pay the costs incurred in this court.

The motion to modify the decree is denied at the cost of the appellee.

Motion denied.

RAILWAY MAIL ASS'N v. DENT.

(Circuit Court of Appeals, Eighth Circuit. April 10, 1914.)

No. 3557.

1. INSURANCE (§ 457*)—ACCIDENT POLICY—"ACCIDENTAL"—DEATH FROM POISON IVY.

Where plaintiff's husband died as the result of coming in contact with poison ivy while in the woods, his death was "accidental" within the terms of an accident policy insuring against injuries, resulting in death, through external, violent, and accidental means.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1175; Dec. Dig. § 457.*

For other definitions, see Words and Phrases, vol. 1, pp. 62–70; vol. 8, p. 7560.

Accident insurance, risk and causes of loss, see notes to National Acc. Society v. Dolph, 38 C. C. A. 3; New Amsterdam Casualty Co. v. Shields, 85 C. C. A. 126.]

2. INSURANCE (§ 457*) — ACCIDENT POLICY — CAUSE OF DEATH — DISEASE — POISON.

An accident policy insured against death resulting through external, violent, and accidental means; the constitution of the association providing that no benefit should be payable unless the accident alone resulted in producing visible external marks of injury or violence, and unless death or disability resulted wholly from the injury, and not from poison or injurious matter taken or administered, accidentally or otherwise. Decedent while in the woods accidentally came in contact with poison ivy, which resulted in an eruption between his fingers, which grew until it covered his limbs and body, and in seven weeks caused his death. It was also shown that contact with ivy operates like a burn, in that when the eruption covers the body it seals the skin against discharge of secretions and blood poisoning results. *Held*, that decedent's death did not result from poison either "taken or administered," nor from disease.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1175; Dec. Dig. § 457.*]

3. INSURANCE (§ 529*)—ACCIDENT POLICY—AMOUNT OF LIABILITY.

Decedent, insured by an accident policy against accidental injury or death, came in contact with poison ivy in the woods May 2, 1909, at which time the certificate of insurance and the constitution and by-laws of the insurer provided for payment of $3,000 if death resulted within 120 days. On June 8th following the constitution and by-laws were amended so as to increase the indemnity to $4,000 in case of death, within the limited period after accident, of any member of the beneficiary department. Decedent died June 23, 1909. *Held* that, since the insurance was against accident, as distinguished from decedent's death, which was the result of the accident alone, and this happened prior to the amendment, plaintiff's recovery was limited to $3,000.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1315; Dec. Dig. § 529.*]

In Error to the Circuit Court of the United States for the District of Minnesota; Charles A. Willard, Judge.

Action by Ella S. Dent against the Railway Mail Association. Judgment for plaintiff (183 Fed. 840) and defendant brings error. Affirmed, on condition.

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

Leo Kennedy, of St. Paul, Minn. (John P. Kennedy, of St. Paul, Minn., on the brief), for plaintiff in error.

O. H. O'Neill, of St. Paul, Minn., for defendant in error.

Before HOOK and SMITH, Circuit Judges, and POPE, District Judge.

HOOK, Circuit Judge. This case involves the liability of the Railway Mail Association, an incorporated fraternal benefit society, under a certificate of accident insurance issued to James Dent for the benefit of his wife, Ella S. Dent. The association promised by the certificate to pay Mrs. Dent $3,000 in case her husband "received injuries through external, violent, and accidental means, resulting in his death from such injuries within 120 days." The constitution and by-laws of the association provided as follows:

"No benefit or sum whatever shall be made payable in any case whatsoever unless the accident alone results in producing visible external marks of injury or violence suffered by the body of the member, nor unless the death or disability results wholly from the injury and within 120 days from the date thereof. Nor shall any benefit be paid where death or disability results from * * * poison or other injurious matter taken or administered accidentally or otherwise. * * * Accidental death shall be construed to be either sudden violent death from external causes, * * * or death within 120 days from injuries received by accident alone."

While in the woods in the suburbs of St. Paul, Minn., Dent accidentally came in contact with poison ivy, with the result that an eruption appeared between his fingers two or three days afterwards, and grew until it covered his limbs and body and in about seven weeks caused his death.

[1] The essentials of a recovery by Mrs. Dent—so far as any contentions advanced make these a matter for present consideration—are that her husband's death was caused by "accident," that the accident alone resulted in producing "visible external marks of injury," and that his death did not result from poison or other injurious matter "taken or administered" accidentally or otherwise. His contact with the poison ivy happened by chance, and was in ignorance of its character, was unintentional and involuntary, and the result from his conscious act was unexpected. This would seem to make it an accident within the customary meaning, as clearly as if he had been stung by a poisonous insect or bitten by a poisonous reptile. Association v. Barry, 131 U. S. 100, 9 Sup. Ct. 755, 33 L. Ed. 60; Western Commercial Travelers' Ass'n v. Smith, 29 C. C. A. 223, 85 Fed. 401, 40 L. R. A. 653; Omberg v. Mut. Ass'n, 101 Ky. 303, 40 S. W. 909, 72 Am. St. Rep. 413. The phrase "injury by accident" in the English Workmen's Compensation Act was held by the House of Lords to include an infection with anthrax while handling wool. In Brintons v. Turvey, App. Cas. (1905) 230, the Lord Chancellor said:

"I think in popular phraseology, from which we are to seek our guidance, it [the act] excludes, and was intended to exclude, idiopathic disease; but when some affection of our physical frame is in any way induced by an accident, we must be on our guard that we are not misled by medical phrases to alter the proper application of the phrase 'accident causing injury' be-

cause the injury inflicted by accident sets up a condition of things which medical men describe as disease. Suppose in this case a tack or some poisoned substance had cut the skin and set up tetanus. Tetanus is a disease; but would anybody contend that there was not accident causing damage?"

[2] This has especial bearing on the argument that Dent died of a disease, that is, blood poisoning, and not from accident. The testimony was that contact with ivy operates much like a burn, in that when the eruption covers the body it seals the skin against the natural discharge of the secretions, and blood poisoning results. The ultimate effects of many injuries indisputably external and accidental might be similarly described. A like contention was before this court in Westtern Commercial Travelers' Ass'n v. Smith, supra. Next, the accident alone must have produced "visible external marks of injury." There is no doubt that contact with the ivy directly and alone caused the condition described; no other cause is suggested. Nor is it disputed that the eruption, first on the hands and then on the limbs and body, was both visible and external. True, it did not appear until two or three days after the contact; but it was not provided it should show at once. It came soon and in the natural course, and was of a character that left no doubt of the immediate cause.

Finally, death must not have resulted from poison or other injurious matter "taken or administered" accidentally or otherwise. This phrase has a more limited meaning than that claimed by counsel for the association. Of course the poison or injurious substance was not "admintered," as that ordinarily contemplates the affirmative action of another person. Nor do we think it was "taken." If the insured had accidentally fallen into a vessel of corrosive liquid, or had been injured by the bursting of a carboy of vitriol, to which he did not contribute it would not be said the injurious substance was taken or administered. The term "taken," which is nearest the case before us, signifies in its text an internal taking, and not an accidental external contact. In McGlother v. Provident, etc., Co., 32 C. C. A. 318, 89 Fed. 685, the insurance excluded injuries from poison or "contact with poisonous substances." In Preferred Accident Ins. Co. v. Robinson, 45 Fla. 525, 33 South. 1005, 61 L. R. A. 145, 3 Ann. Cas. 931, it did not cover injuries "from any poison or infection, or from anything accidentally or otherwise taken, administered, absorbed, or inhaled." The language was substantially the same in Kasten v. Casualty Co., 99 Wis. 73, 74 N. W. 534, 40 L. R. A. 651, and Maryland Casualty Co. v. Hudgins, 97 Tex. 124, 76 S. W. 745, 64 L. R. A. 349, 104 Am. St. Rep. 857, 1 Ann. Cas. 252. Such cases are not in point here. So many and varied are the causes of accidental injury that the particular language employed in instruments of insurance is of the greatest importance. A word added or omitted may alter materially the scope of the indemnity. Many cases like the one at bar lie close to the border line perhaps, because not definitely in mind for inclusion or exclusion; but it is a delicate thing for a court to adopt the latter course merely upon a supposition that they would have been excluded in terms had they been thought of. The insurer most familiar with the subject chooses the words of his undertaking, and it is not unjust to take them in the

sense conveyed to the ordinary reader, nor to hold against him in case of real substantial doubt.

[3] The remaining question is as to the amount of recovery. The accident occurred May 2, 1909, at which time the certificate of insurance and the constitution and by-laws of the association provided for $3,000 if death resulted within 120 days. June 8, 1909, an amendment of the constitution and by-laws was adopted, increasing the amount of indemnity to $4,000 in case of death within the limited period after accident of any member of the beneficiary department. Dent died June 23, 1909. The death was the result of the accident alone, and the accident happened before the amendment. The insurance was against accident, not death, as in an ordinary life policy. The subsequent death was relevant only as indicating the extent of the accidental injury. The cause of action against the association arose when the accident occurred, and was not subject to impairment by subsequent default of the insured in the conditions of continued membership. The insurance being in force at the time of accident, the right of the beneficiary would not have been affected by its lapse before the death ensued. Burkheiser v. Accident Ass'n, 61 Fed. 816, 10 C. C. A. 94, 26 L. R. A. 112. If no subsequent default of the insured would lessen the predetermined sum, it would seem that to increase it should require acts or words showing intention of the party obligated. That intention does not sufficiently appear in the amendment. Substantive legislation, governmental or corporate, relating to demands or rights of action, is generally construed as prospective in operation, and not as affecting those which have accrued. The amendment does not suggest on its face a different construction, the certificate of insurance, which the petition says contained a promise to pay $3,000, was not changed, and there was no proof of subsequent practice by the association indicating the amendment was to have retrospective effect. The recovery in the trial court was $4,000, with interest at 6 per cent. per annum from December 1, 1909. We think it was excessive by $1,000 and interest. If the excess, being separable from the balance is remitted, the judgment for the right amount should stand. Arkansas Cattle Co. v. Mann, 130 U. S. 69, 9 Sup. Ct. 458, 32 L. Ed. 854; Hansen v. Boyd, 161 U. S. 397, 16 Sup. Ct. 571, 40 L. Ed. 746.

The order will therefore be that if Mrs. Dent will, within 60 days after the filing of this opinion, file in the trial court a remittitur of $1,000 and interest from December 1, 1909, and also file a certified copy thereof in this court, the judgment so reduced will be affirmed; otherwise, it will be reversed, and the cause remanded for a new trial.

PATENTS SELLING & EXPORTING CO. ACTIESELSKABET v. DUNN.[1]

(Circuit Court of Appeals, Second Circuit. April 21, 1914.)

On motion to revise former opinion to conform to action of District Court.

Pursuant to mandate of the Circuit Court of Appeals, the following proceedings were had April 7, 1914, in the District Court before Hand, District Judge:

Mr. Merwin: The mandate of the Circuit Court of Appeals having been sent down to the District Court, affirming the decision of the District Court as to the question of validity, and reversing the District Court as to the question of infringement, without, however, prejudice to motions to introduce further proof as to priority of invention in the District Court, counsel for plaintiff offers in evidence the Danish patent No. 7,576, issued May 29, 1905, published June 13, 1905, and filed in the United States Patent Office on July 6, 1905, together with translation of the same; Danish patent No. 8,016, issued November 6, 1905, published November 20, 1905, and recorded in the United States Patent Office December 14, 1905; also Swedish patent No. 20,579, issued April 1, 1905, and filed in the United States Patent Office April 23, 1906, together with translation of the same.

Plaintiff rests.

The Court: Mr. Merwin, I have to-day received a letter from Mr. Prindle, dated April 6, 1914, in which he says that he has no argument to offer in opposition to this motion, that he has been unable to find the witness upon whom he relied to carry back his own date of invention, and therefore does not wish to make any motion for permission to take testimony on his own behalf. I understand this to mean, therefore, that he defaults on this application, and in accordance with the decision of the Circuit Court of Appeals I hereby make a finding that the date of your invention antedates the patents put in evidence before the Circuit Court of Appeals by the defendant, and upon that you are entitled to the usual decree.

I therefore direct that the usual interlocutory decree pass upon claims 1, 2, 3, 5, and 10.

Timothy D. Merwin, of New York City, for the motion.

PER CURIAM. Motion in Circuit Court of Appeals to revise former opinion (213 Fed. 40, — C. C. A. —) denied.

[1] For corrected opinion, see 214 Fed. 1023.

UNITED STATES v. TWO GALLONS OF WHISKY et al.

(District Court, D. Montana. May 16, 1914.)

No. 157.

INDIANS (§ 35*)—INTOXICATING LIQUORS—IMPORTATION INTO INDIAN COUNTRY—FORFEITURES—STATUTES—CONSTRUCTION.

Rev. St. § 2140, provides that if the officers of the United States have reason to suspect, or are informed, that any white person or Indian has introduced any spirituous liquor into the Indian country, they may cause the conveyance and depositories "of such person to be searched; and if any such liquor is found therein, the same, together with" such conveyances "used in conveying the same, and also the goods, packages and peltries of such person, shall be seized," libeled, and forfeited to the informer and the United States. *Held*, that in a proceeding under such section the thing involved, and not its owner, is the offender, and is proceeded against, and that the liquor, whoever its owner, and the property of the offender used in conveying the same, is subject to forfeiture; and hence, where an Indian, owning one horse, borrowed another horse and wagon belonging to his mother and a harness belonging to his father, and without permission drove outside the Indian country and brought back whisky, the whisky and his property, but not that belonging to his mother and father, was subject to forfeiture.

[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 61, 62; Dec. Dig. § 35.*]

Information by the United States against Two Gallons of Whisky and other articles. Judgment directing forfeiture of the whisky and certain property belonging to one J. Matt.

Burton K. Wheeler, U. S. Atty., of Butte, Mont., and S. C. Ford, Asst. U. S. Atty., of Helena, Mont.

Edward C. Mulroney and Thos. N. Marlowe, both of Missoula, Mont., for claimants.

BOURQUIN, District Judge. Information under section 2140, R. S., for the forfeiture of whisky, and of the horses, harness, and wagon with which it was introduced into the Indian country where seized by officers of the libelant.

From the pleadings and concessions of the parties it appears that the whisky was the property of one Eneas Grandjo, one horse was the property of James Matt, the harness was the property of Matt's father, and one horse and the wagon were the property of Matt's mother. Matt is 16 years of age, and lives with his parents in the Indian country. He and his mother are Indian wards of the government. The parents permitted Matt to take the team, harness, and wagon to drive to the post office at Arlee within the Indian country. He made the drive, and then drove to Missoula without the Indian country, with Grandjo as a passenger and on the latter's persuasion. There Grandjo purchased the whisky. He procured Matt to transport it and him back into the Indian country, and there the seizure was made. Matt's parents authorized him to drive to Arlee only, and had no knowledge of and did not sanction his drive to and from Missoula, or his acts in

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

connection therewith. James Matt and his parents are claimants herein.

The introduction of intoxicating liquor into the Indian country is prohibited and a felony by statute. Section 2140, supra, provides that if officers of the United States have reason to suspect or are informed that any white person or Indian has introduced any spirituous liquor into the Indian country, they may cause the conveyances and depositories "of such person to be searched; and if any such liquor is found therein, the same, together with" such conveyances "used in conveying the same, and also the goods, packages and peltries of such person, shall be seized," libeled, and forfeited to the informer and the United States. It is clear the whisky is forfeited regardless of ownership and introducer. It is equally clear that James Matt, as well as Grandjo, introduced the whisky into the Indian country, and, though a minor and an Indian ward of the government, he is responsible and liable for his violation of the law, and is subject to the forfeiture imposed by the statute. But does the statute impose forfeiture of the property of Matt's parents?

It may be observed that Matt's conduct in using the property for purposes other than his parents authorized was a fraud upon them and a conversion of the property. This is no barrier to forfeiture if the statute imposes it. The statute is highly penal, and is not in aider of the revenues. Hence it must be strictly construed, doubts resolved in favor of those against whom it is invoked, no person or case held within it unless clearly within its letter, and all not to defeat, but to effectuate, the legislative intent.

Noting that it forfeits the liquor introduced and found, regardless of ownership and introducer, the statute directs search of the *introducer's* conveyances, if he is a white person or Indian, and seizure, libel, and forfeiture of the *introducer's* conveyances and goods. This restrictive language, in view of its absence in the matter of the liquor, and in view of the nature of the statute and in view of the language of analogous statutes, is significant of congressional intent to limit the forfeiture to the property owned by him who is guilty of the prohibited act. Otherwise the stage, steamer, or other conveyance of a common carrier in the Indian country would be forfeited for the secret introduction of liquor by a passenger in or by the driver or captain of any such conveyance, though the owner was in ignorance thereof; so, likewise, the goods of shippers aboard such conveyances. And if not the goods of others in the introducer's custody, why the conveyances of others in his custody?

It is true that in proceedings of this character the thing involved, and not its owner, is the offender and is proceeded against, but it is the thing made liable by the statute. In some cases the thing is so made the offender regardless of ownership, and therein ignorance and innocence of the owner is no barrier to forfeiture. If those to whom he intrusted his property for honest purposes divert it to dishonest uses, his only remedy is to pursue the delinquent party. In other cases the thing is not made the offender, nor proceeded against unless owned by the person whose act in connection therewith invokes forfeiture, or unless the owner knowingly permitted the thing to be used therein

by said person. In still other cases, the statute imposes forfeiture upon some things, some interests, some properties, and not upon others. See U. S. v. Stowell, 133 U. S. 1, 10 Sup. Ct. 244, 33 L. Ed. 555; Dobbins v. U. S., 96 U. S. 395, 24 L. Ed. 637; Brig Malek Adhel, 2 How. 210, 11 L. Ed. 239; The Swan (D. C.) 77 Fed. 473; One Black Horse (D. C.) 129 Fed. 167; One Black Horse (D. C.) 147 Fed. 770, illustrating various forfeiture statutes.

Forfeitures are odious, and to be declared only when clearly imposed by statute. When they are claimed against those whose only offense is that they lawfully intrusted their property to others who betrayed the trust and diverted the property to unlawful uses, it must be very clear indeed that the owners are within both the letter and spirit of the statute, or the claim must be disallowed. The statute herein has no application to the property of Matt's parents. The whisky of Grandjo and the horse of James Matt are alone declared forfeited. The parents of Matt will have judgment. The seizure of their property was with probable cause, however, and upon reasonable grounds; and a certificate thereof will be entered.

MISSISSIPPI VALLEY TRUST CO. v. OREGON-WASHINGTON TIMBER CO. et al.

(District Court, W. D. Washington, S. D. May 16, 1914.)

No. 9.

STATES (§ 110*)—PRIORITY OF STATE AS CREDITOR.

Premiums or contributions due the state of Washington under the Workmen's Compensation Act (Laws Wash. 1911, c. 74), which under the statute are unsecured by lien upon any specific property, are not entitled to priority of payment over a debt prior in point of time secured by a mortgage to an individual, assuming that at common law the sovereign was entitled to a preference in payment of debts due from an insolvent, and that the state has succeeded to that prerogative under Rem. & Bal. Code, § 143, adopting the common law so far as not inconsistent with the Constitution and laws of the United States or of the state, nor incompatible with the institutions and condition of society.

[Ed. Note.—For other cases, see States, Cent. Dig. § 108; Dec. Dig. § 110.*]

In Equity. Suit by the Mississippi Valley Trust Company, a Missouri corporation, and others against the Oregon-Washington Timber Company, an Oregon corporation, and others, in which the state of Washington intervened. Intervener's petition denied.

Snow & McCamant, of Portland, Or., for plaintiffs.

W. V. Tanner, Atty. Gen., John M. Wilson, Ass't Atty. Gen. (W. M. Williams, of Olympia, Wash., of counsel), for Intervener, State of Washington.

CUSHMAN, District Judge. Upon the petition of plaintiffs, seeking the foreclosure of certain mortgages upon the property of the defendants, a receiver was appointed herein. The state of Washington in-

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

tervenes, and asserts a claim for $1,046.80, being the amount of premium, or contribution, due and payable to the state of Washington, under chapter 74, Laws of Washington 1911, upon the actual pay roll of the workmen employed by the defendant Washington Northern Railroad Company, in the extrahazardous departments and employments of its business. These premiums fell due subsequent to the attaching of the lien of the mortgages sought to be foreclosed herein, but before the appointment of the receiver. Under the laws of the state of Washington, the amount due for such a premium is a debt, unsecured by lien upon any specific property, to be collected by civil action.

The state petitions to have its claim for such premium allowed as a prior and preferred claim, to be paid in full. The plaintiff, trustee, resists the petition. No claim is made that its property in the hands of the receiver, is not covered by the mortgages, nor is the state asking to be preferred to unsecured creditors of the defendant railroad company. Its contention is that it is entitled to have its claim paid in full, to the postponement of any mortgage upon the defendant's property.

Plaintiff cites the following authorities: State v. Bank of Maryland, 6 Gill & J. (Md.) 205, 226, 228, 26 Am. Dec. 561; In re Carnegie Trust Co., 151 App. Div. 606, 136 N. Y. Supp. 466, affirmed 206 N. Y. 390, 99 N. E. 1096, 46 L. R. A. (N. S.) 260; Orem v. Wrightson, 51 Md. 34, 34 Am. Rep. 286; State v. Foster, 5 Wyo. 199, 38 Pac. 926, 29 L. R. A. 226, 63 Am. St. Rep. 47; Wise v. Wise Co., 153 N. Y. 507, 47 N. E. 788; State v. Williams, 101 Md. 529, 61 Atl. 297, 1 L. R. A. (N. S.) 254, 109 Am. St. Rep. 579, 4 Ann. Cas. 970; Freeholders of Middlesex County v. State Bank of New Brunswick, 29 N. J. Eq. 268, 274; Central Trust Co. v. Third Ave. Ry., 186 Fed. 291, 110 C. C. A. 1; Central Bank of Georgia v. Little, 11 Ga. 346; Zimmerman v. Chelsea Sav. Bank, Michigan, 161 Mich. 704, 127 N. W. 351.

Intervener the state of Washington relies upon the following authorities: State ex. rel. Davis-Smith Co. v. Clausen, 65 Wash. 156, 117 Pac. 1101, 37 L. R. A. (N. S.) 460; State v. Mountain Tbr. Co., 75 Wash. 581, 135 Pac. 645; New Jersey v. Anderson, 203 U. S. 483, 27 Sup. Ct. 137, 51 L. Ed. 284; In re Otto F. Lange Co. (D. C.) 159 Fed. 586; In re Industrial Cold Storage & Ice 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. 634, 117 C. C. A. 338; In re Conhaim (D. C.) 100 Fed. 268; In re Halsey Elec. Gen. Co. (D. C.) 23 Am. Bankr. Rep. 401, 175 Fed. 825; State of N. J. v. Lovell, 24 Am. Bankr. Rep. 562, 179 Fed. 321, 102 C. C. A. 505, 31 L. R. A. (N. S.) 988.

A claim by the state such as this is not for a general tax for public purposes, entitling it to be preferred in payment under the Bankruptcy Act. In re Farrell (D. C.) 211 Fed. 212.

The state contends that, even if its claim be considered not as a tax, but as a debt, it is one to a sovereign state, that at common law the sovereign was entitled to a preference in payment of debts due to him by an insolvent, and that the state has succeeded to this prerogative.

In this state, by section 1 of the Code of 1881, as re-enacted by

Laws of 1891, p. 31 (section 143, Rem. & Bal. Code), this state has adopted the common law. This section reads as follows:

"The common law, so far as it is not inconsistent with the Constitution and laws of the United States, or of the state of Washington, nor incompatible with the institutions and condition of society in this state, shall be the rule of decision in all courts of this state."

No attempt has been made herein to point out wherein the prerogative asserted by the state is inconsistent with the federal, or state Constitutions, or any law of either, nor wherein it is inconsistent with the institutions or conditions mentioned in the statute therein. Assuming, without deciding, that if there was such a prerogative under the common law of England, it is a prerogative of the state of Washington, its nature and extent remain for determination.

The question is not whether a debt due to the sovereign will, under a statute giving a lien therefor, or, in case of seizure thereon under warrant, be preferred, when the insolvent debtor's property is in the hands of the court, over an unsecured debt to a citizen, or subject, but precisely whether such a debt will take precedence over one prior in time thereto, secured by mortgage, to an individual. It clearly appears that it will not from the decisions cited, including those relied on by intervener. Guaranty Co. v. Title Guaranty Co., 224 U. S. 153, 32 Sup. Ct. 457, 56 L. Ed. 706; Central Trust Co. v. Third Ave. R. Co., 186 Fed. 291, 110 C. C. A. 1; In re Carnegie Trust Co., 151 App. Div. 606, 136 N. Y. Supp. 466, affirmed 206 N. Y. 390, 99 N. E. 1096, 46 L. R. A. (N. S.) 260.

The petition will be denied to the extent above indicated.

Ex parte MARCIL.

(District Court, W. D. Washington, S. D. May 4, 1914.)

No. 1569.

PRISONS (§ 15*)—BREACH OF PAROLE—COMMUTATION FOR SUBSEQUENT GOOD BEHAVIOR.

Under Act June 25, 1910, c. 387, § 6, 36 Stat. 820 (U. S. Comp. St. Supp. 1911, p. 1703), providing that where a prisoner breaks his parole he shall serve the remainder of the sentence originally imposed upon him, a prisoner is not entitled to commutation for good behavior under the Commutation Law (Act June 21, 1902, c. 1140, 32 Stat. 397), as amended April 27, 1906 (34 Stat. 149, c. 1997 [U. S. Comp. St. Supp. 1911, p. 1701]), during his confinement after being returned to prison for the breach of his parole.

[Ed. Note.—For other cases, see Prisons, Cent. Dig. § 26; Dec. Dig. § 15.*]

Application by James A. Marcil for writ of habeas corpus. Petition for discharge denied.

See, also, 207 Fed. 809; 208 Fed. 403, 125 C. C. A. 619.

James A. Marcil, in pro. per.

George P. Fishburne, Asst. U. S. Atty.

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

CUSHMAN, District Judge. Petitioner asks to be discharged from the custody of the warden of the McNeil Island Penitentiary. He began serving a five-year sentence May 13, 1909. On August 12, 1911, he was released under the Parole Law (1 Supp. 1912 Fed. Stat. Ann. p. 304). At the time of his release he had earned under the Commutation Law (6 Fed. Stat. Ann. p. 41, as amended April 27, 1906 [U. S. Comp. St. Supp. 1911, p. 1701]) 216 days for good conduct. He was out on parole 230 days when he was returned to prison for a violation of his parole. Upon his return, he was notified by the warden that he had, by violating his parole, forfeited the allowance for observance of rules allowed under the Commutation Act.

Petitioner, in September, 1913, brought suit for his discharge, contending that the forfeiture of the deduction earned before his parole was unwarranted. This court held the provision of the Commutation Act, providing for a deduction for good conduct from the sentence of a confined prisoner, unaffected by the later Parole law. 207 Fed. 809. Upon appeal, the Court of Appeals reversed that decision. 208 Fed. 403.

Petitioner has, since his return to prison, observed all the rules and was entitled to discharge, as answered by the warden, April 8, 1914, unless the terms of the Parole Act preclude the allowance of any deduction for good conduct from the sentence served after revocation of parole, as it has been held that it precludes any deduction for time earned prior to parole.

Section 3 of the Parole Act provides:

"Then said board of parole may in its discretion authorize the release of such applicant on parole, * * * to remain, while on parole, in the legal custody and under the control of the warden of such prison from which paroled, and until the expiration of the term or terms specified in his sentence, less such good time allowance as is or may hereafter be provided for by act of Congress. * * *"

Section 6 provides:

"If such order of parole shall be revoked and the parole so terminated, the said prisoner shall serve the remainder of the sentence originally imposed, and the time the prisoner was out on parole shall not be taken into account to diminish the time for which he was sentenced."

Section 10 provides:

"That nothing herein contained shall be construed to impair the power of the President of the United States to grant a pardon or commutation in any case, or in any way impair or revoke such good time allowance as is or may hereafter be provided by act of Congress."

This court, upon the former suit, held, in effect, that the last clause of section 6 fully amplified, explained, and removed any doubt concerning the meaning of the words "the remainder of the sentence originally imposed." In holding this court in error in so ruling, the Court of Appeals said:

"The record in the case shows that the appellee was out on parole 230 days; that he was then, by reason of his violation of the parole, retaken and returned to the prison. The record further shows that if he continued entitled to 216 days earned by him for good conduct before his parole, as the court below held, his sentence had at the time of the issuance of the writ been com-

pleted, and he was legally entitled to a discharge. But if the time so earned by him by his previous good conduct was forfeited by his subsequent misconduct, the judgment of the court below discharging him from custody must be reversed. That is the sole question in the case, and we are of the opinion that it is answered by the provisions of the statutes referred to. Both are acts of clemency intended to invite good behavior, but the consequence of a violation of that clemency is distinctly declared by the statute itself; section 6 of the act of June 25, 1910, declaring that in the event of a violation of the parole and its revocation therefor, not only shall the time for which the prisoner was sentenced not be diminished by the time he was out on parole, but expressly declares that, in such event, he shall serve the remainder of the sentence *originally imposed*, which was, in the instant case, five years. The formerly acquired credit by reason of the previous good conduct of the prisoner, which could not become effective until the end of his term, was thus forfeited by the statute itself upon the revocation of the parole, because of the prisoner's subsequent misconduct."

The words "orignally imposed" are italicized by that court, and by emphasizing those words it is clear that that court determined that an intention was shown by Congress that, when the parole of a prisoner was revoked, he should serve, in confinement, the remaining days of the term of sentence originally imposed, which he had not actually so served, undiminished by any time allowed for good conduct.

It is true that the court says that the deduction earned by good conduct was forfeited, but it is held that the forfeiture was by virtue of this statute; that the forfeiture is not because a forfeiture is expressly by the statute provided, but only because, as held, an intention is shown that the term of sentence imposed should be served in full.

The language is as fit to deny a deduction for good conduct after revocation of parole as to forfeit that earned before. The Court of Appeals held that both the Commutation Act for good conduct and Parole Act were acts of clemency, and the provisions, therefore, are no part of, and cannot be read into, the sentence originally imposed.

Having reached this conclusion, it is not appropriate to consider other matters discussed upon the hearing.

The petition for discharge is denied.

In re SIMS.

(District Court, N. D. Georgia. March 26, 1914.)

No. 3293.

BANKRUPTCY (§ 409*)—GROUNDS FOR REFUSAL OF DISCHARGE—FAILURE TO KEEP BOOKS.

Under Bankruptcy Act July 1, 1898, c. 541, § 14, 30 Stat. 550 (U. S. Comp. St. 1901, p. 3427), as amended June 25, 1910, c. 412, § 6. 36 Stat. 839 (U. S. Comp. St. Supp. 1911, p. 1496), providing that an applicant for discharge shall be discharged unless he has, with intent to conceal his financial condition, destroyed, concealed, or failed to keep books of account or records from which such condition might be ascertained, where a bankrupt, who was seriously embarrassed financially for several months prior to the bankruptcy, purchased lumber during the seven or eight months immediately preceding the bankruptcy, the larger part of which was never paid for, which he sold for over $11,000 in cash, the last of the transactions occurring but a short time before the bank-

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

ruptcy, but failed to keep any record, by books or otherwise, of the disposition of the proceeds of the sales, a discharge would be denied, since it might be assumed that his failure to keep books was in contemplation of bankruptcy, and it was so wholly without excuse that it must have been done with intention to conceal his financial condition.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 739, 752–757; Dec. Dig. § 409.*]

In Bankruptcy. In the matter of E. S. Sims, bankrupt. On objections to the bankrupt's application for discharge. Application denied.

H. W. Dent, Alvin L. Richards, Mayson & Johnson, Geo. B. Rush, and Walter R. Brown, all of Atlanta, Ga., for petitioning creditors.

C. D. Maddox, of Atlanta, Ga., for bankrupt.

NEWMAN, District Judge. I have gone carefully over the evidence recently taken in this case, and am satisfied that, under that evidence and under the evidence taken formerly, the bankrupt is not entitled to a discharge. I am compelled therefore to differ with the referee in the conclusion he reached.

It is clearly shown here that the bankrupt received over $11,000 worth of lumber, and no records whatever were kept, either by books or otherwise, to show what became of the proceeds of the sale of this lumber. It was sold by Mr. Akers, acting for Mr. Sims apparently, and Akers says, with which Sims agrees, that all the money received from the sale of said lumber was turned over to Sims. As stated, Sims shows nothing whatever by entries on books of account or by papers where this $11,000 went. The lumber was all received in 1911 and 1912, and disposed of, it seems, immediately upon its receipt at the railroad, for cash. The bankrupt's schedule of indebtedness indicates, and such I understand also to be the testimony of the trustee, that a large part of this lumber at least was never paid for.

The Bankruptcy Act, section 14, as amended June 25, 1910, c. 412, 36 Stat. 839 (U. S. Comp St. Supp. 1911, p. 1496), provides that all applicants for discharge in bankruptcy shall be discharged "unless he has * * * with intent to conceal his financial condition, destroyed, concealed, or failed to keep books of account or records from which such condition might be ascertained." The claim here is, not that any books were concealed or destroyed, but that he failed to keep books of account of any kind, or records from which his financial condition might be ascertained. Now this receipt of lumber was during the fall of 1911 and winter of 1912 and along up until June, 1912. There is not a scrap of writing, so far as this record shows, from which it might be seen what he did with the $11,653 which he received from lumber.

The only question, therefore, is whether or not the receiving of this large amount of money during a period of seven or eight months immediately before bankruptcy and keeping no record whatever of his business in connection therewith, certainly failing to show in any way what became of this large sum of money, was with intent to conceal his financial condition. It is certainly fair to assume that he did it in contemplation of bankruptcy, and it was so wholly without excuse that it must have been done, I think, with intention to conceal his

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

financial condition. Sims' petition in bankruptcy appears to have been filed August 27, 1912, so it was but a short time before bankruptcy that the last of these lumber transactions occurred. The evidence of the bankrupt shows that he had not deposited in the banks for two or three months prior to the bankruptcy, because of the fact that garnishments were served on the banks in which he deposited. So for some time at least he must have been in a condition of serious financial embarrassment. He must have intended, of course, the actual and necessary result of his acts, and his acts, or rather his failure to act, were such as to have entirely prevented his creditors and his trustee in bankruptcy from ascertaining his financial condition.

In the case of In re Hanna, 168 Fed. 238, 93 C. C. A. 452, decided by the Circuit Court of Appeals for the Second Circuit, this is said:

"A provision intended to insure the keeping of correct and complete accounts should be rigidly enforced."

Judge Hough, in the District Court, in the Schachter Case, 170 Fed. 683, after quoting from In re Hanna, supra, says this:

"No reasonable excuse for this failure to enter an important transaction is assigned by either of the bankrupts, and the court is left to infer intent from what the bankrupts actually did and the motives reasonably to be assigned for their acts."

The application for discharge should be denied.

In re SOCIAL CIRCLE COTTON MILLS.

(District Court, N. D. Georgia. April 23, 1914.)

BANKRUPTCY (§ 140*)—RIGHTS OF TRUSTEE—PRIORITIES.

Under Bankruptcy Act July 1, 1898, c. 541, § 47a(2), 30 Stat. 557 (U. S. Comp. St. 1901, p. 3438), as amended by Act June 25, 1910, c. 412, § 8, 36 Stat. 840 (U. S. Comp. St. Supp. 1911, p. 1500), providing that trustees as to all property in the custody, or coming into the custody, of the bankruptcy court shall be deemed vested with the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon, the right of a trustee to property in the possession of the bankrupt is superior to that of a mortgagee holding under an unrecorded mortgage good as between the bankrupt and the mortgagee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 198, 199, 219, 225; Dec. Dig. § 140.*]

In Bankruptcy. In the matter of the bankruptcy of the Social Circle Cotton Mills, bankrupt. Decision of the referee denying the claim of the First National Bank of Madison for priority as against the trustee of the bankrupt approved and confirmed.

Smith, Hammond & Smith and E. P. Upshaw, all of Atlanta, Ga., and Walker & Roberts, of Monroe, Ga., for trustee.

Rosser & Brandon and Slaton & Phillips, all of Atlanta, Ga., and F. C. Foster, of Madison, Ga., for intervener.

NEWMAN, District Judge. In this case the referee finds that the claim made by the intervener for priority as against the estate of the bankrupt company, and particularly against certain cotton and the

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

products of certain cotton, cannot be sustained because the papers, which he finds to have been mortgages and good as between the parties, but—

"all are unrecorded and therefore submissive to the amendment of June, 1910, and when the trustee took possession of whatever may have been in the mill, either raw cotton, that in process of manufacture, products, output, or proceeds from sales of any of the same, he became clothed with a lien, which Congress gave to trustees in bankruptcy, operated generally as such, and which attached to all of the property that came into the custody of the bankruptcy court, as against the holders of the unrecorded mortgages relied upon by interveners."

It is clear that the referee found correctly if the former decisions of this court and those of several other courts as to this are correct, and I think they are. The first case that came before this court which required the construction of the act of June, 1910, giving to trustees a lien as by legal or equitable proceeding, was the case of Farmers' Supply Co. (D. C.) 196 Fed. 990. In that case this amendment was discussed and all the authorities up to that time. The headnote to that case is as follows:

"Bankruptcy Act July 1, 1898, c. 541, § 47a(2), 30 Stat. 557 (U. S. Comp. St. 1901, p. 3438), as amended by act of June 25, 1910, c. 412, § 8, 36 Stat. 840 (U. S. Comp. St. Supp. 1911, p. 1500), which provides that 'trustees, as to all property in the custody or coming into the custody of the bankruptcy court shall be deemed vested with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings thereon,' was intended to protect general creditors against holders of unrecorded mortgages and conditional sale contracts, and, under such provision, the right of a trustee to property held by the bankrupt under a contract of conditional sale not recorded as required by Civ. Code Ga. 1910, § 3319, or the proceeds of such property, coming into his hands, is superior to that of the seller."

The matter subsequently came before this court in the case of Whatley Bros., 199 Fed. 326. In that case it was said:

"While the courts are not in entire accord, I think it may be considered as settled now that the purpose of the act of June, 1910, was to give the trustee in bankruptcy a lien for the benefit of creditors generally, such as a creditor could have 'by legal or equitable proceedings.' Such is the plain language of the amendment, and there is no escape, so far as I can see, from the conclusion that this was the intent of Congress in its enactment. It is recognized, of course, that the main purpose of the amendatory act of 1910 was to relieve general creditors from the situation which had been created by many decisions, notably by the decision in the York Manufacturing Company Case, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782, by which the liens of unrecorded mortgages and conditional bills of sale, which, under the state laws, would be good as between the parties, were held as good against the bankrupt estate. But, though probably having this particular purpose more distinctly in mind, Congress gave to trustees in bankruptcy this lien, which operates generally, and which attaches to all property coming into the custody of the bankrupt court.

"It has the same effect as a judgment at law or in equity. In re Bazemore (D. C.) 189 Fed. 236; In re Williamsburg Knitting Mills (D. C.) 190 Fed. 871. This latter decision was affirmed by the Circuit Court of Appeals for the Fourth Circuit, in Holt v. Henley, Trustee, 196 Fed. 1005 [115 C. C. A. 670] (February 23, 1912); also in Farmers' Supply Co. and Federal Chemical Co. v. House, Trustee, 196 Fed. 990, decided in this District May 13, 1912.

"My attention has been called to In re Flatland, 196 Fed. 310 [116 C. C. A. 130], which does not seem in accord with other cases; but I cannot agree with it, as I understand it."

There are some cases which might be cited to the contrary, but I think the rule as laid down in this court in the cases referred to is the correct construction of the amendment of 1910 to the bankruptcy act. Certainly it would require a reversal of what has been determined by this court heretofore on the subject.

With reference to the character of the paper made by the Social Circle Cotton Mills to the intervener, or how that should be construed, it must, giving it the strongest construction claimed for it by the intervener, be held to be inferior to the lien of the trustee under the amendment of June, 1910, referred to above.

The decision of the referee is approved and confirmed.

IBERT v. ÆTNA LIFE INS. CO.

(District Court, E. D. New York. May 4, 1914.)

ATTORNEY AND CLIENT (§ 150*)—RIGHT TO COMPENSATION—SUBSTITUTION OF ATTORNEYS.

An attorney, who was to receive one-fourth of the recovery for bringing a suit, was entitled only to reasonable compensation on the basis of the services rendered and capable of being rendered by him, where another attorney was substituted who negotiated a settlement.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 354–357; Dec. Dig. § 150.*]

At Law. Action by Mary L. Ibert against the Ætna Life Insurance Company. Proceeding to determine the rights of attorneys employed by plaintiff in the proceeds of a settlement. Ordered as stated in opinion.

Max E. Lehman, of Brooklyn, N. Y., for plaintiff.

Henry F. Cochrane, of Brooklyn, N. Y., for judgment creditor.

Philip A. Brennan, of Brooklyn, N. Y. (Fredk. S. Lyke, of Brooklyn, N. Y., of counsel), pro se.

CHATFIELD, District Judge. The plaintiff retained an attorney to bring suit under an agreement for one-third of the proceeds. Action under this was brought by another attorney, through arrangement of which the plaintiff was not informed, but which she ratified by verifying the complaint drawn by that attorney of record. The actual attorney of record was to receive one-fourth of the recovery. Settlement was made after substitution of a third attorney, who negotiated a division of the proceeds with judgment creditors, who obtained one-half of the settlement. All the recovery was subject to the rights which on substitution were preserved for the attorney of record by the terms of the order of substitution.

The original attorney has forfeited his rights by concealment of the transaction from his client. If the action had been carried through by the attorney of record, he would have been entitled to the full one-fourth. As a result of the substitution, however, he is entitled only to a reasonable compensation from the basis of his contract and of the services rendered and capable of being rendered by him. It

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

would seem that an allowance of $500 would be a fair compensation therefor, and such amount will be allowed from the entire proceeds of settlement. The plaintiff and judgment creditor may adjust their own shares therein, but the plaintiff will be held responsible for payment of the amount allowed.

THE HILTON.

THE ATLANTA.

(District Court, E. D. Virginia. March 27, 1914.)

COLLISION (§ 83*)—MOVING AND ANCHORED VESSEL—IMPROPER ANCHORAGE IN CHANNEL.

A collision in the Patapsco river between a steamship which had anchored because of dense fog near the port side of the channel, where she was allowed to swing to within 50 or 60 feet of the edge of the deep water channel, and a following steamship, *held* due to the faults of both vessels, the anchored vessel being in fault for anchoring within the channel where she obstructed the passage of other vessels, in violation of Act March 3, 1899, c. 425, § 15, 30 Stat. 1152 [U. S. Comp. St. 1901, p. 3543], when there was a sufficient depth of water outside of the channel, and the moving vessel being in fault for moving at too great speed in the fog.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 156, 167, 175; Dec. Dig. § 83.*

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

In Admiralty. Suit for collision by the A. H. Bull Steamship Company, owner of the steamship Hilton, against the steamer Atlanta, the Chesapeake Steamship Company, claimant, with cross-libel. Decree finding both vessels in fault and dividing damages.

Hughes, Little & Seawell, of Norfolk, Va., and B. W. Wells, of New York City, for libelant.

Arthur D. Foster, of Baltimore, Md., and W. Leigh Williams, of Norfolk, Va., for respondent.

WADDILL, District Judge. These cases involve a collision that occurred on the morning of the 26th of December, 1912, in the waters of the Patapsco river, at the junction of the Brewerton and Cut-Off channels, between the steamship Hilton of the libelant company's line, and the steamer Atlanta of the Chesapeake steamship line. The Hilton is a large steamer of 3,102 tons gross, 2,433 net, 315'5" long, 46' beam, 22' deep; and the Atlanta, a fast passenger and freight steamer, 2,094 tons gross, 1,399 net, 225' long, 42' beam, and 14' deep. The two steamers were on the morning of the collision, as was also the steamship Howard of the Merchants' & Miners' Transportation Company, hereinafter referred to, proceeding up the river en route to Baltimore; the Hilton some half hour ahead of the others, on a voyage from Carteret, N. J., light, and the Atlanta from West Point, Va., laden with freight and passengers. A short time before the collision, the three vessels encountered fog in the Cut-Off channel, and

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

the Hilton, on account of the density of the fog, came to anchor on the port side of the channel, opposite buoy 17, and the other two vessels continued their courses in said channel, the Howard on the starboard of the Atlanta, and the latter ship between her and the port side of the channel. While thus navigating, the Atlanta came into collision with the Hilton, striking her on her starboard bow, causing the damages sued for. The collision occurred about 7 o'clock in the morning; the Howard at the time had dropped anchor on the opposite side of the channel from that of the Hilton.

The Hilton charges fault against the Atlanta in that she failed to keep a good lookout; that she was proceeding at an immoderate rate of speed under the circumstances; that she should have stopped and backed; that she did not keep to the starboard side of the channel; and that she failed to avoid colliding with the Hilton.

The Atlanta, on the other hand, insists that the Hilton's anchorage was a clear violation of the statute; that she should have anchored in other anchorage grounds in the vicinity; and that it was merely her own convenience that caused her to anchor where she did, creating an obstruction to navigation, and a menace to life and property of others lawfully using the channel; that she was without a sufficient anchor watch, and failed to adopt the reasonable precaution of dropping her stern as well as her bow anchor, to hold her parallel with the channel.

Upon the issues thus made, considerable testimony was taken by the parties respectively, and in the view taken by the court the case turns upon the correct determination of two questions: (1) Whether the Hilton at the time of the collision was anchored in a proper place, and safely and properly moored; and (2) whether the Atlanta was proceeding at an undue speed in the then prevailing weather. These will be considered in the order mentioned.

In determining the propriety of the place of anchorage of the Hilton, the fact of the existence of fog, which became denser as she proceeded up the channel, and that she, the forward ship, had been forced to anchor perhaps half an hour before the collision, must be taken into account, as must also the width and depth of the waters in and out of the channel at the scene of the collision. The Brewerton channel, as well as the Cut-Off channel, was about 600 feet wide, and 35 feet deep, but at the place of the accident, namely, at the intersection of the two channels, between buoys 15 and 19, the deep water on the port side, opposite buoy 17 where the collision occurred, outside of the channel was for some distance 17, 18, and 19 feet deep at low water. The collision happened during flood tide. The Hilton was light, drawing 7 feet forward, and about 15 feet aft, and might have anchored outside of the channel with safety and prudence, as well as either to the starboard side, where she should properly have been navigating, or preferably, if in the channel at all, in the middle thereof, there being room to have anchored there, leaving ample space for the free passage of shipping to lawfully navigate on either side. Sight is not lost of the fact that in a fog difficulty may frequently be encountered in knowing where to anchor; but that does not apply here, since the Hilton was in full view of and saw the buoys on her

port side, at and before the time she anchored, and knew where she was; and she was charged with knowledge as well of the width of the channel at the angle of intersection between the two, as of the depth of water outside the buoys, observable to her when she anchored.

From the testimony it appears that the three vessels while proceeding up the Cut-Off channel, about Seven Foot Knoll on a northwesterly course, and at a distance of some two miles from the scene of the accident, encountered fog which became thicker after passing buoy 15, the point of intersection of the two channels, and some half a mile from the place of collision. At buoy 15, the ascending vessels changed their courses so as to make the turn into the Brewerton channel. It seems evident to the court that on the morning in question, while both the Hilton and the Atlanta claim to have been navigating about midway of the channel, that they directed their courses by the buoys on the port side, and so continued until rounding buoy 15, as above indicated; and that neither vessel had observed the "narrow channel" rule, and kept to the starboard side of the channel; and this is certainly true as far as the Hilton is concerned, both as respects her navigation and anchorage on that side. The Atlanta was more excusable in what she did in ascending the channel, and at and about the time of anchoring, because the Howard that immediately preceded her was to her starboard, and it was necessary for her to take that fact into account, though no such condition existed with the Hilton. It was doubtless more convenient for the Hilton to drop her anchor where she did, but she should not have done so, having regard to the free and lawful navigation of the channel by others in the exercise of due care. She should have taken especially into account the fact that down-coming vessels belonged on that side of the fairway; and she should have known that if it was convenient for her ascending the channel in contravention of the starboard hand rule, to hug somewhat to the port side instead of the starboard side thereof, on account of the buoys, that others, as was true in the case of the Atlanta, might do as she did, and hence she should not have placed herself in the way of both ascending and descending vessels. Whatever there may be in the claim of the desirability, if not the necessity, of vessels ascending the Cut-Off channel in a fog, before reaching buoy 15, to navigate by the buoys on the port side, that should not serve to excuse the Hilton for her navigation and anchorage after rounding buoy 15, since then there were buoys on both sides.

The question of the proper anchorage of vessels is a difficult one to determine, and must be left somewhat necessarily to the discretion of the navigators, who frequently act in emergencies, and whose acts cannot be easily passed upon in the light of later events and other surroundings. The subject has received much consideration since the passage of the Act of Congress of March 3, 1899, c. 425, § 15, 30 Stat. 1152 (U. S. Comp. St. 1901, p. 3543), particularly in the courts of this circuit. The Hilton cites The Europe, 190 Fed. 475, 479, 111 C. C. A. 307. This is a fog case, and it will be observed that the Circuit Court of Appeals of the Ninth Circuit, relying on the case of The Oregon, 158 U. S. 186, 15 Sup. Ct. 804, 39 L. Ed. 943, considered

it as settled law that ocean-going vessels might lie at anchor in the nighttime, in the deep channel of a navigable river, but held that they must be so placed as not to prevent or obstruct the passage of other vessels, in violation of the act of Congress referred to. The Minnie, 100 Fed. 129, 40 C. C. A. 312, was a thick weather case, in the Circuit Court of Appeals of this circuit, and the duty to keep the channel open was clearly recognized. The Job H. Jackson (D. C.) 144 Fed. 896, affirmed by the Circuit Court of Appeals of this circuit in 152 Fed. 1021, 82 C. C. A. 332, was a fog case, the collision occurring in what might not be termed a river or narrow channel, and in which the place of anchorage was not a voluntary one, but made necessary as the result of damage sustained in a collision. The Caldy (D. C.) 123 Fed. 802, a decision of the District Court of Maryland, affirmed by the Circuit Court of Appeals of this circuit, in 153 Fed. 837, 83 C. C. A. 19, was a case of obstructing a narrow channel, not in a fog. In this case, it was decided that the purpose of the act of March 3, 1899, supra, was not intended to absolutely prohibit the anchorage of vessels in navigable waters, except where so doing would necessarily prevent the passage of other vessels, or obstruct them to such an extent as would make an effort to do so a dangerous maneuver. In the recent case in this court of the Margaret J. Sanford, The Strathleven (D. C.) 203 Fed. 331, 336, 338, and which has since received the approval of the Circuit Court of Appeals of this circuit in 213 Fed. 975, 130 C. C. A. 381 (February term, 1914) much consideration was also given to this subject, and the conduct and duty of navigators in coming to anchor fully commented upon.

Under the decisions above cited, the court thinks that the Hilton was clearly in fault in the manner and place of her anchorage. While navigators must necessarily be accorded much latitude in determining when and where to anchor, they must not fail to reasonably respect and observe the rules governing them, or the rights of others in what they do. In this case, there was a clear omission on the part of the Hilton to measure up to the requirements imposed upon her by law in the respects indicated. The ship was a large one, 315 feet long, and so anchored that when she swung her stern came to within 50 or 60 feet of the banks of the deep water channel. There was certainly no necessity for her so monopolizing the channel either because of the lack of other location, a crowded harbor, or of existing weather or other conditions. Moreover, she should, if necessary so to anchor where she did, have used both her stern and bow anchors in order to keep the vessel parallel to, or nearly with, instead of across, the channel.

Second. Coming to the consideration of the faults assigned against the Atlanta, and how far she should be held, if at all, responsible for the collision, the conclusion of the court is that at the time of the accident she was proceeding at an unreasonable rate of speed in a fog. She had been running under half speed of about 7½ miles an hour, for some time, it is true, and after turning buoy 15, and making her departure at the junction of the Brewerton and Cut-Off channels, the fog having become denser, upon hearing the bells of a ship ahead, which turned out to be the Hilton, she still further checked her speed, but not enough

to avoid the collision. She should sooner have reduced her speed, and if necessary stopped and reversed, and at all events should have been sufficiently in control of her movements as to have stopped, under the circumstances of this case, in time to avoid collision after sighting the Hilton. The fog was growing thicker all the time; the Howard was immediately ahead of and slightly to her starboard, and had or was about to come to anchor. The Hilton was only a short distance ahead and her fog bells heard, all of which should have caused the Atlanta to exercise the utmost care in the matter of her movements. The Umbria, 166 U. S. 404, 412, 417, 17 Sup. Ct. 610, 41 L. Ed. 1053.

It follows from what has been said that the collision came about as a result of the combined negligence of the two vessels, and a decree will be entered so ascertaining.

RINGER v. VIRGIN TIMBER CO.

(District Court, E. D. Arkansas, W. D. April 8, 1914.)

1. USURY (§ 115*)—USURY AS DEFENSE—EVIDENCE.
   In support of the defense of usury, parol evidence is admissible although it varies or adds to the written contract.
   [Ed. Note.—For other cases, see Usury, Cent. Dig. § 326; Dec. Dig. § 115.*]

2. USURY (§ 16*)—USURIOUS TRANSACTIONS—DEVICES AS COVER FOR USURY.
   If a transaction was in substance merely a device to evade the usury laws, the defense of usury will be sustained, regardless of the form of the contract or of the language used in the negotiation as descriptive of the transaction.
   [Ed. Note.—For other cases, see Usury, Cent. Dig. § 30; Dec. Dig. § 16.*]

3. USURY (§ 31*)—USURIOUS TRANSACTIONS—PURCHASE AND SALE OF PROPERTY UNDER AGREEMENT.
   The owners of the stock of a lumber company against whose property, consisting of a large sawmill, timber lands, and a short-line railroad, a foreclosure suit was pending, applied to the real complainant herein, which was a realization company, for a loan with which to redeem from the mortgage. They were told that under its charter complainant could not lend money, and that its business was to buy property, largely that of insolvents, and sell again at a profit. After negotiations, it was agreed that complainant would buy in the property at foreclosure sale, if it could be purchased for $450,000, and resell the same to a new company to be organized, taking its notes therefor, secured by mortgage on the property for $597,000, which was about $75,000 in excess of lawful interest on the money actually advanced. This agreement was carried out, except that the notes and mortgage were for $750 more than agreed, which was admittedly to cover interest for the few days before the new notes were given. Complainant had no experience in the lumber business and would not have bought the property except for the agreement. *Held*, that the transaction was in substance a loan of money and was usurious; the exaction of the $75,000, ostensibly as a profit, being merely a device to cover the taking of usurious interest.
   [Ed. Note.—For other cases, see Usury, Cent. Dig. §§ 74, 78–81; Dec. Dig. § 31.*]

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

4. USURY (§ 83*)—USURY AS A DEFENSE.
That the maker of usurious notes is a corporation which has no property beyond that mortgaged to secure the notes, or even the fact that such property is insufficient in value to pay the debt, does not relieve the notes of their usurious character nor deprive the corporation of the right to plead the usury as a defense.
[Ed. Note.—For other cases, see Usury, Cent. Dig. §§ 163–166; Dec. Dig. § 83.*]

5. USURY (§ 2*)—WHAT LAW GOVERNS—PLACE OF PAYMENT.
Where notes were executed in Arkansas and secured by mortgage on property in that state, but were payable in Chicago, where the payee resided and carried on its business, the notes were governed, as to the question of usury, by the law of Illinois.
[Ed. Note.—For other cases, see Usury, Cent. Dig. §§ 2–15, 418; Dec. Dig. § 2.*]

In Equity. Suit by Jacob Ringer, as trustee, against the Virgin Timber Company. Decree for complainant, less deduction for usury.

Rose, Hemingway, Cantrell & Loughborough, of Little Rock, Ark., for plaintiff.

Moore, Smith & Moore, of Little Rock, Ark., for defendant.

TRIEBER, District Judge. This is an action to foreclose a deed of trust in the nature of a mortgage executed by the defendant to secure the payment of certain notes of the defendant, payable to A. B. Newman, which notes it is alleged in the complaint were executed for the purchase money of the property conveyed by the deed of trust. The defense is that the indebtedness is tainted with usury and is therefore, under the Constitution and laws of the state of Arkansas, void. The notes were executed in the state of Arkansas, and made payable at the office of the payee, A. B. Newman, in the city of Chicago, where he resides and carries on his business.

Article 19, § 13, of the Constitution of the state of Arkansas, is as follows:

"All contracts for a greater rate of interest than ten per centum per annum shall be void as to principal and interest, and the General Assembly shall prohibit the same by law, but when no rate is agreed upon the rate shall be six per centum per annum."

In pursuance of this constitutional provision, the first General Assembly of the state of Arkansas which met after the adoption of the Constitution in 1874 enacted a law regulating the rate of interest on contracts. The provisions of that act applicable to the issues in this case, as digested in Kirby's Digest of the Statutes of Arkansas, are as follows:

"Section 5379. When no rate of interest is agreed upon, the rate shall be six per centum per annum.

"Section 5380. The parties to any contract, whether the same be under seal or not, may agree in writing for the payment of interest not exceeding ten per centum per annum on money due or to become due.

"Section 5381. No person or corporation shall, directly or indirectly, take or receive in money, goods, things in action, or any other valuable thing, any greater sum or value for the loan or forbearance of money or goods, things in action, or any other valuable thing, than in section 5380 prescribed."

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

"Section 5390. All bonds, bills, notes, assurances, conveyances, and all other contracts or securities whatever, whereupon or whereby there shall be reserved, taken or secured, or agreed to be taken or reserved, any greater sum or greater value for the loan or forbearance of any money, goods, things in action, or any other valuable thing, than is prescribed in this act shall be void."

The statute of Illinois on this subject in force at the time the contract was made, and still in force, is as follows:

"If any person or corporation in this state shall contract to receive a greater rate of interest or discount than seven per cent. upon any contract, verbal or written, such person or corporation shall forfeit the whole of said interest so contracted to be received, and shall be entitled only to recover the principal sum due to such person or corporation. And all contracts executed after this act shall take effect, which shall provide for interest or compensation at a greater rate than herein specified, on account of nonpayment at maturity, shall be deemed usurious, and only the principal sum due thereon shall be recoverable." Hurd's Rev. St. Illinois 1912, c. 74, § 6.

Many important facts are undisputed, and therefore had best be set out here. These are:

The Clio Lumber Company, a corporation engaged in manufacturing lumber, was the owner of a large sawmill, large tracts of valuable timber lands, and several thousand acres of land from which the timber had been cut. It also owned all the capital stock of a short-line railroad constructed primarily for the purpose of carrying the logs to the mill, and the manufactured product from the mill to a trunk line. It is known as the Anderson & Saline River Railroad Company, and is duly incorporated as a railway. All of the capital stock of the Clio Lumber Company was owned by the Bluff City Lumber Company, another corporation, which sold the manufactured product of the Clio Lumber Company. The Clio Lumber Company had executed a mortgage on all of its property to secure a large indebtedness, and, having defaulted, suit was instituted in this court to foreclose the mortgage and a receiver was appointed to take charge of its assets. While these proceedings were pending, the Bluff City Lumber Company became insolvent, and, by a proper proceeding instituted in this court, a receiver was appointed to take charge of all its affairs and distribute the funds arising from the sale thereof among its creditors. Among the assets which thus came to the receiver of the Bluff City Lumber Company were the shares of the capital stock of the Clio Lumber Company. The capital stock of the Bluff City Lumber Company was all owned by one J. F. Rutherford and his wife, except that Mr. Rutherford had agreed to sell one-fourth of the capital stock to Mr. J. H. Allen, his nephew, when he paid for the same. But he had never paid for it, and therefore it was never delivered to him, but under this contract he claimed an interest in the Bluff City Lumber Company.

While these proceedings were pending, Mr. Rutherford died, and thereupon his wife became entitled, as dower, to one-third of all the stock owned by him at the time of his death, in addition to the stock owned in her own right. As administratrix of his estate she held the remainder of his shares of stock.

While the proceedings for the foreclosure of the Clio Lumber Company mortgage were pending, Mrs. Rutherford and her nephew, Mr.

Allen, believing that, as owners of the capital stock of the Bluff City Lumber Company, they had a valuable equity in the assets of the Clio Lumber Company, made strenuous efforts to obtain the money necessary to pay off the mortgage debt and reorganize the company, but had failed up to the time the final decree of foreclosure was rendered and the mortgaged premises directed to be sold by the master of this court. They thereupon employed Mr. B. J. Altheimer, an attorney then residing in Chicago, Ill., but who had previously resided in Pine Bluff, Ark., where the other parties resided, and was a friend of Mrs. Rutherford and Mr. Allen, to try to obtain the sum of $450,000 for the purpose of paying off the decree of foreclosure, which, with the costs and receiver's certificates which had been issued, was calculated to amount to that sum. The mortgaged property was estimated by them as being of the value of $1,000,000 or $1,200,000. Mr. Altheimer decided to go to New York and try to make arrangements for obtaining the $450,000 to pay off this indebtedness. The unsecured creditors of the Clio Lumber Company, it was proposed, were to be paid in notes running one, two, three, four, and five years if accepted by them; that indebtedness amounted to between $90,000 and $100,000. A number of these creditors holding about 55 per cent. of these unsecured claims had agreed to accept that proposition, but the others had either declined or refused to commit themselves.

On his way to New York, Mr. Altheimer stopped off in Chicago, his home, to make an effort to secure the money there. Mr. Rutherford had had negotiations for a loan with the Commercial & Continental National Bank of Chicago before the foreclosure proceedings against the Clio Lumber Company were instituted, but for some reason had failed to secure the loan. Upon his arrival in Chicago, Mr. Altheimer called on a friend of his, Mr. Julius Lowenthal, a broker in that city, and asked him to introduce him to the officers of the Commercial & Continental National Bank in order that he might see them about securing the money needed for the reorganization of the Clio Lumber Company. Mr. Lowenthal introduced him to one of the officials of that bank, and thereupon Mr. Altheimer presented to him his application for the money. He was then referred to an officer of a trust company connected with the bank, and which dealt in matters of that nature, and after showing him what the assets consisted of, and assuring him that their value exceeded $1,000,000, was about to come to an understanding, when the officer learned that the property was in the hands of a receiver. As soon as he learned that fact, he broke off all negotiations, saying it would be impossible to sell the bonds to investors, as one of the important facts which investors would want to know was whether the concern had been successful. He informed Mr. Altheimer that the only institutions which would care to handle such a proposition were what are known as "realization companies." These negotiations having failed, Mr. Altheimer returned to Mr. Lowenthal, who thereupon introduced him to Mr. A. B. Newman, the payee of the notes now in controversy, and the president of the Illinois Realization Company, a corporation organized under the laws of the state of

Illinois, and whose business it is to purchase assets of insolvent concerns and rehabilitate them.

The undisputed testimony further shows that it was finally arranged between the parties that if, after investigation, the assets of the Clio Lumber Company were found to be of the value represented, or near it, Mr. Newman, acting for the realization company, would purchase them at the master's sale, provided the price would not exceed $450,000; that any sum in excess of that amount should be furnished by Mr. Altheimer and his associates; that, when purchased by Mr. Newman, Mr. Altheimer and his associates were to organize two corporations under the laws of the state of Arkansas, one of the corporations to be known as the "operating company" and the other to be known as the "holding company"; that upon the organization of these corporations Mr. Newman was to convey to the holding company all of the assets acquired by him from the master's sale, except some assets which were to be conveyed by him to the operating company; that the consideration for said conveyances from Mr. Newman to these corporations was to be $597,000, to be secured by a trust deed or mortgage on all the property conveyed. All of the capital stock of the holding company was to be turned over to him as additional security, and also the stock of the Anderson & Saline River Railroad Company which had been owned by the Clio Lumber Company, and was to be obtained by him by his purchase of the assets of that company; that upon the organization of the operating company Mr. Altheimer and his associates should take $49,000 of the capital stock of said company, Mr. Newman retaining $51,000 as additional collateral security, Mr. Altheimer and his associates to pay for the stock $50,000 in cash, but after the sale had been made, Mr. Altheimer and his associates being unable to pay for any of that stock, it was agreed that all of this stock should be turned over to Mr. Newman as additional security.

The notes executed by the defendant were for $597,750, payable at different times as follows: $12,500 three months after date; $30,500 six months after date; $12,500 nine months after date; $30,500 twelve months after date; $12,500 fifteen months after date; $30,500 eighteen months after date; $12,500 twenty-one months after date; and $456,250 two years after date. No interest was to be charged on these notes until after maturity, when they were to bear interest at the rate of 10 per cent. per annum. At the sale made by the master Mr. Newman purchased the assets of the Clio Lumber Company, paying therefor $450,000 cash; that was not quite sufficient to pay off the decree and all the costs, which amounted to about $470,000. Although Mr. Altheimer and his associates were to pay this excess sum with their own funds, they did not do so, but paid it out of the assets of the new corporations after they had been organized. The two corporations were organized, one of which was the defendant, the Virgin Timber Company, and the other called the Triangle Lumber Company. The lands, mill, and railroad were by Mr. Newman conveyed to the Virgin Timber Company after it had been organized, and the other assets to the Triangle Lumber Company. The Virgin Timber Company executed its deed of trust, in the nature of a mortgage, whereby it conveyed to the

plaintiff, Jacob Ringer, as trustee, all of the property which had been acquired by Mr. Newman and conveyed to that company, to secure the notes executed in conformity with the agreement hereinbefore set out.

Before the corporations were organized, a written agreement was made by the parties in pursuance of the former agreement as hereinbefore set out.

The first five notes were paid as they matured, and thereafter there was a default, and as the trust deed, as well as each of the notes, contained an acceleration clause, authorizing the holders of the notes to declare all of them due upon default in the payment of any of them, these proceedings were instituted to foreclose the mortgage.

On the part of the defendant it is claimed that the entire proceeding was merely a loan for the purpose of enabling a reorganization of the Clio Lumber Company and was so treated in all their negotiations, and that the purchase by Mr. Newman and the subsequent sale to defendant corporations was merely a device for the purpose of evading the usury laws of the state of Arkansas where the property is situated, as well as those of Illinois, where the negotiations were initiated and the notes finally made payable.

On the other hand, on the part of the plaintiff it is claimed: That the realization company, for which Mr. Newman acted, and which is the real party in interest, was expressly prohibited by its articles of incorporation to engage in the business of loaning money; its articles providing that its object is "to do a general brokerage and commission business, other than corporate stocks, and buy real estate at judicial, fiduciary, trustee's, pledgee's, mortgagee's and other liquidating or private sales, and to convert the property so bought into money, but not to engage in the business of loaning money." That it purchased these assets in good faith for its own use and sold them to the defendant, reserving to themselves what they considered a reasonable profit on their investment, their services, and the expenditure amounting to about $12,000 for counsel fees, investigation of the property, estimating its value, and other expenses connected with the transaction.

It is undisputed that these expenses were to be borne by the realization company, regardless of whether the negotiations resulted successfully or not.

[1] A preliminary question arose at the hearing when counsel for plaintiff objected to the introduction of oral testimony to vary the written agreements entered into by the parties. It requires no citation of a long list of authorities to show that this contention is untenable. As stated in Houghton v. Burden, 228 U. S. 161, 169, 33 Sup. Ct. 491, 493 (57 L. Ed. 780), where the precise question was before the court:

> "Where the inquiry is whether the contract is one forbidden by law, it is open to evidence dehors the agreement to show that though legal upon its face it was in fact an illegal agreement. Otherwise the very purpose of the law in forbidding the taking of usury under any cover or pretext would be defeated. The defense is one which the debtor may make even though it contradicts the agreement."

The defendants, for the purpose of establishing their contention, introduced two witnesses, B. J. Altheimer and J. H. Allen, who con-

ducted the negotiations with Mr. Newman. Their testimony, in addition to the undisputed facts hereinbefore recited, tends to show that in their negotiations with Mr. Newman the fact that a sale would have to be had and the property purchased by Mr. Newman and the conveyances made to the new corporation was not mentioned at the first meetings; that what they wanted from Mr. Newman, and what was understood by him, was a loan of $450,000; that they asked for the loan for five years, but that Mr. Newman absolutely declined to make a loan for such a length of time, and at first insisted that if the loan was made it would be for not exceeding eighteen months, but finally agreed that it might be made for two years; that he told them, in order to make that loan, he would charge them interest at the rate of 8 per cent. per annum on the $450,000 for the full two years, amounting to $72,000, although a part of it would be paid back sooner, and the further sum of $75,000 for his services, making a total of $597,000, which they would have to pay him to obtain the loan of $450,000. The additional $750 included in the notes, according to the testimony of the parties, represents the interest on the $450,000 for ten days at the rate of 6 per cent. per annum; the $450,000 having been paid for the purchase at the master's sale ten days before the final arrangements were made and the notes now sued for executed.

On the other hand, the testimony of Mr. Newman, as well as Mr. Ringer, his attorney, tends to show that when Mr. Altheimer and Mr. Allen came to see Mr. Newman they were at once told that this corporation was not permitted under its charter to lend any money; that it never engaged in making loans, but that its business was to purchase the assets of insolvents and then dispose of them at a profit, and that the only negotiations that could be had would be upon that basis; that until Messrs. Altheimer and Allen testified at the hearing of this cause they had never heard it intimated that there was any claim or could be any claim that the transaction was in the nature of a loan; that until the plea of usury was filed in this cause, and it was not pleaded in the original answer but only set up in an amended answer after the cause had been set down for hearing, they did not know that the transaction was claimed to be a loan, and usurious, nor upon what the claim was based.

It would serve no useful purpose to state in detail the conflicting testimony. The witnesses all testified orally, and the court finds from the evidence that, although Mr. Altheimer intended to obtain a loan, and probably treated it in his own mind as a loan, the plaintiff and his attorney, both of whom have been connected with this business since its organization in 1909, and were thoroughly familiar with the usury laws of Illinois, as well as those of Arkansas, never admitted that the transaction would be one of loan, but spoke of it at all times as a purchase of the property and a sale at a good profit.

In the opinion of the court the language of Judge Coxe, delivering the opinion of the Circuit Court of Appeals for the Second circuit in Re Canfield, 193 Fed. 934, 113 C. C. A. 562, and quoted with approval by the Supreme Court when that case was before it on appeal (sub

nom. Houghton v. Burden, 228 U. S. 161, 33 Sup. Ct. 491, 57 L. Ed. 780) is very apposite. He said:

"Why should Burden make an agreement to enable him to receive usurious interest and at the same time make it impossible for him to take such interest without placing him absolutely at the mercy of Canfield?

"There is no pretense that Burden was non compos mentis at the time, and yet it is difficult to believe that any rational being would have gone to the trouble and expense of having this elaborate agreement prepared for the purpose of avoiding the usury law and at the same time admit to the only man who could interpose a defense of usury that it was a void agreement. So far as the validity of the agreement is concerned, Burden might as well have stamped in red ink on its face the words 'void for usury.' We must assume that Burden is a man of ordinary common sense; but, in order to find that he made the statement quoted, we must convict him of stupidity which is unique in its originality. It is difficult to imagine that a rational being would procure a safe to protect him from burglary and immediately send the 'combination' to the burglar whom he had most reason to dread."

[2] But, regardless of the language used in the negotiations as descriptive of the transaction, if the transaction was in substance merely a device for the purpose of evading the usury laws, the plea must be sustained, for the law does not tolerate any device to avoid the consequences of unlawful acts. The authorities are unanimous that the courts will disregard the form which a contract may take, but look to the substance of the transaction in order to determine whether or not it is usurious. The books contain many cases where artful contrivances have been resorted to whereby the lender is to receive some other advantage or something of value beyond the repayment of the loan with legal interest. In Missouri, Kansas, etc., Trust Co. v. Krumseig, 172 U. S. 351, 19 Sup. Ct. 179, 43 L. Ed. 474, a novel device had been resorted to for the purpose of evading the usury laws, but it did not prevent the court from sustaining the plea of usury. When that case was before the Circuit Court of Appeals for this circuit (77 Fed. 32, 23 C. C. A. 1), Judge Caldwell, who delivered the opinion of the court, quoted with approval from Trust Co. v. McLachlan, 59 Minn. 468, 61 N. W. 560, the following:

"We had supposed that in the course of our professional and judicial experience we had met with about all the forms of contract which have been devised by the ingenuity of modern associations of this and similar kinds, but this one is entirely novel to us. It is certainly unique, and after a careful study of all its provisions it seems clear to us that it must have been contrived for the purpose of evading either the insurance laws or the usury laws, or both, of this state."

The finding of the Court of Appeals that the contract in that case was merely a device to obtain usurious interest on the loan was affirmed by the Supreme Court. 172 U. S. 351, 19 Sup. Ct. 179, 43 L. Ed. 474.

Leading cases on that subject which have been followed by all the American courts, are De Wolf v Johnson, 10 Wheat. 367, 385, 6 L. Ed. 343, and United States Bank v. Owens, 2 Pet. 527, 537, 7 L. Ed. 508. In the first-cited case the court held:

"Usury is a moral taint, wherever it exists, and no subterfuge shall be permitted to conceal it from the eye of the law; this is the substance of all the

cases, and they only vary as they follow the detours through which they have had to pursue the money lender."

In the Owens Case it was said:

"A profit made, or loss imposed on the necessities of the borrower, whatever form, shape, or disguise it may assume, where the treaty is for a loan and the capital is to be returned at all events, has always been adjudged to be so much profit taken upon a loan, and to be a violation of those laws which limit the lender to a specified rate of interest."

The devices resorted to for the purpose of evading the usury laws are so manifold that it is impossible to enumerate them. New schemes are continually devised, but the courts will not permit them no matter what disguise may be assumed, if, in fact and effect, it is but a device to obtain usurious interest.

In Re Fishel, 198 Fed. 464, 117 C. C. A. 224, the scheme was to pay the lender, in addition to the lawful rate of interest, a commission for collecting accounts assigned as collateral security. No actual rendition of such service was contemplated, and the court held that it was merely a device to cover usury.

In Scott v. Fabacher, 176 Fed. 229, 100 C. C. A. 147, the scheme held to be usurious was as follows: Defendant lent the plaintiff $15,000 to be used in the purchase of a tract of land which complainant expected to sell to a corporation at a profit. The transaction took place in Texas and a note was there given for the money payable there. At the same time a contract was entered into by the parties reciting that in consideration of the loan complainant agreed to pay to the defendant three-fifths of the $10,000 profit realized from the sale of the land, and if such profit was not made to pay 10 per cent. on the loan, and also to execute a deed of trust on some of his property to secure the performance of the entire contract. Plaintiff, having made the expected profit, executed his note to the defendant in the city of New Orleans for $6,000. The original note was paid, and in an action involving the $6,000 note the plea of usury was set up and by the court sustained.

In Missouri, Kansas & Texas Trust Co. v. Krumseig, supra, the scheme held to be usurious was as follows: A loan of $2,000 was made which was to be repaid in monthly installments of $30 for ten years, the debt to be canceled in case of the death of the borrower before all the payments were made. After a medical examination, the lender procured a policy of insurance on the life of the borrower to cover the loan, with deductions for each month's payments. This scheme was declared to be a cloak for usury by the Supreme Court of Minnesota in Trust Co. v. McLachlan, 59 Minn. 468, 61 N. W. 560; by Judge Nelson in Krumsieg v. Missouri, K. & T. Trust Co. (C. C.) 71 Fed. 350; and the Circuit Court of Appeals for this circuit in 77 Fed. 32, 23 C. C. A. 1, and finally affirmed by the Supreme Court of the United States.

That a bona fide sale of property will not be declared usurious is true, as the element of lending and borrowing is absent; but in every

instance the courts add, "unless it is a device to cover a loan and exact usurious interest."

[3] In the instant case the real facts, as the court finds them, are that Mrs. Rutherford and Mr. Allen believed that, as owners of the capital stock of the Bluff City Lumber Company, they had a valuable equity in the property of the Clio Lumber Company, worth at least $600,000, although, in fact, they had no such equity, that stock having vested in the receiver of the Bluff City Lumber Company; that by obtaining a loan of $450,000 on the security of the assets of the Clio Lumber Company they could save that valuable equity; that they employed Mr. Altheimer to procure a loan of that sum; whether to obtain the loan it would be necessary to have the property of the Clio Lumber Company sold by the receiver under the decree of the court, or obtain a discharge of the receivership upon payment of the mortgage debt and costs, was a mere matter of detail to be determined by the parties from whom the money was to be obtained. On the other hand, the realization company, having satisfied itself of the sufficiency of the security, was willing to furnish the money necessary to enable these parties to secure the assets of the Clio Lumber Company, and thus save for them the equity which they believed they owned; but it was unwilling to furnish the money at a lawful rate of interest, but would do so if it could secure a large profit, much in excess of the lawful rate of interest. To accomplish this it was necessary to resort to the scheme of a purchase and sale.

From time immemorial needy borrowers have consented to any terms imposed upon them, and in the opinion of the court the realization company was organized for the very purpose of taking advantage of the necessities of such persons. The plaintiff, Mr. Ringer, who was the attorney for the company, and who had prepared the articles of incorporation, a lawyer of great ability and experience, in answer to the question, "What is the object of the organization?" testified, "The prime object of its organization is to buy in property in liquidation, finance compositions, and rehabilitate the properties." Mr. Newman, the payee of the note, and president of the realization company, in reply to the question, "What is the business of the company?" testified, "To buy and sell properties of all kinds. We usually buy the assets of bankrupt estates from the court." The object of the realization company, as stated in its articles of incorporation, is to do "a general brokerage and commission business other than corporate stocks, buy real estate at judicial, fiduciary, trustee's, pledgee's, mortgagee's and other liquidated or private sales, and convert the property so bought into money, but not to engage in the business of loaning money." The insertion of this last clause "but not to engage in the business of loaning money" arouses a suspicion that it is to be used as a shield against a plea of usury. What was the necessity of inserting it? The law is well settled that a corporation can engage only in such business as the articles of incorporation authorize, either expressly or by necessary implication, and, if they fail to authorize the loaning of money, the corporation has no right to engage in it, and in a proper proceeding

its charter could be forfeited, if it engages in unauthorized transactions.

The circumstances surrounding this entire transaction are of such a nature that it is impossible to reach any other conclusion than that at least $75,000 of the $597,000 agreed on as the purchase money to be paid by the new corporation was a device to evade the usury laws. None of the parties connected with the realization company had any experience in the lumber business or the handling of large tracts of lands; they had no intention of having anything to do with the management of the business except so far as would be necessary to see to the proper application of the money realized from the operation of the plant. Mr. Ringer testified that during the negotiations Mr. Newman said:

"Altheimer, we never go into business where we have to operate it. We are not practical operators; we don't know anything about running a mill concern; we won't go in anything of the kind."

And speaking for himself he testified:

"Our company would not have bought that property if we had not had an understanding that Altheimer and Allen would look after it for us. In other words, we would not have come in here as mere naked bidders to buy a lumber concern; we might have bought standing timber, or might have bought the lands outright; we might have bought the tangible assets, but we would not have gone into any venture that required the operation of a plant if we had to do the operating. We were not qualified to do it."

From a careful review of all the evidence and the circumstances shown to have existed, it is clear that it was never contemplated by either of the parties that the property, when bought at the receiver's sale, should pass into the actual control of Mr. Newman or his company, further than was necessary to secure the money they were to advance and the profit they were to receive; that all the assets were to pass to the corporations to be organized for that purpose by Mr. Altheimer and his associates, subject to the mortgage to secure the money furnished by Mr. Newman, and the compensation he was to receive therefor. Under that agreement Mr. Newman could not sell that property to any other person, no matter how much more he could realize by such a sale. Another circumstance which must be taken into consideration is that $750 was added to the contract price, which all parties agreed was to pay interest on the $450,000 for the ten days which elapsed between the day the money was paid to the receiver and the transaction was finally consummated by the execution of the deeds and mortgage.

Cases directly in point are Tillar v. Cleveland, 47 Ark. 287, 1 S. W. 516, and Lowe v. Loomis, 53 Ark. 454, 14 S. W. 674. In the Cleveland Case, Cleveland applied to Tillar for a loan of $270 to purchase a lot and complete the building thereon, offering to pay 10 per cent. interest per annum, the highest rate allowed by the laws of the state. Tillar declined to make the loan at that rate of interest, but agreed to purchase the lot himself and sell it to Cleveland for $360, payable at the rate of $30 per month. This proposition was agreed to; the deed to

the lot was executed by the seller to Tillar, who took twelve notes of $30 each from Cleveland and executed a bond for title to convey the lot to him upon payment of all the notes. The court held that this was a usurious contract.

In Lowe v. Loomis the facts were similar to those in Tillar v. Cleveland, and the same conclusion was reached.

Ford v. Hancock, 36 Ark. 248, is another case in point. It was there held that, while it is not usurious for one to sell property on credit for a higher price than if sold for cash with the highest legal rate of interest added, the transaction is usurious if the sale be really made on a cash estimate and the amount is added for the time credit is given which is greater than the highest lawful rate of interest.

To the same effect is Grider v. Driver, 46 Ark. 50.

Brakefield v. Halpern, 55 Ark. 265, 15 S. W. 190, and Ellenbogen v. Griffey, 55 Ark. 268, 18 S. W. 126, cited for plaintiff, in no wise conflict with or modify the earlier cases hereinbefore cited.

In the Brakefield Case the facts were that Halpern, a merchant, had entered into an agreement with an organization of farmers to sell them goods at a net profit of 10 per cent. if paid for in cash and 20 per cent. above cost and carriage if sold on credit. There was no contract for a loan of money. Only two witnesses testified at the trial, which was had to the court, a jury having been waived, the plaintiff and the defendant. The plaintiff's testimony tended to show that it was a purchase and sale, while the defendant's testimony tended to show that it was in the nature of a loan. The trial court found the issue for the plaintiff. Upon appeal the judgment of the lower court was affirmed in a very brief opinion. The opinion reads:

"The only question presented for our consideration is: Was the verdict sustained by the evidence? The answer is: It was. It is unsatisfactory; but, as there was some evidence to sustain it, we cannot disturb it, but, on the contrary, affirm the judgment of the court below."

In the Ellenbogen Case the court reaffirmed the rule established in Ford v. Hancock, Grider v. Driver, and Tillar v. Cleveland, but held that they were inapplicable to the facts in the case before them. The court stated the facts as follows:

"In the case at bar it does not appear that Robbins ever applied to Ellenbogen for a loan of money, or that the former desired to borrow, or the latter to lend, money. Ellenbogen was the owner of store fixtures and a stock of liquors, and Robbins wished to purchase them."

The court found the transaction to be a bona fide sale and not borrowing or lending, and therefore not usurious.

In Wormley v. Hamburg, 46 Iowa, 144, property had been sold at a judicial sale, but before the time for redemption had expired a person other than the owner redeemed it and entered into an agreement with the original owner that he would convey it to him for a consideration equal to the amount paid to redeem the land and a profit equal to 40 per cent. This was held usurious.

In Wilkinson v. Wooton, 59 Ga. 584, the transaction held to be usurious was as follows: One held a bond for title to land, and, be-

ing unable to pay the balance due, entered into an agreement whereby the other was to pay the balance, taking a conveyance of the land and renting it to the original holder of the bond for title until he could repay the money loaned, at which time he was to have a conveyance and in the meantime pay rent for the use of the lands equal to 20 per cent.

Other cases in point are Ferguson v. Sutphen, 8 Ill. (3 Gilman) 547; Fiedler v. Darrin, 50 N. Y. 437.

[4] Counsel for plaintiff say that:

"There is no human being under any obligation to repay Mr. Newman this money. Mr. Newman's only chance is to get it out of the property."

It is true that the incorporators of the Virgin Timber Company were by Mr. Newman released from all personal liability which might arise from the fact that they had subscribed and issued to themselves, without paying therefor, the stock of the Virgin Timber Company; but the Virgin Timber Company is clearly liable for this debt, and, if it becomes seized of any other property than that covered by this mortgage, it will be liable for any deficiency after a sale of the mortgaged premises. It may be that it has no property subject to execution at present, but that does not relieve it of its liability nor deprive the plaintiff of having a deficiency decree against it. By the execution of the notes it obligated itself to repay the money at all events.

Eames v. Hardin, 111 Ill. 634, is cited on behalf of plaintiff as establishing a rule different from the one hereinbefore stated, and it is claimed, being in the nature of a construction of the Illinois usury statute, where the notes in this case are made payable, it should control. Assuming for the present that this contract is to be governed by the laws of the state of Illinois, the facts as found by the court differ so materially from those found in the instant case that it cannot be said that it conflicts with the rule established in Tillar v. Cleveland, supra, and the other cases hereinbefore cited. In that case it was held that to establish a deed, absolute in form, as a mortgage, the proof must be clear and convincing. The court stated the facts as follows:

"When appellants purchased the master's certificates, Hardin's relation to the property had ceased. He was then a stranger to the title. He expected, if he could control the title, to be able in a short time to turn the lots over to Cushman at a large profit on the price he agreed to pay for them; but Cushman having become insolvent, and unable to take and pay for the lots, and they, like all other property, doubtless having appreciated largely in value, he now is endeavoring to turn the transaction into a loan and mort gage, and thus make of appellants a portion of the profits he expected to, but did not, realize from Cushman."

The earlier decision of that court in Ferguson v. Sutphen, supra, is neither overruled nor modified by the Eames Case.

[5] As hereinbefore stated, the contract was finally executed in Arkansas, but the notes were made payable in Illinois, where the lender resided and carried on its business. As there is quite a difference in the penalties imposed by the laws of these states in usurious transactions, it is important to determine the laws of which state control this case. There is no proof whatever to justify a finding that in the specific acts of either the execution of the notes, or the selection of the

place of performance, there was any intention to evade the laws of either state. That being the case, the law of the state of performance, the state of Illinois, must control. De Wolf v. Johnson, supra; Miller v. Tiffany, 1 Wall. 298, 17 L. Ed. 540; Junction R. R. Co. v. Bank of Ashland, 12 Wall. 226, 20 L. Ed. 385; Bedford v. Eastern Bldg. & Loan Ass'n, 181 U. S. 227, 21 Sup. Ct. 597, 45 L. Ed. 834; Dygert v. Vermont L. & T. Co., 94 Fed. 913, 37 C. C. A. 389; Sawyer v. Dickson, 66 Ark. 77, 48 S. W. 903.

That the notes stipulated for a higher rate of interest after maturity than is permitted under the laws of Illinois, but which is permissible under the laws of Arkansas, is no indication of an intention by the parties to subject the transaction to the operation of the laws of a state other than that of performance so as to prevent the application of this rule. As the payee of the notes conducted his business in the city of Chicago, it is but reasonable that the notes should be made payable there.

The penalty for the usurious charges must therefore be determined by the laws of the state of Illinois, which is a forfeiture of all interest, but not the principal. The loan was for $450,000, to which should be added the $750, interest charged for the ten days hereinbefore mentioned, and which the defendant agreed to pay. From these sums the payments made by the defendant, amounting to $98,500, should be deducted, leaving a balance of $352,250, for which a decree of foreclosure may be entered.

BURLINGHAM et al. v. CITY OF NEW BERN et al.

(District Court, E. D. North Carolina. May 21, 1914.)

No. 39.

1. STATUTES (§ 21*)—ENACTMENT—CONSTITUTIONAL REQUIREMENTS.

Const. N. C., art. 2, § 14, providing that no law shall be passed to allow counties, cities, or towns to raise money on their credit, or pledge their faith, unless the bill shall have been read three several times in each house and passed three several readings on three different days, and unless the yeas and nays on the second and third readings shall have been entered on the journals, is mandatory; and, not having been complied with in the passage of Public Laws 1887, c. 198, and Laws 1889, c. 92, authorizing certain counties, townships, towns, or cities to subscribe for stock in a railroad company and issue bonds in payment therefor, bonds issued by a city pursuant thereto were void, though authorized at an election held under such statutes.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 18–27; Dec. Dig. § 21.*]

2. STATUTES (§ 285*)—ENACTMENT—EVIDENCE OF ENACTMENT.

Under Const. art. 2, § 14, requiring certain bills to pass three readings on three different days, and requiring the yeas and nays on the second and third readings to be entered on the journals, the journal must show who voted for the bill, and that the requisite number of Senators and members did so, and no other source of evidence can be invoked, and the certificate of the presiding officers that a bill has been read three several times does not obviate the necessity of examining the journal.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 17, 27, 384, 385; Dec. Dig. § 285.*]

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

3. MUNICIPAL CORPORATIONS (§ 912*)—BONDS—POWER TO ISSUE—STATUTORY PROVISIONS.

Code 1883, N. C., § 1996, and Revisal 1905, § 2558, authorizing counties to subscribe stock to any railroad company when necessary to aid in the completion or construction of any railroad in which the citizens of the county have an interest, does not authorize cities to issue bonds in payment for stock in a railroad company.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1902–1904; Dec. Dig. § 912.*]

4. MUNICIPAL CORPORATIONS (§ 949*)—BONDS—INVALIDITY—RIGHTS OF HOLDERS.

Where bonds were issued by a city without authority of law, the levy and collection of a tax for the payment of interest and to provide a sinking fund was also without authority of law, and the holders of the bonds acquired no right to the amount collected.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1991–1994; Dec. Dig. § 949.*]

In Equity. Bill by Charles C. Burlingham and others, trustees of Thomas A. McIntyre and others, bankrupts, against the City of New Bern and others. Heard on the pleadings and an agreed statement of facts. Bill dismissed.

E. K. Bryan, of Wilmington, N. C., for complainants.

Guion & Guion, H. C. Whitehurst, and E. M. Green, all of New Bern, N. C., for defendants.

CONNOR, District Judge. The facts agreed upon, material to the decision of the controversy, are: The charter of the city of New Bern, N. C. (chapter 42, Private Laws of 1879), conferred upon said city, among specific powers not affecting the questions presented herein, "the power to do any and all things granted to municipal corporations under any general laws of the state of North Carolina." The Legislature at its session of 1899 (chapter 30, Private Laws 1899) repealed the charter of said city and, by chapter 82, Private Laws 1899, granted a charter to said city, including the same territorial limits, granting the usual powers conferred upon municipal corporations and "the power to do any and all things not therein enumerated which were necessary and proper to be done to effectively carry on a municipal government." Said acts were duly and regularly passed by the General Assembly of North Carolina in accordance with all the requirements of the Constitution of the state, and especially in accordance with the provisions of article 2, § 14, of said Constitution. Defendant D. M. Roberts is the duly elected and qualified treasurer of said city of New Bern, with the duties prescribed by said charter. Defendants named herein as such are the duly elected and qualified board of aldermen of said city, with the powers prescribed by the charter. The General Assembly of North Carolina, at its session 1887, passed an act entitled, "An Act to incorporate the East Carolina Land and Railway Company," being chapter 198, Public Laws 1887. Said act conferred upon the counties of Jones and Onslow power to subscribe to the capital stock of said company in such amount as the commissioners of said counties should determine,

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

subject to the approval of a majority of all the qualified voters of said counties. The commissioners of said counties, upon the approval of the voters, were authorized to issue bonds bearing interest at the rate of 6 per cent., and to levy a tax upon the taxable property of said counties to meet the interest and provide a sinking fund to pay the principal of said bonds. By the provisions of said act, any town or township in said counties was authorized to subscribe for stock in said company in such amount as the commissioners of the county in which such town or township were situate should determine, upon application of at least five freeholders in the manner prescribed by said act, upon approval of the qualified voters of said town or township at an election to be held as prescribed by said act. The said East Carolina Land & Railway Company was duly organized pursuant to the provisions of said act.

At its session of 1889, the General Assembly of North Carolina passed an act amending the act of 1887 (chapter 92, Laws 1889), in which it was provided, among other things, that any of the other counties, townships, towns or cities, through which or near the said company's road is to be located, should, if they so desired, subscribe for stock in said company upon the application of not less than 25 freeholders and resident taxpayers of the county, and the approval of a majority of all the qualified voters in such county, township, town, or city, etc. After the organization of said company, it began the construction of its road, and continued the same from a point in Onslow county to the city of New Bern. While said company was engaged in constructing its road towards the city of New Bern, said city being desirous of subscribing for stock in said company and issuing bonds in payment thereof, some 25 or more freeholders and resident taxpayers petitioned the board of commissioners of Craven county, wherein said city is located, to submit the question of the subscribing for said stock to the amount of $50,000, to the qualified voters of said city as provided by said acts, and especially by sections 18, 19, 20, 21, and 22 of chapter 198 of the act of 1887, and the act amendatory thereof, to all of which reference is hereby made. By the terms of chapter 198 of the Laws of 1887 and chapter 92 of the Laws of 1889, the said city was authorized to subscribe for stock in said company and issue its bonds in payment thereof for the purpose of aiding in the construction of said road. Pursuant to the provisions of said acts, and in accordance with the petition of said freeholders and taxpayers, the board of commissioners of Craven county, at a regular meeting, on November 5, 1889, ordered an election to be held in said city on January 9, 1890, for the purpose of submitting to the qualified voters of said city the question of the subscription by said city of $50,000 of the capital stock of said company and the issuance of bonds in payment thereof and the levy of taxes to pay the interest and principal of said bonds. At said election a large majority of the voters cast ballots approving said subscription issuing bonds therefor, and levying the tax to pay the same and the interest thereon. The result of said election was duly canvassed and declared, and pursuant thereto the commissioners of Craven county, on behalf of said city of New Bern, subscribed for $50,000 of the capital stock

of said company, and received the proper certificates of stock therefor, and in payment therefor contracted the debt and incurred the obligation of said city. Thereafter the said company constructed its road, as allowed by said acts, through a portion of the said county of Craven and to the city of New Bern, and said road is now being operated. The duly constituted authorities of said city, pursuant to said acts and the said election, on January 2, 1893, issued 100 coupon bonds of said city of the denomination of $500 each, payable on January 1, 1953, and attached thereto 30 interest warrants or coupons at the rate of 5 per cent., payable on the 1st day of January of each year until the maturity of said bonds. Each of said bonds contained a recital that it was issued—

"In pursuance of a vote of the majority of the qualified voters of said city of New Bern at an election held in said city on the 2d day of January, 1890, by order of the board of county commissioners of Craven county in pursuance of an act of the General Assembly of North Carolina, entitled 'An act to incorporate the East Carolina Land and Railway Company,' ratified the 4th day of March, 1887, and the acts amendatory thereof."

Thos. A. McIntyre, prior to January 1, 1897, purchased for full value in the open market all of the said bonds, except those numbered from one to six, inclusive. The said city of New Bern and the board of commissioners of Craven county levied, assessed, and caused to be collected from the taxable property of the inhabitants of said city, as required by law, for the years 1894, 1895, and 1896, with which to pay the coupons maturing on said bonds on the 1st day of January for said years and a sinking fund to pay said bonds at maturity, which money, so collected, was paid over to the treasurer of said city for said purpose and no other, and from said money so collected he paid the coupons for said years, but has refused to pay the coupons maturing for the years 1897 and 1898, or to apply any of the money in the sinking fund to the payment of said bonds or the coupons. He has transferred the said amount received from the collection of said taxes to other departments of the city government, and used the same for city purposes. Defendants have refused to apply said money, or any part thereof, to the payment of said coupons or the principal of said bonds, alleging that same were not the legal or valid obligations of said city. Defendants have refused to levy or assess any other or further tax on the property of the inhabitants of said city for the purpose of meeting the payment of coupons maturing since January 1, 1896, or providing a sinking fund to pay said bonds when due, alleging that said bonds were not legal and valid obligations of said city, although demand has been made upon them in respect to both the coupons and the sinking fund. At the time said bonds were voted and issued the debt of said city, including the amount of said bonds for the construction of railroads, the support and maintenance of internal improvements, or for any special purpose whatsoever, did not amount to 10 per cent. of the assessed valuation of the real and personal property situated in said city.

The amount of taxes collected to pay the coupons and to be placed in the sinking fund, as hereinbefore recited, and transferred under the direction of the proper officers of said city, to other departments there-

of for the use of said city, amounts to the sum of $5,249.37. There is now due on coupons, which have matured, $29,325. Prior to the filing of the bill herein, complainants presented to the proper officers of said city coupons overdue on said bonds, and demanded payment thereof, which was refused. Said city and its officers deny all liability therefor. The act of the General Assembly (chapter 198, Laws 1887) and the act amendatory, 1889, were passed by the General Assembly of North Carolina at its regular session of said years, but at the time of the passage of said acts, and each of them, the said General Assembly did not cause the said bills to be read on three different days in each house of said General Assembly, and the "yeas" and "nays" to be entered in the Journal of the said respective houses of the General Assembly on the second and third readings of the said acts (bills), as required by article 2, § 14, of the Constitution of North Carolina. T. A. McIntyre, the purchaser and owner of said bonds, was duly adjudged bankrupt by the District Court of the United States for the Southern District of New York, and plaintiffs were duly elected and qualified as the trustees of said McIntyre; all of said plaintiffs being residents and citizens of the state of New York. Plaintiffs attach appropriate prayers for judgment in accordance with the facts herein found, etc. Plaintiffs insist: First. That the bonds issued by the defendant city of New Bern are valid and legal obligations of said city: (a) By virtue of the power conferred upon said city of New Bern by its charter and other public statutes in force at the time said stock was subscribed and said bonds were issued; (b) by virtue of the act of 1887, chapter 198, and the act amendatory thereof, chapter 92, Laws 1889. Second. That said bonds are valid under the provisions of section 2558 of the Revisal of 1905, being section 1996, Code of 1883. Third. That, conceding said bond to be invalid, they are entitled to a decree commanding defendants to pay over to them the amounts collected from taxes levied for the specific purpose of paying same.

[1, 2] The Constitution of North Carolina, article, 2, § 14, ordains that:

> "No law shall be passed to raise money on the credit of the state, or to pledge the faith of the state, * * * or allow the counties, cities or towns to do so, unless a bill for the purpose shall have been read three several times in each house of the General Assembly and passed three several readings, which readings shall have been on three different days, and agreed to by each house respectively, and unless the yeas and nays on the second and third readings of the bill shall have entered on the journal."

This constitutional limitation upon the power of municipal corporations to contract debts, and prescribing the essential legislative procedure in the enactment of laws for that purpose, has, by a long and uniform line of decisions by the Supreme Court of this state, been held "to be mandatory upon the General Assembly, and a condition precedent which must be performed in its entirety before the bill can become a law." Annotated Constitutions of North Carolina, Connor and Cheshire, 119, where all of the cases are collected. That no vote of approval of a proposition to subscribe for stock in a railroad company, by a municipal corporation pursuant to an act passed, authorizing an election

for that purpose in the enactment of which this legislative procedure has not been observed, is valid to create any obligation by reason of the issuance of bonds pursuant thereto is held in all of the cases which have been decided by the Supreme Court. So mandatory and essential to the creation of a valid municipal obligation, coming within the language of the Constitution, is this procedure that a consent judgment rendered in an action upon such obligation, is equally invalid. Bank v. Commissioners, 119 N. C. 214, 25 S. E. 966. The certificate of the presiding officers of the two houses that a bill has been read three several times in each house does not obviate the necessity of examining the Journal for the purpose of ascertaining whether the constitutional requirement has been complied with. The Journal must show who voted for the bill, and that the requisite number of Senators and members did so—no other source of evidence can be invoked. Commissioners v. Snuggs, 121 N. C. 394, 28 S. E. 539, 39 L. R. A. 439; Commissioners v. De Rosset, 129 N. C. 275, 40 S. E. 43; Wilson v. Markley, 133 N. C. 616, 45 S. E. 1023. In so far as effect is to be given by this court to the decisions of the Supreme Court of North Carolina upon this subject, the decision in Wilkes County v. Coler, 180 U. S. 506, 21 Sup. Ct. 458, 45 L. Ed. 642, is decisive.

[3] The plaintiffs insist that, however this may be, authority is to be found sustaining the validity of the bonds in the provisions of the charter of the city of New Bern and section 2558, Rev. 1905, being section 1996, Code 1883. Conceding that the charter (chapter 42, Private Laws 1879) and the amendments thereto, and that section 1996, Code 1883, were passed in compliance with the requirements of article 2, § 14, of the Constitution, the plaintiffs are confronted with several insurmountable obstacles. Section 1996 confers power upon counties "to subscribe stock to any railroad company or companies, when necessary to aid in the completion [Rev. 1905, "construction"] of any railroad in which the citizens of the county may have an interest." It has been held by the Supreme Court of North Carolina in Graves v. Commissioners, 135 N. C. 49, 47 S. E. 134, that this section does not authorize townships to issue bonds. For more convincing reasons it cannot be construed to authorize a city to do so. The Constitution and legislation of North Carolina makes and maintains a clear and essential distinction in respect to powers and functions between counties and townships, and towns and cities. Giving full force to all that is said in Stanly Co. v. Coler, 190 U. S. 437, 23 Sup. Ct. 811, 47 L. Ed. 1126, plaintiffs fail to derive any support to their contention from the decision in that case. Conceding that, if invalid under the act of March 4, 1887, pursuant to which they declare on their face they are issued, they may be sustained under other legislation, if within its terms and provisions, it is manifest that they cannot, for several reasons, be brought within the provisions of sections 2558 and 2559 of the Revisal. It would seem that every phase of this case was presented and decided adverse to plaintiffs in Graves v. Commissioners, supra.

[4] If the bonds were issued without authority of law, they are absolutely void, and no right, as against the city of New Bern, can accrue under them; no action taken by the authorities of the city in re-

gard to them confers any right upon the holders. The levy and collection of the tax was without authority of law and plaintiffs acquired no right to the amount collected. It was held by the city subject to the right of the taxpayer to demand repayment. It was no concern of the plaintiffs that the city authorities applied it to other purposes—no harm came to them by reason of the unlawful act of the city.

The bill will be dismissed at the cost of plaintiffs.

MEMORANDUM DECISIONS

ALEXANDER ECCLES & CO. v. LOUISVILLE & N. R. CO. (Circuit Court of Appeals, Fifth Circuit. April 28, 1914.) No. 2496. In Error to the District Court of the United States for the Northern District of Alabama; Wm. I. Grubb, Judge. Action at law by Alexander Eccles & Co. against the Louisville & Nashville Railroad Company. Judgment for defendant, and plaintiff brings error. Affirmed. For opinion below, see 198 Fed. 898. Before PARDEE and SHELBY, Circuit Judges, and BURNS, District Judge.

PER CURIAM. The plaintiff below sued to recover losses caused by cashing drafts accompanied by forged cotton bills of lading, the cotton therein described not having been received by the carrier, and claimed to hold the carrier liable because during a period of years other forged bills of lading of the same character had been used under like circumstances, on which other consignees had made advances, and thereafter through the connivance of agents of the carrier deliveries were allowed to be made upon such forged bills, whereby it is contended that the carrier by its course of deliveries under forged and irregular bills of lading had held out all forged bills as genuine, to the plaintiff's loss and damage. On the trial before the jury there was evidence tending to show that, after a cotton bill of lading had been forged and used as collateral for foreign drafts, the forger, having delivered to the carrier cotton of the same quantity, weights, numbers, marks, etc., obtained true bills of lading substantially identical with the forged bills, and thereafter, the true bills being suppressed, delivery was allowed to be made upon such forged bills, all with more or less knowledge and consent on the part of inferior agents of the carrier. The case was submitted to the jury, and from an adverse verdict and judgment plaintiff sued out this writ of error. We doubt if there was sufficient evidence to warrant the submission of the case to the jury, but as it was submitted under instructions in which we find no reversible error, and as we find no error in any of the rulings admitting or rejecting evidence, the judgment of the District Court is affirmed.

CARD et al. v. McELDOWNEY. (Circuit Court of Appeals, Sixth Circuit. April 14, 1914.) No. 2296. In Error to the District Court of the United States for the Eastern District of Tennessee. Lucky, Andrews & Fowler, of Knoxville, Tenn., for plaintiffs in error. Shields & Cates, of Knoxville, Tenn., and E. S. Jouett, of Louisville, Ky., for defendant in error. For opinion below, see 193 Fed. 475.

PER CURIAM. **Writ of error dismissed, pursuant to stipulation of counsel.**

CAREY v. DONOHUE. (Circuit Court of Appeals, Sixth Circuit. May 15, 1914.) No. 2621. Appeal from the District Court of the United States for the Southern District of Ohio. Morison R. Waite and John R. Schindel, both of Cincinnati, Ohio, for appellant. Willis G. Durrell and David Davis, both of Cincinnati, Ohio, for appellees. See, also, 209 Fed. 328.

PER CURIAM. Decree of the District Court affirmed.

GENERAL ELECTRIC CO. v. YOST ELECTRIC MFG. CO. (Circuit Court of Appeals, Sixth Circuit. May 12, 1914.) No. 2528. Appeal from the District Court of the United States for the Northern District of Ohio. Samuel O. Edmonds, of New York City, Julian H. Tyler, of Toledo, Ohio, and Waite & Schindel, of Cincinnati, Ohio, for appellant. Robert H. Parkinson, of Chicago, Ill., and Owen & Owen, of Toledo, Ohio, for appellee. For opinion below, see 208 Fed. 719.

PER CURIAM. Appeal dismissed, pursuant to stipulation of counsel.

MANNHEIM INS. CO. OF MANNHEIM, GERMANY, v. THOMAS. (Circuit Court of Appeals, Fifth Circuit. April 7, 1914.) No. 2579. Appeal from the District Court of the United States for the Eastern District of Louisiana; Rufus E. Foster, Judge. Suit in admiralty by A. G. Thomas against the Mannheim Insurance Company of Mannheim, Germany. Decree for libelant, and respondent appeals. Affirmed. J. Esmond Phelps, of New Orleans, La., for appellant. John D. Grace, of New Orleans, La., for appellee. Before PARDEE, Circuit Judge, and NEWMAN and GRUBB, District Judges.

PER CURIAM. Considering the evidence in the record in the light of the intelligent and exhaustive briefs submitted by the proctors, we find the Reliance was seaworthy, and that the warranty as to watchman was substantially complied with. On the much contested and vital question as to whether the Reliance was lost through "the unavoidable dangers of rivers" we find that the preponderance of the evidence as to the probable cause and actual manner of the sinking of the Reliance is in favor of the libelant's contention, as set forth in the eighth article of his libel, and shows such a state of facts that we are compelled to hold that the loss was caused by an unavoidable danger of the river within the meaning of the policy of insurance. The District Judge who tried the case in a very clear opinion, recapitulating and analyzing all the evidence, reached the above conclusions. The case was correctly decided in the District Court, and the decree appealed from is affirmed.

METROPOLITAN BANK et al. v. SINNOTT. (Circuit Court of Appeals, Fifth Circuit. April 18, 1914.) No. 2608. Appeal from the District Court of the United States for the Eastern District of Louisiana. In the matter of James B. Sinnott, alleged bankrupt. From an order dismissing the petition, the Metropolitan Bank and other petitioners appeal. Affirmed. Dinkelspiel, Hart & Davey, McCloskey & Benedict, and Denegre, Leovy & Chaffe, all of New Orleans, La., for appellants. P. M. Milner, of New Orleans, La., and E. N. Pugh, for appellee. Before PARDEE and SHELBY, Circuit Judges, and MAXEY, District Judge.

PER CURIAM. This is an appeal from an order of the District Court declining to adjudge James B. Sinnott an involuntary bankrupt. A majority of the court find no error in the record, and the order of the trial court is therefore affirmed.

MITCHELL v. NORTHERN PAC. RY. CO. (Circuit Court of Appeals, Ninth Circuit. May 11, 1914.) No. 2330. In Error to the District Court of the United States for the Northern Division of the Eastern District of Washington. Oscar Cain and Francis A. Garrecht, U. S. Attys., both of Spokane, Wash., for plaintiff in error. Charles W. Bunn and Charles Donnelly, both of St. Paul, Minn., and E. J. Cannon, of Spokane, Wash., for defendant in error. For opinion below, see, 208 Fed. 469

PER CURIAM. This case having been reached in the regular call of the docket, and there being no appearance in open court of counsel for either party, and it appearing that the record has not been printed, as required by rule 23, and that no brief has been filed by or on behalf of either party thereto, as required by rule 24, thereupon, upon consideration thereof, it is ordered and adjudged that writ of error be and hereby is dismissed, under section 3 of rule 22, and for failure of plaintiff in error to print record, as required by rule 23, and for failure of plaintiff in error to file a brief, as required by rule 24.

SAWYER et al. v. GRAY et al. (Circuit Court of Appeals, Ninth Circuit. June 1, 1914.) No. 2385. Appeal from the District Court of the United States for the Southern Division of the Western District of Washington; Edward E. Cushman, Judge. Suit in equity by W. H. Sawyer and others, against Raymond S. Gray and others. Decree for defendants, and complainants appeal. Affirmed. Herbert S. Griggs, of Tacoma, Wash., for appellants. F. M. Dudley, of Seattle, Wash., for appellee Milwaukee Land Co. Peters & Powell, of Seattle, Wash., for appellees Barr. W. A. Reynolds, of Chehalis, Wash., for appellees Gray. C. E. Moulton, of Portland, Or., for appellees Huston and others. Before GILBERT and ROSS, Circuit Judges, and WOLVERTON, District Judge.

GILBERT, Circuit Judge. The questions arising in this case from the allegations of the third amended bill of complaint and the demurrers thereto are the questions that were presented to this court in Daniels v. Wagner (No. 2226, and decided by this court on May 5, 1913) 205 Fed. 235, 125 C. C. A. 93. Decision is controlled by the principles announced in that cause, and the decree of the court below herein will be affirmed.

SOUTH et al. v. NICROSI et al. (Circuit Court of Appeals, Fifth Circuit. May 11, 1914.) No. 2470. Appeal from the District Court of the United States for the Middle District of Alabama. Before PARDEE and SHELBY, Circuit Judges, and MAXEY, District Judge.

PER CURIAM. This case has been argued orally twice and submitted also on exhaustive briefs. After careful consideration, we are of the opinion that the District Court ruled correctly in sustaining the demurrer and dismissing the bill. The decree is therefore affirmed.

PARDEE, Circuit Judge, dissents.

UNITED STATES to USE of MILLER et al. v. MITCHELL et al. (District Court, E. D. New York. May 5, 1914.) Suit in equity by the United States, for the use of Frank Miller and others, against Edmund H. Mitchell and Henry T. Mitchell, doing business as Mitchell & Co., and the Illinois Surety Company. Assigned to equity calendar. King & Booth, of New York City, for plaintiff Miller. George W. Bristol, of New York City, for plaintiffs Hazell, Briggs, and Benvenutti. Arthur M. Allen, of Providence, R. I., and George R. Coughlan, of New York City, for plaintiff Packard Dredging Co. Carpenter & Park, of New York City, for plaintiff E. S. Belden & Sons. Nel-

son L. Keach and L. L. Kellogg, both of New York City, for defendant Illinois Surety Co.

CHATFIELD, District Judge. The result of the appeal is to establish for this circuit the proposition that an action under the statute in question should proceed as a case in equity, with practically an accounting and the presentation of claims, which are to be considered and ordered paid as they may be proven, but apportioned if the fund available be insufficient for all. Cases tried apparently as actions at law have been affirmed in the Supreme Court. Mankin v. Ludowici-Celadon Co., 215 U. S. 533, 30 Sup. Ct. 174, 54 L. Ed. 315; United States Fidelity Co. v. Bartlett, 231 U. S. 237, 34 Sup. Ct. 88, 58 L. Ed. ——. A case presenting the form of an account with appropriate decree has also been affirmed. United States ex rel. Texas P. C. Co. v. McCord and National Surety Co., 233 U. S. 157, 34 Sup. Ct. 550, 58 L. Ed. ——, decided April 6, 1914. The original opinion of this court (which has now been reversed on the appeal) was based upon its interpretation of the language of the statutes by which and according to which the cause of action is entirely given and jurisdiction conferred. "The cause of action did not exist before, and is the creature of the statute." McCord Case, supra. The Court of Appeals has not determined that this court was wrong in treating the action as purely statutory. On any other theory this court could have found no way of leaving the matter to the jury for a verdict to each claimant. Inasmuch, therefore, as the *District Court* is given jurisdiction to consider an action for damages, in which by petition others may join and a suit in equity thus be instituted, there seems to be no reason to hold that Congress has not the fullest authority to give the equity side of the court jurisdiction to make such a decree as may be necessary. If Congress can by a statute give the courts the right to make rules by which an action at law can be changed or transferred into a bill in equity, then the power to provide for an action on a bond, without a trial by jury (especially in the case of a bond given specially to cover just such rights as are being litigated), is not in contravention of the rights preserved for trial by jury in actions triable under the common law at the time the Constitution was adopted. Amendment 7, U. S. Constitution. See Schurmeier v. Connecticut Mut. Life Ins. Co., 171 Fed. 1, 96 C. C. A. 107. For these reasons, the cause (now restored to this court for trial and at issue more than the 60 days required by equity rule 47 [33 Sup. Ct. xxxii] without application for depositions) will be placed by the clerk upon the equity calendar under rule 56 (33 Sup. Ct. xxxv) for call.

END OF CASES IN VOL. 213

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